

AMNESTY INTERNATIONAL PUBLIC STATEMENT

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Fiji's draft constitution falls short on human rights standards

The Fijian authorities should review at the earliest opportunity the Fiji new draft constitution and ensure that it is in line with international human rights law and standards. The revised draft constitution made public on 21 March 2013 includes weak provisions for the protection of key human rights, fails to guarantee the independence of the judiciary and enables impunity for perpetrators of human rights violations.

These shortcomings run counter to the commitments made by the Fijian authorities at the Universal Periodic Review in July 2010 to accord the *“utmost importance, in the formulation of the new Constitution to the promotion and protection of human rights and fundamental freedoms.”* Further, such limitations on human rights protection within the constitution would prevent adequate protection for human rights in Fiji in the context of ongoing serious violations at the hands of the state and a climate of enduring impunity, in particular since the 2006 coup.

Amnesty International welcomes the government's recent announcement¹ that the deadline for commenting on the draft constitution has been extended until 30 April 2013. However, we are concerned that this extension remains insufficient to allow for proper consideration of the document. Further, repeated changes to the constitutional drafting process, and repeated interference with the work of the Constitutional Commission in Fiji since mid 2012 has undermined the ability of the local population to meaningfully engage in the debate on the country's constitution. For example, the Fiji government seized and destroyed copies of the draft constitution in December 2012, which the Commission had planned to distribute to the public as part of its mandate to inform the people of its progress.

The constitutional adoption process after 30 April 2013 remains unclear. Amnesty International calls on the Fiji government to ensure that the public are fully informed of the next stages of the constitutional process, including through mass media, and that concrete steps are taken to ensure that the people of Fiji can participate and express their views in an open and transparent manner. In order to ensure a truly inclusive consultation process, all submissions made to the Fiji Attorney General's office should be publicly available and seriously considered.

Despite the time constraints to review the draft constitution, Amnesty International would like to provide a number of preliminary, non-exhaustive comments on the current available draft. These are divided under seven main headings: protection of the right to life; right to a fair trial; impunity and the right of victims to remedy; restrictions on freedom of expression and other human rights; gender equality; rights of indigenous peoples; and right to equality and freedom from discrimination. The last section contains recommendations, which if implemented, would contribute to ensuring that the draft constitution respects international human rights standards, and provides human rights protection to the people of Fiji.

1. Protection of the right to life

¹ As reported by the Fiji Times on 12 April 2013, available at: <http://www.fijitimes.com/story.aspx?id=231079>

The provision on the right to life (Chapter 2, section 8) currently includes unacceptable exceptions, in effect allowing officials to kill “*in order to effect a lawful arrest or to prevent the escape of a person lawfully detained*” or “*in action lawfully taken for the purpose of quelling a riot or insurrection.*”

These provisions are contrary to international law and standards, which seek to protect the right to life. In particular, the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials provide that force must be avoided as far as possible. The use of force and firearms is permissible only if unavoidable, in which case law enforcement officials must exercise restraint and use only such force as is proportionate to the law enforcement objective, and must minimize damage and injury and respect and preserve human life. The intentional lethal use of force is allowed only “when strictly unavoidable in order to protect life.”

Amnesty International has reported on four deaths in custody since December 2006.² Charges and full sentences were carried out against the perpetrators in only one of these cases. Amnesty International is alarmed that restrictions on the right to life would prevent justice for the families of these persons and others who have lost their lives as a result of human rights violations by government officials.

2. Right to a fair trial

The draft constitution currently contains a provision for “the right to personal liberty” (Article 9), which provides the state, in times of emergency, with powers to detain persons without charge or trial. The draft constitution provides that, under such circumstances, persons may be detained without the authorities being obliged to provide any explanations for up to seven days and without access to a judge for up to a month. Detention for such periods without being told of the reasons and without judicial oversight constitutes arbitrary detention, prohibited under international human rights law.

In addition, Article 9 the draft constitution does not place any restrictions whatsoever on the period for which a person may be administratively detained without charge or trial, thus providing for indefinite detention.

Amnesty International is opposed to and has globally campaigned against the practice of administrative detention as it involves violations of human rights and is used to circumvent the fair trial guarantees of the criminal justice system. Amnesty International’s report *Fiji: Paradise Lost* (2009) outlined a pattern of arbitrary arrests and detentions (often accompanied by torture and other ill-treatment) under public emergency regulations. The constitutional framework must prevent similar violations occurring in the future.

3. Impunity and the right of victims to remedy

The draft constitution currently contains a whole chapter (Chapter 10, Articles 152-155) devoted to, and entitled, “Immunity”. It includes extensive, sweeping and immutable provisions for immunity from prosecution and any other liability to former and current officials, offering watertight protection for those who have violated human rights and includes denial of reparation for victims. Immunities from 2000 up until the elections scheduled for 2014 are quite extensive, and previous constitutional immunities which date back to 1987 are maintained. Amnesty International is particularly concerned that the future immunities for acts not yet committed perpetuates the culture of impunity and fails to respect for the rule of law. They may also be inconsistent with Fiji’s obligations under the Rome Statute of the International Criminal Court which Fiji ratified in 1999.

² Available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G10/141/56/PDF/G1014156.pdf?OpenElement>, p2

In December 2012, Amnesty International wrote to the Fiji government expressing concern over the case of five escaped prisoners who suffered torture and ill treatment following their recapture by the security forces. One man was injured so severely that his leg was amputated. In February 2013 a video was released on YouTube that apparently shows Fiji military and police officers assaulting two other men, one of whom was restrained at the time. Amnesty International has called for an independent and impartial investigation into these incidents. There is a concern that broad sweeping immunities for these incidents will prevent the perpetrators of this torture from being brought to justice.

The right to remedy is also affected by restrictions on access to justice as highlighted in Chapter 10.

4. Restrictions on freedom of expression and other human rights

Section 169 of the draft constitution currently provides for the preservation of decrees, which restrict free speech, unless and until they are amended by parliament. Amnesty International has previously raised concerns about a number of decrees that undermine human rights and the rule of law.

For example:

- The Media Industry Development Decree (2010) and the Public Order Amendment Decree (2012) include hefty fines and imprisonment for people exercising their rights to freedom of expression, peaceful assembly and association. A journalist may face two years in prison for publishing something which is not in the “public interest”. A person may be imprisoned for five years for saying something which “undermines the economy of Fiji”. These provisions have contributed to a climate of fear and self censorship within civil society and the media in Fiji.

- The Human Rights Commission is based on the Human Rights Commission Decree (2009), under which its chairperson and other members are appointed by the President after consultation with, or on the advice of, the Prime Minister. The government bears “general policy responsibility for the management of the Commission,” thus clearly restricting its independence. While under the draft constitution the Commission may take cases to court, it would be unable, under the 2009 Decree, to do so where it involves challenging the legality or validity of a decree. The authorities should ensure that the constitutional framework provides for a fully independent Commission and does not restrict its mandate to investigate human rights violations and to bring cases of human rights violations to the courts.

- The Administration of Justice Decree (2009) is to be repealed, but significant provisions (particularly section 23) are to remain in force. Section 23 prohibits the courts from reviewing any decrees or decisions by any government officials from December 2006 until April 2009. In effect, this denies victims and survivors the right to justice and reparation for human rights violations and greatly expands the impact of the immunity provisions. Amnesty International calls on the Fiji authorities to ensure and safeguard the independence of the judiciary, including its ability to review administrative or executive decisions concerning human rights and the rule of law as soon as possible.

5. Gender equality

Fiji and other Pacific countries have some of the lowest rates of women’s representation in parliament. A number of positive provisions encouraging participation of women in parliament in the Constitutional Commission’s draft³ dated 22 December 2012 have been removed from the current draft constitution.

³ Available at: <http://resources.news.com.au/files/2013/01/07/1226549/109442-aus-world-file-fiji-draft-constitution.pdf>

Under the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW), States parties like Fiji are required to “*take all appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular, shall ensure to women, on equal terms with men, the right:*

...

(b) To participate in the formulation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government”⁴

Under the Convention, Fiji can also adopt temporary special measures to assist in the implementation of this and other obligations. Such special measures aimed at accelerating equality between men and women, are not considered as discrimination (article 4). Accordingly, the Fiji authorities should include in the draft constitution a provision promoting women’s representation in parliament.

Section 45 of the Constitutional Commission’s draft guaranteed equality between men and women, including equal opportunities in political, educational, social and cultural and sporting spheres. It also covered the rights of women to own land or property, receive equal pay for equal work, access maternal health care, maternal and paternal leave and non-discrimination in the work place due to pregnancy. This section covered a wide range of human rights, consistent with the government’s obligations under CEDAW which appear to be absent from the current draft constitution. Amnesty International urges the Fiji authorities to consider reintroducing section 45 of the Constitutional Commission’s draft constitution which promotes equality between men and women.

6. Rights of indigenous peoples

The current draft constitution does not contain any provisions for the protection of indigenous peoples, particularly in relation to indigenous peoples' effective participation in decisions affecting them, and their human rights to traditional lands, culture and livelihood as affirmed in the UN Declaration on the Rights of Indigenous Peoples⁵ and the Indigenous and Tribal Peoples Convention, 1989⁶.

7. Right to equality and freedom from discrimination

The right to equality and freedom from discrimination underlines is provided for in the UN Charter and is contained in a wide range of subsequent human rights treaties and other instruments. The International Covenant on Civil and Political Rights provides (in Article 4) that even measures taken by states “*in time of public emergency which threatens the life of the nation*” must not be discriminatory. In this and other human rights treaties, the right to equality and freedom from discrimination is formulated as an overarching principle, not as a rule followed by exceptions. It should be noted that non-discrimination does not mean crudely that no two people may ever be treated differently,

In view of the above, Amnesty International is concerned that Article 26 in the current draft constitution contains purported exceptions to the rule of non-discrimination, such as for “imposing a retirement age” and “excluding persons from holding certain offices” which are superfluous, depart from international human rights provisions and may weaken protection against discrimination.

8. Recommendations

⁴ See Article 7, CEDAW. Fiji ratified CEDAW in 1995.

⁵ Adopted by Fiji in 1998

⁶ Ratified by Fiji in 1998

In order to ensure that the draft constitution is in line with international human rights law and standards and provide adequate human rights protection to the people in Fiji, Amnesty International recommends that the Fijian authorities:

- Ensure that the right to life is fully protected and that the constitutional framework does not include exceptions to that right which could be used as an excuse for unnecessary or excessive use of force by security officers;
- Ensure that there are no immunities for perpetrators of serious violations of human rights, including the right to life and freedom from torture and other ill-treatment;
- Ensure that freedom of expression, association and assembly is adequately protected and that any restrictions are provided by law and are necessary for respect of the rights or reputations of others and for the protection of national security or of public order or of public health or morals. The provision for these rights must include protection for those who may be critical of government or government institutions and the right to join and form trade unions;
- Ensure appropriate provisions are included to protect the rule of law and the independence of the judiciary;
- Provide adequate protection against administrative detentions, including by limiting the maximum time a person may be detained and providing for judicial review of administrative decisions;
- Ensure the independence and impartiality of the human rights commission in line with the Paris Principles, including by providing that it is able to take human rights cases to the prosecuting authorities if there is sufficient admissible evidence;
- Provide for the possibility of introducing temporary special measures to promote gender equality, including to increase representation of women in parliament, and re-introduce section 45 of the Constitutional Commission's draft constitution in line with Fiji's obligations under the UN Convention on the Elimination of all forms of Discrimination Against Women;
- Ensure that there is protection of indigenous peoples' rights, particularly in relation to their rights to customary land and their effective participation in decisions impacting on them in line with the UN Declaration on the Rights of Indigenous Peoples and ILO Convention 169, and amend the non-discrimination provision (currently in Article 26) to explicitly include indigenous origin; and
- Ensure that protection from discrimination covers the full range of grounds prohibited under international human rights standards, including by formulating the provision for non-discrimination as a general principle rather than as a rule with exceptions.

In order to ensure that the drafting process proceeds in a transparent and inclusive manner, allowing time and space for wider public participation, Amnesty International recommends that the Fijian authorities:

- Ensure that the public are fully informed of the next stages of the constitutional drafting process, including through the mass media, and that they have the opportunity for public participation in the constitutional adoption process; and
- Ensure that all submissions made to the government are made publicly available and are considered seriously and in detail.