

FROM BIG BANG TO INCREMENTALISM: CHOICES AND CHALLENGES IN CONSTITUTION BUILDING

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Session V Deferring Controversial Issues

Deferred issues: The Fiji case

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What significant issues were deferred and why?

Fiji has had four coups, and four constitutions, the last promulgated in 2013.

The May 1987 coup and the 1990 constitution established a cycle of general election, followed by a military coup, followed by a new round of constitution making, and then a general election, and the possibility of yet another coup. Deferring of constitutional matters that were difficult to resolve and allowing for possible future review and inclusion of such issues were evident in the negotiations that led up to Fiji's 1970 independence constitution in London.

A critical stumbling block was the system for electing representatives to the House of Representatives. Although a compromise was reached between the Alliance Party which advocated for a 'communal roll' that amounted to ethnically reserved seats, and the National Federation Party which pushed for 'common roll' with 'one person, one vote, one value' with no ethnically reserved seats, there was an agreement that after independence, the electoral system would be reviewed and if agreed to, modifications would be made to the electoral arrangements in the constitution. To this end in 1975 a Royal Commission led by Sir Harry Street was appointed. The Street Commission's recommendation that in the open seats to the House of Representation, the Single Transferable Vote (STV) system be introduced was rejected by the ruling Alliance Party and never debated in parliament.

The 1990 Sovereign Democratic Republic of Fiji Constitution was promulgated by Presidential decree on 25 July of that year. A draft constitution had been submitted to the Great Council of Chiefs by the Fiji Constitution Inquiry and Advisory Committee in March 1989, and again in June 1990. The proclamation of this Constitution was designed to get the country back to being a parliamentary democracy, to foster economy growth, to safeguard and enhance the interests of indigenous Fijians, and at the same time it also sought to protect the interests of other communities in the country. It was accepted that arriving at the promulgation stage of the Constitution would be difficult and protracted, and ultimately it was imposed on Fiji's multi-ethnic citizenry.

The electoral system established under the constitution was entirely based on reserved ethnic seats with indigenous Fijians (Taukei) being allotted 37 seats, Indo-Fijians 27 seats, Rotumans 1 seat, and other ethnicities 5 seats. The absolute majority of iTaukei was reinforced by the membership of the 34-member Senate comprising 24 indigenous Fijians nominated by the ethnically exclusive Great Council of Chiefs, 1 nominee of the Rotuma Island Council and 9 members appointed by the President from all communities.

While the second chapter of the 1990 Constitution, 'Protection of Fundamental Rights and Freedoms of the Individual', provided for a bill of rights with many of the standard non-discriminatory (ethnic, gender, religion, political affiliation and regional) provisions, Chapter III 'Fijian and Rotuman Interests' nullified these non-discriminatory provisions so as to promote and safeguard economic, social, cultural, traditional and other interests of iTaukei and Rotumans. This chapter provided for affirmative action for the latter in the allocation of scholarships and training, opportunities, jobs in the public service, and permits or licenses for any trade and business.

This Constitution was endorsed by the Methodist Church and the Great Council of Chiefs. It was rejected by leaders of non-iTaukei communities, and some iTaukei urban leaders. It was also subject to intense criticism by India, Australia, New Zealand and concerns were expressed by both the Commonwealth and the United Nations. Political parties other than those representing iTaukei, condemned the Constitution as undemocratic, racist, and feudalistic. The last because only 5 of the 37 seats allocated to indigenous Fijians were for urban constituencies where the numbers of iTaukei were relatively high, but the influence of chiefs was not as strong.

A significant redeeming feature of the 1990 Constitution was section 161, Review of the Constitution which stipulated that:

"This Constitution shall be reviewed after a period of time but before the end of seven years after the promulgation of this Constitution. Thereafter, the Constitution shall be reviewed every 10 years".

The reason for the deferment of the review of the constitution as a whole had to do with the fact that it was not a consensus document, and to reduce the extent of opposition to it. It could therefore be seen as an interim constitution for the country, made by the interim government to allow for parliamentary democracy to be reinstated. There was contestation and controversy among opposition political parties on whether they should boycott the general election under this constitution. Eventually when the general election was held in 1992, all political parties did participate.

What drafting or other techniques were used to defer the issue?

The 1990 Constitution appeared to have 'cannibalised' provisions of the 1970 Constitution, and added provisions that embedded the ethno-nationalist agenda that the usurpers and the military wanted. Largely drafted by senior military officers and the Attorney General's office, the Constitution's leading advocate was the Great Council of Chiefs, which also legitimated it in the eyes of indigenous Fijians.

How was the decision to defer made and by who?

It is hard to say how the decision to defer was made, and by whom, as the matter was not in the public domain. However, it can be surmised that among those who wielded power there were those who

were mindful of the longer-term implications of a Constitution that was opposed by half the citizenry and the international community. The deferment provision may have been designed to build consensus among those involved in compiling the Constitution, who included representatives of the military, the interim government, ethno-nationalists, and the Great Council of Chiefs, an exclusively ethnic Fijian and Rotuman group.

Did deferral assist the general Constitution building process? What were seen to be the benefits and risks of deferral?

There were 3 objectives of the adoption of the 1990 Constitution, to: (a) return Fiji to parliamentary democracy, (b) stabilise the economy which had been spiralling downwards, and (c) protect and promote indigenous interests and protect the interest of all other communities. This flawed constitution was able to achieve all of these to varying degrees. Two national elections were held under its electoral system culminating in the formation of governments and with an effective opposition. The economy stabilised and there was a modicum of growth over its 7 years of existence. While a segment of indigenous citizens did benefit from the host of affirmative action policies, bad governance and lack of due diligence resulted in the collapse of the National Bank of Fiji with the loss of more than F\$250 million.

The major benefits of the deferral in terms of constitution building were that political conflict de-escalated, a semblance of constitutionality and rule of law was restored, and there was a period of normalisation and respite. On the negative side, there was an ethnicization of the public service, statutory bodies and state-owned enterprises, accompanied with a noticeable decline in the quality of state services. The Constitution failed to restore complete confidence in the country. Cronyism, nepotism and corruption increased as did 'Ali-Baba' machinations.

What ultimately happened in relation to the issue/s deferred?

Clause 161 allowed for the review of the 1990 Constitution, and with the Prime Minister, the coup maker and military strong man, needing the support of an opposition political party to continue his hold on power in 1992, and again in 1994, he was under pressure to move on the review of the Constitution. So in 1995 he announced the establishment of the Constitution Review Commission (CRC) led by the late Sir Paul Reeves with two prominent Fiji personalities as members. They were the late Mr Tomasi Vakatora, a former speaker of parliament and member of parliament, and Professor Brij V Lal renowned Pacific historian and scholar.

The CRC received more than 850 submissions from CSOs, NGOs and provincial councils. It thoroughly reviewed the 1990 constitution. Its close to 800-page report, 'Towards a United Fiji' sought to build multi-ethnic coalitions and reduce extremism. The Joint Parliamentary Select Committee (JPSC) adopted most of the 697 recommendations but altered the critical recommendation relating to the system of representation in parliament, and introduced 'power-sharing' in government. With regard to the former, the recommendation that there be 40 open seats and 25 ethnically reserved seats was reversed to provide instead for 40 'communal seats' and 25 'open seats'. The power sharing arrangement was intended to compel a multi-party coalition government to be formed but the vision and spirit of this provision were never genuinely espoused by either of the leaders of the political parties that won power under the resulting 1997 Constitution.

The 1997 Constitution based on the CRC recommendations and JPSC mediation so modified the 1990 Constitution that it was for all intents and purposes a new constitution. Significantly, it was adopted unanimously by both houses of parliament, and endorsed by the Great Council of Chiefs. It was, as such, a consensus constitution. Following its abrogation in 2007, even those who opposed it, like the leader of the Fiji Labour Party, expressed strong support for it.

What insights can be gained from Fiji's experience with deferral, in relation to the kinds of issues that can effectively be deferred and the conditions in which deferral occurs?

It is apparent that the main deferral issue was the provision for amending the constitution which has been discussed above. Five years on from the adoption of the 1990 Constitution the process for its review was put in place with the appointment of the CRC. The Commission thoroughly reviewed the 1990 Constitution. So thoroughly in fact, that the amended constitution was very different from the one that was reviewed. A significant lesson learnt was that timing of both constitution making and its review is important – with time, changes to the constitution can be made that were unthinkable following the unleashing of ethno-nationalism of the late 1980s and early 1990s. In this regard, Fiji's constitutional history is peculiar to its distinct history of racial politics and indigenous ethno-nationalism – in which constitutional struggles (advances and regressions) have largely been conditioned by multi-culturalism (multi-racialism) on the one hand, and narrow ethno-nationalism on the other.

More specifically, the deferral covered the 1990 Constitution as a whole but particularly the electoral system, and the third chapter which provided for systematic discriminatory treatment in favour of Taukei. The immunity clause (164) which exculpated members of the security forces and usurpers of all wrong doing and human rights violations and disallowed any future litigation against them was another source of grievance that was removed from the 1997 Constitution.

The main issue which may be said to have been deferred in Fiji's 1990 Constitution was the electoral system. The CRC recommended transition to a representation system with substantially reduced numbers of communal seats was deferred. This was not a strategic decision by the JPSC. The reticence in moving towards a system of 'one person one vote' was longstanding, and had its origins in colonially-devised ethnic politics and its legacy of inter-ethnic mistrust. While the CRC desired that Fiji moved firmly to an electoral system that was 'non-racial', its own somewhat transitional recommendation of 45 'open' and 25 'communal' seats allowed the JPSC to reverse the representation.

While also not strictly issues that were deferred, it could be argued that the selective affirmative action provisions in the 1990 Constitution, paved the way to the inclusion in the 1997 Constitution of social justice provisions intended to benefit any disadvantaged category of citizens, irrespective of ethnicity; and the progressive Bill of Rights in the 1997 Constitution, modelled on the South African constitution, paved the way to equal citizenship.

The immunity provisions protecting the coup leader/s from prosecution which were included in the first post-coup (1990) constitution, excluded from the 1997 Constitution, but resurrected and entrenched in the 2013 Constitution, may be considered the most problematic deferred issue.

Conclusion

Like the 1990 Constitution (and in contrast to the 1997 Constitution), the new 2013 Constitution was not endorsed by the parliament, and at its inception did not have the support of the majority of the people of the country, as it was imposed by a military-backed regime, headed by the coup-maker. Unlike the report of the Reeves Commission which was largely accepted by the government in office at the time, the Ghai Commission's 'Peoples' Constitution' was rejected outright by the post-coup regime and supplanted by a constitution of its own design. And unlike the 1990 Constitution, the 2013 Constitution includes no provisions for review.

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