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Towards a united future¹

Report of the Fiji Constitution
Review Commission

All the great things can be expressed in single words: freedom,
justice, honour, duty, mercy, hope.

— Winston Churchill²

In 1996, the Fiji Constitution Review Commission handed down its report on its review of the postcoup 1990 Constitution with recommendations for the basis of a new Constitution that met the needs of Fiji as a multiethnic society. The Commission recommended a gradual but decisive shift towards a nonracial political culture. Many of the Commission's recommendations were incorporated into the 1997 Constitution, except those relating to the election to and composition of parliament. The 1997 Constitution was overthrown by the Fijian military in 2009. What Fiji's future might have been like if that constitution had a different fate will never be known. 'What might have been' must remain some of the saddest words in the English language. This chapter provides a summary of the work of the Commission and its thinking behind its recommendations. I was one of the commissioners on the three-person Fiji Constitution Review Commission. In the larger perspective of history, the

1 Originally appeared in *The Journal of Pacific History* 32 (1997): 71–84.

2 Winston Churchill, cited in Robert Rogers, 'Second thoughts', *Who Goes Home: A Parliamentary Miscellany* (London: Robson Press, 2012), n.p.

work of the Commission will be seen as a signal achievement of compromise and consensus in the most difficult of circumstances, and whose vision for Fiji was fundamentally progressive and far-sighted.

On 6 September 1996, the Fiji Constitution Review Commission submitted its report on the review of Fiji's 1990 Constitution to the country's president, Ratu Sir Kamisese Mara. Four days later, the report, nearly 800 pages long and containing some 694 recommendations, was laid on the table of Fiji's Parliament.³ This chapter, which is in the nature of an executive summary of the Constitutional Review Report, attempts to present the thinking as well as the reasoning behind the Commission's recommendations, which sought to point Fiji in a new direction. As a coauthor of the report, I have borrowed freely and extensively from the text to preserve its flavour and to protect its integrity.

Origins of the Fiji Constitution Review Commission

The 1990 Constitution, decreed into existence by President Ratu Sir Penaia Ganilau five years after the military coups of 1987,⁴ with no popular participation in its formulation or its implementation, was assumed by its authors to be an interim document. Section 161 of the Constitution provided for its review at the end of seven years after the date of its promulgation, that is, before 25 July 1997. After the 1992 elections,⁵ which brought the Soqosoqo ni Vakavulewa ni Taukei (SVT) to power and Major-General Sitiveni Rabuka to the prime minister's chair, the government and the opposition started discussions on the review of the constitution.

A Joint Parliamentary Committee was set up to make recommendations on how the review process should be undertaken. After protracted discussions, the joint committee recommended, and both Houses of

3 Report of the Fiji Constitution Review Commission (Sir Paul Reeves, Tomasi Rayalu Vakatora and Brij V. Lal), *The Fiji Islands: Towards a United Future*, Parliamentary Paper, 34 (1996).

4 There were two coups in 1987. The first one was on 14 May 1987. This was the main coup. There was another one in September, which severed Fiji's links to the UK Monarchy. So, when I talk about the 1987 coups, I lump them together to make the larger point about turbulence, etc. When I discuss the May coup, I mean the first coup.

5 See Brij V. Lal, 'Chiefs and Indians: Elections and politics in contemporary Fiji', *The Contemporary Pacific* 5(2) (1993): 275–301.

Parliament unanimously agreed in September 1993, that a commission of inquiry should be set up to review the constitution. Parliament also unanimously approved the terms of reference for the Commission, but further progress was disrupted when the SVT Government fell in November 1993.⁶

Early in 1994 the SVT returned to power with an increased majority, and resumed discussion on the constitutional review with the opposition parties. The most important unresolved issue was the membership of the Commission. Eventually, it was agreed that the Commission would consist of three persons, one appointed by the government, one by the opposition, and a chairperson to be an independent person from outside. The government nominated Tomasi Rayalu Vakatora, a former senior public servant, a Senator, a government minister and the Speaker of the House. The opposition nominated me, an academic specialist on Fiji history and politics. Both sides agreed on Sir Paul Reeves, former Anglican Archbishop and ex-Governor-General of New Zealand, as chair. The three commissioners received their commissions on 15 March 1995 and the two legal counsel assisting them (Alison Quentin-Baxter and Jon Apted) on 19 May. The Commission commenced its work in early June.

The terms of reference, themselves an historic achievement of consensus and compromise, considering the bitterness and hostility generated by the coups, required the Commission to recommend constitutional arrangements that would meet the present and future needs of the people of Fiji, and promote racial harmony, national unity and economic and social advancement of all communities. Those arrangements had to guarantee full protection and promotion of the rights, interests and concerns of the indigenous Fijian and Rotuman people, have full regard for the rights, interests and concerns of all ethnic groups in Fiji, and take into account internationally recognised principles and standards of individual and group rights. In accomplishing this task, the Commission was expected to have scrutinised the constitution, facilitated the widest possible debate on its terms and, after ascertaining the views of the people, suggest how the provisions of the 1990 Constitution could be improved upon to meet the needs of Fiji as a multiethnic and multicultural society. The terms of reference were wide-ranging, prompting some critics to wonder what they actually meant and whether they could be reconciled

⁶ See Brij V. Lal, 'Rabuka's Republic: The Fiji Snap Elections of 1994', *Pacific Studies* 18(1) (1995): 47–77.

into a workable formula. These thoughts also crossed the Commission's mind, which devoted a great deal of time early on to analysing the text as well as the implications of the terms of reference.

Unlike previous commissions of enquiry, such as the Street Commission of 1975 and others set up in the immediate aftermath of the coups,⁷ the Reeves Commission was required to review the whole constitution, not only the provisions relating to the electoral system and the composition of parliament. The review, then, was to be a fundamental, wide-ranging exercise, covering, besides the two critical areas just mentioned, the functioning of parliament, the relationship between the executive and the legislative branches, institutions of government and the mechanism for improving accountability and transparency in them, the administration of justice, citizenship, ethnic and social justice issues, rights of communities and groups, the operation of local government bodies, public revenue and expenditure, emergency powers, and a Bill of Rights, among others.⁸

To accomplish the task, the Commission took an early decision regarding the *modus operandi* of its work: as far as possible, the process of consultation would be open, transparent and inclusive. To ascertain the view of the people, and thus fulfil one of the requirements of the terms of reference, the Commission decided to hold public hearings throughout the country to receive submissions. That exercise, exhausting and exhaustive, lasted from July to November 1995. More than 800 written and oral submissions were received from individual citizens, community, religious, cultural and various interest groups, and all political parties. The overwhelming majority of the submissions were made in public, and are available to the public;⁹ but some individuals, for various reasons, chose to speak to the Commission in confidence, and these naturally form part of the closed record. The Commission also invited specific individuals, heads of statutory organisations and other prominent individuals in public life to share their experiences and views privately. At the same time, the Commission commissioned papers from local and overseas researchers on a range of topics, to deepen its knowledge of the local social and economic environment and to better understand international

7 The first of these, set up in July 1987, was chaired by former Alliance Government Attorney-General Sir John Falvey, which produced a divided report.

8 Bills of Rights in Fiji have been included in various versions of the constitution. They are not stand-alone Bills.

9 These have been microfilmed by the Pacific Manuscripts Bureau at The Australian National University and are accessible to all researchers.

conventions and constitutional arrangements for power sharing in other jurisdictions. The Commission visited three of them, Malaysia, Mauritius and South Africa, to find out firsthand how they had resolved the problem of political representation in their multiethnic societies. While all these various sources of information were enormously helpful in facilitating an understanding of the task at hand, no one source was privileged over any other.

Fiji's constitutional arrangements

It is neither possible nor desirable to cover all the major areas contained in the Commission's report. For the purposes of this exercise, two sets of issues will be discussed. The first, and perhaps the most critical, concerns the election to and the composition of parliament. That question lay at the centre of the 'web', and was at the forefront of all the submissions. It was the one area of central disagreement between the major political parties and the two major communities. The second relates to the functioning of the institutions of government and issues of social justice and human rights.

From the outset, the Commission believed that unless the systemic nature of Fiji's constitutional problems was clearly understood, there was little hope of devising constitutional arrangements that would not give rise to the same problems in the future. From the evidence before it, the Commission concluded that it was Fiji's constitutional arrangements that had hampered the process of nation building and impeded effective cooperation among the various communities, which otherwise had shown a remarkable capacity for tolerance and respect for each other's cultural and religious traditions while sharing the values and interests they had in common.

Fiji's problems, the Commission concluded, arose from four features of the country's constitutional arrangements. Two were understandable responses to Fiji's multiethnic society—the principle that Fijian interests should be paramount, and the communal system of representation in parliament—and these two reflected the Westminster system of government that Fiji inherited at the time of independence: the role of political parties and the principle that a government must command the support of a majority in parliament. All these underpinned both the 1970 and the 1990 constitutions.

The principle that Fijian interests should always remain paramount had been expressly enunciated by the colonial government since the early years of this century, partly reflecting genuine concern for the position of the indigenous Fijians, partly serving to deflect the Indo-Fijian demand for equal political representation, and partly serving as a tool to guide political change at a pace acceptable to the colonial state. Nonetheless, the principle was widely accepted and became part of the political culture of Fiji. As Fiji moved towards self-government in the 1960s, the principle of political paramountcy became the focus of negotiations among the main political actors in the colony. The Fijian view was that the principle that Fijians' interests should be paramount could only be secured if they had political paramountcy as well. As other communities already dominated the economy, Fijian leaders pointed out, it was only fair that Fijians should dominate in government. For their part, Indo-Fijian leaders agreed to the entrenched legislative protection of Fijian land ownership, culture and separate system of administration, but did not see the paramountcy of Fijian interests as involving an ongoing commitment to secure the reelection of a predominantly Fijian government. If the democratic process provided for in the constitution gave the opportunity, Indo-Fijian leaders saw no reason why they should not join other groups, including some Fijians, in voting in a government in which they could participate. Differing interpretations of the meaning of Fijian paramountcy, then, was one contentious issue.

Another was the system of representation in parliament. From the very beginning, the electoral system in Fiji has been communal, the seats always allocated among the various ethnic communities. This arrangement grew out of the colonial government's view that, in an ethnically divided society, separate representation of different communities was natural and desirable. And the system enabled the government to keep the differences apart as much as possible, thus accentuating its own role as an impartial and indispensable mediator of disputes among the communities. Until 1966, Fiji had only a communal roll, with voters in each community electing members belonging to that community. Later, the communal rolls were complemented with cross-voting rolls, allowing members belonging to each community to be elected by all voters. This system also represented a compromise between the Fijian and European desire for communal representation from the communal roll and the Indo-Fijian commitment to the principle of a nonracial common roll. The compromise spawned more problems than it resolved.

The third feature of Fiji's political arrangement was that all its parties were essentially ethnic. The National Federation Party (NFP), formed in the aftermath of the 1960 strike in the sugar industry, was based in the Indo-Fijian community, able to attract only a motley number of Fijian supporters over the years. The Alliance Party, formed in 1965 at the behest of Governor Sir Derek Jakeway, was a Fijian-dominated party supported by the Fijian Association, the General Electors Association and the Indian Alliance. The Alliance was more multiracial, but at each successive election, the ethnic basis of the two main parties became increasingly clear.

The final feature of Fiji's political arrangements was the Westminster system, where the prime minister is the leader of the party or combination of parties that can command majority support in the Lower House. The Cabinet is drawn exclusively from that coalition or party. Through its direction of the departments and other government agencies, the government of the day has effective control of policy. Because of its majority in parliament, it can secure the passage of its budget and other legislation. If the party in power is defeated in a general election, the control of government passes to the winning party.

1970 and 1990 constitutions

These arrangements were reflected in both the 1970 and the 1990 constitutions. The 1970 Constitution, negotiated by the leaders of the two main political parties, the Alliance and the National Federation, was an 'interim solution'. The method of election had proved a major stumbling block in the negotiations leading to independence. Unable to break the impasse, the leaders agreed to defer the question of the electoral system to an independent commission. Meanwhile, the 1970 Constitution provided for a 52-seat House, of which 22 were to be Fijian, 22 Indian and eight General Voters (that is, those classified neither as Fijians nor Indians). Of the 22 Fijian and Indian members, 12 were to be elected on the communal roll and 10 by cross-voting; three of the General Voters were to be elected from the communal roll and five from the national roll.

At the beginning, hopes were for the development of multiracial politics. In the 1972 elections, both the Alliance and the National Federation Party made genuine attempts, although with limited success, to attract voters from all communities, but as time went on, communal politics gained ascendancy. This was not surprising, but a logical consequence of the

constitutional arrangement in place in Fiji, combining the Westminster system with communal representation. The communal system provided little incentive or opportunity for either voters or candidates to concern themselves with the problems of other communities. Communal sentiments were reinforced. It followed that those elected from the national (cross-voting) seats, representing national constituencies, were not regarded as really legitimate representatives of their own communities. Political parties, predominantly ethnic in character, focused their energy on the community whose interests they were formed to promote. The stress on communalism meant that those parties that were originally committed to multiracialism were inevitably driven back to promoting mainly or only the interests of the community from which, historically, they derived their support.

From this followed the most serious problem of all: the role of ethnic parties in forming government. Because the political parties, responding to the communal system of representation, drew their support mainly from one community, government by one party was seen essentially as ethnic government. The defeat in a general election of the governing party by another party or coalition supported mainly by another ethnic group was seen as the defeat of one community by another. This is precisely what happened in Fiji. In 1987, when the Alliance was defeated by a coalition of the NFP and the Fiji Labour Party (FLP), many Fijians thought that their community had been defeated, and that they were deprived of the political paramountcy, which they saw as essential in safeguarding their interests. Because so much weight was placed on political paramountcy, the Fijians were unwilling to accept the outcome of the election. Fijians saw the defeat of their party as a breach of the Indo-Fijians' tacit acceptance of the principle of Fijian political paramountcy, but the Indo-Fijians saw no inconsistency with their recognition of this principle, as they understood it, with seeking to become government. The result of this mutual incomprehension was the military overthrow of the Coalition Government on 14 May 1987.

Yet the outcome of the 1987 election was entirely consistent with the nature of the 1970 constitutional arrangements. No constitution based on democratic principles can guarantee that a particular party will always remain in office. Nor can it guarantee that the party that wins a majority will always be the one representing a particular ethnic community. The very essence of a democratic system is the ability of elections to change

the government, to maintain their accountability and responsiveness to the people. The process of change, which is both natural and inevitable, has been evident in Fiji.

The 1990 Constitution reflected what Fijians believed to be the remedy for their political predicament. There were significant departures from the 1970 Constitution. The size of the Lower House was increased to 70, and there was no longer parity of representation between Fijians and Indo-Fijians. The 37 seats for the Fijians gave them an overall majority. Indo-Fijians were allocated 27 seats, and Rotumans, previously part of the Fijian electoral roll, were given one seat. The number of General Voter seats was reduced from eight to five, and the roll enlarged to include Pacific Island voters who had been previously on the Fijian roll. The prime minister was required to be a Fijian, and the president an appointee of the Great Council of Chiefs (GCC). All seats were to be filled by voting on communal rolls. There was no provision for cross-voting, so that no single ethnic community could affect the selection of members to represent any community but its own. The Upper House of 34 consisted of 24 nominees of the GCC, one of the Council of Rotuma and nine appointed by the president to represent the other communities. A number of positions were reserved for the indigenous communities, and affirmative action policies required specific attention to their needs.

The 1990 Constitution was a drastic response to what had been seen as a drastic situation. Its underlying assumption was that if Fijians had more than half the seats in the House of Representatives, they would be able to maintain their hold on political power. An indigenous Fijian party winning all the 37 seats would have the necessary majority to form a government. Splinter Fijian parties would submerge their differences and come together in the interests of the larger Fijian cause. And Rotumans and General Voters could be counted upon for their support. That was the hope, but, in reality, there was considerable divergence of interests across occupations and regions in Fijian society, created by the effects of the monetary economy, which no amount of political engineering could hide. Even with the benefit of weighted representation, Fijians could not form government without the support of independent members and members of another party. Nor was the governing coalition able to maintain its own unity in all circumstances, most clearly seen in the defeat of the SVT-led coalition in November 1993.

The lesson was clear. First, the goal of permanent Fijian political unity was unrealistic and efforts to pursue it in the context of a rapidly changing environment had a high cost for Fijians themselves. Second, in the absence of unity, even a constitution as heavily weighted in favour of Fijians as that of 1990 might not prevent a minority of Fijians from joining with an Indo-Fijian party or parties to form a government. And third, trying to keep a predominantly Fijian government in office in perpetuity might not be the best way of securing the paramountcy of Fijian interests. In short, the assumptions and understandings that underpinned the 1990 Constitution proved untenable. Fiji would need to chart a new course to move away from the cul-de-sac of communal politics and ethnic compartmentalisation.

Charting a new course

The Commission was convinced, after listening to submissions, that the people of Fiji wanted all communities to play some part in the Cabinet, and that the voters should be able to cast votes for at least some candidates belonging to communities other than their own. They disagreed on the means of achieving that end and the pace in the direction of multiethnicity, but the broad goal was widely shared. The Commission agreed that progress towards the sharing of power among all communities was the only way to resolve some of Fiji's constitutional problems, the only way to attain racial harmony, national unity and the social and economic advancement of all communities. Constitutional arrangements that promoted the emergence of multiethnic governments should be the primary goal. Such arrangements should protect the rights and interests of all citizens, particularly of the indigenous communities. They should provide incentives to political parties to strive for the goal of multiethnic cooperation, and for the political process to move gradually but decisively away from the communal system of representation. The principle of Fijian paramountcy should be recognised, as in the past, in its protective role, in securing effective Fijian participation in a multiethnic government, along with members of other communities, and in securing the fruits of affirmative programs of social and ethnic justice based on a distribution of resources broadly acceptable to all. Fijian interests should not be subordinate to the interests of other communities. Ultimately, however, the best guarantee of the interests of all ethnic communities was a constitution that gave all political parties a strong inducement not to espouse policies that favoured the interests of one community over

others. Instead, it should encourage them to see the important interests of each community as national interests that have to be met through the concerted efforts of all.

This goal of achieving an inclusive, democratic, open and free multiethnic society is reflected in a number of the Commission's early recommendations. Fiji should be named The Republic of the Fiji Islands, which would give all Fiji citizens, if they wished, the opportunity of calling themselves by the common name of 'Fiji Islanders'. The constitution should accord the Fijian, Hindi and English languages equal status and, wherever possible, provide services to the public in all three languages. The preamble should be broadly acceptable to all its citizens, touching upon the history of Fiji's multiethnic society and its shared beliefs and values. Perhaps most important, the values and principles that should be taken into account when forming governments should be stated in a Compact, an artefact of moral as distinct from legal force. These include respect for the rights of all individuals, communities and groups, including those protecting the traditional ownership of Fijian land and the observation of lease arrangements between landlords and tenants; the right to freely practice religion, language, culture and traditions; the right of the indigenous communities to governance through separate administrative systems; political freedom and full and equal citizenship rights for all; respect for the democratic process; fair and inclusive government and the need to negotiate in good faith to reach agreement, to resolve differences and conflicts of interest; recognition of the principle of the paramountcy of Fijian interests as a protective principle to ensure that the interests of the Fijian community are not subordinated to the interests of other communities; and the need for affirmative action and social justice programs to secure equality of access to opportunities, amenities and services for the Fijian and Rotuman people, as well as other communities and for all disadvantaged groups, to be based on an allocation of resources broadly acceptable to all ethnic communities.

Institutions of government

The values and principles mentioned above were given concrete constitutional form in the Commission's recommendations on the structure of government. They represented significant shifts from both the 1990 and the 1970 constitutions. To begin with, the Commission recommended that the Bose Levu Vakaturaga (BLV) should not only be

recognised in the constitution, as was the case in the 1990 Constitution, but that its composition, powers and functions should be further specified. There was widespread support for this view, reflecting the respect that institution is accorded for its preeminent role in Fijian affairs. Some Fijians wanted to return the BLV to its original status, restricting its membership predominantly to chiefs. The Commission regarded that view as impracticable and inconsistent with contemporary reality. It recommended that the BLV should consist of a mix of members nominated by the three confederacies and those elected by the provinces, besides five *ex-officio* members including the president, the heads of the three confederacies and the Minister of Fijian Affairs. The BLV should continue to be an advisory body, though with the important functions of nominating candidates for the office of president, and exercising veto power over amendments of the entrenched legislation relating to Fijians, Rotumans and the Rabi Island community or any other legislation the attorney-general certifies as affecting Fijian land or customary rights. To exercise its functions impartially, the BLV should be independent not only from government but also from any political party. It should have its own secretariat and relative financial autonomy as well as electing its own chairperson. The Indo-Fijian community also wanted a body similar to the BLV for itself. The Commission recognised the need for such a body but felt that this was a matter for the Indo-Fijian community to take up in the first instance. It could be conferred statutory or constitutional status if it proved its utility as a representative body of Indo-Fijian opinion.

The Commission recommended the retention of the Office of the President, largely with the same powers as the holder of the office of governor-general in the Westminster tradition. This meant that executive power would rest with the Cabinet, and the president would be bound to act on the advice of ministers. The ceremonial role of the presidency would be important, with the holder of the office expected to symbolise the unity of the nation, command the loyalty and respect of all the communities and be seen to be impartial in the discharge of duties. There would be clearly spelt out matters on which the president could act in his or her 'own deliberate judgement', but within the bounds of the conventions of the parliamentary system of government. Most submissions agreed that the president should continue to be an indigenous Fijian, an important symbolic recognition of Fijians as the indigenous people of the land, but they also suggested that this be balanced by the constitutional provision that there should be a vice-president who should be a non-Fijian. The president

(and the vice-president, who would be the president's running mate as in the American system) would be elected without debate by the Electoral College comprising both Houses of Parliament from a list of three to five names submitted to it by the BLV. There would be a President's Council of 10–15 distinguished citizens of all ethnic communities and walks of life to give the president their well-informed, nonpartisan views on issues of national importance, without in any way imposing constraints on the actions of the Cabinet.

The Commission recommended the retention of the bicameral Westminster system, which has been in existence in Fiji for nearly 30 years, but suggested significant changes in both the composition of the two Houses as well as the method of election. Both the Houses should be elected. The Upper House, to be renamed *Bose e Cake*, should be comprised of 35 members, two each from the 14 Fijian provinces, one from Rotuma and six appointed by the president on the advice of the Electoral Commission to represent communities and groups unrepresented in parliament (religious and cultural groups, women, youth). Members of all communities would have a very strong sense of territorial identity through both birth and residence as well as shared or complementary interests. Time and again, the Commission was told by members of all communities belonging to a particular area that 'here, we all get on well together'. In the rural areas, most people were able to speak both Fijian and Hindi; indeed, in several places, some Indo-Fijians indicated to the Commission their desire to make their submissions in the Fijian dialect of the area. For these reasons, the Commission recommended that members representing the provinces in the *Bose e Cake* be elected by voters from all communities resident in the province, thus helping to strengthen the sense of common identification with the province and their economic and, sometimes, social interdependence. Provincial concerns would be articulated from provincial rather than narrow racial perspectives. In terms of its powers and functions, the *Bose e Cake* would be similar to a house of review in the Westminster tradition.

The arrangements for electing members of the House of Representatives attracted the greatest amount of attention nationally and internationally—understandably so—as it would not only be the main legislative organ of the country but also because the party alignment of its members would determine which party would form the government and which party leader would become prime minister. The Commission approached the delicate issue of the election and composition of the House with certain

objectives in mind: they should encourage the emergence of multiethnic governments; comply with international standards of equal suffrage; be based on a more open system of representation, and provide a gradual but decisive means of moving away from the present constitutional arrangements. Applying these criteria made it clear that the Fijian system of communal representation was anachronistic and generally contrary to international practice. A study of the voting systems of 150 of the world's 186 sovereign states by the International Parliamentary Union in 1993 showed that in only 25 states some members were elected or appointed to the legislature to represent particular groups, but in each case, the number of special seats was very small in comparison to the size of the legislature. In Fiji, all the seats were elected on a communal roll.

Many submissions supported the present arrangements, and many Fijians wanted to see them even more heavily weighted in favour of the indigenous communities. Equally, there were many submissions, from individuals and groups of all communities, which wanted at least some seats to be filled by candidates elected by voters on a nonracial basis. Many advocated returning to the cross-voting seats under the 1970 Constitution, but that arrangement was fraught and only marginally successful in bringing about more conciliatory and less communally based politics. The community found it hard to accept that members elected mainly by the votes of other communities really represented the community to which the seat belonged. Consistent with its view that the people of Fiji should make a gradual but decisive break from the present arrangements, the Commission recommended a 70-seat Lower House, to be called the *Bose Lawa*, made up of 45 seats elected from open constituencies (with no constitutional restriction of race for voters or candidates) and 25 from reserved seats allocated as follows: 12 Fijians (including Pacific Islanders), 10 Indo-Fijians, two General Voters and one Rotumans. Communal representation is not in itself inconsistent with international standards, especially if it operates within the framework of individual choice and the principle of equal suffrage, but the Commission saw the reserved seats as a transitional measure to be discarded over the next decade or so. Hence any deviation from the principle of equality could be accommodated within the 'margin of appreciation' that international law allows to states in applying international human rights standards. The allocation of reserved seats was broadly based on population figures, while taking account of historical and other factors that had affected the present and past allocations of communal seats. The point was that the allocation should be seen to be fair and acceptable.

The 25 reserved seats represent approximately 36 per cent of the total number of seats in the Bose Lawa and the open seats 64 per cent; the minimum necessary to allow them to act as a spur to the development of multiethnic politics. As a further incentive to the emergence of multiethnic government, the Commission recommended that 45 open seats should be elected from 15 three-member constituencies. Boundaries of these constituencies were to be drawn in such a way as to ensure that, as far as possible, and while taking into account the traditional criteria such as geographical features, existing administrative and recognised traditional areas, means of communication and mobility of population, the constituencies should be heterogeneous. That is, they should be composed of members of different communities, the object being to force political parties to appeal for votes for their candidates from communities other than the one in which they were based. The chances of a candidate or candidates of a community-based party succeeding would depend on the extent of support from other communities. The level of heterogeneity would naturally vary, given the nature of population distribution in Fiji—some places were predominantly Fijian and some predominantly Indo-Fijian—but the principle of multiethnicity should be borne in mind in designing constituency boundaries. The Commission took as the measure of heterogeneity the inclusion within the constituency of a mixed population ranging from a more or less equal balance between Fijians and Indo-Fijians, to a proportion as high as 85–95 per cent of one community and 10–15 per cent of the other. The average distribution was 60 per cent of one community and 40 per cent of the other. The evidence before the Commission suggested that it was entirely possible to draw boundaries in Fiji in a way that achieved reasonable heterogeneity.

Along with open seats and heterogeneous constituencies, the electoral system could also play an important role in promoting multiethnic cooperation. Students of politics have long realised the crucial role electoral systems play in shaping the behaviour of political parties, the strategies they employ to win elections and the incentives they provide in rewarding one outcome and punishing another. Fiji, like most ex-British colonies, inherited the British voting system at independence. That is the plurality system known as first-past-the-post (FPP) under which the winning candidate is the one who gets the greatest number of votes. A logical system when the choice is between only two candidates, the FPP is widely considered unfair and iniquitous where there are more than two candidates. It also denies voters the possible range of preferences they

may have among them. Because of the disadvantages of plurality systems, various modifications have been proposed over the years to ensure that a winning candidate gets an absolute majority of the votes cast, that is, more than 50 per cent, and several of these were mentioned to the Commission for its consideration.

Acknowledging the critical role the electoral system plays in determining political outcomes, the Commission identified and ranked a number of criteria against which to evaluate the various available options. These, in their order of importance, included the encouragement of multiethnic government; recognition of the role of political parties; incentives for moderation and cooperation across ethnic lines; effective representation of constituents; effective voter participation; effective representation of minority and special interest groups; fairness between political parties; effective government; effective opposition; proven workability; and legitimacy. All electoral systems meet some of these criteria, and some more than others. The Single Transferable Vote (STV), which was recommended by the Street Commission in 1975, for example, mitigates against the winner-take-all outcome of FPP, and achieves a better proportionality of seats to votes than does FPP. But, by requiring an extremely low threshold to get elected—in a three-member constituency, a successful candidate would need no more than 25 per cent to get elected—and by privileging the representation of community interests, it fails to meet the commission's most important electoral criteria—the promotion of multiethnic governments. The List System Proportional Representation allocates seats to parties in proportion to the number of votes cast for the party, and while it has considerable merit, its one weakness is that by treating the whole country or major regions of a country as a single constituency, it fails to provide the important links between the voter and his or her member. It also provokes fears of small parties exercising disproportionate influence in the governance of the country.

In the Commission's view, the Alternative Vote (AV), also known as the Preferential Vote, best met all the criteria it identified as being relevant. The AV is based on the same principle as second ballots, but avoids the need for a second election at a later date. It is in effect a refinement of the FPP system in that it requires voters to rank candidates in order of preference. To be elected, a candidate must have a majority of the votes cast, that is, 50 per cent plus one. If no candidate reaches the threshold when first preferences are counted, then second and third preferences are counted and allocated. The process of elimination continues until one

of the candidates has obtained the required quota. The AV provides an incentive for vote pooling by requiring the winning candidate to obtain more than 50 per cent of the votes. In heterogeneous constituencies, this threshold increases the need for the winning candidate to have multiethnic support. The system allows parties to trade preferences. Again, only moderate parties with conciliatory policies will agree to trade preferences, and be able to persuade their supporters to honour the agreement. The system therefore encourages the emergence of such parties. Constituents are effectively represented, at least in so far as candidates represent territorial constituencies and citizens are given considerable opportunity to affect the outcome of the poll by expressing preferences among individual candidates. As a majoritarian, not a proportional system, AV is likely to encourage the emergence of a strong party or preelection government. The Commission recommended that the AV system be used in multimember constituencies, but there is nothing stopping its use in single-member constituencies. I should add parenthetically that in the 1999 General Elections, the spirit of the AV system, in which like-minded parties would trade preferences and put those whose policies they found repugnant last, was breached by the FLP. With winning at any cost as their main goal, they gave first and second preferences to parties such as the Christian Democrats with whose policies they completely disagreed, thus putting their former coalition partner NFP, now their rival, last. They won a pyrrhic victory in the elections.

As mentioned, the Commission recommended the retention of the Westminster system for Fiji. The people were familiar with its workings and conventions. Nonetheless, its adversarial nature, pitting an 'Indian' opposition against a 'Fijian' government, elicited comment in the submissions. The Commission noted that in Fiji very often an opposition criticism of a government proposal, no matter how valid or rational, was portrayed as an Indian criticism of Fijian performance. People asked the Commission to suggest ways of minimising the harmful effects of this aspect of the Westminster system and to allow the House to use the talents of all its members to good advantage in a collaborative way. Fortunately, Commonwealth countries, including New Zealand, have devised such ways by setting up sector committees that permit all members of the Lower House, except ministers or assistant ministers, and whether belonging to the government or the opposition, to take part in national decision-making. Sector committees are structured in such a way that all departments and other government agencies come within

the supervision of some committee. The Commission recommended that in addition to the existing standing committees (such as the Standing Select Committee on Sugar and the Public Accounts Committee), there should be five standing select committees—each dealing with one of the following sectors: economic services, social services, natural resources, foreign relations and administrative services. These committees would systematically scrutinise all areas of government activity, and consider Bills referred to them by parliament. Their overall membership should reflect the balance of the parties in the House, with the chairperson and the deputy chairperson to come from opposite sides of the House.

All these various ways—from the Compact, through the method of electing parliament from open heterogeneous constituencies using the AV system to the establishment of sector select committees—are designed to achieve an open, representative, inclusive and multiethnic government that protects the interests and addresses the concerns of all communities and groups within the overarching framework of a democratic system. That was the only way all the people of Fiji could aspire to realise for themselves and their children a prosperous and united future.

Issues of governance and accountability

While questions surrounding the election of parliament understandably occupy the centre stage in any constitutional review, there are other areas of considerable importance that impinge on the daily lives of the people that need attention. These include, among others, provisions relating to the acquisition and deprivation of citizenship, fundamental freedoms and rights, the independence and functioning of the judiciary, the enforcement of accountability in the performance of the public sector, and access to state services on a nondiscriminatory basis. Often in these areas, the Commission was required not so much to formulate new proposals as to modernise or revise the existing ones in the light of new international conventions and practices that have been adopted over the last decade or so.

To illustrate, the 1990 Constitution already had a Bill of Rights, called Fundamental Rights and Freedoms, adapted with few changes from the one in the 1970 Constitution. But the independence Bill of Rights was in a form developed by the Foreign and Commonwealth Office and included, with only slight variations, in the constitutions of most former

British colonies. It naturally reflected British caution about including individual rights in a judicially enforceable constitution. Individual rights and freedoms were seen as already enshrined in common law. The emphasis was not on affirming their existence but on protecting them from unjustified interference by the state. The Commission recommended that in keeping with modern trends, the constitution should affirm rights and freedoms in positive terms, that these should be judicially enforceable, binding the legislative, executive and judicial branches of government at all levels, and that they should not conflict with the international human rights standards but rather give effect to them where appropriate. It recommended the creation of a three-member Human Rights Commission to educate the public about the nature and purpose of the Bill of Rights, make recommendations to government about matters affecting compliance with human rights and exercise any other functions conferred to it by Act. The Commission adopted a similar approach to the issue of citizenship. Fiji's existing citizenship laws reflected the thinking of an earlier generation and were in some important respects not only archaic but also in breach of modern conventions. The independence constitution and its 1990 counterpart allowed noncitizen women the automatic right to acquire Fiji citizenship upon marriage to a Fiji male citizen, but did not accord the same privilege to noncitizen husbands. Whatever the reason for that discrimination in the past, it is no longer acceptable. Nor did the earlier constitutions make specific reference to the rights of children. Most women's groups who made submissions were adamant that discrimination against women and children had to go, and the Commission agreed.

In the Westminster system, a vital corollary of the power of politically appointed ministers to direct government policy is the expectation that the administration of that policy will be carried out economically, efficiently and effectively by politically neutral and impartial state services. Although the objectives of economy, efficiency and effectiveness in state services have a long history in Fiji, they have never been expressly required in the constitution. Because these objectives are so fundamental to the functioning of all state services, the Commission felt that they should be reflected in a constitutional provision. A related issue, to be considered alongside the ones mentioned above, was the 'fair treatment' of each community in the number and distribution of entry appointment. The 1970 Constitution directed the Public Service Commission to 'ensure that, so far as possible, each community in Fiji receives fair treatment

in the number and distribution of offices to which candidates of that community are appointed on entry'. The 1990 Constitution obliged the government to ensure each level of each department comprised not less than 50 per cent Fijians and Rotumans, and not less than 40 per cent members of other communities. But this quota has not been observed, nor, to be fair, is it possible to achieve at *every level* within *every department*. Indo-Fijians complained of a significant reduction in their numbers in the state services, particularly at senior levels. They expressed concern at falling Indo-Fijian representation in the police force and their almost total absence from the armed forces. Whatever the reason—occupational preferences, emigration—the Indo-Fijian complaint was well founded. The Commission concluded that while efficiency, economy and effectiveness should be the principal objectives in managing state services, some more appropriate account must be taken of the overall representation of different ethnic groups at all levels in all the various state services.

To that end, the Commission proposed a new general provision in the constitution along the following lines. In recruiting and promoting members of all state services belonging to the executive branch of government, including the public service, the Fiji Police Force and the Republic of Fiji Military Forces, and in the management of those services, the factors to be taken into account include the need to ensure that government policies can be carried out effectively; the need to achieve efficiency and economy in all the state's services; the need to make appointments and promotions on the basis of merit; the need to provide men and women and members of all ethnic groups with adequate opportunities for training and advancement; and the need for the composition of each service, at all levels, broadly to reflect the ethnic composition of the population, taking into account, however, occupational preferences.

Closely related to the provision of state services is the issue of ethnic and social justice. Section 21 of the 1990 Constitution explicitly enjoins the government to introduce affirmative action programs for the Fijian and Rotuman communities that were perceived to be lagging behind other communities in terms of their achievement in some sectors, notably education, commerce and participation in higher levels of the public service. These policies have had an effect. In 1985, Fijians made up 46.4 per cent of established civil servants, Indo-Fijians 48 per cent and General Voters and expatriates 5.6 per cent. The corresponding figures in October 1995 were Fijians 57.3 per cent, Indo-Fijians 38.6 per cent,

and General Voters and expatriates 4.11 per cent. In 1995, of the 31 permanent secretaries, 22 were Fijians, six were Indo-Fijians and three General Voters. Indo-Fijians accepted the principle of affirmative action to redress imbalances in the public sector but wanted them to include disadvantaged members of all communities, not just the indigenous people. Their submission drew attention to the growing poverty among sections of their people, and their growing numbers in squatter settlements fringing towns and cities. The Commission agreed that the government needed to continue implementing policies and programs to reduce inequalities between different ethnic communities, but since there are areas in which other communities are also disadvantaged, social inequalities should not be neglected. It recommended a social justice and affirmative action program for Rotumans and Fijians and other ethnic communities, and for men as well as women, to provide effective equality of access to education and training, land and housing, participation in commerce and all aspects of service of the state at all levels, and other opportunities, amenities and services essential to an adequate standard of living. Furthermore, the program should be authorised by an Act (following parliamentary debate), which specifies the goals of the program and the identity of the persons or groups it is intended to benefit, the means by which those goals would be achieved, performance measures for achieving the efficacy of the program, and the criteria for the selection of the members of the group entitled to participate in the program. In short, to be effective, affirmative action policies should be transparent, properly debated and carefully monitored.

Generally, for state services and institutions to be effective and impartial, they need to be subject to strict rules of accountability. The Commission received many submissions proposing constitutional provisions to prevent official corruption and to achieve higher ethical standards from those holding important offices of state. They were not accusations against ministers or state servants; they were about public confidence in Fiji's system of government and the integrity of its leaders. Existing statutes, regulations and orders contained ethical standards and rules that applied to state servants, members and officers of statutory bodies, but the Commission was convinced of the need to go further. It therefore proposed an 'integrity code' for the president, the vice-president, ministers and all members of parliament, and all constitutional office holders, which would require them not to place themselves in positions in which they have or could have a conflict of interest; compromise the fair

exercise of their public or official functions and duties; use their offices for private gain; allow their integrity to be called into question; endanger or diminish respect for, or confidence in, the integrity of government; demean their office or position. These principles should be enshrined in an Act of Parliament, which would make detailed and specific provisions to deal with the various kinds of conflicts of interest in the context of Fiji's particular circumstances. The Commission also recommended the strengthening of the Office of Ombudsman to investigate allegations of corruption or mismanagement of public office. In an important and innovative recommendation, the Commission recommended the creation of a new Constitutional Offices Commission, which would recommend to the president the appointment of the ombudsman and the auditor-general and directly appoint the solicitor-general, the director of public prosecutions, the secretary-general to parliament, the supervisor of elections and the commissioner of police.

A future constitution, the Commission felt, should be generally acceptable to all citizens; guarantee the rights of individuals and groups and promote the rule of law and the separation of powers; recognise the unique history and character of Fiji; encourage every community to regard the major concerns of other communities as national concerns; recognise the equal rights of all citizens; and protect the vital interests and concerns of the indigenous Fijian and Rotuman communities, and all the other groups, within the inclusive and overarching framework of democracy. The consequences of any other approach are too sad to contemplate.

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