

# CASTING A BLIND-EYE: IS FIJI'S 2013 'ETHNICALLY-BLIND' CONSTITUTION A PATH TO DEMOCRATIC STABILITY?

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## ABSTRACT

Fiji has a checkered history with democracy. Since gaining independence from the United Kingdom in 1970, its politics have been marked by a pattern of coups and constitutional reform. After the first military coup in 1987, three constitutions designed by political elites have attempted to resolve ethnic tensions and foster democratic stability. Underlying Fiji's constitutional reforms is a struggle for supremacy between two very different conceptions of the nation, namely ethnic and civic. While the 1970 and 1997 Constitutions sought a form of multicultural compromise with the realities of Fiji's demographic make-up, demands for continued ethno-political paramountcy by sections of the indigenous Fijian (*iTaukei*) population led to the overthrow of the democratically-elected governments in 1987 and 2000. In fact, the 1990 Constitution institutionalized the privileged ethno-political status of indigenous Fijians. Subsequently, the coup of 2006 ushered in a period of political reform that has sought to promote a more civic and 'ethnically blind' set of constitutional arrangements. This article investigates the potential for democratic stability provided by the 2013 Constitution. It argues that while the 2013 Constitution and its provisions do shift the discourse away from previous preoccupations with race and ethnicity, the context of the constitution-making process also indicates that the Bainimarama regime was largely intent on maintaining the status quo.

**Keywords:** Constitutional Reform; Fiji Politics; Democracy; Militarization; Ethnicity; Democratic Stability

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## INTRODUCTION

As a diverse and divided society, Fiji has suffered from forms of ethnic tension. Since independence in 1970, the country has struggled periodically to manage its diversity issues and resolve ethno-cultural tensions. This has unfolded in a cycle of political instabilities and constitutional crises. The key challenge in Fiji's political and constitutional development has been the problem of how to formulate and implement constitutional arrangements capable of reconciling an indigenous Fijian belief in their political primacy with a more fair and equitable representation of the interests and demands of other ethnic groups, primarily Indo-Fijians.

Fiji's colonial history and its legacies have remained a potent force in post-independent politics and constitutional development. Demands by indigenous Fijian elites based on claims around indigenous Fijians' right to rule as the first settlers have led to instabilities. Fiji has witnessed six coups (May and September 1987, 19 May and 29 May 2000; and December 2006 and April 2009) and has had four constitutions (1970, 1990, 1997, and 2013). The 1970 Constitution at independence was a multicultural compromise between indigenous Fijians demands for a form of exclusionary state that guaranteed indigenous Fijian political dominance and Indo-Fijian demands for a state that provided political juridical equality regardless of their ethnic grouping. After the coups of 1987, the constitution was abrogated due to its failure to ensure indigenous Fijian political dominance. An ethnically biased one in 1990 then replaced the 1970 constitution. For the most part, the latter consolidated indigenous Fijian political dominance but also provided limited political rights for other ethnic groups. However, the 1990 Constitution created an unstable political environment and precipitated intra-indigenous Fijian political competition. A process of constitutional review was established and resulted in the multi-cultural 1997 Constitution. The unsuccessful coups of 2000 (civilian and military) failed to abrogate this constitution in favor of a return to the 1990 style Constitution. The Courts in 2000 and 2001 prevented these attempts and reinstated the 1997 Constitution.

In 2006, the military removed the multi-party government albeit in an attempt to transform the country in quite the opposite direction to the earlier coups. The coup and its ideology sought to supplant the politics of race that has pervaded Fiji since decolonization by engaging in a nation-building project. For Fraenkel and Firth, the paradoxes and contradictions of the 2006 coup surpass anything in Fiji's modern history. Unlike the

previous coups, this coup was not against a predominantly Indo-Fijian supported government. It was against an indigenous Fijian led government supported by more than 80 percent of indigenous Fijian voters. Unlike the previous coups, the intention of this coup was to bring an end to the ‘coup culture’, and address the pressing issues of corruption and racism.<sup>1</sup> Coup leader Commodore J. Voreqe (Frank) Bainimarama promised a new Constitution with the objective of ‘civic nation-building’. The stated goal was to nurture a sense of common citizenship that moved beyond narrow ethnic allegiances. After the Court of Appeal ruled the coup unconstitutional, the military regime abrogated the 1997 Constitution in April 2009, setting in motion reforms that led to the promulgation of the 2013 Constitution.

This article investigates the potential of the current ‘ethnically-blind’ 2013 Constitution to establish more representative and sustainable democratic arrangement in Fiji. To do so, the paper compares the deficiencies and failures of previous constitutional frameworks against the new provisions of the 2013 Constitution framework to gauge whether the latter are sufficient to sustain substantive democratic progress in the country. It argues that while the 2013 Constitution and its provisions do shift the constitutional discourse away from previous preoccupations with race and ethnicity, the context of the constitution-making process also indicates that the Bainimarama regime was largely intent on maintaining the status quo.

## **FIJI: A DIVIDED SOCIETY?**

Political instabilities in Fiji have revolved around allocation of power between the two main ethnic groups in Fiji, namely the indigenous Fijians and the immigrant Indo-Fijian communities, who together make up more than 93.5 percent of the population. In the lead-up to independence, indigenous Fijians made up 42% of the population while Indo-Fijians made-up 50.5%. However, significant emigration and lower birth rates of Indo-Fijians from the 1980s onwards has altered the demographic makeup: indigenous Fijians comprising 56% while Indo-Fijians around 37.5% of the population by 2007 census.<sup>2</sup>

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<sup>1</sup> Jon Fraenkel and Stewart Firth, ‘The Enigmas of Fiji's Good Governance Coup’ in Jon Fraenkel, Stewart Firth and Brij Lal (eds), *The 2006 Military Takeover in Fiji. A Coup to End All Coups* (2009) 6-7.

<sup>2</sup> Romitesh Kant, ‘Constitutional Redesign for Democratic Stability in a Divided Society: A Fiji Case Study’ (2018) MA Thesis, University of the South Pacific, Suva 155.

While English is the *lingua franca*, indigenous Fijians and Indo-Fijians speak in their own vernacular when in their own company. Overwhelming cultural differences also continue, distinct practices such as rituals and observances around religion, diet, and marriage and family matters distinguish and separate the two groups.<sup>3</sup> Despite increasing interethnic socializing in employment, schools, clubs and some sports, mutual negative stereotypes persist. Religious, cultural and ethnic cleavages are layered in in a pattern of parallel and life-worlds separating Indo-Fijians from indigenous Fijians.<sup>4</sup> To be sure, there are areas of sharing such as in education, attire and a mutual appreciation of each other's cuisine. However, culture in Fiji encapsulates in a meaningful sense the essential differences between the two groups.

Steven Ratuva argues that plurality in ethnic composition in a society does not necessarily produce ethnic tensions rather 'it is how the plural demographic pattern becomes institutionalized as part of the political culture and process and when the politics of numerical balance, domination or marginalization becomes a significant variable in the political equation'.<sup>5</sup> What remains true for Fiji is that political allegiance is highly dependent on ethnicity, and that ethnicity is vastly more important than class as a determinant of voting.<sup>6</sup> The manipulation of indigenous Fijian concerns about their place in the political and economic order has been a contributing factor in maintaining democratic stability in Fiji.

However, it must be noted that in spite of political antagonisms between the two major ethnic groups relationship between them have been ordinarily good both at the level of everyday dealings as well as between moderate political elites pursuing more accommodating relations. This makes Fiji an exception to most divided societies, as there has been an absence of major outbreaks of political violence with the few exceptions in the aftermath of the coups in 1987 and 2000.

## **THE CREATION OF THE COLONIAL STATE**

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<sup>3</sup> Ralph Premdas, 'Seizure of Power, Indigenous Rights and Crafting Democratic Governance in Fiji' (2002) *Nationalism and Ethnic Politics* 8(4) 20; Robert Norton, 'Reconciling Ethnicity and Nation: Contending Discourses in Fiji's Constitutional Reform' (2000) *The Contemporary Pacific* 12(1) 86.

<sup>4</sup> Robert Milne, 'The Pacific Way' Consociational Politics in Fiji' (1975) *Pacific Affairs* 48(3) 415; Robert Norton, *Race and Politics in Fiji* (1977) 5-7.

<sup>5</sup> Steven Ratuva, 'The Paradox of Multiculturalism: An assessment of Ethno-Political Conflict in Fiji' *Conference on Conflict in the Asia-Pacific Region*, National Center for Peace and Conflict Studies, University of Queensland, Brisbane, Australia (2005) 4.

<sup>6</sup> Robert Milne, above n 4, 415.

The political instabilities in post-independent Fiji are a result of colonial policies that were instituted since British colonization in 1874. Policies of indirect rule aimed at placating indigenous Fijians and the divide and rule policies that separated ethnic groups since the introduction of indentured Indian laborers has had a lasting impact on solidifying ethnic identities in Fiji. These policies later created problems for the British government in the lead up to independence and contributing to political instabilities after independence.

In order to thwart European settler exploitation of indigenous Fijian labor and land, and protect indigenous Fijian culture and tradition, Fiji's first Governor General, Sir Arthur Gordon, reorganized the social modes of control to keep order and stability in Fiji.<sup>7</sup> This meant that preserving the doctrine of the 'paramountcy of [indigenous] Fijian interests', implied in the Deed of Cession, was of the utmost importance. Gordon instituted a policy of 'divide and rule', of which indirect rule was a major part of this policy.

Through the divide and rule policies, constitutional policy in colonial Fiji was developed with regard to ethnic differences. Initially, the Legislative Council was composed exclusively of nominees by the Governor. Although indigenous Fijian chiefly hierarchy was integrated into the running of district administrations, the Council of Chiefs played an advisory role at the national level.<sup>8</sup> Subsequent changes, from 1904, to representation in the Legislative Council incorporated nominees of the Council of Chiefs, elected non-official Europeans and, from 1929, Indo-Fijian representatives elected from a communal roll. Despite granting franchise to Europeans and Indo-Fijians, effective power was retained by the Governor and his Executive Council. As moves towards independence gained momentum in the 1960s, adult franchise was extended to indigenous Fijians (much to the opposition of indigenous Fijian chiefs), women and other groups. Since the end of indenture in 1918, Indo-Fijians had consistently demanded common roll and political equality.<sup>9</sup> However, the colonial administration and especially European members of the Legislative Council resisted these demands fearing that open franchise combined with a majoritarian system would end up with Indo-Fijian political dominance. They therefore supported communally based electoral rolls. Nevertheless in 1929, the colonial government agreed to

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<sup>7</sup> Robert Robertson and Akosita Tamanisau, *Fiji: Shattered Coups* (1988) 7; Henry Srebrnik, 'Ethnicity, religion, and the issue of aboriginality in a small Island State: Why does Fiji Flounder?' (2002) *The Round Table* 189.

<sup>8</sup> Ahmed Ali, *Plantation to Politics* (1980); Timothy MacNaught, *The Fijian Colonial Experience: A Study of the Neotraditional Order Under British Colonial Rule Prior to World War II* (1982).

<sup>9</sup> Kenneth Gillion, *The Fiji Indians: Challenge to European Dominance, 1920–1946* (1977) 130.

the principle of parity in representation in the Legislative Council between elected representatives from the three major communities despite discrepancies in population between Europeans on the one hand and Indo-Fijians and indigenous Fijians on the other. The main outcome of this was that this policy created and fostered many misperceptions between the two major ethnic groups.

## **POST-INDEPENDENT POLITICS: NEGOTIATING COMPETING CLAIMS OF CIVIC AND ETHNIC NATIONALISM**

Constitutional debates in the lead-up to independence and thereafter have witnessed contentious debates around civic and ethnic nationalisms. While Indo-Fijian leaders through the Federation Party advocated common roll electoral design and political integration, indigenous Fijian leaders through the Fijian Association, together with European political leaders, opposed common roll and political integration.<sup>10</sup> They were suspicious of the Federation Party proposals, as the demographic changes during that period would mean Indo-Fijian political domination.

Indigenous Fijians viewed the Deed of Cession as a ‘protective’ document that would preserve and protect their ‘rights and interests with regards to ownership of land and chiefly titles’, arguing that their interests should be paramount. As independence became imminent, this protective understanding turned into a more ‘assertive’ one fueled by uncertainty of how their ‘interests would receive special recognition in the new constitutional order’.<sup>11</sup> Indigenous Fijian demands were seen as providing for rules and structures that would ensure and provide for political paramountcy – that ‘only if Fijians were in control of Fiji’s political leadership, their interests could be protected.’<sup>12</sup>

## **THE MULTICULTURAL COMPROMISE: 1970 CONSTITUTION AND REEMERGENCE OF ETHNO-NATIONALISM**

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<sup>10</sup> Robert Norton, ‘Accommodating Indigenous Privilege: Britain’s Dilemma in Decolonizing Fiji’, (2002) *The Journal of Pacific History* 37(2) 134.

<sup>11</sup> Robert Norton, ‘Averting ‘Irresponsible Nationalism’: Political Origins of Ratu Sukuna’s Fijian Administration’ (2013) *The Journal of Pacific History* 48(4) 426.

<sup>12</sup> Brij Lal, *Islands of Turmoil: Elections and Politics in Fiji* (2006) 10; Robert Norton, ‘Seldom a Transition with such Aplomb’ (2001) *The Journal of Pacific History* 39(2) 169-170; Joseph Bush, ‘Defining Group Rights and Delineating Sovereignty’ (1999) *American University International Law Review* 14(3) 564-565.

The solution, after intense series of closed-door negotiations in 1969 and 1970 between the leaders of the two major ethnic groups, was a consociationalist arrangement, encapsulated in the 1970 Constitution, whereby the indigenous Fijians and Indo-Fijians were allocated the same number of parliamentary seats.<sup>13</sup> To appease indigenous Fijian concerns, which feared political domination by Indo-Fijians and loss of land and political rights, there was agreement that the Senate would provide greater indigenous Fijian representation with veto powers over legislation affecting indigenous Fijian interests.<sup>14</sup>

The 1970 Constitution provided hopes that democracy could be made to work in Fiji. In the peaceful transition to independence, leaders from both parties worked well together, establishing a good personal rapport proving to people in Fiji and abroad that genuine multicultural cooperation was possible. Despite this, ethnic polarization was still evident during elections, with voters choosing the comfort of the ethnically based parties, a result of the racially based electoral system.<sup>15</sup>

## **TRIUMPH OF ETHNO-NATIONALISM: 1987 COUPS AND THE 1990 CONSTITUTION**

In the April 1987 elections, the NFP/Fiji Labor Party coalition defeated the incumbent Alliance Party. Three weeks after the elections, Sitiveni Rabuka led a military coup, with the support of the iTaukei movement and the chiefs, to oust the NFP/FLP government. Initially, Rabuka claimed national security, alluding to the threat posed by the Taukei Movement's agitation and demonstrations, as the reason for carrying out the coup.<sup>16</sup> However, the language that materialized after the coup revealed the reason to be threats of an Indo-Fijian dominated government to indigenous Fijian political supremacy.<sup>17</sup> This rationale was used as a means to whip up indigenous Fijian fears about security of their land

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<sup>13</sup> Seats in the lower house were communally allocated, maintaining parity amongst indigenous and Indo-Fijians with 22 seats each and 8 seats for General Electors. Of the 52 seats, 27 were communal reserved seats (12 each for indigenous Fijian and Indo-Fijians and 3 for General electors) while 25 seats were national seats, to be elected cross-nationally (10 seats each for indigenous Fijians and Indo-Fijians and 5 for General electors). Section 30 Fiji Independence Order 1970 and Constitution of Fiji.

<sup>14</sup> Raj Vasil, 'Communalism and Constitution-making in Fiji' (1972) *Pacific Affairs* 45(10) 28. Relevant sections of constitution?

<sup>15</sup> Roderick Alley, 'Independence for Fiji: Recent Constitutional and Political Developments' (1970) *Australian Outlook* 24(2) 184-186; Yash Ghai and Jill Cottrell, 'A Tale of Three Constitutions: Ethnicity and Politics in Fiji' in Sujit Choudhry (ed), *Constitutional Design for Divided Societies: Integration or Accommodation?* (2008) 291-292.

<sup>16</sup> Yash Ghai, 'A Coup by Another Name? The Politics of Legality' (1990) *The Contemporary Pacific* 2(1) 13; Stephanie Lawson, *The Failure of Democratic Politics in Fiji* (1991) 257-259.

<sup>17</sup> Yash Ghai, above n 16, 13; Stephanie Lawson, above n 16, 260-261.

ownership to garner support for the coup. In a subsequent coup in September 1987, Rabuka declared Fiji a Republic, severing all ties with the British monarchy.<sup>18</sup> This led to the abrogation of the 1970 constitution and the promulgation of a new constitution constructed to secure ‘paramountcy of [indigenous] Fijian interests’.<sup>19</sup>

The 1990 Constitution provided for indigenous Fijian domination in the legislature and executive – 37 out of the 71 seats<sup>20</sup> in the lower house were reserved for them and 24 out of 34 Senate members<sup>21</sup> were to be nominated by the Great Council of Chiefs (GCC). In addition, the President appointed by the GCC would always be a Fijian chief and the post of Prime Minister and other ministries were reserved for indigenous Fijians.

The constitution also ‘enhanced the entrenchment of legislation protecting Fijian land and other interests’.<sup>22</sup> The protection provided to specific acts of parliament now encompassed any bill ‘affecting land, customs or customary rights’.<sup>23</sup> The GCC Senate appointees were accorded the power of veto with rules specifying that no less than eighteen of the twenty-four Senate members appointed by the GCC had to support it for the bill to pass.<sup>24</sup> The parliament and the executive were also given unlimited powers to establish affirmative action programs and policies for ‘promoting and safeguarding the economic, social,

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<sup>18</sup> Brij Lal, ‘Chiefs and Indians: Elections and Politics in Contemporary Pacific’ (1993) *The Contemporary Pacific* 5(2) 276; Brij Lal, ‘Constitutional Engineering in Post Coup Fiji’ in Andrew Reynolds (ed), *The Architecture of Democracy* (2002).

<sup>19</sup> Brij Lal, above note 18, 274.

<sup>20</sup> Brij Lal, above n 18, 280-281. 27 seats were reserved for Indo-Fijians, 5 for General Electors and 1 for Rotumans. Pacific Islanders who were previously under the Fijian communal roll were not re-classified under the general Elector roll. There was also controversy in the apportionment of the 37 indigenous Fijian reserved seats – 32 seats were from rural constituencies while 5 were from urban. Approximately a third of indigenous Fijians resided in urban centers and it has been argued that they voted for the FLP-NFP coalition in the 1987 elections. Therefore, the intention of the malapportionment was to reduce the influence of these urban indigenous Fijians. Another issue was the parity of seats between provinces – Ba, the most populous indigenous Fijian province (55000) was allotted 3 seats, the same number as Lau with an indigenous Fijian population of 14000. Similarly, Rewa with a population of 48000 indigenous Fijians was allotted 2 seats, same as Cakaudrove with 29000 indigenous Fijian population. See Alumita Durutalo, ‘Elections and the Dilemma of Indigenous Fijian Political Unity’ in Brij Lal (ed), *Fiji Before the Storm: Elections and the Politics of Development* (1999).

<sup>21</sup> The remainder of the Senate members were appointed by – Rotuma Council (1) and appointment by the President without any consultation (9). See Section 55 of the Sovereign Democratic Republic of Fiji 1990.

<sup>22</sup> Yash Ghai and Jill Cottrell, ‘A tale of three constitutions: Ethnicity and politics in Fiji’ (2007), *International Journal of Constitutional Law*, 5 (4), 297-300.

<sup>23</sup> These acts included the Fijian Affairs Act, the Native Lands Trust Act, the Native Lands Act, the Fijian Development Fund Act, The Rotuma Act, the Rotuma Lands Act, the Banaban Lands Act and the Banaban Settlement Act. Relevant sections?

<sup>24</sup> Section 78, *Constitution of the Sovereign Republic of Fiji 1990*



educational, cultural, traditional and other interests of the [indigenous] Fijian and Rotuman people'.<sup>25</sup>

In effect, Fiji transformed into an 'ethnic democracy whose democratic credentials are minimalist (diminished) due to the lack of equal rights guaranteed. Rights accorded to members of the non-dominant group are inferior and the state through the constitution allows for discrimination in favor of the dominant group'.<sup>26</sup> The transformation to an ethnic democracy via the 1990 Constitution, inspired by ethno-nationalist ideals, ensured indigenous Fijian political dominance by reserving more than half of 70 seats in the lower house and three quarters of seats in the senate for indigenous Fijians via nomination by the GCC. There was an element of corporate consociationalism<sup>27</sup> in the way seats were allocated in the legislature. The 1990 Constitution got rid of cross-voting seats, thereby making representation exclusively communal. The bureaucracy underwent ethnicization to ensure continuation of the ethnic state. While other ethnic groups were granted political and social rights, these were subservient to the principle of paramountcy of indigenous Fijian interests. As Sutherland and Leckie claim, there was 'Fijianisation' of the public service after the coups of 1987.<sup>28</sup>

However, the transformation into an ethnic democracy was not as smooth as the indigenous Fijians elites had wished for. Electoral provisions in the Constitution accentuated intra-indigenous Fijian struggles for political representation based on regionalism and provincialism.<sup>29</sup> According to Robert Robertson, 'vanua politics represented a contradiction in [ethno-] nationalist logic; the greater the majority [indigenous] Fijians possessed in parliament, the greater their divisions'.<sup>30</sup> The allocation of the 32 out of 37 indigenous Fijian seats along provincial lines brought back old rivalries, promoting division as opposed to the intention of fostering unity. Alumita Durutalo concluded, indigenous Fijian disunity

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<sup>25</sup> Chapter 3 'Fijian and Rotuman Interests', *Constitution of the Sovereign Republic of Fiji 1990*

<sup>26</sup> Sammy Smooha, 'The model of ethnic democracy: Israel as a Jewish and democratic state' (2002) *Nations and Nationalism* 8(4), 478. Is this source describing Fiji?

<sup>27</sup> Corporate consociations assume that 'group identities are fixed, and that groups are both internally homogeneous and externally bounded'. A feature of corporate consociationalism is the use of ethnic quotas and in some cases, ethnic based voting rolls. For more see Allison McCulloch, 'Consociational settlements in deeply divided societies: the liberal-corporate distinction' (2014) *Democratization* 21(3), 502.

<sup>28</sup> Jacqueline Leckie, *State coercion and public sector unionism in post-coup Fiji* Suva, South Pacific Forum (1991) 67; William Sutherland, 'The problematics of reform and the 'Fijian' question' in A. H. Akram-Lodhi (ed), *Confronting Fiji Futures* (2000) 208.

<sup>29</sup> Brij Lal, 'Chiefs and Thieves and Other People Besides: The Making of George Speight's Coup' (2000) *The Journal of Pacific History* 35:3 (2000) 275; William Sutherland, above n 55, 221-222.

<sup>30</sup> Robert Robertson, *Multiculturalism & Reconciliation in an Indulgent Republic. Fiji after the coups: 1987-1998* (1998) 94.

was exposed at various levels within the indigenous community: ‘within each province there [were] subtle forms of competition based on pre-colonial vanua’.<sup>31</sup>

There was one bright spot in the Constitution; it provided for a review of the Constitution before the end of 7 years after its promulgation.<sup>32</sup> After its promulgation there was intense internal and external pressure on the government to change the Constitution. Several factors prompted a review in 1995. Apart from indigenous Fijian disunity and a sense of apprehension felt by many indigenous Fijians about the future of their own socio-political arrangements there was also growing concern about the future of Fiji as a modern state. Aid donors and international financial institutions viewed with condemnation the discriminatory constitutional arrangements, limiting the level of financial and technical assistance provided to Fiji. Post-coup investment in Fiji remained low, and government administration and the provision of professional services also continued to suffer from the ongoing exodus of Indo-Fijians and people of other races. This strengthened demands for economic and political reform.<sup>33</sup>

## **TRANSFORMING THE ETHNO-HEGEMONIC STATE**

Hegemonic ethnic democracies are intrinsically unstable; due to tension between the structure of the state around the dominant ethnic group and the state’s commitment to democracy.<sup>34</sup> Transformation from a hegemonic, ethnic democracy to a more substantial democracy can take two forms: cosmetic or comprehensive. Cosmetic transformation is a gradual step towards further democratization that includes a gradual dismantling of the hegemonic state’s most blatant democratic violations without the destruction of the fundamentally ethnic character of the state. A comprehensive transformation involves a radical change towards genuine democracy either through ‘ethnic-blindness’, granting all individuals political equality (liberal democracy) or through genuine pluralism, apart from

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<sup>31</sup> Alumita Durutalo, above note 20, 79.

In each province, for example, there are certain vanua, which receive more from government than others. In the province of Nadroga-Navosa, the coastal Nadroga people have always been favoured over the inland Navosa people in terms of state resources for any development in the province

<sup>32</sup> *Constitution of the Sovereign Republic of Fiji 1990, s 161*

<sup>33</sup> Ghai and Cottrell, above n 22, 652-653.

<sup>34</sup> Ilan Peleg, ‘Transforming Ethnic Order to Pluralist Regimes: Theoretical, Comparative and Historical Analysis.’ in Adrian Gulke (ed), *Democracy and Ethnic Conflict: Advancing Peace in Deeply Divided Societies* (2004) 7-25; As’ad Ghanem and Aviad Rubin, ‘Democracy and Distributiveness: Patterns of Transition from Hegemony in Divided Societies’ (2015) *Citizenship Studies* 19, 6-7, 714-733; John McGarry and Brendan O’Leary, ‘The Political Regulation of National and Ethnic Conflict’ (1994) *Parliamentary Affairs* 47(1) 94-115.

granting political equality also guaranteeing group rights (consociational democracy) through recognition of language rights, equal or significant share in the state's economic resources and protected political representation.<sup>35</sup>

The review of the 1990 Constitution proposed elements of both cosmetic and comprehensive transformation. This reflected the review committee's terms of reference, which provided that while recommending changes to the Constitution, the Commission had to balance the principle of indigenous Fijian interests while also guaranteeing having full regard to the rights, interests and concerns of all ethnic groups. While the Commission's recommendations<sup>36</sup> indicated their intention to radically transform Fiji politics through arrangements aimed at de-ethnicization of politics, the Joint Parliamentary Sector Committee's (JPSC's) deviation from these recommendations signaled their intention for cosmetic transformation thereby retaining the fundamentally ethnic character of the state while making some efforts towards dismantling the hegemonic ethnic state.

### **THE 1997 CONSTITUTION: A MULTICULTURAL COMPROMISE?**

The 1997 Constitutional arrangements included a mixture of consociational and centripetal features. The communal allocation of almost two-thirds of seats in the House of Representatives is a feature of corporate consociationalism, treating major ethnic groups as corporate entities. It also attempted to move away from race based politics through the introduction of 25 common roll seats. An appointed 32 member Senate was retained, however, there was a reduction in the number of GCC nominees from 24 to 14 who retained their power of veto over all legislation affecting indigenous Fijians thereby retaining the principle of paramountcy of [indigenous] Fijian interests' but only in a protective sense.<sup>37</sup> The GCC was granted constitutional recognition in the 1990 Constitution; however the 1997 Constitution went further and provided for its roles and functions.<sup>38</sup> Chapter 13 of the Constitution (Group Rights) also provided for entrenchment of laws relating to indigenous Fijians, Rotumans and Banabans and their land and provided for procedures on how to alter the laws. It also provided for the parliament to enact legislation regarding customary laws

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<sup>35</sup> Ilan Peleg, above n 34, 16-20.

<sup>36</sup> For more on the Constitution Review Committee's recommendations refer to their report: Paul Reeves, Tomasi Vakatora and Brij Lal, *The Fiji Islands: Towards a United Future, Parliamentary Paper no. 34 of 1996* (Suva, Government Printer, 1996).

<sup>37</sup> Other than the 14 GCC nominated senators, the PM nominated 9, the Leader of Opposition 8 and 1 nominated by the Rotuma Island Council.

<sup>38</sup> *Fiji Islands Constitutional Amendment Act 1997*, s 116

and for dispute resolution in accordance with traditional processes, for distribution of royalties to landowners and registered customary fishing rights for mineral and resource extraction.<sup>39</sup> Another feature of consociationalism in the Constitution was the mandatory power sharing in the executive whereby the Prime Minister was constitutionally mandated to invite all parties that attain ten percent or more seats in parliament to be part of their cabinet in proportion to their composition in Parliament<sup>40</sup>.

The electoral provisions of the 1997 Constitution reflect the preferences of the political scientist Donald Horowitz, who preferred a power-sharing model comprising ‘centripetal, integrative or incentive-based techniques’ which he suggests is most likely to foster moderation and conciliation on the part of all concerned. Horowitz recommends the AV system as the best option for divided societies as he believes that political elites must be afforded political and electoral incentives with the aim of ‘making moderation pay’.<sup>41</sup> The notion behind this system is to provide politicians with incentives to seek electoral support from groups beyond their own ethnic community.

In May 1999, Fiji went to elections under the provisions of the 1997 Constitution. The multi-ethnic People’s Coalition composed of the Fiji Labor Party (FLP), Fijian Association Party (FAP), the Party of National Unity (PANU) and the Christian Democratic Alliance (VLV), and won the elections resoundingly<sup>42</sup>. Mahendra Chaudhry, the leader of the Fiji Labor Party, became the Prime Minister, the first Indo-Fijian to ever hold that position. Despite constitutional provisions protecting indigenous Fijian interests, this failed to guarantee constitutional and democratic stability in Fiji. One year later, in May 2000, George Speight and his men, carried out a civilian putsch, supported by the Counter Revolutionary Warfare Unit (CRW) of the military, removing the elected government and holding Chaudhry and his cabinet hostage for 56 days.<sup>43</sup> Speight’s ultra-nationalist rhetoric appealed to the grassroots indigenous Fijians.<sup>44</sup>

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<sup>39</sup> *Fiji Islands Constitutional Amendment Act 1997*, ss 185-6

<sup>40</sup> *Fiji Islands Constitutional Amendment Act 1997*, s 99

<sup>41</sup> Donald Horowitz, ‘Making Moderation Pay: The Comparative Politics of Ethnic Conflict Management’ Joseph Montville, *Conflict and Peacemaking in Multiethnic Societies* (1990) 451-475.

<sup>42</sup> Jon Fraenkel, ‘Electoral Engineering and the Politicisation of Ethnic Friction in Fiji’ in ed. Sunil Bastian and Robin Luckham, *Can Democracy be Designed: the Politics of Institutional Choice in Conflict-torn Societies* (2003) 235-245.

<sup>43</sup> William Sutherland and Robbie Robertson. *Government by the Gun* (2001); Brij Lal, *Islands of Turmoil: Elections and Politics in Fiji* (2006) 200.

<sup>44</sup> Sutherland and Robertson, above n43.

Any transition from a hegemonic, ethnic democracy is riddled with challenges. Transition involves significant shifts in power and privilege from the dominant ethnic group to the non-dominant ones creating winners and losers in the system. Some members of the dominant group will resist and challenge reforms where their powers or ‘preservation of their preferential status in the state over equal distribution of power and resources’ are threatened.<sup>45</sup> The 2000 civilian coup demonstrated the precariousness of such a transition when elements of the indigenous Fijian political class resorted to extra-constitutional measures to recapture power they lost during the transition from an ethnic to multicultural democracy in the 1999 elections.

The transition prompted Speight to raise issues in relation to land and tenancy agreements, the removal of race based affirmative action programs and the socio-economic standards of indigenous Fijians, particularly compared to Indo-Fijians. He also emphasized the People’s Coalition government’s attempt to ‘destroy indigenous Fijian institutions, namely the Native Lands Trust Board and the Great Council of Chiefs’.<sup>46</sup> Underlying all these issues was the notion that only an indigenous Fijian led government would put in place laws and policies that will protect and promote indigenous Fijian interests. There always existed a cleavage within the indigenous Fijian political class, one that supported and was sympathetic to multiculturalism and another that over the course of post-independent history has radicalized thereby adopting a hardline stance promoting and demanding preferential treatment in the form of a hegemonic, ethnic state. The GCC responded to the demands by Speight by urging President Ratu Mara to institute constitutional reforms that took into account these grievances and ensure that political leadership of Fiji remained with indigenous Fijians.<sup>47</sup>

However, this coup wasn’t simply an ‘indigenous Fijian’ versus ‘Indo-Fijian’ concern. In spite of the usual ethno-nationalist rhetoric about the ‘[Indo-Fijian] threat’ this coup was more complex. According to Lawson, indigenous ethno-nationalism in the form of ‘anti-Indianism’ after the 1987 coups had turned into a means through which intra-indigenous Fijian rivalries have been played out.<sup>48</sup> With the crisis worsening, the military commander,

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<sup>45</sup> Ilan Peleg, above note 31, 21; As’ad Ghanem and Aviad Rubin, above note 31, 722.

<sup>46</sup> George Speight, ‘Confidential Draft and Statement of 22 May 2000.’ in Lal, Brij V. and Michael Pretes (ed), *Coup: Reflections on the Political Crisis in Fiji*. Canberra: ANU E Press, (2008) 147-153.

<sup>47</sup> Brij Lal, above n 38, 200.

<sup>48</sup> Jon Fraenkel, ‘The Clash of Dynasties and Rise of Demagogues: Fiji’s Tauri Vakaukauwa of May 2000’ (2000) *The Journal of Pacific History* 35(3) 295-308; Stephanie Lawson, ‘Indigenous Nationalism in Fiji:

Commodore Bainimarama assumed executive authority on 29 May 1999 in order to restore stability and resolve the crisis.<sup>49</sup> He also abrogated the 1997 Constitution, appointed a military council to run the affairs of the country and also promised a new constitution within three years. Speight's objectives of the civilian overthrow of the elected government came to fruition, although Speight was not included in the post-coup government.

Laisenia Qarase, an ethno-nationalist, was sworn in as the interim PM to run the affairs of government until 2002, when a new constitution would be in place for new elections to take place. In July 2000, a Constitution Review Commission, headed by Professor Asesela Ravuvu, was tasked with making recommendations for a new constitution that took into account the principle of paramountcy of indigenous Fijian interests. The Commission did release a report prepared by a four-member sub-group despite its work being suspended in January 2001 due to a High Court ruling on the legality of the abrogation of the constitution and interim government.<sup>50</sup> The contents of the report places the blame on Indo-Fijians, 'who should but did not, accept their proper culturally sanctioned role to serve, or at least be subservient to the [indigenous Fijians], the owner of the land'. They used 'democracy, equality, and human rights to discourage and outmaneuver [indigenous] Fijian political efforts and aspirations to regain that nationalism and the power which had been ceded in 1874' argued the report. They also failed to 'consider the [indigenous] Fijian people's demands for the paramountcy of their interests and return of all government authority into Fijian hands'.<sup>51</sup> The solution to long-term stability and prosperity according to the report was that indigenous Fijians should have political paramountcy and political leadership, 'within a timeframe to allow others to be eventually assimilated and accepted as Fijians'.<sup>52</sup>

The High Court of 2001, which had suspended the work of the Commission, was a case brought by an Indo-Fijian farmer challenging the legality of the coup. The Court upheld the 1997 Constitution as the supreme law, and held the coup and the interim government to be illegal.<sup>53</sup> The Prime Minister of the Interim Civilian Government, Qarase and his

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Rethinking the Politics of Ethnicity' *Paper prepared for presentation at the 2009 International Political Science Association Conference, 12th-16th July*. Santiago, Chile (2009) 10; Brij Lal, above n 38, 282-283.

<sup>49</sup> Brij Lal, above n 43, 203; William Sutherland and Robbie Robertson, above n 43.

<sup>50</sup> Chandrika Prasad v The Republic of Fiji and the Attorney-General of Fiji (High Court Action No. HBC0217.00L

<sup>51</sup> George Williams, 'The Case that Stopped a Coup? The Rule of Law in Fiji' *Presentation at the 2003 Quentin-Baxter Memorial Trust Lecture*. Wellington: Law School, Victoria University of Wellington, (2003); Brij Lal, above n 43, 213.

<sup>52</sup> Brij Lal, above n 12, 214.

<sup>53</sup> Republic of Fiji v Prasad [2001] 2 LRC 743

government resigned, announcing that Fiji would be returned to democratic parliamentary rule under the 1997 Constitution. Instead of recalling the deposed parliament, the President reappointed Qarase and called a general election under the 1997 Constitution.<sup>54</sup> Two more elections were held, in 2001 and 2006, under the 1997 Constitution.

The design of the electoral system under the 1997 Constitution also produced unexpected results. For example, the selection and adoption of the alternative vote, preferential system was envisaged as a means of fostering moderation by offering incentives to political parties to appeal beyond sectional ethnic interests and trade preferences with other moderate parties. However, in the 1999 elections, operationalization of the electoral system especially trading preferences did not eventuate as expected.<sup>55</sup> Jon Fraenkel claims that the design of the electoral provisions of the 1997 Constitution was designed to ensure that the politicians behind the drafting of the 1997 were guaranteed victory at the elections.<sup>56</sup> Additionally, the Commission's assumption that moderate political parties would share preferences with each other was proved wrong during the 1999 and subsequent elections. They demonstrate that in effect, where moderate political parties and politicians were marginalized, the electoral system rewarded ethically-based politicians who appealed to sectional interests.<sup>57</sup>

Political expediency and the concern with gaining power over principles of moderation was the norm with trading preferences during the 1999 elections. Another result of the design of the electoral system was that in communal seats, the alternative vote had become inconsequential as voters became more communal minded in their choices indicating polarization of the constituencies.<sup>58</sup>

## **CIVIC TRANSFORMATION OF FIJI VIA A MILITARY COUP**

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<sup>54</sup> Brij Lal, above n43.

<sup>55</sup> Jon Fraenkel and Bernard Grofman, 'A Neo-Downsian Model of the Alternative Vote as a Mechanism for Mitigating Ethnic Conflict in Plural Societies' (2004) *Public Choice* 121(3) 487–506; Jon Fraenkel and Bernard Grofman, 'Does the Alternative Vote Foster Moderation in Ethnically Divided Societies?: The Case of Fiji' (2006) *Comparative Political Studies* 39:5 (2006) 623–651; Donald Horowitz, 'Strategy Takes a Holiday: Fraenkel and Grofman on the Alternative Vote' (2006) *Comparative Political Studies* 39(5) 652–662; Donald Horowitz, 'The Alternative Vote and Interethnic Moderation: A Reply to Fraenkel and Grofman' (2004) *Public Choice* 121(3/4) 507-516.

<sup>56</sup> Jon Fraenkel, above n 55.

<sup>57</sup> Jon Fraenkel, 'Electoral Engineering and the Politicisation of Ethnic Friction in Fiji.' in Sunil Bastian and Robin Luckham (eds), *Can Democracy be Designed? The Politics of Institutional Choice in Conflict-Torn Societies* (2003) 248.

<sup>58</sup> Yash Ghai and Jill Cottrell, above n 22, 307.

Six months after the 2006 elections, the military led by Commodore Bainimarama, carried out Fiji's fifth coup (5 December 2006), defying the assumptions upon which post-independence Fiji was built on, the unwritten rule of indigenous Fijian political paramountcy. An indigenous Fijian dominated military removed a government led by an indigenous Fijian with more than eighty percent support from the indigenous Fijian electorate. Initially Bainimarama insisted that the coup was carried out to protect the 1997 Constitution claiming Qarase was violating the spirit of the Constitution by pursuing a controversial legislation that would grant amnesties to those convicted in the 2000 coup. He argued that this legislation would 'divide the nation and will have very serious consequences to our future generations'. He proclaimed that the military 'not only adheres to the rule of law and the Constitution but more importantly believes in the adherence to the spirit of law and the Constitution'.<sup>59</sup>

In April 2007, the Bainimarama regime announced its intentions to review the 1997 Constitution with the goal of 'ridding the Constitution of provisions that facilitate and exacerbate the politics of race in such areas as the registration of voters and the election of representatives to the House of Representatives through separate electoral rolls' preferring an electoral system that was based on one person-one vote.<sup>60</sup>

Speaking at the UN General Assembly in 2007, Bainimarama argued that Fiji's independence was built on shaky foundations (i.e. race based constitutions) that separated Fijians. Democratic politics that had been practiced in Fiji was therefore divisive and constrained efforts at nation-building. He announced that Fiji had to do away with race-based politics, committing to reforms that would entail greater democratization that would ultimately end coup culture.<sup>61</sup> The coup and its ideology therefore sought to supplant the politics through a nation-building project.

This was initiated under the guise of a state of emergency. The military government acquired extraordinary powers that permitted the armed and police forces to quell dissent, with force if necessary. In the aftermath of the coup and the eventual abrogation of the 1997

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<sup>59</sup> *ibid*, 311.

<sup>60</sup> Fiji Ministry of Information, *Moving in the Right Direction* (April, 2007), [http://www.fiji.gov.fj/uploads/Roadmap\\_2007.pdf](http://www.fiji.gov.fj/uploads/Roadmap_2007.pdf) (Accessed 14 March, 2017.)

<sup>61</sup> Josaia Bainimarama, Statement by Commodore Joasia V. Bainimarama at the 62nd Session of the United Nations General Assembly. New York (28 September 2007).



Constitution in April 2009, decrees were put in place that severely restricted freedom of movement, assembly and expression (including media freedom).<sup>62</sup>

## **CURBING ETHNO-NATIONALISM**

Bainimarama challenged the Methodist Church and the Great Council of Chiefs, institutions that indigenous Fijians hold dear and with reverence causing much concern amongst indigenous Fijians.<sup>63</sup> The military has been and remains the stronghold of indigenous Fijian power and Bainimarama has depended on it to support his reforms. In an Australian television interview he raved about the necessity of the military, as an unelected institution, to facilitate the changes the coup sought where politicians had failed to. He stated that the military did not have to please the chiefs nor the Methodist Church and was in the best position to institute political and constitutional reforms that would benefit everyone, regardless of their ethnicity.<sup>64</sup> He further argued that indigenous Fijians needed to change their mindset that the nation and democracy belonged or should belong to the chiefs.<sup>65</sup>

The GCC was opposed to the 2006 coup, calling on the military to return back to the barracks advising the President to set up an interim council to resolve the impasse. Bainimarama warned the GCC not to hold any meetings when the 'state of emergency' was in place without seeking approval from the military. In 2007, Bainimarama ordered his interim Minister for Fijian Affairs to suspend the GCC and initiate reform of the institution. In justifying the suspension of the GCC, Bainimarama argued that since the GCC 'does not recognize the interim government' it 'constitutes a security threat in our efforts to move the country forward'.<sup>66</sup>

These events were in stark contrast to the crisis after the 1987 coup in this regard. The military carried out the 1987 coup with the aim of consolidating indigenous Fijian power

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<sup>62</sup> see Mosmi Bhim, *Stifling Opposition: An Analysis of the Approach of the Fiji Government after the 2006 Coup*. Canberra: SSGM Discussion Paper Series (2011) 2.

<sup>63</sup> Brij Lal, 'Anxiety, Uncertainty and Fear in our Land: Fiji's Road to Military Coup, 2006, in Jon Fraenkel, Stewart Firth and Brij Lal (eds), *The 2006 Military Takeover in Fiji: A Coup to end all coups?*, (2009) 31-32; Brij Lal, 'This Process of Political Readjustment': The Aftermath of the 2006 Fiji Coup, in Jon Fraenkel, Stewart Firth and Brij Lal (eds), *The 2006 Military Takeover in Fiji: A Coup to end all coups?*, (2009) 77; Robert Norton, 'The Changing role of the Great Council of Chiefs' in Jon Fraenkel, Stewart Firth and Brij Lal (eds), *The 2006 Military Takeover in Fiji: A Coup to end all coups?*, (2009) 112. Robert Norton, 'The Troubled Quest for National Political Leadership in Fiji' (2015) *The Round Table* 104(2) 113-125; Steven Ratuva, 'The Military Coups in Fiji: Reactive and Transformative Tendencies' (2011) *Asian Journal of Political Science* 19(1) 112.

<sup>64</sup> Robert Norton, above n 63.

<sup>65</sup> Josaia Bainimarama, above n 61.

<sup>66</sup> Robert Norton, above n 63, 107.

with the endorsement of the GCC, whereas Bainimarama's actions indicated a desire to combat indigenous Fijian nationalism, which he viewed as a threat to national security.<sup>67</sup> In February 2008, the regime published new regulations for the GCC.<sup>68</sup> The changes included removal of the President, Vice-President and the prime minister as ex-officio members while retaining the Minister for Indigenous Affairs as the chair with increased powers.<sup>69</sup> In an effort to depoliticize the GCC, the draft decree prohibited chiefs from being part of the institution if they were members of parliament or standing as candidates, official members of political parties, or civil servants<sup>70</sup>. Further restrictions were planned on issues the GCC could discuss, confining it to issues affecting indigenous Fijians and Rotumans as referred to by the Minister.<sup>71</sup> Additionally, the Minister would be empowered 'to suspend, dismiss, or take disciplinary action against a member...for bringing disrepute or for any other good cause'.<sup>72</sup> Previously, the Minister had no authority to control the agenda of the GCC nor to discipline the members.<sup>73</sup>

These reforms signaled Bainimarama's intention that the GCC should 'primarily be an instrument of government, insulated from electoral and parliamentary politics, especially the influence of [indigenous] Fijian nationalist groups'. Only four out of the fourteen councils supported the reforms to the GCC, eight rejecting the reforms on the basis that the regime was illegal and didn't have the power or the mandate to initiate such reforms.<sup>74</sup> The lack of support for the reforms eventually led to the GCC being suspended again in March 2012, this time indefinitely, with Bainimarama citing politicization of the institution and its secretariat.<sup>75</sup>

Fiji's transition to democracy that began with the Bainimarama regime's constitution making process was carried out in a restrictive political environment. For 6 years, the regime was successful in controlling and silencing most dissenters and the media. In 2012, the regime released two decrees to pave the way for the drafting of a new constitution: the

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<sup>67</sup> *ibid*, 108-109.

<sup>68</sup> *Republic of Fiji Islands Government Gazette (Extraordinary)* Vol 8 No.12, 13 February 2008 - *Fijian Affairs Act, Fijian Affairs (Great Council of Chiefs) Regulations 2008*.

<sup>69</sup> *Fijian Affairs Act, Fijian Affairs (Great Council of Chiefs) Regulations 2008*, s3. The reforms in the 1993 did not require provincial representatives to be chiefs. See Robert Norton, above note 63, 112.

<sup>70</sup> *Fijian Affairs Act, Fijian Affairs (Great Council of Chiefs) Regulations 2008*, s6

<sup>71</sup> *ibid*, s7

<sup>72</sup> *ibid*, s5(2)

<sup>73</sup> Robert Norton above n 63.

<sup>74</sup> Robert Norton, above n 63, 112-113.

<sup>75</sup> Stephanie Lawson, 'Indigenous Nationalism, 'Ethnic Democracy', and the Prospects for a Liberal Constitutional Order in Fiji' (2012) *Nationalism and Ethnic Politics* 18(3) 306.

Fiji Constitutional (Constitution Commission) Process Decree 2012 or Decree 57 and the Fiji Constitutional Process (Constituent Assembly and Adoption of Constitution) Decree 2012 or Decree 58.<sup>76</sup> Decree 57 stipulated 11 non-negotiable principles which had to be reflected in the constitution: common and equal citizenry; a secular state; removal of systematic 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 voting age of 18. Hanging over these non-negotiable principles was the call for unconditional immunity for the 2006 coups and events thereafter. Together with these decrees, the regime rescinded the Public Emergency Regulations by promulgating a Public Order Amendment Decree to allow for CSO's and people to take part in the process.<sup>77</sup>

Some of the non-negotiables were easy to incorporate into constitutional provisions while others were controversial (such as a common and equal citizenry and secular state) as it contradicted the unquestionable notion of paramountcy of indigenous Fijian interests. A five member Commission was appointed by the regime, headed by Professor Yash Ghai. The Commissioners started their work in July 2012 and wound up operation in December 2012 with the presentation of a draft Constitution to the President. The Ghai Commission's public consultation received more than 7000 submissions from individuals and groups. The Commission had to toe a fine line between two competing stipulations in the Decree. It had to listen to and take into account peoples' views whilst at the same time ensuring the draft was in line with the non-negotiable principles and providing for unconditional immunity.<sup>78</sup>

The 2012 Commission's draft constitution marked a departure from previous constitutions, a significant move away from the consociational character that defined previous constitutions to one that was intent on civic nation building and integration. It had a difficult balancing act to manage. While the regime wanted integrationist provisions in the constitution, the Commission after listening to people's views decided to maintain certain aspects of iTaukei institutions and provide for protection of language, culture, traditions and practices, although making a distinction between the public and private spheres. In the 1990

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<sup>76</sup> Fiji Constitutional Process (Adoption of Constitution) Decree. Suva: Fiji Government. (Decree 12 of 2013, March 21) and Fiji Constitutional Process (Constituent Assembly and Adoption of Constitution) Decree. Suva: Fiji Government. (Decree 58 of 2012).

<sup>77</sup> Romitesh Kant and Eroni Rakuita, 'Public Participation and Constitution-Making in Fiji: A Critique of the 2012 Constitution-Making Process in Fiji' (2014), *State Society and Governance in Melanesia Discussion Paper Series No. 2014/6*, 5-6.

<sup>78</sup> *Ibid.*

and 1997 Constitutions, the GCC had been recognized as a public institution with important powers conferred to it but in the 2012 draft, the GCC was classified as a civil society organization with only advisory powers. Section 47 provided for rights to join and maintain cultural, linguistic and religious association and practices. The GCC was given constitutional recognition as a non-partisan organ of civil society, namely, as a custodian of iTaukei culture and traditions.<sup>79</sup>

The Commission's draft also removed the President as the Commander-in-Chief of the military, granting oversight control to the parliament and removing its guardian role.<sup>80</sup> Additionally, members of the military were also prohibited from following illegal orders and immunity for previous treasonous activities would be conditional upon renouncing their crimes and swearing an oath of allegiance disavowing their support for illegal regimes.<sup>81</sup> To prevent another illegal overthrow of a democratically-elected government, the draft also made it impossible to seek immunity for future transgressions.<sup>82</sup> Another controversial section of the draft related to the transitional provisions whereby the regime would have to hand over power to a caretaker government for six months which would then put in place mechanisms for free and fair elections that included repealing and amending restrictive decrees that were inconsistent with the draft Constitution.<sup>83</sup>

In January 2013, the regime dumped the Commission's Draft Constitution. The President informed people that the commission's draft while it included some good provisions, 'many of the provisions of the Ghai draft positions us in the past'.<sup>84</sup> He directed the regime to put together a new draft. The regime released its draft in March and held its own 'consultations' on it. The fundamental shortcoming for the Commission was that it had recommended a political settlement that was welcomed by the regime's detractors.<sup>85</sup>

In August 2013, the regime released the final version of the Constitution that would take Fiji to elections, which was promulgated by the President in September. The 2013 Constitution in the Preamble makes references to the indigenous Fijians and Rotumans as

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<sup>79</sup> Fiji Constitution Commission Draft Constitution 2012, s56

<sup>80</sup> *ibid*, ss73 and 176

<sup>81</sup> *ibid*, Schedule 3—Oaths Or Affirmations

<sup>82</sup> *ibid*, s27, Schedule 6

<sup>83</sup> *ibid*, s17, Schedule 6

<sup>84</sup> Fiji Times Online. 'The President Ratu Epeli Nailatikau's Address on Fiji's Constitution and Constituent Assembly' *FijiTimes Online* (10 January 2013) <http://www.fjtimes.com.fj/story.aspx?id=222129>, (Accessed 10 July 2017).

<sup>85</sup> Romitesh Kant and Eroni Rakuita, above n 77, 12-14.

the first inhabitants of Fiji, recognizing their lands, unique culture, customs traditions and language. It also recognizes the same for all other later immigrants. For the first time it makes mention of a common national identity, which remains to this day a thorny issue within the indigenous Fijian community.

The recognition of indigenous Fijian customary land ownership in the Constitution is intended to appease suspicions stirred up by ethno-nationalists over most of Fiji's independent history. It is strengthened by Article 28, which confirms that indigenous Fijian, Rotuman and Banaban land rights are inalienable while section 30 provides for fair distribution of royalties from minerals extracted from traditional lands and/or customary fishing grounds.

In terms of institutions, the Senate and the Great Council of Chiefs, both already defunct in practice, are no longer constitutionally recognized. A single-chamber Parliament is introduced, to be elected via a system of proportional representation of party lists.<sup>86</sup> With some symbolic importance, Article 53 provides very explicitly: 'each voter has one vote, with each vote being of equal value, in a single national electoral roll comprising all the registered voters'. Ethnic electoral rolls, and ethnic representation in Parliament, are thus abolished. With indigenous people now constituting a majority of the population, this measure was not as controversial as it would once have been. In all other regards, Fiji's institutions under the terms of this Constitution are Westminster-inspired. The relationship between Parliament and the Cabinet is a reaffirmed codification of British custom; the President, appointed by Parliament, is a purely ceremonial head of state, bound to act solely on his ministers' advice.<sup>87</sup>

After assenting to the constitution, the President, in an address to the nation, stated, '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'.<sup>88</sup> Bainimarama described the new

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<sup>86</sup> *Constitution of the Republic of Fiji 2013*, s53.

<sup>87</sup> *ibid*, s82

<sup>88</sup> Epeli Nailatikau, *President's Address to the Nation* (13 September 2013).

constitution as a ‘blueprint for democracy’, marking a ‘new beginning’ for Fiji. He proclaimed that the 2013 Constitution will make Fiji democratic and foster stability.<sup>89</sup>

With minimal recognition to ethnic and cultural identities, the 2013 Constitution aimed to develop a culture of civic nationhood. The promulgation of the 2013 Constitution paved the way for parliamentary elections in September 2014. The constitution had brought an end to communal voting, a feature of previous constitutional arrangements. Seven political parties<sup>90</sup> contested the election, however the main competition was between FijiFirst and SODELPA.

The 2014 election was a contest between two visions of Fiji; namely FijiFirst’s appeal to voters as representative of inclusive civic nationalism and SODELPA’s vision of a nationalism linked with chiefly rule, of Christian dominance, which stretched to an attack on secularism and the 2013 Constitution as a ‘God-less Constitution’.<sup>91</sup> The NFP, FLP and PDP advocated for multiculturalism while also promising to review the Constitution, and provide recognition and a role for the GCC.

## **PROSPECTS FOR DEMOCRATIC STABILITY**

Ethnicity has been entrenched in Fiji’s political culture through constitutions designed to preserve communal representation. Democracy and stability has remained elusive due to the persistence of coups. Prior to the 2006 coup, democracy was acceptable as long as it returned an indigenous Fijian political party to power. Political and constitutional reform post 2006 coup have endeavored to eliminate this entrenchment of ethnicity through the promulgation of an ethnically-blind constitution in 2013 aimed at bringing about democratic stability. However, as Brij Lal has noted ‘the Fijian democracy that Bainimarama [has created] rests on very thin and narrow foundations’.<sup>92</sup> While the 2013 Constitution has some long sought after progressive aspects (like a non-communal electoral system and common national identity), it also contains some worrying provisions (concentration of power with the Prime Minister and the Attorney General, entrenchment of decrees, limiting political rights; shielding decrees from legal challenge, and expanding the role of the army).

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<sup>89</sup> Romitesh Kant and Eroni Rakuita, above n 77, 15.

<sup>90</sup> These political parties were SODELPA, the Fiji Labour Party (FLP), the National Federation Party (NFP), the People’s Democratic Party (PDP) (a breakaway from FLP), OneFiji Party (a breakaway from SODELPA) and the Fiji United Freedom Party.

<sup>91</sup> SODELPA 2014, Reclaiming Fiji: The Manifesto of SODELPA, [www.sodelpa.org/SODELPA-manifesto-LR.pdf](http://www.sodelpa.org/SODELPA-manifesto-LR.pdf) (Accessed 15 April 2017)

<sup>92</sup> Brij Lal, ‘Editorial: Fiji: The Road to 2014 and Beyond’ (2015) *The Round Table* 104(2) 87.

Arguably, the 2013 Constitution is ‘not designed to establish a stable constitutional democracy in Fiji’, it addresses ‘the deep divisions in Fijian society that have contributed to the instability of Fiji for the past century’. However, it does so by ‘ignoring them – by insisting on ethnically blind constitutional arrangements’.<sup>93</sup> The 2013 Constitution is flaunted as the final solution to the persistent issues that have plagued Fiji’s protracted quest for a sustainable democracy, however, concerns about the current transition remains. Three issues that have the potential to trigger instability are: the nature of the transition, the role of the military and the principle of paramountcy of indigenous Fijian interests.

## STALLED TRANSITION

Fiji’s transition to democracy has been marred by the dominant-power politics of the Bainimarama regime in the lead up to and after elections. The recent attempt at transition that started with the constitution-making process in 2012 was high jacked by the Bainimarama regime, who in turn drafted the 2013 Constitution in secrecy.<sup>94</sup> The 2013 Fijian Constitution concentrates most power in the executive, especially the offices of the Prime Minister and Attorney-General which includes powers to make appointments to the judiciary and ‘independent’ accountability bodies.<sup>95</sup> This concentration of power with these individuals does not bode well for Fiji’s transition as they have controlled the transition, for example in drafting the new constitution in secret, and in making regulations and unilateral appointments to electoral management bodies in the lead up to the 2014 elections.

These factors and others meant that Fiji’s latest democratic transition was not based on a level playing field. The Constitution did not provide for a caretaker government to lead Fiji’s transition. The Bainimarama regime issued decrees until the eve of the elections using the power of incumbency brazenly and without control. The regime’s Attorney General (also the Minister of Elections) who was also the General Secretary of the FijiFirst party claimed there was no conflict of interest.<sup>96</sup> Opposition parties faced numerous obstacles: SODELPA was forced to change its name from SDL to SODEPLA by an amendment to the political parties decree that prohibited political parties from having names in the vernacular.

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<sup>93</sup> International Senior Lawyers Project. ‘Analysis of the Draft Constitution of Fiji released by the Interim Government of Fiji’ (28 March 2017). [www.islp.org/sites/default/files/Analysis%20of%20the%20Draft%20Constitution%20for%20Fiji.pdf](http://www.islp.org/sites/default/files/Analysis%20of%20the%20Draft%20Constitution%20for%20Fiji.pdf) (Accessed 15 July 2017)

<sup>94</sup> Romitesh Kant and Eroni Rakuita, above n 77, 13-14.

<sup>95</sup> *Constitution of the Republic of Fiji 2013*, ss 104, 114-122

<sup>96</sup> Maciu Bolaitanama, ‘I do not need to step down as Minister: AG’, *Fiji One* (8 May 2014) <http://fijione.tv/i-dont-need-to-step-down-as-a-minister-ag/> (Accessed 22 April 2017)

Leaders of SODEPLA/SDL and FLP were charged and sentenced to prison that effectively prohibited them from contesting the elections.<sup>97</sup> Some other opposition candidates were disqualified after a further amendment to the Electoral Decree in June 2014 which stipulated that proposed candidates were to be present and living in Fiji for at least eighteen months of the two year period prior to elections.<sup>98</sup> Additionally, donor funded civil society organizations were prevented from conducting voter education or holding debates/panel discussions on election related issues without the prior approval of the electoral authorities.<sup>99</sup>

Since the elections, the Bainimarama government has demonstrated the use of dominant-power politics by changing the parliamentary rules (Standing Orders) to remove the requirement that the Chairman of Public Accounts Committee (PAC) be from the Opposition and the PAC's Terms of Reference (TOR) which removes its ability to effectively scrutinise the Auditor-General's reports.<sup>100</sup> Historically, all chairpersons of the Public Accounts Committees have been from the Opposition to enable greater scrutiny of public finances. Since the changes, the PAC appointed an MP from the governing party as the chair thereby compromising the role of the committee to independently scrutinize public finances.<sup>101</sup> Another change to the Standing Orders restricts tabling of petitions in Parliament by MPs.<sup>102</sup> The change made it harder for an MP to table a petition as the rules require 40% of MPs to vote for the petition for it to be passed on to the relevant parliamentary committee. This change was brought on deliberately by the government as the 40% requirement meant that opposition MP's were powerless as they constituted only

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<sup>97</sup> s 23(4) of the *Electoral Decree 2014* rules out as candidate any person 'during the eight years immediately before being nominated' who has 'been convicted of any offence under any law for which the maximum penalty is a term of imprisonment of 12 months or more'. Two other Opposition candidates were disqualified: Jagnath Karunaratne, the leader of Fiji's United Freedom Party, was banned from contesting the election because of a seven-year-old sentence which carried a fine of \$300 and Fiji Labour Party candidate Steven Singh, based on a conviction that had actually been set aside by the Courts.

<sup>98</sup> *Electoral Decree 2014* s115. NFP candidates Makereta Waqavonovono and Jone Vakalalabure were disqualified based on this rule.

<sup>99</sup> see Romitesh Kant, 'Fiji Constitution Monitoring Report: September 2013-2014' in Citizen's Constitutional Forum (ed), *Fiji in Transition: Towards a Sustainable Constitutional Democracy* (2014) 111-121.

<sup>100</sup> Radio New Zealand International, *NGO Calls for Reversal of Changes to Fiji Standing Orders* (18 February 2016) <http://www.radionz.co.nz/international/pacific-news/296803/ngo-calls-for-reversal-of-changes-to-fiji-standing-orders> (Accessed 22 April 2017).

<sup>101</sup> Newswire, *Biman Prasad Voted out as Chair of Public Accounts Committee* (12 March 2016) <https://www.newswire.com.fj/national/parliament/biman-prasad-voted-out-as-chair-of-public-accounts-committee/> (Accessed 28 April 2017).

<sup>102</sup> Fiji One, *Concerns Raised on Procedure of Petitions Presented in Parliament* (26 April 2016) <http://fijione.tv/concerns-raised-on-procedure-of-petitions-presented-in-parliament/> (Accessed 26 April 2017).



36% of parliamentary membership. FijiFirst has therefore monopolized legislative and electoral arenas and appropriated the post-transition political space.

Another problem facing this transition is the status of FijiFirst Party. Since its inception prior to the 2014 elections, the party has operated more like a movement than as a political party. They have endorsed a discourse in relation to the significance of their leader to the stability and prosperity of Fiji. During the campaign, the focus was almost exclusively on Bainimarama as the leader, which seems to have worked well for FijiFirst.<sup>103</sup> Bainimarama garnered almost 40% of the total valid votes cast (67% of all votes cast for FijiFirst). Since its inception, FijiFirst has never held an annual general meeting of its active membership nor does it seem to have a long-term leadership succession plan. Without proper leadership succession, the power of domination remains with Bainimarama rather than FijiFirst as an institution. There have been parties that have persisted and continue to exist despite extreme personalization such as Atatürk's Republican People's Party of Turkey. However, these parties have had a strong and vibrant ideological sphere of activity and were created during founding of the nation-state. This is not the case with FijiFirst.

The personalized-dominant power politics of Bainimarama and his FijiFirst party point to the fact that stability in Fiji will be guaranteed by the extent to which the ruling party has the ability to control the transition process.

## **THE MILITARY AS THE GUARDIAN OF THE CIVIC STATE**

Since independence, the military has been faced with a dilemma regarding its role in the Fijian polity. The dilemma has been between the 'role of the military as a national security institution and the military as an ethnically aligned organization'.<sup>104</sup> The coups of 1987 tarnished the crucial role the Fijian military played in international peacekeeping by succumbing to the ethno-nationalist demands and removing a democratically elected government. Indigenous Fijian political elites have viewed the military in Fiji as defenders of the long-established customary leaders and traditional institutions, including by conducting the two coups of 1987. The role of the military after 1987 was not only to establish and maintain a transformed political space further strengthened an ethnic state;

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<sup>103</sup> Joni Madraiwiwi, 'The Fijian Elections of 2014: Returning to Democracy ...?' (2014) *The Journal of Pacific History* 50(1) 57.

<sup>104</sup> Steven Ratuva, 'The Military Coups in Fiji: Reactive and Transformative Tendencies' (2011) *Asian Journal of Political Science* 19(1) 101.

they also had also to make sure that ethnonationalist behavior was restrained. In the period after the coup leading to the 1992 elections, the military found itself in conflict with ethno-nationalists. In its bid to restore its image, the military under the leadership of Ratu Epeli Ganilau, the son of the President and Ratu Mara's son-in-law, (and later Bainimarama) embarked on an 'institutional and ideological transformation which drastically altered its ethno-nationalist image and ideological orientation'.<sup>105</sup> This reorientation to a multiculturalist ideology did not sit well with ethno-nationalist political elites including the Methodist Church.

Constitutional reform in the mid-1990s moved towards greater democratization and included attempts to bring the military under civilian rule, subordinating it to a democratically elected government. However, from the 2000 coup onwards, under the leadership of Bainimarama, the military transformed its ideological position claiming to be guardian of equal rights for all citizens, challenging traditional and customary power.

Both the 1997 Constitution and the 2012 Constitution Commission Draft attempted to limit the role of the military compared to the 1990 and the 2013 Constitutions. The 2012 Draft contained provisions to make the RFMF accountable to an elected civilian government, through a National Security Council intended to 'exercise civilian oversight of the security services' (section 175).<sup>106</sup> However, the 2013 Constitution disregarded these provisions and opted for an extraordinary expansive role of the RFMF similar to the position under the 1990 Constitution. The RFMF is given the responsibility of 'overall responsibility ... to ensure at all times the security, defense and well-being of Fiji and all Fijians'.<sup>107</sup>

In 2017, the military made three public statements that are cause for concern in relation to democratic stability in Fiji. The first statement by the military was regarding a Methodist Church submission to the village by-laws calling for Fiji to be declared a Christian State was released. The military in an unsigned press release cautioned against institutions and people causing suspicion, distrust, heightening ethnic tensions and potentially lead to conflict stating their constitutional role of ensuring peace, security and well-being of all

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<sup>105</sup> Steven Ratuva, above n 104, 101-102; Steven Ratuva, 'The Pre-Election 'Cold War': The Role of the Fiji Military during the 2006 Election', in Jon Fraenkel and Stewart Firth (eds), *From Election to Coup in Fiji: The 2006 Elections and Its Aftermath* (2007) 31-32.

<sup>106</sup> Fiji Constitution Commission Draft Constitution 2012, s175

<sup>107</sup> *Constitution of the Republic of Fiji 2013* s 131. The RFMF in its submission to the 2012 Ghai Commission stated that it was the 'last bastion for law and order in Fiji' and would continue to be 'the guidance of the governance of this country, ensuring that peace, prosperity and good governance is practiced and adhered to'.

Fijians.<sup>108</sup> Subsequently, in June 2017, two statements were issued by the military's chief of staff Colonel Jone Kalouniwai against two opposition party leaders. They warned the newly elected NFP President on his statements at the party's annual general meeting where he was to have said that security of all Fijians lays with the goodwill of all communities, particularly the iTaukei. Kalouniwai warned political parties against making statements that could fuel ethno-nationalism in Fiji. He stated that although the military is apolitical, it would continue to play a pivotal role towards nation building.<sup>109</sup> On 28 June 2017, Kalouniwai warned the Fiji ex-Peacekeepers and Action Trustee Association to be wary about the SODEPLA leader, Rabuka's, involvement with their group in their legal action for compensation from the government for participation in UN Peacekeeping Missions from 1978 to 2002.<sup>110</sup> In all these instances, the military referred to the powers given to it under the 2013 Constitution to ensure peace, security and wellbeing of Fiji and its citizens.

The 32 elected FijiFirst MPs included 7 former military officials.<sup>111</sup> The military continues to play a crucial role in propping up Bainimarama's personalized rule who in return has ensured the continued support to the military through patronage. The military still remains largely an indigenous institution in Fiji, possibly the most powerful given the disbandment of the GCC and the silencing of the Methodist Church. Robert Norton points out that the 2006 coup is 'nonetheless an expression of ethnic Fijian power and identity, and, for the soldiers, a legitimate form of communal Fijian action'.<sup>112</sup> Despite proclamations of equality the military remains 95 percent indigenous Fijian in its composition and there have been no moves to make the military multiethnic. The military since 1987 has seen itself as a

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<sup>108</sup> Pacific Islands Report, 'Fiji Military Rejects Methodists' Call To Turn Country Into A 'Christian State' (27 April 2017) <http://www.pireport.org/articles/2017/04/26/fiji-military-rejects-methodists-call-turn-country-christian-state> (Assessed on 15 July 2017)

<sup>109</sup> Vijay Narayan, 'Don't use race and religion for political gain – RFMF' (23 June 2017) <http://fijivillage.com/news-feature/Dont-use-race-and-religion-for-political-gain---RFMF-ks2r59> (Accessed on 15 July 2017)

<sup>110</sup> Vijay Narayan, 'RFMF Concerned with Rabuka's Close Involvement with Fiji Ex-Peacekeepers and Action Trustee Association' (28 June 2017) <http://fijivillage.com/news-feature/RFMF-concerned-with-Rabukas-close-involvement-with-Fiji-exPeacekeepers-And-Action-Trustee-Association-9rsk52> (Accessed on 15 July 2017)

<sup>111</sup> Initially, there were 10: Joji Konrote resigned after being appointed as the President of Fiji; and Pita Natuva and Pio Tikoduadua both since resigned from their positions in the cabinet and the parliament. The 7 former military officers that make up FijiFirst Party parliamentary caucus are V Bainimarama, I Tuitubou, I Seruiratu, J Cawaki, N Rika, S Vunivalu and S Korolavesau. Incidentally, the opposition SOPDELPA Party has five former military officers in I Tikoca, V Tagivetaua, S Matanitobua, K Kiliraki and J Dulaki, highlighting the influence of the military in national politics as a whole.

<sup>112</sup> Robert Norton, 'Epilogue: Understanding Fiji's Political Paradox' in Jon Fraenkel and Stewart Firth (eds), *From Election to Coup in Fiji: The 2006 Campaign and its Aftermath* (2007) 414; Robert Norton, 'The Troubled Quest for National Political Leadership in Fiji' (2015) *The Round Table* 104(20) 123.

guardian of the post-coup political order. Despite its ideological orientation from supporting ethno-nationalism to civic nationalism, questions around the military's increasing role in national politics remain. What happens once Bainimarama loses power? Will the military support opposition parties if they are able to cobble together a working majority? Is the military's ideological support for multiculturalism and ethnic-blindness sustainable given the ethnic composition of the military?

### **PARAMOUNTCY OF INDIGENOUS FIJIAN INTERESTS**

The third factor that still poses a threat to democratic stability in Fiji is the issue of paramountcy of indigenous Fijian interests. This doctrine upholds the supremacy of indigenous Fijian interests over and above the interests of any other racial or ethnic groups in Fiji. Since decolonization, indigenous Fijian demands for recognition of their claims to political dominance and reconciling these claims with the need for inclusive nation-building has been a fundamental problem in fostering democratic stability. Initially, this doctrine was used to protect indigenous Fijians from the excesses of European settlement in Fiji during colonization. However, since the 1920s, it has been used as a means to protect against Indo-Fijian demands for equality with Europeans, first by Europeans, and from the 1940s onwards by indigenous Fijian elites.

The principle in itself is highly contested and disagreements still persist on constitutional articulation of the principle. On one end of the spectrum, progressive recognition of this principle aligns with guarantees of constitutional protection of indigenous Fijian interests as symbolized in the 1997 Constitution through the provision of veto powers to GCC nominated senators. At the extreme ethno-nationalism end it is typified in the pronouncements by Butadroka and his FNP. This interpretation of the principle amounts to appropriation of the state by indigenous Fijians for indigenous Fijians, inspired by the Deed of Cession as a guarantee of political paramountcy, and seeking legitimacy from ILO Convention 169<sup>113</sup> and the UN Declaration on the Rights of Indigenous People,<sup>114</sup> translating self-determination into a call for political dominance (such as reserving the position of Prime Minister, President, Commander of the armed forces, Commissioner of Police etc and parliamentary majority reserved for indigenous Fijians). This interpretation

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<sup>113</sup> *Convention (No. 169) concerning Indigenous and Tribal People in Independent Countries*, 27 June 1989, 1650 U.N.T.S. 383 (entered into force 5 September 1991).

<sup>114</sup> The United Nations General Assembly. *Declaration on the Rights of Indigenous People*. 2007.

was used during the coups of 1987 and 2000 as a justification for loss of political predominance of indigenous Fijians. The 1990 Constitution is viewed as an ideal that realizes the objectives of the paramountcy of indigenous Fijian interests. Respect for Indo-Fijian citizenship was premised on the condition that non-indigenous Fijians respected their ‘guest’ (vulagi) status in relationship to their ‘hosts’ (taukey). Advocates maintain that ethnically-blind approaches to Fiji’s society is the foundation for instability, because race is ‘pivotal’ to politics.

SODELPA, while not an extremist indigenous Fijian political party, has advocated a ‘protectionist, ethno-nationalistic and conservative’ vision of Fiji.<sup>115</sup> Describing the 2013 Constitution as ‘Godless’, the manifesto spoke of how the Constitution ‘ignored the role of Christianity in the development of Fiji’. Secularism became cast as an attempt ‘to encourage worship of an unknown deity’. SODELPA insisted that when it formed government, a new constitution would ‘Ensure God’s rightful place in our supreme law’ and ‘uphold Christian values and principles’.<sup>116</sup> SODELPA’s leadership constantly attacked the Bainimarama Government and the 2013 Constitution for undermining indigenous rights, claiming that by abrogating the 1997 Constitution, the entrenched protection of native land rights had been removed. One specific objection was that without a Senate, and the representation afforded to the GCC through this body, all that was required to change Taukei land ownership in the new unicameral legislature was a simple majority vote in parliament.<sup>117</sup>

Beginning with the usual reference to the 1874 Deed of Cession as the basis for iTaukei monopoly of land ownership, SODELPA’s manifesto proceeded to list all the actions of the Bainimarama Government that had purportedly undermined these. The list included appointing government sympathizers to staff the Native Land Trust Board (NTLB, now iTaukei Land Trust Board) and opposition to the Qarase government’s Qoliqoli Bill dealing with the ownership of coastal areas, including those used for surfing. The manifesto also made clear that its principal objection was to the transfer of control over native lands away from the chiefs, manifested in the GCC, to the Minister responsible for indigenous Fijian affairs.

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<sup>115</sup> Steven Ratuva, ‘Protectionism versus Reformism: The Battle for Taukei Ascendancy in Fiji’s 2014 General Election’ (2015) *The Round Table: The Commonwealth Journal of International Affairs* 104(2) 143-145.

<sup>116</sup> Social Democratic Liberal Party (SODELPA) *Reclaiming Fiji: Summary of the Manifesto of SODELPA Social Democratic Liberal Party* (Suva, Fiji, 2014)

<sup>117</sup> Social Democratic Liberal Party (SODELPA), ‘Land-The Truth And Nothing But The Truth: A Statement and a Challenge by the Social Democratic Liberal Party (SODELPA)’ *Fiji Times* (11 September 2014) 29.

Given that SODELPA managed to secure almost 60 percent of indigenous Fijian votes (28 percent of the total votes cast), there still remains a strong support for constitutional recognition of indigenous Fijian culture and tradition to the extent of promoting indigenous Fijian political hegemony. How potent this demand is will be tested again during the 2018 elections.

Since elections in 2014, SODELPA in parliament has consistently raised issues with regards to Bainimarama's regime and FijiFirst's blatant disregard for issues dear to indigenous Fijians and the suppression of indigenous rights since the 2006 coup. MP Niko Nawaikula claimed that Bainimarama – and later his 2013 Constitution – contravened UN-mandated indigenous rights by abolishing the GCC and the exclusive Fijian name, and by denying indigenous Fijian self-determination.<sup>118</sup>

In response to SODELPA, Bainimarama claimed that 'SODELPA keeps summoning up the past and preying on the fears of the iTaukei people about the security of their land and their way of life,' ... 'it is divisive. It is offensive. And it simply isn't true ... There is no threat to iTaukei – to our land, culture, institutions or religion'.<sup>119</sup>

Other signs of indigenous Fijian disquiet emerged. Fear of losing privileged constitutional status, small groups of indigenous Fijians in Nadroga/Navosa and Ra provinces, under the influence of an indigenous Fijian expatriate, residing in Australia, who urged them to rise up against the Bainimarama government, declared their provinces sovereign Christian states. Those involved in this blamed the secular, ethnically-blind 2013 Constitution. A statement from the group echoed familiar ethno-nationalist themes about alleged British failure at independence in 1970 to return Fiji to descendants of the original signatories of the 1874 Deed of Cession. The Ra group denounced the 'oppressive, dictatorial and tyrannical nature of the Bainimarama/Khaiyum regime', with its 'nirvana concept of a polity of equality', and 'dream' of a 'modern progressive Fiji'. The Uluda Declaration purported to express the aspirations of 'ethnic peoples, first nation peoples of Fiji and therefore sovereign people of this land'. It criticized the government's 'perverse form of social engineering which

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<sup>118</sup> 'Nawaikula Brings Up Constitution and Rights' *FBC News* (Suva, Fiji, 13 September 2017) <http://www.fbc.com.fj/fiji/54456/nawaikula-brings-up-constitution-and-rights-> (Accessed 19 September 2017).

<sup>119</sup> 'Full Speech: New Kadavu Provincial Council Opening, Fiji Sun, (20 February 2015) <http://fijisun.com.fj/2015/02/19/full-speech-new-kadavu-provincial-council-opening/> (accessed 25 March 2016)

employs constitutionally enshrined laws of ‘mainstreaming’ with which it enforces intensive assimilation that selects only the native Fijian race as its target group’.<sup>120</sup>

As a consequence, by September 2015, 63 persons had been arrested and charged with sedition.<sup>121</sup> Fifteen people charged with sedition in Ra were all found guilty in September 2017 while court proceedings are underway for those charged in Nadroga/Navosa case.<sup>122</sup>

When taken together, these three issues have the potential to play a part in impeding democratic consolidation in Fiji. Interestingly, these issues are in a way interconnected to each other. While Bainimarama has managed to curb ethno-nationalism through military support, it has not been eliminated completely. The image of indigenous Fijians as taukei (owners of the land) remains a potent symbol and will remain so in the near future. Given that the military is still almost exclusively indigenous Fijian in its makeup, the potential to influence the military’s ideological reorientation towards ethno-nationalism remains a reality.

## **CONSTITUTIONS IN DIVIDED SOCIETIES: EVOLUTION NOT REVOLUTION**

Fiji's post-independent political history has been symbolized by a continuing pattern of crisis and reconciliation: on the one hand, political crises that highlight ethnic conflict while on another, providing new contexts for dialogue and accommodation. Solutions for these crises have involved an intense debate between two diametrically opposing visions of Fiji: one insisting on the equality of all citizens, the other on maintaining and protecting indigenous Fijian political supremacy and a largely indigenous Fijian identity for the nation.

The main obstacle to the achievement of the objectives of the 1970 and 1997 Constitutions have been the unyielding belief by representatives of the indigenous Fijian community that their community is entitled to a position of political ‘paramountcy’ over every other community in Fiji – an assertion which has its origins in a principle that had, according to one observer, been articulated by the colonial government ‘for self-serving as well as

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<sup>120</sup> Michael Field, ‘On Snake Gods and Sedition in Fiji’ *Micheal J.Field*, (2 September 2015) <http://michaeljfield.tumblr.com/post/128137108353/on-snake-gods-and-sedition-in-fiji-these-are-the> (Accessed 25 March 2016).

<sup>121</sup> Stefan Armbruster, ‘Fiji PM ‘Distracts’ with Overseas Plotter Threat’, *SBS News* (31 August 2015) <http://www.sbs.com.au/news/article/2015/08/31/fiji-pm-distracts-overseas-plotter-threat> (Accessed 30 April 2017).

<sup>122</sup> Dhanjay Deo, ‘15 People Charged with Sedition Found Guilty by the High Court’ *Fiji Village* (Suva, Fiji, 23 September 2015), <http://fijivillage.com/news-feature/15-people-charged-with-sedition-found-guilty-by-High-Court-Judge-r52ks9/> (Accessed 30 September 2017)

altruistic reasons’, but which has become a useful political slogan for indigenous Fijian leaders since decolonization.<sup>123</sup>

Fiji’s 2013 Constitution is the latest attempt at political and constitutional reform. It has been presented as the document that would solve the intractable problems faced by Fiji. In a revolutionary zeal, Bainimarama, on the day the Constitution was promulgated, proclaimed that

That revolution [2006 coup] was to put our nation back on track after years of turmoil... We had to reset the clock, create “Year Zero.” With men and women of goodwill, we had to rebuild Fiji and put it on a different path, a path of equality and inclusiveness.<sup>124</sup>

The Bainimarama regime asserted that the ethnically-blind 2013 Constitution provided the ‘blueprint for our genuine democracy’ meeting the ‘standards of the most liberal of democracies and international norms and conventions’. However, the rhetoric of transition to a genuine democracy has not materialized. The transition appears to have stalled and in some analyses slipped back into an elected dictatorship. To entrench the Constitution, rigid amendment processes have made it almost impossible to change the constitution. The 2013 Constitution can only be amended by a bill debated three times in Parliament, and voted on twice by at least three-quarters of members of Parliament. Subsequently, the Electoral Commission must then hold a referendum on the proposed amendments, which then requires approval of three-quarters of registered voters (Section 160). The requirement of approval by three-quarters of registered voters through a referendum makes amending the constitution extremely difficult rendering it one of the most difficult constitutions in the world to amend. There is every likelihood that the Fiji Government Constitution will never be changed from its current form.<sup>125</sup> The difficult amendment processes takes away the opportunity for future citizen oriented democratic deliberations via which Fijians could make the constitution their own over time. Apart from the stalled transition, the military and the issue of how to reconcile demands for constitutional protection of indigenous Fijian interests have the ability to contribute to future instability in Fiji.

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<sup>123</sup> Robert Norton above n 10.

<sup>124</sup> Josaia Bainimarama, ‘Fijian Prime Minister's Address on the Assent to the Constitution by the President’ (6 September 2013). Available at: <http://www.fiji.gov.fj/Media-Center/Speeches/FIJIAN-PRIME-MINISTER-S-ADDRESS-ON-THE-ASSENT-TO-T.aspx> (Accessed 20 March 2017)

<sup>125</sup> The Citizens' Constitutional Forum, *An Analysis: 2013 Fiji Government Constitution* (2013) 42-43.



Constitutional design in divided societies should not be seen as attempts to be comprehensive presenting it as a final solution to the persistent problems the society faces. Controversial issues such as national identity, nation-building, official language, and state religion should be deferred for future deliberation therefore arguing in favor of constitutional ambiguity on these issue as an initial matter. Conflict is highly probable if the constitution attempts resolve the foundational problems of a divided society. Constitutions should be flexible and leave room for future constitutional (re)design as people negotiate and renegotiate on how best to address the problems facing the society in their pursuit of greater democratization and stability.

In divided societies, constitutional reforms intended to promote ethnic political cooperation via elites, is bound to fail if systemic conditions undercut trust and commitment needed for continued nation-building. If failure to achieve support for broader (inter-ethnic) goals is not well established, democracy has little chance to succeed. What is needed for Fiji is opening up and sustaining spaces for continuous intra- and inter-ethnic dialogue on issues surrounding nation-building, on the paramountcy of indigenous Fijian interests and the appropriate role of the military in Fijian politics. These spaces should not only involve political elites but include significant contributions from the society at large.

In Fiji, as in many divided societies coming out of conflict, it is clear that short-term pressure to democratize has not been sufficient to foster democratic stability. What is required are sustainable long-term systems and processes of reconciliation that aim to bring about profound change in attitude, in conduct, and in the quality of governance systems, socio-economic environment, structures and institutions. Transitions to democracy usually involved political elites without much regard to necessary societal changes to ensure future stability. These elite negotiated agreements mostly assume that these political resolutions will allow conflicting groups to reconcile and live in harmony. This view overlooks the deep cleavages that still exist. Post-conflict reconciliation in divided societies requires a process that goes beyond inclusion of elites therefore it should be designed in such a way that is long-term and involves civil society organizations and the community and at large. Overlooking a process of deeper reconciliation at the grassroots has the potential to create more problems for the transition and compromises long-term stability.

## CONCLUSION

The 2013 Constitution that emerged out of the 2006 coup signals a move away from the racial overtures of earlier constitutions and coups. The move towards political integration however is fraught with challenges. The Bainimarama regime's stated aim was to 'rid the Constitution of provisions that facilitate and exacerbate the politics of race [in] such areas as the registration of voters and the election of representatives to the House of Representatives through separate racial electoral rolls'.<sup>126</sup>

The 2013 Constitution was therefore drafted with the idea of 'ethnically blind' integration in mind, which distinguishes it from previous constitutions and their preoccupation with race and ethnicity. While the 2013 Constitution and its provisions do shift the constitutional discourse away from previous preoccupations, this article demonstrates that the context of the constitution-making process indicated that the Bainimarama regime was also largely intent on maintaining the status quo. Whether this is the basis for greater democratic stability and legitimacy in the future remains to be seen.

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<sup>126</sup> Yash Ghai and Jill Cottrell, above n 15