Is the time ripe for constitutional change in Fiji?

by Jon Fraenkel

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Fiji's Constitution
Photo Credit: Facebook/Legal Aid Fiji

The liquidation of the former governing party, FijiFirst, has opened up debate about an amendment to the 2013 constitution or its complete replacement. FijiFirst was the party led by former military commander and 2006 coup leader Frank Bainimarama, but he is now in prison and his party was de-registered in late June after failing to comply with the Political Parties Act. Its 26 Members of Parliament (MPs) are now considered “independents”, placing Prime Minister Sitiveni Rabuka’s governing People’s Alliance party in a much stronger position to make the constitutional changes that he and his coalition allies have long called for. Whereas Rabuka was elected as Prime Minister in December 2022 with only a one seat majority in the 55-member parliament, he now has some support from at least nine of the former FijiFirst MPs and that faction has declared a preparedness to back a review of the 2013 Constitution.

The 2013 Constitution commences with the words “We, the people of Fiji …” but it was not assembled by any elected authority or passed in a referendum. It centralises power in the hands of the Prime Minister and his Attorney-General and grants the military extraordinary powers and immunities. It was drawn up behind closed doors in the offices of the former Attorney-General. Nevertheless, it has one of the highest thresholds for amendment in the world. It cannot be changed except by a double 75% majority: first, the backing of 75% of parliamentarians followed by the support of 75% of registered voters in a referendum, an excessively high threshold.

Until recently, it had been widely assumed that judges who have sworn an oath of allegiance under the 2013 Constitution would be unlikely to rule this unlawful. Yet a Supreme Court judgment in April acknowledged that the consultative process prior to the adoption of the 2013 Constitution was “not the … the type of public process that preceded the adoption of the United States Constitution”. Another Supreme Court ruling in June again recognised that “there was no extensive public consultation prior to its adoption; rather it was the work of a small group of officials” and asked whether this deficiency might “weaken the notion of constitutional supremacy”.

Some have argued that the courts might be prepared to rule the Constitution invalid on the grounds that the procedures followed during its adoption violated the military decrees operating at that time. This might be an attractive option if the judges were already disposed to reach such a verdict, but it neglects the delicate politics of constitution-making in Fiji and the apprehension encouraged by public discussion of constitutional change.

In any case, judges would be most unlikely to rule a constitution unlawful in its entirety, leaving nothing in its place. One option would be to go back to the 1997 Constitution, but that would potentially entail reconvening the 2006 parliament, the last legislature assembled under that constitution. That would be absurd since so many of the 2006 MPs have died or emigrated. Reverting to the discredited alternative vote electoral system – which was entrenched in the 1997 Constitution and which was used for general elections in 1999, 2001 and 2006 – would also be widely rejected. Another possibility is that the higher courts might selectively annul various parts of the 2013 Constitution, most importantly its amendment provisions, thereby opening the door for a constitutional review process. That would be a good outcome.

Others have proposed a reversion to the 2012 draft constitution drawn up by a commission under veteran constitutional lawyer Professor Yash Ghai, but that commission was not appointed by any elected authority. It shared the Bainimarama government's integrationist vision of rejecting any recognition of ethnic differences or any protection of ethnic minority rights. It was never ratified.

From the mid-1940s to the 1980s, the Fiji Indian community had the largest share in the population. Even in the 1990s, it was primarily politicians elected by the indigenous community that sought constitutional protections and resisted integration-oriented institutional arrangements. Now, as a result of relatively lower fertility rates and higher rates of out-migration, the Fiji Indian population share is down close to 30%. So, in the future, it is politicians appealing for the votes of that community who will be the more likely to baulk against the imposition of majoritarian "winner takes all" institutional arrangements and who will have reason to prefer proportional representation both in the legislature and in cabinet.

In contrast to Ghai's integrative approach, the 1997 Constitution was essentially a compact between leaders of the two communities to agree to share power. Arrangements left by the British in 1970 had ensured that indigenous Fijian politicians were always likely to control the government while Fiji Indian leaders would usually sit on the opposition benches. Whenever that status quo was disrupted, there was either a constitutional crisis (April 1977) or a coup (May 1987). The 1997 power-sharing rule instead required that all parties with more than 10% of

seats would be invited into cabinet. Although noble in intent, this was poorly drafted and largely failed to achieve its purpose subsequently, except for during the eight months after the May 2006 election. Those seeking to reach a durable inter-ethnic accommodation then found themselves jettisoned from office by Bainimarama's coup in December of that year.

The anxieties that the 1997 power-sharing rule was intended to alleviate are still in existence today. Whenever the current government raises the issue of constitutional amendment, this triggers some fear in the minority community that what is planned is a reversion to an ethno-nationalist constitution of the type put in place after the 1987 coup in 1990, which disadvantaged the Fiji Indian community. In the past, such sentiments encouraged many to vote for FijiFirst. Now, the response is to defend the indefensible 2013 Constitution as if this offers a protective bulwark.

Over the course of three post-coup elections (2014, 2018 and 2022), the opposition realised that to defeat FijiFirst a robust multi-ethnic coalition was required, one which Rabuka's People's Alliance and Biman Prasad's National Federation Party (NFP) led to the narrow election victory of December 2022. That underlying dynamic needs to be replenished ahead of any revision of the 2013 Constitution. It helps that Rabuka and then NFP leader Jai Ram Reddy were also the key politicians who brokered the 1997 power-sharing deal.

Recent developments on the floor of parliament may seem to create a potential for greater consensus, but there is an illusory quality about this. The changing positions of the former FijiFirst MPs do not reflect some shift in the broader electorate. On the contrary, most of these MPs were elected on the coat tails of their now imprisoned former party leader, who personally obtained 68% of his party's total vote in December 2022. In their own right, many of the former FijiFirst MPs now sitting as independents mustered only a few hundred votes each. To take their endorsement as a mandate for constitutional change would be tantamount to excluding the voice of the minority community from the revision process. That could scarcely be called an "inclusive" approach.

In any case, a completed constitutional review is unlikely ahead of the next election. The Ghai Commission took nine months (March to December 2012) but it was unfinished. The Reeves/Lal/Vakatora review took 18 months (15 March 1995 to 6 September 1996) and after the parliamentary deliberations took a further eight months, the constitution was signed into law in July 1997. So the entire process took two years and four months. Participatory constitutional review processes tend to take a long time.

The law allows Cabinet to seek advice from the Supreme Court concerning the legal

status of the 2013 Constitution. Instead of relying on faulty procedural technicalities to collapse the current constitution, the higher courts could be asked to strike down those 75% amendment provisions so as to open the path for constitutional change. In the meantime, nothing prohibits government from embarking on a constitutional review, with the objective of assuaging the fears of the minority community and signposting the intended direction of change.

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