



Submission

on the

DRAFT CONSTITUTION OF FIJI

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INTRODUCTION

The Seventh-day Adventist Church (hereafter called 'the church') is grateful to the government of the Republic of Fiji for the opportunity to participate in these fundamental and historical discussions leading up to a constitution for our beloved island nation. It symbolizes the government's recognition of the significance and worth of its major stakeholders, such as churches and religious organizations, in nation-building of these islands.

The Seventh-day Adventist Church has been active in Fiji for over 115 years, with more than 30,000 adherents in some 250 congregations and 13 schools spread across our island nation.

The church has historically respected any government in power unless the actions of the government are such that it makes it ungodly to do so. Being part of the body of Christ, the church seeks to work in unity with the rest of the Christian community and the larger community, for the common good of our nation and our people. On basis of our theology, the church has always sought to make its contribution to matters of national interest and seek to secure for our people, the benefits of modern globalization without the attending ills.

As such the church has considered the government's invitation to make submissions on the draft constitution it has prepared and have responded thus.

The draft constitution is well drafted, obviously with the national interest in mind, and contains modern and forward-looking provisions. At the same time the church believes it has some provisions which are inconsistent with acceptable international practices and values that we request to be reconsidered and rectified.

This submission identifies some of these provisions and proposes alternative recommendations to address them. It does not offer comment or analyse every aspect of the document but only certain provisions about which the church are most concerned.

The church is aware that the nature of a country's constitution is such that it will set and shape the future, influence the not-yet, and set the agenda for generations to come. Hence, much care and consideration should be exercised to ensure the continuity of values, the preservation of our cultures and protection of our heritage.

The church shares the concern of the wider community for the preservation of our moral values and traditional family lifestyles. The church is heartened by the attempt of government in the revised draft to secure and protect these values. However, the church is cognizant of the fact that much will be determined in the final drafting through the latitude given to incorporate the comments and suggestions from all stakeholders in Fiji.

It is our earnest prayer therefore, that the Lord will guide the government in the final drafting, and that the concerns and recommendations raised in this submission will be noted and favorably considered.

May God bless Fiji.

A. CHAPTER 1 – THE STATE

SECTION 4 – SECULAR STATE¹

Comments:

The church strongly support the first three articles (1), (2), and (3) under Section 4, and the first article and the two injunctions under subsection 3 - (a), (b) & (c).

However, the injunction in subsection 3 (d) that “*no-one may assert a religious belief as a legal reason to disregard this constitution or any other law*” undercuts the value of having a constitutional protection of religious freedom in Section 22.

The point of a constitutional Bill of Rights is that laws that conflict with those rights, including religious freedom, can be deemed invalid by a judge, and the individual and his right protected. Indeed, Section 22, the "Freedom of Religion" section only makes sense if religious belief can be raised as an objection to some law or legal standard imposed by the state.

There is a Section 6 and Section 40, which sets out that rights are not absolute, and that they must be enforced in a way that acknowledges the rights of others and the concerns of peace and safety of the state. Thus, this subsection (3) (d) is really not needed.

RECOMMENDATIONS:

1. That Section 4, subsection 3 (d) be dropped.
2. If it cannot be dropped, the church proposes that the wording be changed to read that ...

"(d) no person may assert any religious belief as an absolute right to ignore criminal or civil laws, but claims for religious freedom that seek to challenge existing legal standards must be evaluated and weighed by the relevant courts under the considerations set forth under Section 6."

B. CHAPTER 2 – BILL OF RIGHTS

¹ We support government's reservations about Fiji being a Christian state; at the same time we also have reservations about it being an officially secular state. Even so, if Fiji is going to be a 'secular state,' (s4), then we propose that Fiji is to be guided towards a religiously sensitive secularity, and not the anti-Christian kind or the modern, religiously corrosive secularity that is appearing in some countries of the west, especially in Europe and increasingly in the United States. In the ideal relationship between church and state, the state realizes its proper place and stays out of the church's business, unless the church is operating outside of its proper sphere and illegally interfering with the freedom of others in society. Individual conscience is also respected and the state seeks to strike a balance between enacting laws that are good for all of society while at the same time not trampling on the conscience of those in the minority whose consciences may be offended by such laws.

SECTION 22 – FREEDOM OF RELIGION

Comments:

The church applauds the enshrining of the Bill of Rights in the draft Constitution. This is the central freedom by which all our citizens express their religion. However, there are some observations that the church wishes to make.

The first observation with the Freedom of Religion language (Clause 22) is that it lumps freedom of religion in with all thought or opinion. This may appear very broadminded, but in our view what it will do in reality is dilute the protection of religion – it brings religious conviction down to the level of a personal whim. No society can protect every thought or preference at a high level.

We fear that if such a broad definition is adopted, freedom of religion will lose its pre-eminent place among rights. That it is in the middle of the enumerated rights in the draft (as opposed, for example, to the first right enumerated in the US Bill of Rights) is an indication to us that freedom of religion is not particularly a priority. This concerns us greatly.

The second observation is that the provision contains a clause pertaining to religious educational entities that misses the point of constitutional protection entirely. It states that religious entities must comply with “**any standards prescribed by law**” [22(4)]. The church is concerned about what may happen when those standards clash with the religious principles of the educational institution? Under this formulation, our fear is that the religion automatically loses. So the concern of the Church is if all the legislature has to do to suppress that freedom is pass a statute, the rights of freedoms that we wish to enjoy are not so well protected. We believe this exception voids the right to religious freedom for religious educational facilities.

The draft constitution also provides the exceptional **right to students to refuse religious instruction** or religious attendance [22(6)], even if the student is attending a religious school. The provision does not spell out whether it is designed to apply to students in state-run schools only or in all schools, including religious-run schools.

Further, the section relating to ‘equality’ contains provisions that clash with the ‘rights’ in this section; which right should prevail in such clashes is not clear in the current draft.

The church believes that Not only does the section not fully protect religious freedom, but the exceptions are so exceptionally vague and broad, that they ensure the protections will have no teeth should a government decide to violate them [22(7)].

RECOMMENDATIONS:

1. That a new subsection is to be added and to read as follows:

"Everyone shall have the right to freely explore other religions, and shall have the right to change their religion, and no entity or person, whether public or private, shall use the threat of, or reality of, coercion, blackmail, or violence to prevent or force such a change to take place."

2. That this entire section on **Freedom of religion should be dealt with as a stand-alone section** at the outset of the enumerated rights. In this section, religious speech should be given

particularly strong protection, as free expression of faith is at the heart of the religious experience. The only exception should be speech likely to incite imminent harm to persons or property.

3. A suggested inclusion in the stand-alone section on Freedom of Religion can be as follows:

Religion provides meaning, motivation and order to the lives of adherents. Therefore, religious belief, expression and religiously motivated action must be accorded the highest level of respect and protection by the state and society. Specifically:

- a. No one shall be required to hold a religious view for the purposes of holding any government position or office, other than Chaplain.*
- b. Religious adherents may not be compelled or forbidden by the state to engage in actions or refrain from them, against their conscience, unless such compulsion or prohibition is necessary to protect imminent harm to persons or property. Actions that may not be compelled or prohibited include, but are not limited to, serving in the military, working on holy days, taking oaths, making statements that violate their conscience, taking off religiously mandated garb or changing religious required grooming standards.*
- c. Religious communities can operate faith-based entities according to the principles of their religion, as interpreted by the adherents involved. This includes maintaining faith-based hiring, behavior and participation standards.*
- d. Religious expression shall be protected except:*
 - When expression is found by a court of law to likely result in imminent harm to person or property;*
 - When expression is found by a court of law to be libel*
 - When expression is found by court of law to be a violation of a legally binding contract*

Secular employers both private and public shall accommodate religious beliefs and practices unless by doing so, the employer incurs a significant cost or inconvenience. Nothing in this section shall protect against investigation or prosecution on activities that promote or conspire to commit terrorist acts.

SECTION 26 – RIGHT TO EQUALITY AND FREEDOM FROM DISCRIMINATION

Comments:

The church agrees that equality and freedom from discrimination are an important aspect of a free and just society. The Church does have certain reservations concerning this provision that we wish to highlight.

The definition of discrimination in this section is both broad and vague that on one hand seeks to protect every possible variance in people, but then in the end, lowers the standard of protection to that which is merely “**reasonable**.” Thus, while it seems to protect every kind of group and class of people, in the end, it protects almost no-one meaningfully.

And while the promise of equality before the law is laudable, the draft constitution lacks the clarification necessary to understand how these provisions would work in the real world.

For example, a person can't be "unfairly discriminated" against for their "opinions or beliefs." Yet no definition of what "unfair" means is provided. If this was implemented broadly, no values-based entity could exist. Political parties would have to accept all members, whether or not they shared the core political beliefs of the party. Environmental organizations would have to hire global warming skeptics, and churches would have to hire non-believers or those who engage in activities disallowed by their faith. Further, the ban on discrimination on the basis of sexual orientation would have the likely effect of seeing Fiji being forced to change its family law, including its definition of marriage and its policies on adoption.²

As noted above, clause (8) lists the standard for justifying discrimination as anything "reasonable." But almost all laws can be justified on some ground of "reasonableness," and this offers hardly any protection. Indeed, all the laws regarding children, school attendance, marriage, driving, etc., are reasonable. The church observation of the drafting of this section shows that it does not offer protection to anyone. Other categories that regularly must be used in making laws include gender, disability, economic status, and marital status.³

RECOMMENDATIONS:

1. The church recommends that the group of protected characteristics needs to be limited, the protection level needs to be heightened, and then appropriate exemptions need to be made for religious organizations to be able to carry out their religious values in terms of belief, mission,

² For example, on Same-sex marriage, while the Attorney-General, Mr Khaiyum, has publicly announced that it is prohibited under this constitution, and that marriage is always between a man and a woman, that prohibition is not evident or articulated anywhere in the document. We nevertheless support Mr Khaiyum's definition of marriage and urge that this provision be included and spelled out clearly in the final draft of the constitution.

³ The American legal system has evolved a three-tier level of protection that we think handles these problems well. It creates a highly protected class, which says that to discriminate on these grounds requires "compelling justification" and a high level of proof. This category would include ethnicity, social origin, race, colour, conscience, or religious belief.

Then there is a middle tier, which requires an intermediate level of justification, with a medium level of proof. This middle tier would include gender, disability, language, pregnancy, and perhaps social status. Then, there would be a lower level of protection that would require a "reasonable" justification, and that would include birth, age, gender identity, sexual orientation, economic status. Finally, there needs to be a protection for private organizations, especially religious organizations, to be able to make decisions based on religious doctrine and autonomy that may conflict with these values. For instance, Catholic, Muslim, Hindu and some Protestant groups would not want to ordain or elect women priests.

Also, these same groups may have beliefs against employing or enrolling practicing homosexuals or persons in polygamous marriages. Thus, there needs to be a provision that will protect churches and religious institutions, including religious schools, colleges, hospitals, and nursing homes from the requirements of these sections, insofar as their religious teachings are in conflict.

behavior and conduct.⁴

2. Also add the descriptive “unfair” or “unfairly”, as grammar dictates, before every mention of “discrimination” or “discriminate” in the section. Then add this definition:

For the purpose of interpreting this Section, “unfair discrimination” and “unfairly discriminate”, refers to discrimination that is unrelated to the religious, philosophical or functional nature of an entity or activity. Actions that are not “unfair discrimination” include, but are not limited to:

- (a) *Religious requirements associated with employment, attendance or association with a religious community or entity.*
- (b) *Political requirements associated with employment, attendance or association with a political entity.*
- (c) *Philosophical requirements associated with employment, attendance or association with a philosophical community or entity.*
- (d) *The requirement to be aligned with the values, goals and general activities of an employing entity.*
- (e) *Defining marriage as being exclusively between male and female.*
- (f) *Recognising the unique needs for children to have both a mother and a father, and associated efforts to support and promote families with both a mother and a father.*

SECTION 20 – EMPLOYMENT RELATIONS (TRADE UNIONS)

Comment:

The right to join a trade union is a personal choice and the church does not force any member to join or not to join a union. Having said that the Church again supports the rights of citizens to join a trade union. There is one concern that the church wishes to express regarding this section.

The right to join a trade union [s.20], while it has exceptions, does not include the exception relating to freedom of religion. Further, it does not explicitly protect the right of people to opt out of union membership on the basis of religious convictions.

RECOMMENDATION:

That the following clause be inserted as Section 20 (5) (g):

⁴ To illustrate the over breadth problem, consider the category of age. The state has all sorts of age-related discrimination, e.g. those of a certain age must go to school, cannot drive a car or get a license, cannot drink alcohol, cannot marry, etc., etc. To list ‘age’ as a category creates either a big problem for government in appropriately taking care of children, or the standard of discrimination must be very low.

Faith-based entities with religious objections to trade unions shall retain the right to employ a non-unionised workforce. Further, individuals or entities with religious objections to joining a trade union shall not be required to do so as a prerequisite for obtaining or retaining employment or contracts.

SECTION 8 – RIGHT TO LIFE

Comment:

The church considers life a gift from God. Life is sacred. The church agrees wholeheartedly that everyone has a right to life. However, the church have reservations with certain aspects of the provision. The church respectfully submit the following.

The section covering the Right to Life, does not define who is covered. Specifically, it does not state whether babies in utero are accorded the right to life or not.

Furthermore, the church is gravely concerned with the exceptions given in this section. Section 8 (2) (b) and (c) are most troubling and the church cannot endorse such actions.

RECOMMENDATIONS:

That the following be included in this section:

- 1 *All human beings are covered by the right to life from the time a heartbeat can be detected, until death.*
- 2 *A pregnancy may be terminated at the request of the mother, or, if she is incapacitated, her agent, after a heartbeat can be detected in exceptional cases in which two medical professionals certify that:
(a) the life of a mother is in imminent danger if a pregnancy is not terminated;
(b) a mother will suffer permanent, catastrophic disability if a pregnancy is not terminated; or
(c) a baby in utero suffers from an incurable fatal disease or catastrophic birth defect.*
- 3 *A pregnancy may be terminated after a heartbeat can be detected in exceptional cases in which at least one medical professional and one law enforcement professional certify that:
(a) the pregnancy is more likely than not the result of rape or incest.*
- 4 *Nothing in this section shall prevent the removal of life support, nutrition or medical treatment should a patient, or the patient's agent in the case the patient is no longer capable of responding, so request.*

That section 8 (2) (b) and (c) be removed from the equation.

SECTION 17 – FREEDOM OF EXPRESSION, PUBLICATION AND MEDIA

Comments:

The freedom of expression is very important is very important to the church and we are thankful that it is included in the draft constitution. The church has some concerns, however and we wish to respectfully elaborate.

The draft constitution's exceptions to fundamental rights are exceptionally broad and vague. For example, "Freedom of Expression, Publication and Media," may be limited for "public order", or "public morality" – neither of which is defined.

In all, there are 21 separate justifications for limiting this right in 17(3) of the draft constitution (we say 21, though it could be slightly more or less, depending on how the courts interpret each exception).

Among the church's grave concern is the exceptions in the right to limit "**hate speech**" which is defined very broadly [17(3)(b)(i) & 17(4)]. This could be used to silence a church's or religious organization's teachings relating to everything from discussions on doctrinal differences to its teachings on sexual morality.

Another particular concern is the blanket right to **regulate the media** [17(4)]. We believe a nation cannot be free if it does not have a free media.

Other Broad and Vague Exceptions

Freedom of Assembly [18], Freedom of Association [19], Freedom of Movement and Residence [21], Political Rights [23] and the Right to Privacy [24] all similarly contain exceptions that are exceptionally broad and vague and that appear designed to permit the government to easily circumvent the right if it so desires.

RECOMMENDATIONS:

1. That the incitement to violence or advocacy of hatred [s17 (2), c,ii] should be required to "*constitute incitement to cause **physical** harm.*"⁵
2. That in subsection 2(b), add 'armed' so it reads "*violence or **armed** insurrection against this Constitution.*"⁶
3. That we substitute the current raft of exception to freedom of expression with the following exceptions (and follow a similar tact with the other fundamental freedoms):

Freedom of expression can be limited by the state only in the following instances:

- (a) *When expression is found by a court of law to likely result in imminent harm to persons or property;*
- (b) *When expression is found by a court of law to be a libel (that is, both untrue and resulting in economic harm);*

⁵ Mere **harm** could be understood as mental or emotional or psychological harm. This could prevent Catholics trying to win converts by criticizing Muslims or Protestants, or vice versa, or could be used to prevent preachers or Imams or Priests from preaching against homosexual behavior or polygamy or adultery in their churches, temples or mosques.

⁶ As worded, it could imply that democratic efforts to alter or replace the constitution were illegitimate, where the real concern might be a call to armed or violent revolt.

- (c) *When expression is found by a court of law to be a violation of a legally binding contract (for example, an employment contract); and*
- (d) *In the unique case of speech by for-profit entities and their agents, the state may limit, or require, speech in the general interest of society.*

SECTION 40 – LIMITATION OF RIGHTS UNDER STATE OF EMERGENCY

Comment:

State of emergency provisions in constitutions are usually not preferable, but the reality is that states will do this when faced with a crisis or emergency, and this provides an orderly way of handling it.

RECOMMENDATION:

A time limitation should be required, for example, *"such limitation shall only apply for 30 days, at which point the government shall be required to make another showing that the limitation should be extended for another 30 days."*

C. CHAPTER 4 – THE EXECUTIVE

Comments:

Although the draft constitution divides power between the Prime Minister, the President and the Courts, the drafting, seems to show otherwise.

The PM has the power to nominate the President [83(2)]. While the opposition leader enjoys the same right [83(2)], as the President is the product of a simple majority vote in Parliament [83(3)], and the PM is by definition the leader of the majority party [92(20)], the PM's majority will virtually always ensure he wins the vote. The church is of the opinion that, the PM should not nominate the President. In the national interest and in keeping with transparency and accountability principles that are championed by the Government, the church humbly submits that the State and the Executive should be kept separate.

In addition, the PM has the right to initiate the removal of the President [88(3)]. Although this removal must involve the Chief Justice, the Chief Justice himself is highly likely to also be a proxy for the PM [105 (1)]. Thus, the PM controls the appointment of the President and the removal, making the President reliant on the PM for his position.

Once a PM's proxy is installed as President, the PM will exert almost total control over Fiji.⁷

⁷ For example:

- The PM is commander in chief of the military [91(2)];
- The PM appoints the Commander of the Republic of Fiji Military Forces [130];
- The PM appoints the Attorney General [95];
- The PM appoints the Auditor General [143];
- The PM appoints the Governor of the Reserve Bank of Fiji [145];

While there are requirements for consultation before appointments are made by the PM or the President, those consulted have no ability to direct who is appointed. That is, no confirmation votes are required, and nomination and appointment powers are not separated. And while the removal power requires approval by subcommittees, the subcommittees are all formulated in a manner that ensures they cannot be independent of the PM/President. Hence the PM controls both the appointment and the removal of all these officers.

The church believes Fiji will be better served by a constitution that provides a separation of powers to ensure balance. Ultimately, sitting PMs will also benefit, as such systems foster great leaders and wise decision making.

RECOMMENDATIONS:

Rather than requiring a simple parliamentary majority for the President, require a super majority. For example, require a two-thirds majority vote or even a three quarter majority vote. This would not be unique; the US Constitution requires a super majority in certain circumstances.

Alternatively, or in addition, require judicial appointments to be proposed by the judicial commission and confirmed by a two-thirds vote of the Parliament. At the same time, have the judicial commission members appointed by a super majority vote in Parliament. This would separate the judiciary from executive control.

Require senior appointments to be confirmed by a super majority vote of the Parliament.

Separate the removal power from the PM. For example, appoint a parliamentary subcommittee that is required to be evenly divided among political parties in the Parliament, and who can remove, for cause, those appointed. Or, in the case of the judiciary, a statutorily defined committee of judges, who could be appealed to by a two-thirds majority of the Parliament.

D. PREAMBLE

Comment:

The preamble is clear but it is too brief. Our beautiful country boast a rich history forged through time and we submit that more be drafted concerning our people, our history and the important role that Christianity has played in our coming of age.

The PM's proxy – the President - appoints the Chief Justice, the President of the Court of Appeal, the Judges of the Supreme Courts, the Justices of the Appeal and the Judges of the High Court [105];

The PM's proxy – the President –can also remove judges [110];

The PMs proxy – the President – appoints the Solicitor General [115];

The PM's proxy – the President – can also remove the Solicitor General [115];

The PM's proxy – the President – appoints the Director of Public Prosecutions [116]; and

The PM appoints the Commissioner of Police [128(4)].

RECOMMENDATION:

That the preamble should include:

- a. a description of who we are as a people of Fiji and of our brief history
- b. a recognition of the role of Christianity in Fiji's history
- c. an acknowledgment of the role and contribution of other religions and ethnic communities in Fiji ...

... as in the Preamble and Compact of the 1997 Constitution.⁸

OTHER CONCERNS:

We also support provisions on the following:

- (a) a drug-free environment;
- (b) sanctity of the marriage institution; and
- (c) provision for tax exemptions for relief and development programs.
- (d) provision for tax exemption for religious and charitable organizations.
- (e) a religiously-sensitive secular state.

CONCLUSION:

The Seventh-day Adventist Church in Fiji believes that the draft Fiji Constitution, though well drafted and containing appeals to the highest ideals of liberal democracy, needs substantial revisions. These revisions include substantial changes and clarifications in the fundamental rights section and significant improvements to separation of powers.

The church notes that the draft Constitution shows the Governments' commitment to bring Fiji to a modern society. In this process the church is grateful for the opportunity to contribute, through its recommendations and concerns to the process.

The church prayerfully submits this document to government in the hope that, as a religious organisation with a long and proud history of contribution to our nation its concerns will be taken note of and its constructive proposals duly considered.

May God Bless Fiji.

⁸ These help our people to remember that our most important national document is grounded and rooted in our history, mixed and full of turns and tides as it may have been. We nevertheless believe that our brief history as a young nation must at least be mentioned or noted somewhere in our constitution.