

## DEMOCRATIC DEFICIT: THE ELECTORAL SYSTEM UNDER FIJI'S 2013 CONSTITUTION

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### ABSTRACT

Fiji has introduced four constitutions since independence in 1970. Each Constitution offered the opportunity to establish an electoral system that complies with established democratic principles and meets the particular needs of Fiji. This article engages with the shortcomings of the electoral process under the current *Constitution of the Republic of Fiji 2013* (Fiji). Questions regarding the electoral system are raised, such as whether the D'Hondt/Jefferson model is the right choice for a multi-party jurisdiction; whether the electoral bodies are sufficiently independent to conduct free and fair elections; and whether the judiciary has sufficient capacity to resolve electoral grievances. The article concludes that the *Constitution 2013* does not provide adequate checks and balances for free and fair elections, and electoral bodies hamper the implementation of democratic principles.

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## I INTRODUCTION

Democracy is not just a way of governance: it is a way of life. Democratic principles — such as the rule of law, free and fair elections, the freedom to elect representatives and be elected, freedom of assembly and political participation, freedom of speech and expression, and transparency in elections and governance — are essential for protecting an individual's rights.<sup>1</sup> Free and fair elections are a fundamental component of democracy.<sup>2</sup> The Inter-Parliamentary Union declares that free and fair elections reaffirm 'the significance of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights'.<sup>3</sup> The fairness of elections depends on multiple standards based on voting and election rights, candidature, campaigning rights and responsibilities, and the rights and responsibilities of states.<sup>4</sup>

The purpose of this article is to examine the election process established under the *Constitution of the Republic of Fiji 2013* (Fiji) ('*Constitution 2013*'), evaluating the standards of states' responsibilities to conduct free and fair elections, the transparency in the election process, and the adjudication of election disputes. The article exemplifies the journey of Fiji's election process from first-past-the-post ('FPP') to the proportional representation ('PR (List PR)') system. Furthermore, the article illustrates the impact of PR (List PR) and the 5% clause in the *Constitution 2013* for securing a seat in Parliament.

In this article, I explicitly conceptualise the role of the Fijian Electoral Commission, the equal participation in the government, the appointment process of members of electoral bodies, and the appointment process of judges who have the jurisdiction to decide on election disputes. This article argues that the process of appointment for electoral bodies and adjudication authorities should be more neutral, and that the opposition in a democracy should have a greater role in these critical appointments.

## II THE ELECTORAL SYSTEM IN FIJI

This part of the article considers the different electoral systems adopted and experimented with in Fiji, from FPP to the present PR (List PR) system. Under the *Constitution 2013*,<sup>5</sup> members of the unicameral Parliament are elected by secret ballot on a proportional representation ('PR') basis. Responsibility for a free and fair election lies with the Electoral Commission.<sup>6</sup> The

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<sup>1</sup> 'Declaration on Criteria for Free and Fair Elections', *Inter-Parliamentary Union* (Web Page, 2021) <<https://www.ipu.org/our-impact/strong-parliaments/setting-standards/declaration-criteria-free-and-fair-elections>>.

<sup>2</sup> See, eg, National Academy of Sciences, Engineering, Medicine, *Securing the Vote: Protecting American Democracy* (Consensus Study Report, National Academies Press, 2018); Patrick Merloe, *Promoting Legal Frameworks for Democratic Elections: An NDI Guide for Developing Election Laws and Law Commentaries* (National Democratic Institute for International Affairs, 2008).

<sup>3</sup> 'Declaration on Criteria for Free and Fair Elections' (n 1).

<sup>4</sup> 'Chapter 23: Monitoring Human Rights in the Context of Elections' in Office of the United Nations High Commissioner for Human Rights, *Manual on Human Rights Monitoring* (United Nations, 2011) 7.

<sup>5</sup> *Constitution of the Republic of Fiji 2013* (Fiji) s 162(2) ('*Constitution 2013*').

<sup>6</sup> *Ibid* s 52.

*Constitution 2013* abolished the Senate and the House of Representatives, which existed from 1970 to 2006.<sup>7</sup> The PR (List PR) electoral system in Fiji is a multi-member open-list PR system, with a single, multi-member constituency. Each voter has a single vote of equal value.<sup>8</sup> Seats are allotted to the candidates in proportion to the total number of votes cast in favour of each political party.<sup>9</sup>

Between independence in 1970 and the 1987 coups, Fiji used an FPP system for House of Representatives elections. However, the major drawback of the FPP system was that candidates with a small percentage of the overall vote could be elected, often in those constituencies where multiple candidates contested the election.<sup>10</sup> During this period, separate ethnic constituencies were used to provide a degree of proportionality in disproportionate results produced by the FPP system. A new *Constitution 1990*, introduced after the twin Sitiveni Rabuka coups of 1987, did not change the electoral system, and so national elections in 1992 and 1994 were also conducted using the FPP system.<sup>11</sup>

After the 1994 election, with the support of two Indo-Fijian Members of Parliament (‘MPs’) Jai Ram Reddy and Mahendra Chaudhry, the Rabuka government initiated a constitutional review process.<sup>12</sup> In 1996, the Constitution Review Commission (‘CRC’) addressed the issues that were faced by the FPP plurality voting system.<sup>13</sup> This system may be considered logical when voters choose between only two candidates.<sup>14</sup> However, the CRC observed that in a multi-party system such as Fiji’s, the FPP system has disadvantages — for example, a winning candidate may receive less than 50% of the votes. Furthermore, under this system, a particular party may gain a majority in the House if they have the most candidates elected via FPP but have fewer than half of all votes cast.<sup>15</sup>

To overcome these defects, the CRC proposed the alternative vote (‘AV’) system. This system requires voters to rank candidates in order of their preference. A candidate must have a majority of the votes cast to be elected, which in a single-member constituency is over 50% (see the formula for calculating this quota below). However, in a single-member constituency, if two

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<sup>7</sup> ‘History of the Parliament of the Republic of Fiji’, *Parliament of the Republic of Fiji* (Web Page, 2021) <<http://www.parliament.gov.fj/our-story>>.

<sup>8</sup> *Constitution 2013* (n 5) s 53(1).

<sup>9</sup> *Ibid* s 53(2)(a).

<sup>10</sup> Norm Kelly, ‘A New Electoral System for Fiji in 2014: Options for Legitimate Representation’ (Pacific Islands Brief No 3, Pacific Islands Development Program, East-West Center, 15 February 2013) <<https://www.eastwestcenter.org/sites/default/files/private/pib003.pdf>>.

<sup>11</sup> Steven Ratuva, ‘Shifting Democracy: Electoral Changes in Fiji’ in Steven Ratuva and Stephanie Lawson (eds), *The People Have Spoken: The 2014 Elections in Fiji* (Pacific Series, ANU Press, 2016) 17, 18–19 <<http://press-files.anu.edu.au/downloads/press/p337333/pdf/ch022.pdf>>.

<sup>12</sup> Kelly (n 10).

<sup>13</sup> DG Arms, ‘Fiji’s Proposed New Voting System: A Critique with Counter-Proposals’ in Brij V Lal and Peter Larmour (eds), *Electoral Systems in Divided Societies: The Fiji Constitution Review* (ANU E Press, 2012) 97, 101; Sir Paul Reeves, Tomasi Rayalu Vakatora and Brij Vilash Lal, *The Fiji Islands: Towards a United Future — Report of the Fiji Constitution Review Commission 1996* (Parliamentary Paper No 34, Parliament of Fiji, 1996) 305 <<http://www.paclii.org/fj/constitutional-docs-archives/reeves-report/ch10.pdf>> (‘Reeves Report’).

<sup>14</sup> Reeves Report (n 13) 310.

<sup>15</sup> *Ibid* 305.

candidates receive 50% of all votes then the candidate who has the highest number of first-preference votes, as opposed to second- or third-preference votes, will be elected.<sup>16</sup> Furthermore, in a single-member constituency, if no candidate surpasses the 50% threshold, the first-preference votes are counted for each candidate, and the candidate with the lowest number is eliminated. Then, in the second round of counting, any ballot papers giving a first-preference vote to the eliminated candidate are re-examined and votes are re-allotted to the remaining candidates for whom those voters have expressed a second preference.<sup>17</sup> Once the second preferences are added to the first preferences for the candidates still in the running, the candidate with the lowest number of votes is again eliminated and the process goes on until one of the candidates surpasses the required 50% threshold.<sup>18</sup>

For calculating the threshold (or quota) that must be achieved by a candidate in a single- or multi-member constituency in order to obtain a seat in Parliament, the AV system uses this formula:<sup>19</sup>

$$\text{Quota} = \frac{\text{votes}}{\text{seats} + 1} + 1$$

For example, if the total number of votes cast is 10,000 and the number of seats is one (that is, a single-member constituency), then  $10,000 / ((\text{number of seats} = 1) + 1) + 1$  (so  $10,000 / 2 + 1$ ) = 5,001 votes. If there are two seats, then  $10,000 / 3 + 1 = 3,334.33$ , and therefore the quota for a constituency with two seats will be 3,334 votes. If the country has multiple single-member constituencies, then the quota will be over 50% of total votes cast and the same will be applicable for every constituency.

The general election of 1999 used the AV system, resulting in the victory of the Fiji Labour Party and, for the first time, the appointment of an Indo-Fijian Prime Minister, Mahendra Chaudhry.<sup>20</sup> From 71 members of the House of Representatives, the Labour Party won 37 seats, thereby having a majority in the house.<sup>21</sup> The Labour Party won all the Indo-Fijian ethnic seats, as well as 18 of the open seats, making a total of 56 seats.<sup>22</sup> This dominance of the Indo-Fijian

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<sup>16</sup> Arms (n 13) 102.

<sup>17</sup> Ben Reilly, 'Constitutional Engineering and the Alternative Vote in Fiji: An Assessment' in Brij V Lal and Peter Larmour (eds), *Electoral Systems in Divided Societies: The Fiji Constitution Review* (ANU E Press, 2012) 73, 76.

<sup>18</sup> Donald L Horowitz, 'Encouraging Electoral Accommodation in Divided Societies' in Brij V Lal and Peter Larmour (eds), *Electoral Systems in Divided Societies: The Fiji Constitution Review* (ANU E Press, 2012) 21, 29.

<sup>19</sup> Andrew Reynolds et al, *Electoral System Design: The New International IDEA Handbook* (International Institute for Democracy and Electoral Assistance, 2005) 76 <<https://www.ifes.org/sites/default/files/electoral-system-design-the-new-international-idea-handbook.pdf>>.

<sup>20</sup> Stewart Firth and Jon Fraenkel, 'Changing Calculus and Shifting Visions' in Jon Fraenkel and Stewart Firth (eds), *From Election to Coup in Fiji: The 2006 Campaign and Its Aftermath* (ANU E Press and Asia Pacific Press, 2007) 1, 6–7 <<https://library.oapen.org/bitstream/handle/20.500.12657/33744/459242.pdf?sequence=1>>.

<sup>21</sup> Rae Nicholl, 'Broken Promises: Women and the 2006 Fiji Election' in Jon Fraenkel and Stewart Firth (eds), *From Election to Coup in Fiji: The 2006 Campaign and Its Aftermath* (ANU E Press and Asia Pacific Press, 2007) 160, 162, Table 12.1 <<https://library.oapen.org/bitstream/handle/20.500.12657/33744/459242.pdf?sequence=1>>.

<sup>22</sup> Robert Norton, 'Understanding the Results of the 1999 Fiji Elections' in Brij V Lal, *Fiji before the Storm: Elections and the Politics of Development* (ANU Press, 2012) 49, 57 <<https://www.jstor.org/stable/j.ctt24h84v.11>>.

community motivated the George Speight coup of 2000.<sup>23</sup> The AV system was also used in the 2001 and 2006 general elections. In these elections, the pro-Indigenous Soqosoqo Duavata ni Lewenivanua Party (SDL or United Fiji Party) won the election with a total of 44% of votes, edging out the Labour Party's 40%.<sup>24</sup> However, the elected government of 2006 did not survive for long and, in the same year, another coup put the country under a military regime led by Commodore Voreqe (Frank) Bainimarama.<sup>25</sup> From 2006 to 2014 the country remained under the military regime.

The principal drawback of the AV system is that the counting of votes takes a long time to achieve an absolute majority. The candidate with the highest first-preference count may be surpassed by a lower-polling candidate who receives a higher number of second and third preferences, creating confusion and anger amongst voters.<sup>26</sup>

The *Constitution 2013* introduced the PR system.<sup>27</sup> The PR system has its own drawbacks — for example, in electorates with a low number of candidates to be elected, high levels of proportionality are difficult to achieve, and in electorates with a high number of candidates to be elected, representatives with a relatively low number of votes can be elected. This is what happened in the 2014 and 2018 elections.<sup>28</sup>

There is no single electoral system that can achieve simplicity, local representation, a strong party system, stable government, protection of minorities, and a direct correlation between votes and results.<sup>29</sup> However, the question is which electoral system can achieve most of these attributes. The FPP and PR (List PR) systems do have attributes like simplicity, local representation, protection of minorities, and proportionality of results. The AV system is good in terms of simplicity, but is limited in other attributes.<sup>30</sup> The *Constitution 2013* adopted the PR (List PR) system, because it was believed that neither the FPP nor AV systems produced

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<sup>23</sup> Brij V Lal, *Islands of Turmoil: Elections and Politics in Fiji* (ANU E Press and Asia Pacific Press, 2006) 185 <<https://press-files.anu.edu.au/downloads/press/p27031/pdf/book.pdf>>.

<sup>24</sup> Jon Fraenkel, 'Bipolar Realignment under the Alternative Vote System: An Analysis of the 2006 Electoral Data' in Jon Fraenkel and Stewart Firth (eds), *From Election to Coup in Fiji: The 2006 Campaign and Its Aftermath* (ANU E Press and Asia Pacific Press, 2007) 272, 272–5 <<https://library.oapen.org/bitstream/handle/20.500.12657/33744/459242.pdf?sequence=1>>.

<sup>25</sup> Brij V Lal, 'Anxiety, Uncertainty and Fear in Our Land: Fiji's Road to Military Coup, 2006' in Jon Fraenkel, Stewart Firth and Brij V Lal (eds), *The 2006 Military Takeover in Fiji: A Coup to End All Coups?* (State, Society and Governance in Melanesia Program Studies in State and Society in the Pacific No 4, ANU E Press, 2009) 21, 21–3 <<https://press-files.anu.edu.au/downloads/press/p7451/pdf/book.pdf>>.

<sup>26</sup> W Glenn Harewood, 'Comparing the Advantages & Disadvantages of First Past the Post [FPTP], Alternative Voting [AV], and Proportional Representation [PR] Electoral Systems' (External Brief, House of Commons, Canada, 31 August 2016) 3–4 <<https://www.ourcommons.ca/content/Committee/421/ERRE/Brief/BR8555618/br-external/HarewoodWGlenn-e.pdf>>.

<sup>27</sup> *Constitution 2013* (n 5) s 53.

<sup>28</sup> Kelly (n 10) 2–3.

<sup>29</sup> *Ibid* 6–7.

<sup>30</sup> Arms (n 13) 102–3.

desirable results, and that ethnicity-based constituencies promoted power struggles between ethnic groups.<sup>31</sup>

The PR system is often promoted in diverse societies like Fiji to reduce the dominance of one ethnic group. The major disadvantage of the FPP system is that candidates receiving fewer votes can win the election. However, this disadvantage applies to the PR system also: in the 2014 and 2018 elections, some of the candidates won the election even though they received fewer votes than other candidates. On the other hand, the most important benefit of the FPP system — that is, the direct relationship between the elected MP<sup>32</sup> and their constituents, where the constituents can raise questions to the elected MP if the constituency's interests are not represented — is lost in the PR system. In the PR system, members of the public do not know who their elected MP is, so they cannot specifically raise their constituency's (local) grievances.

### III THE ELECTORAL SYSTEM AND THE 5% CLAUSE

In this part of the article, the effects of the 5% clause for securing a seat in Parliament are illustrated, with the help of mathematical calculations. The electoral system adopted in Fiji is known as the D'Hondt/Jefferson model. Thomas Jefferson was the third President of the United States; Victor d'Hondt was a Belgian lawyer and mathematician who developed a model in the 1880s in an attempt to better accommodate different linguistic groups and political traditions. This method works on the quotient received after each party's total number of votes is repeatedly divided by 1 plus the number of seats already allocated (1, 2, 3...) until all seats are filled. This division produces an average, and the party with the highest average vote is awarded the first seat, the next highest the second seat, and so on.<sup>33</sup>

Fiji is a multi-ethnic society, including: iTaukei, or Indigenous Fijians (the majority); descendants of indentured labourers from British-occupied India, commonly known as Indo-Fijians; Rotumans, who came from Rotuma Island; Rabi Islanders (Banabans); and others.<sup>34</sup> In the absence of affirmative action, the D'Hondt method does not equalise representation of all communities, and the *Constitution 2013* is silent on protecting the rights of minorities. It does not further one of the goals of the 1996 CRC, which was 'to encourage the emergence of multi-ethnic parties or coalitions'.<sup>35</sup> The *Constitution 1970* s 32 prescribed the number of seats for every community so that every community got equal representation in the House of Representatives.<sup>36</sup> It also specified separate voter rolls for iTaukei, Indo-Fijians and others, and

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<sup>31</sup> Ratuva (n 11) 30.

<sup>32</sup> Kelly (n 10) 4.

<sup>33</sup> Silvia Kotanidis, European Parliamentary Research Service, 'Understanding the D'Hondt Method: Allocation of Parliamentary Seats and Leadership Positions' (European Parliament Briefing, June 2019) 3.

<sup>34</sup> Alan Howard, 'Plasticity, Achievement and Adaptation in Developing Economies' (1966) 25 *Human Organization* 265, 265–6.

<sup>35</sup> Brij V Lal, 'Fiji Constitution Review Commission Recommendations for a New Electoral System in Fiji' in Brij V Lal and Peter Larmour (eds), *Electoral Systems in Divided Societies: The Fiji Constitution Review* (ANU E Press, 2012) 39, 40.

<sup>36</sup> *Fiji Independence Act 1970* (UK).

from each separate roll, 22 MPs each were to be from iTaukei and Indo-Fijian communities, and 8 from other ethnic groups present in Fiji.<sup>37</sup>

Similar provisions were included in the *Constitution 1990*, whereby the House of Representatives had 70 seats, with 37 for iTaukei,<sup>38</sup> 27 for Indo-Fijians, 5 for other ethnicities, and 1 representative from Rotuma Island.<sup>39</sup> The MPs were responsible for their respective constituencies, making them answerable to the people directly, and, most importantly, the citizens knew the person with whom they could direct their grievances. However, neither the *Constitution 1970* nor *1990* were effective enough to bridge the gap between the ethnic groups, especially between the iTaukei and Indo-Fijians.<sup>40</sup>

Under the *Constitution 2013*, the winning candidate is determined by totaling the number of votes cast in favour of each candidate of that political party, which should be at least 5%<sup>41</sup> or more of the total votes in that election to qualify for a seat in Parliament.<sup>42</sup> In a hypothetical scenario, if a candidate receives 10,000 votes but their political party receives less than 5% of the total number of votes cast, then they are ineligible to become an MP. However, if a candidate receives 5,000 votes but their political party receives more than 5% of the total votes, they are eligible for a parliamentary seat.<sup>43</sup> Therefore a candidate receiving more votes can lose out to a candidate receiving fewer votes.

Bainimarama of the FijiFirst Party, the present Prime Minister (the head of the Fijian government), received 167,732 votes out of the total 227,241 FijiFirst Party votes (or 74% of his Party's total). Therefore, the other FijiFirst candidates to whom seats in Parliament were allocated only received 59,509 votes collectively, with a total of 27 FijiFirst seats in a 51-

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<sup>37</sup> Stephen Sherlock, 'Constitutional and Political Change in Fiji' (Parliament of Australia Research Paper No 7 1997–98, 11 November 1997) 7 <[https://www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/pubs/rp/RP9798/98RP07](https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/RP9798/98RP07)>.

<sup>38</sup> Lal, *Islands of Turmoil* (n 23) 100. In 1994, Sitiveni Rabuka's party Soqosoqo ni Vakavulewa ni Taukei (SVT) returned to power with 32 out of 37 seats reserved for iTaukei under *Constitution 1990*. They formed a coalition government with the General Voters Party, which won four out of five seats allocated to them. However, while this arrangement gave representation to every ethnic group, it excluded any possibility for the second-highest ethnic group — the Indo-Fijians — to occupy power. Sherlock (n 37) 5, states that '[t]he philosophy underlying the Fiji Constitution of 1990 was that the interests of indigenous Fijians could be protected only if Fijian leaders were guaranteed political ascendancy, a formula based on the effective political exclusion of the Indo-Fijians.'

<sup>39</sup> Lal, *Islands of Turmoil* (n 23).

<sup>40</sup> Brij V Lal, 'The Sun Set at Noon Today' in Brij V Lal and Michael Pretes (eds), *Coup: Reflections on the Political Crisis in Fiji* (ANU E Press, new ed, 2008) 8, 8–9. For example, Apisai Tora, a Fijian nationalist leader, stated that 'Indians came as slaves, and they are now our masters. Fiji should have a Fijian Prime Minister and nothing less will do'; the chair of the landowners' council attacked the Chaudhry government and threatening the non-renewal of the expiring native leases to (mostly) Indo-Fijian farmers; Taniela Tabu, former Taukei movement supporter and trade unionist, accused the Chaudhry government of 'Indianising the public service'. These instances and many more resulted in the George Speight coup of 2000. All these instances have divided Fijian society to its deepest core and this divide is exploited for political gain.

<sup>41</sup> *Constitution 2013* (n 5) s 53(3).

<sup>42</sup> *Ibid* s 53(2); *Electoral Act 2014* (Fiji) s 104(3) ('*Electoral Act 2014*').

<sup>43</sup> After the enforcement of the *Constitution 2013* two general elections were conducted, one in 2014 and another in 2018. The FijiFirst Party won 32 out of 51 seats in 2014, and 27 in 2018, with a total vote share of 59.17% in 2014 and 50.02% in 2018.

member Parliament.<sup>44</sup> So, the Prime Minister holds one seat with 167,732 votes while the rest of the FijiFirst MPs hold the remaining 26 seats with 59,509 votes. If we divide 59,509 votes by the 26 seats, that averages to only 2,288 votes per MP.

In the 2018 general election, 458,532 votes were cast out of 637,527 registered voters, a 71.9% turnout.<sup>45</sup> To qualify for a seat in Parliament, 5% of 458,532 is needed, that is 22,926 votes. The *Constitution 2013* requires an independent candidate to gain 22,926 votes to qualify for a seat, compared with an average of 2,288 votes (59,509 votes divided by 26 seats) for a member of a political party, which not only qualifies them but practically won them seats in the 2018 election. Even if we divide the total number of votes (458,532 voters) in the general election of 2018 into 51 seats equally, each elected MP would have received 8,990 votes. However, in the present context, candidates receiving 2,288 votes or even fewer became MPs.

The 5% clause applies to independent candidates and these candidates are eligible for one seat each in Parliament.<sup>46</sup> In the 2014 election, two independent candidates ran for election, but neither of them received the minimum of 5% of the total votes cast. In the 2018 election, no independent candidates ran.<sup>47</sup> The effect of the 5% clause is that, if any political party or an independent candidate receives less than 5% of the total votes cast, they will not be eligible for a seat in Parliament.<sup>48</sup>

In some democracies, independent candidates contest elections against the political party within a constituency, not the whole country. This may be fairer, as the independent candidate runs against another individual and not against an entire political party. A voter can therefore consider either the individual or the political party when casting a vote. In most federal structures, votes may distinguish between local constituency issues and national issues, though not necessarily. Nevertheless, this distinction gives a chance to an independent candidate against a political party. In Fiji, voters have no opportunity to distinguish between local and national issues. Independent candidates are, therefore, fighting a losing battle.

#### IV ELECTORAL BODIES: POWERS AND FUNCTIONS

Electoral bodies have the most important role in conducting free and fair elections: this part of the article examines the appointment process for members of electoral bodies. The Electoral Commission was constituted under the *State Services Decree 2009* (Fiji),<sup>49</sup> and continues in existence under the *Constitution 2013*.<sup>50</sup> The Electoral Commission, which comprises a

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<sup>44</sup> Jope Tarai, '2018 Fiji Elections: The Real Losses and Wins', *Devpolicy Blog* (Blog Post, 30 November 2018) <<https://devpolicy.org/fiji-2018-elections-the-real-losses-and-wins-20181203>>.

<sup>45</sup> *Ibid.*

<sup>46</sup> *Constitution 2013* (n 5) s 53(2)(b).

<sup>47</sup> Fijian Elections Office, *FEO Results App* (App, 12 March 2018). Mohammed Saneem, Supervisor of Elections, *2018 General Election: Joint Report by the Electoral Commission and Supervisor of Elections* (Final Report, 10 January 2019) 1: the general election of 2018 was contested by six political parties and there were no independent candidates.

<sup>48</sup> *Constitution 2013* (n 5) s 53(3).

<sup>49</sup> *State Services Decree 2009* (Fiji) s 4 ('*State Services Decree 2009*').

<sup>50</sup> *Constitution 2013* (n 5) s 75(1).



chairperson and six other members,<sup>51</sup> is independent and must perform its functions and powers without being subject to the control of any person or authority.<sup>52</sup> The chairperson must be a judge or qualified to be a judge.<sup>53</sup> Fiji consists of four kinds of courts, which in ascending hierarchy are the Magistrate Court, High Court, Court of Appeal and Supreme Court.<sup>54</sup> The *Constitution 2013* is silent on which kind of court judge is required for the chairpersonship, because the qualifications for the appointment of a judge in the three highest courts are identical.<sup>55</sup>

The *Constitution 2013* provides a list of persons ineligible to become one of the six additional members,<sup>56</sup> but does not specify the minimum qualifications required to become a member. The Fijian President (the head of state of Fiji) appoints the chairperson and other members on the advice of the Constitutional Offices Commission.<sup>57</sup> The Constitutional Offices Commission consists of the Prime Minister (chairperson), the Attorney-General, and the leader of the opposition. The President appoints two members on the advice of the Prime Minister and one member on the advice of the leader of the opposition.<sup>58</sup> The government has four members and the opposition has two. Indeed, the ruling party will always have an upper hand.

In addition to the Electoral Commission, the office of the Supervisor of Elections, established under the *State Services Decree 2009* (Fiji), continues to exist.<sup>59</sup> The Supervisor of Elections works under the direction of the Electoral Commission.<sup>60</sup> The minimum qualifications for becoming the Supervisor of Elections are not stipulated. The Supervisor of Elections is appointed by the President on the advice of the Constitutional Offices Commission following consultation between the Constitutional Offices Commission and the Electoral Commission.<sup>61</sup> The *Electoral Act 2014* (Fiji) stipulates the independence of the Supervisor of Elections. However, the Supervisor must comply with the direction of the Electoral Commission concerning the performance of their functions, and is also bound by the decision of a court of law.<sup>62</sup>

In 2014, the High Court of Fiji at Suva held that the Supervisor of Elections is not bound by the direction given by the Electoral Commission.<sup>63</sup> Aggrieved by this judgement, the Electoral Commission appealed to the Court of Appeal in 2016. The Supervisor's lawyer argued that, in terms of the *Electoral Act 2014* (Fiji) s 8 and the *Constitution 2013* s 76(3), the Supervisor is

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<sup>51</sup> Ibid s 75(6).

<sup>52</sup> *Electoral Act 2014* (n 42) s 4(1).

<sup>53</sup> Ibid.

<sup>54</sup> *Constitution 2013* (n 5) s 97(1): 'The judicial power and authority of the State is vested in the Supreme Court, the Court of Appeal, the High Court, the Magistrates Court, and in such other courts or tribunals as are created by law.'

<sup>55</sup> Ibid s 105(2).

<sup>56</sup> Ibid s 75(8).

<sup>57</sup> Ibid s 75(7); cf *State Services Decree 2009* (n 49) ss 4(7)–(8).

<sup>58</sup> The Fijian Constitutional Offices Commission held its First Meeting in 2015.

<sup>59</sup> *State Services Decree 2009* (n 49) s 5(1); *Constitution 2013* (n 5) s 76(1).

<sup>60</sup> *Constitution 2013* (n 5) ss 76(2)–(3).

<sup>61</sup> Ibid s 76(4).

<sup>62</sup> *Electoral Act 2014* (n 42) s 8.

<sup>63</sup> *Election Commission v Supervisor of Elections* (2014) FJHC 627, 637.

‘required’ to seek relief from the court if they think that the Commission’s direction is wrong. The objection to this plea was that nowhere in any of the provisions cited by the Supervisor’s lawyer is it stated that the Supervisor is required to seek relief from the court. The Court of Appeal partly allowed the appeal and ruled that ‘section 76(3) of *Constitution* read with section 8(a) of *Electoral Act 2014* the Supervisor of the Election has to comply with all the directions given by the Electoral Commission regarding its functions’.<sup>64</sup>

In some democracies, an electoral commission is sufficient to conduct elections.<sup>65</sup> Some of these countries have a three-tier system of governance, whereby there are elections for Parliament, state legislative assemblies, and local bodies, such as town or municipal corporations. The need to have two constitutional bodies in Fiji — the Electoral Commission and the Supervisor of Elections — for conducting only one general election every four years puts a burden on the taxpayer to maintain an additional office for conducting elections.<sup>66</sup> This is doubly problematic, as the country does not have any other elections, even for local bodies.

The Electoral Commission can review the number of seats in Parliament one year before the date of general elections,<sup>67</sup> and can increase or decrease the number of seats in Parliament based on the population-to-seat ratio.<sup>68</sup> While determining the population, the Commission must refer to the most recent census, the register of voters, or any other official information available.<sup>69</sup> This change of seats is made to ensure that, as far as practicable, at the date of any such review (one year before the general election), the population-to-seat ratio is the same as the population-to-seat ratio at the date of the first general election held under the *Constitution 2013*,<sup>70</sup> which was the 2014 election. For the general election of 2022, the Commission has increased the number of seats by four, from 51 to 55.<sup>71</sup> The *Constitution 2013* also empowers Parliament to make a written law for further provisions to give effect to the review of the number of seats.<sup>72</sup> In the exercise of powers vested under s 54(5), Parliament enacted the *Electoral Act 2014* (Fiji). The Electoral Commission holds the responsibility and authority to formulate policy for the determination of the number of seats in Parliament before every general election.<sup>73</sup>

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<sup>64</sup> *Election Commission v Supervisor of Elections* (2016) FJCA 159, 178.

<sup>65</sup> Countries like Australia, Bangladesh, Canada, India, Jordan, Nigeria, Poland, Romania, United Kingdom, etc.

<sup>66</sup> *Constitution 2013* (n 5) s 75(1). The Electoral Commission is responsible for registering voters; regularly revising the register of voters; registering candidates; settling electoral disputes; and monitoring and enforcing compliance with any written law governing elections and political parties. Under s 76(2) the Supervisor of Elections, acting under the direction of the Electoral Commission, is responsible for administering the registration of voters for election of MPs; conducting elections of MPs, and such other elections as Parliament prescribes; and performing such other functions as are conferred by written law. In a broad sense, it is difficult to distinguish the functions of these two constitutional bodies, as their essential functions are the same.

<sup>67</sup> *Ibid* s 54(5).

<sup>68</sup> *Ibid*.

<sup>69</sup> *Ibid* s 54(3).

<sup>70</sup> *Ibid* s 54(2).

<sup>71</sup> Fijian Electoral Commission, ‘Electoral Commission Approves 55 Seats in Parliament for Next General Election’, *Fiji Sun* (online, 25 June 2021) <<https://fijisun.com.fj/2021/06/25/electoral-commission-approves-55-seats-in-parliament-for-next-general-election>>.

<sup>72</sup> *Constitution 2013* (n 5) s 54(4).

<sup>73</sup> *Electoral Act 2014* (n 42) s 3(1)(c).

The proportionate ratio in 2014 was 17,329 people to 1 seat (50 seats); in 2017 it was 17,205 people to 1 seat (51 seats); and for 2021 it was 16,424 people to 1 seat (55 seats). The difference in the proportionate ratio between 2017 and 2021 is 781. Can 781 votes be considered negligible when the present Minister of Commerce is holding his parliamentary seat with 589 votes?<sup>74</sup> Since the population-to-seat ratio at the date of the first general election held under the *Constitution 2013* in 2014 was 17,329 people to 1 seat, if the 2021 population of 903,359 is converted into seats, keeping 17,329 people to 1 seat, there should be an increase of just 1.1 seats, totaling 52.1 seats ( $903,359/17,329 = 52.1$ ).

A July 2021 press release by the Electoral Commission did not explain the formula or method used for the determination of the number of seats, or for increasing the number of seats in Parliament from 51 to 55 seats between 2017 and 2021. The press release simply stated that, while exercising its powers under the *Constitution 2013* s 54(2), the Electoral Commission increased the number of seats from 51 to 55.<sup>75</sup> There is a method in place for the determination of the number of seats, but that method is neither available in the public domain nor explained by the Electoral Commission in the recent increase in the number of seats for the 2022 general election. The Electoral Commission is responsible to people and is required to provide relevant information so that people can understand the method or process used for increasing the number of seats for the 2022 general election.

## V COURT OF DISPUTED RETURNS: POWERS AND FUNCTIONS

This part of the article discusses the powers and functions of the Court of Disputed Returns, along with the appointment process to the court. Disputes regarding elections are heard by the High Court as the Court of Disputed Returns, having original jurisdiction to hear and determine whether a person's election is valid,<sup>76</sup> and to receive submissions by way of proceedings and make judgements on whether the seat of an MP has been vacated.<sup>77</sup> The *locus standi* for bringing the motion before the court is with any person who has the right to vote in that election, or by a candidate contesting that particular election, or by the Attorney-General.<sup>78</sup> If the petition is not filed by the Attorney-General or if the dispute is about the validity of the election of an MP, the Attorney-General may intervene in the proceedings.<sup>79</sup> If the seat becomes vacant under s 63 of the *Constitution 2013*, the Electoral Commission will offer the seat to the highest-ranked candidate of that political party.<sup>80</sup> By-election would only be conducted in the case that there was no candidate from the same political party or, if there was, the candidate did not agree to hold the post.<sup>81</sup> If the High Court declares an election void, a by-election must be conducted

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<sup>74</sup> Fijian Elections Office (n 47).

<sup>75</sup> Fijian Electoral Commission (n 71). The same press release is not available on 'Press Releases', *The Electoral Commission: Republic of Fiji* (Web Page, 2021) <<http://www.electoralcommission.org.fj/category/press-releases>>.

<sup>76</sup> *Constitution 2013* (n 5) s 66(1)(a).

<sup>77</sup> *Ibid* s 66(1)(b).

<sup>78</sup> *Ibid* ss 66(3)(a)(i)–(iii).

<sup>79</sup> *Ibid* s 66(4).

<sup>80</sup> *Ibid* s 64(1).

<sup>81</sup> *Ibid*.

within 60 days of the decision of the court.<sup>82</sup> However, for the by-election, there must be knowledge of the electoral pool of that candidate, but since there is just one multi-member constituency in the PR (List PR) electoral system in Fiji, would the entire country need to go to the election for the sake of one seat of Parliament?

The Attorney-General,<sup>83</sup> as well as the Supervisor of Elections, can intervene in election petitions.<sup>84</sup> The nature of an intervention is not specified. While the High Court has the jurisdiction to decide election disputes, if an electoral dispute arises in Vanua Levu, one has to travel to Viti Levu, the island where the High Court is situated. This exhibits ‘justice out of reach’ in a nation with 330 islands, some situated very remotely. In the age of ‘justice on the doorstep’, the *Constitution 2013* should ensure that all the people of Fiji, including those living in the remote islands, are capable enough (economically, politically and socially) to at least reach the door of justice. As there are no constituencies, they are left with minimal information and the result is that no one has challenged the election of any candidate in either the 2014 or 2018 elections.

The court has to conclude the election petition within 21 days, though the *Constitution 2013* is silent on what happens if the dispute is not addressed within that timeframe — will the petition be considered as dismissed or allowed?<sup>85</sup> An MP whose seat becomes vacant under s 63(1) and applies to the High Court under s 63(5) is suspended from Parliament, pending the decision of the court.<sup>86</sup> Proceedings under the declaration of whether an MP’s seat has become vacant can be brought before the court by any other MP, a registered voter, or the Attorney-General,<sup>87</sup> but not by the MP themselves.<sup>88</sup> If the proceedings are not brought by the Attorney-General, then they may intervene in the proceedings;<sup>89</sup> the nature of the intervention is not specified, nor is there a requirement to seek the approval of the court before intervening. This executive intervention in judicial proceedings is inconsistent with the democratic principle of separation of powers.<sup>90</sup>

High Court judges are appointed by the President on the recommendation of the Judicial Service Commission, after consultation with the Attorney-General.<sup>91</sup> The Judicial Service Commission was established under the *State Services Decree 2009* (Fiji)<sup>92</sup> on the recommendation of the 1996 CRC. The CRC accepted the recommendation of the Beattie Commission (a 1994 Commission of Inquiry into the judicial system of Fiji) of having a

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<sup>82</sup> *Electoral Act 2014* (n 42) s 131(c).

<sup>83</sup> *Constitution 2013* (n 5) s 96(1). The post of Attorney-General is appointed to a Minister, and they are the chief legal advisor to the government and have executive powers.

<sup>84</sup> *Ibid*; *Electoral Act 2014* (n 42) s 124(3).

<sup>85</sup> *Constitution 2013* (n 5) ss 63(6), 66(8).

<sup>86</sup> *Ibid* s 63(8).

<sup>87</sup> *Ibid* s 66(5).

<sup>88</sup> *Ibid* s 66(7).

<sup>89</sup> *Ibid* s 66(6).

<sup>90</sup> See also Roslyn Atkinson et al, *Dire Straits: A Report on the Rule of Law in Fiji* (International Bar Association Human Rights Institute Report, March 2009).

<sup>91</sup> *Constitution 2013* (n 5) s 106(2).

<sup>92</sup> *Ibid* s 104(1).

separate commission to deal with judicial appointments.<sup>93</sup> However, Fiji also appoints visiting judges to its highest courts on a fixed-term contractual basis.<sup>94</sup> A state should refrain from appointing judges on a fixed-term contractual basis because a judge's position is well described as a public office rather than a private contractual relationship.<sup>95</sup> If such contractual appointments are inevitable, then they should be subject to the appropriate security of tenure and require special justification;<sup>96</sup> however, in no case should these appointments be made in the Supreme Court.<sup>97</sup> Fiji disregards almost all of these safeguards and allows a serious intervention of the executive in the judiciary.

## VI CONCLUDING REMARKS

It seems that the drafters of the *Constitution 2013* missed the opportunity to establish an electoral system that complies with established democratic principles and meets the particular needs of Fiji. The 5% clause that is the benchmark for securing a seat in Parliament enables political parties to have a strong advantage over independent candidates. The same 5% clause allows candidates with fewer votes to secure a seat in Parliament with the help of the overall performance of their party. The appointment process of members of electoral bodies favours the party in power; though these bodies are independent, the role of the government in the process ensures the appointment of pro-government individuals. Even the appointment process of judges to the Court of Disputed Returns has an inclination towards pro-government individuals. Though there is no concrete evidence to establish that judges of the Court of Disputed Returns and members of electoral bodies are pro-government, it was said by Lord Hewart, former Lord Chief Justice of England 1922–1940, in the case of *R v Sussex Justices, ex parte McCarthy*,<sup>98</sup> that ‘justice should not only be done, but should manifestly and undoubtedly be seen to be done’. The appointment process must be done, and be seen to be done, justly. Apart from the appointment process, there has been no judicial review of these provisions, and so they have not passed the test of validity and fairness. The *Constitution 2013* has very few judicial precedents because each regime change has resulted in a new Constitution. Consequently, the country has had four constitutions since independence.

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<sup>93</sup> Reeves Report (n 13) 430, para 13.19. See also Brij V Lal, ‘Towards a United Future: Report of the Fiji Constitution Review Commission’ (1997) 32(1) *Journal of Pacific History* 71.

<sup>94</sup> For a critique of contractual judicial appointments, see Marc de Werd, ‘Appendix III: Overall Assessment of the Draft Law Introducing the Visiting Judge Concept in Slovakia through the Perspectives of Relevant Experience in the Netherlands’ (Council of Europe, nd) <<https://rm.coe.int/appendix-iii-the-visiting-judge-concept-in-slovakia-through-the-perspe/1680966e48>>.

<sup>95</sup> J van Zyl Smit, Bingham Centre for the Rule of Law, *The Appointment, Tenure and Removal of Judges under Commonwealth Principles: A Compendium and Analysis of Best Practice* (Report, 2015) 63.

<sup>96</sup> Ibid 58.

<sup>97</sup> Ibid 184.

<sup>98</sup> [1924] KB 256; [1923] EWHC KB 1.