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## Charting a new course

The 1990 constitution, decreed into existence by President Ratu Sir Penaia Ganilau five years after the military coups of 1987, was assumed by its architects to be a temporary solution to a troubled situation. Section 161 provided for its review within seven years, that is, before 25 July 1997. The constitution was undeniably a contested document provoking deep emotions and often diametrically opposed responses. The Indo-Fijian community rejected it, and made its repeal, or at least an impartial review, the central plank in their election campaigns in 1992 and 1994. Equally, on the Fijian side, there was fervent support for a document that was widely believed to entrench Fijian political dominance. Nonetheless, after the 1992 elections, which brought the SVT to power, the government initiated private discussions with the opposition on the nature and process of a constitutional review. Sitiveni Rabuka acknowledged the deep differences of opinion, but emphasised that ‘these should not deteriorate into confrontational and tension-filled relations, if our political leaders exercise and develop relationships based on trust, understanding and respect for the laws of our country’ (*Fiji Focus*, June 1992).

To start the review process, Rabuka appointed a cabinet subcommittee that was expanded to include opposition members after a discussion with Jai Ram Reddy and Mahendra Chaudhry on 9 June 1993. The three agreed that the review would be completed in time for the 1997 general election to be held under a revised constitution. Further, they agreed that the review would not be confined to the electoral provisions of the 1990 constitution but would be of a broad nature, covering the entire

document and including ‘a consideration of the system of government considered most appropriate for Fiji’. They agreed that the new constitution should be ‘autochthonous’, developed by the people within the country, unlike the 1970 constitution that was negotiated in London. They agreed further to think about some ‘pillar principles’ that ‘would serve as the foundation for the promotion and reinforcement of national unity in Fiji’ (Parliament of Fiji, *Hansard*, 14 September 1993).

The subcommittee appointed a multiparty Joint Parliamentary Select Committee (JPSC), made up of 11 government and nine opposition nominees, to facilitate the review. The JPSC would recommend to cabinet the size and composition of the review commission, assist the commission in its work and undertake initiatives to develop consensus about the new constitution. This was a significant achievement. After protracted private negotiations, the subcommittee recommended, and in September 1993 both houses of parliament unanimously agreed to set up a review commission. Parliament also unanimously approved its terms of reference, but progress was disrupted when the SVT government fell in November 1993. Early in 1994 the SVT, having returned to power with an increased majority, resumed discussion with the opposition parties.

The most important unresolved issues were the size and, more importantly, the membership, of the commission. In November, the cabinet agreed on an eight-member commission, chaired by a person from overseas who possessed ‘vast experience in [a] multiracial, multicultural environment’—preferably someone from Malaysia—three Fijians, two Indo-Fijians, one Rotuman and one general voter, and assisted by two legal counsel, one from overseas and one local (*Fiji Focus*, June 1994). Subsequently, for reasons still unknown, the SVT suggested an 11-member commission, made up of a Chairman (Fijian), Deputy Chairman (Indian), two SVT nominees, one general voter, one NFP member, one Fijian Association member, one All Nationals Congress, one Rotuman and one state services representative. The government insisted that the commission consist of local people who represented major political parties or groups in parliament and who were familiar with local language and customs. ‘Any foreign participation would be confined to the role of expert consultants and advisers only’, because ‘the exercise would only be meaningful if it was undertaken by people whose lives would be affected

by changes that would be implemented and who had the relevant language and cultural understanding of the different sections of the Fiji's multiethnic and multireligious society' (Press statement).

It also proposed that the members of the commission be appointed by the major political parties represented in parliament, and not by other interest groups, such as, the Great Council of Chiefs, or the president, or the churches, because 'this would better facilitate communication with the Joint Parliamentary Select Committee and the public of Fiji as well as provide an impetus to the bipartisan consensus building process that was vital to this exercise'. The government envisaged the process having two stages. First, the commission would compile an interim report and submit it to parliament for consideration. Parliament's comments would then be incorporated by the commission in the final report. The exercise was expected to take about two years. Things turned out differently. The government's proposal for an eleven-member commission was soon realised to be too unwieldy and expensive. In the end, the JPSC decided on three members to undertake the review.

Similarly, the government's insistence that the chairperson should be an indigenous Fijian was rejected by the opposition, even though the person the government had in mind was the Chief Justice, Sir Timoci Tuivaga, who was willing to serve, if asked. The opposition wanted an independent outsider, and threatened to boycott parliament if the government refused to reconsider its position. Without some international participation, they said, the process would lack legitimacy and credibility.

A number of prominent individuals were identified, including Telford George, a former Chief Justice of Tanzania and Bermuda and member of the commission which had reviewed the constitution of Trinidad in 1974; Sir Robin Cooke, of the Supreme Court of New Zealand; Sir Graham Speight, a retired New Zealand judge and former President of the Fiji Court of Appeal; Eddie Durie, Chief Judge of the Maori Land Court; Sir Ian Thompson, former Fiji colonial civil servant living in retirement in Scotland; and Sir Paul Reeves, former New Zealand Governor General and Archbishop (*Daily Post*, 6 February 1996). Further negotiation between the government and the opposition narrowed the list to Thompson and Reeves, who were interviewed by Filipe Bole, chairman of the JPSC. Reeves was offered the chair.

As someone from the Pacific islands, with known sympathy for the Maori cause, and with his background in the church and experience of high public office, Reeves was acceptable to a wide cross-section of the Fiji community. As its representative on the commission, the government nominated Tomasi Rayalu Vakatora, a former senior public servant, senator, minister and Speaker of the House of Representatives; and the opposition nominated me, an academic specialist on Fiji history and politics. The commissioners received their warrant from the president on 15 March 1995. The two legal counsel, Alison Quentin-Baxter and Jon Apted, received theirs on 19 May. Quentin-Baxter was a retired Executive Director of the New Zealand Law Reform Commission with constitutional experience in the Marshall Islands and Niue. She was a great asset, with her tireless energy, her meticulous preparation and impeccable professionalism. Apted was resourceful and intelligent, with a sound understanding of the local scene. The commission secretary was another local lawyer, Walter Rigamoto, a Rotuman. The commission began its work in early June.

The terms of reference—a historic achievement of consensus and compromise, considering the bitterness generated by the coups—required the commission to recommend constitutional arrangements to meet the present and future needs of the people of Fiji, and promote racial harmony, national unity and the 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, and take into account internationally recognised principles and standards of individual and group rights. The commission was expected to scrutinise the constitution, facilitate the widest possible debate on the terms of the constitution, and, after ascertaining the views of the people, suggest how the 1990 constitution could be improved to meet the needs of Fiji as a multiethnic and multicultural society. The terms of reference were wide-ranging, prompting some cynics to wonder what they actually meant and whether they could be reconciled into a workable formula. These thoughts also crossed the minds of those in the commission, who devoted a great deal of time to analysing the meaning of the terms of reference.

Unlike previous commissions of enquiry, such as the Street Commission of 1975, and others set up after the coups, the Reeves Commission (as it came to be known) was required to review the whole constitution, not only 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, 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.

The commission adopted a carefully designed plan of action. The first stage would involve receiving submissions from the people of Fiji. Consultation would be open, transparent, thorough and inclusive. To ascertain the view of the people, and thus fulfill one of the requirements of the terms of reference, the commission decided to hold public hearings throughout the country to receive submissions. The opposition was not keen on a prolonged and public enquiry. Jai Ram Reddy had told parliament that ‘this widest possible consultation is unnecessary’ (Parliament of Fiji, *Hansard*, 22 September 1993). Mahendra Chaudhry agreed, adding that ‘this was a concession that we made’. They perhaps feared that a public enquiry would revive old hostilities, politicise the review and derail the whole process.

Perhaps Reddy and Chaudhry were reminded of Rabuka’s abortive ‘government of national unity’ proposal. A public enquiry would reveal nothing new: what the different communities wanted, or did not want, was already too well known to warrant detailed investigation—the commission could revisit the arguments by reading submissions given to previous enquiries. The commission did not share this view. It was determined to make its own independent assessment, although it had access to papers produced for earlier enquiries. It also knew that its report would lack credibility without public input. The people of Fiji should be bound into the review process, and not excluded from it—it was, after all, their constitution that was being reviewed.

The commission expected to hear discordant, even disquieting, voices from time to time; there would be public posturing and grandstanding; and some people might use the commission to promote their own causes. Some of our fears were realised, as both Mr Vakatora and I were vilified by people seeking free publicity for their personal and political causes. But that was the price of living in an open, democratic society. As it turned out, the consultation was exhaustive, and exhausting. From July to November, commission members travelled the country by car, boat and air, receiving over 800 oral and written submissions from individual citizens, community, religious, cultural and other interest groups, and all the major parties. A number of organisations were set up with the express purpose of making submissions. One, the Citizens Constitutional Forum, continues to do valuable work in educating the public about the constitution. Most of the submissions were made in open forum, and are available to the public; but some individuals spoke in confidence, and their presentations naturally form part of the closed record.

Supplementing these data were commissioned research papers on a range of issues. One set of papers dealt with local issues such as the performance of the economy, education, the relationship between state and religion, land tenure, the structure and functioning of Fijian institutions, gender relations, minority concerns and the like. The aim was to enrich commission members' knowledge of the local context in which the 1990 constitution functioned, and to deepen their understanding of some issues raised in the submissions. Another set, written by eminent scholars from around the world, focused on systems of power sharing in ethnically divided societies, alternative electoral systems, indigenous and human rights in international law, protection of fundamental rights, and so on. Both sets have been published (Lal and Vakatora 1997).

Early in the commission's deliberations, the need to view Fiji's constitutional experience in comparative perspective became clear. Malaysia, Mauritius and South Africa seemed to offer experiences and perspectives of particular relevance. Malaysia, which had grown close to Fiji since the coups—some of its legislation, for instance, regarding internal security, was adopted in Fiji—had experienced racial tensions, culminating in riots in 1969, but later emerged as an economic superpower

in Southeast Asia. Its pro-indigenous (*bhumiputra*) policies, legislative protection of indigenous interests and their integration into the country's political system, the special place of Malay culture and the overarching role of Islam, the relationship between religion and state, all resonated with issues raised in submissions to the commission.

Mauritius, like Fiji, was a multiethnic island state, lagging behind Fiji in nearly all sectors of the economy when it became independent in 1968, just two years before Fiji. Three decades later it was ahead of Fiji in all sectors of the economy. The commission wanted to fathom the reason for this transformation and see for itself if there was any correlation between the constitutional system and economic performance. South Africa was an obvious choice, in the mid 1990s undergoing perhaps the most massive effort in constitutional engineering in modern times, steering a deeply divided and racially polarised society from its brutal apartheid system towards a non-racial, multiparty democracy. The commission wanted to understand the nature of the problems that arose out of the transition, particularly the use of the mechanism of a government of national unity to effect the change.

This comparative exercise was immensely educative, reinforcing the fundamental point that each country had devised unique constitutional arrangements to suit their particular social and political needs. But there were certain common threads. Everywhere, there was recognition of the need to share power among the various ethnic groups. Everywhere, there was explicit recognition of ethnicity. And everywhere, there was a strong commitment to an overarching sense of national unity, its importance underlined by a history of ethnic conflict and tension.

The commission's work received wide publicity in the media, particularly on the (recently introduced) television where it was a regular feature of the evening news bulletin for weeks. Predictably, submissions varied in tone and content, addressing some concerns and issues that were tangential to the commission's central project. The following sums up the thrust of what was presented to the commission. There was widespread recognition, among both indigenous Fijians and Indo-Fijians, that Fiji's political and social structures, instead of bringing people together, had kept them apart for more than a hundred years, so that people continued to live, think and work in racial compartments. Members

of both groups noted that, in rural communities, Fijians and Indo-Fijians lived happily together, extending a helping hand to one another. Many Indo-Fijian individuals and groups expressed their commitment to working with Fijians towards restoring full democracy and establishing a genuinely harmonious non-racial and multicultural society, assuming, of course, that this was what Fijians themselves wanted. Racial cooperation was better than confrontation. Some adverted to the worldwide need to take account of the rights of indigenous peoples. Fijians, too, stressed that while indigenous interests were paramount, this should not affect the interests and traditions of other communities. No one should feel threatened in what was their own country. A multiracial society was one in which different communities respected one another, interacted, learnt each other's culture and languages and lived together in trust.

Some thought that a lasting solution would depend on foregoing racial politics and building mutual trust, while others argued strongly that Fiji must abandon the habit, introduced by the colonial government, of thinking, making decisions, legislating and carrying out other activities on a racial basis. The constitution should make people focus first on belonging to the country and only after that on belonging to a particular group. But that trust, some argued, should be built only on the confidence of the different ethnic group: their own identity should be built in relation to that of the other groups. While the Indo-Fijian population was increasing rapidly, there was genuine fear among the indigenous people that they would be swamped and Fiji taken out of their control. However, Fiji's biggest asset was that, despite each group's fears and mistrust, the ordinary people were basically decent and considerate, which had enabled Fiji to avoid violence so far.

Many Indo-Fijians expressed their commitment to social and economic advancement for all the people of Fiji. They urged that a new constitution should enable Fiji to solve its serious social and economic problems such as access to land, unemployment, poverty and homelessness, in a spirit of cooperation, trust, tolerance, sound planning, team work and the innovative and creative use of resources. The country's enormous potential could not be realised until its citizens were united in their diversity, and discussed such concerns as those of the Fijians about not being in the main economic

stream and of Indo-Fijians about mushrooming squatter colonies on the fringes of the urban centres. The Indo-Fijian business community could take the initiative in training young Fijians in business and as apprentices. It was necessary to move away from the stereotype that all Indo-Fijians were educated and prosperous. Nor was it true that Indo-Fijians controlled the economy. The banking sector was not in their hands, nor was the gold mine. It was also wrong to suggest that Fijians had no significant role in the economy. They were not well-represented in the visible aspects of commercial life like shop-keeping, transport and tourism, but they owned one of the country's most productive assets—land.

Many submissions pointed out that in many rural areas, members of the two communities spoke each other's language. Even so, a number of Indo-Fijians acknowledged that they could have done more to learn Fijian culture, tradition and language. Some Indo-Fijian schools already had a large number of Fijian students, and were promoting the teaching of Fijian to all students, but it was not an examinable subject for non-Fijians. Multiethnic schools encouraged communication and trust among the children. Although some schools were still categorised as 'Fijian' or 'Indian', almost 58 per cent of the 672 primary schools and almost 91 per cent of the 142 secondary schools were multiracial. However, stereotypes still took the place of knowledge. The state had to be a major player in promoting an understanding among the different communities of one another's language and culture.

The subject of a common name was raised in many submissions, which, it was said, was necessary to promote national identity. Among Indo-Fijians and a few Fijians, there was support for the name 'Fijian', but some thought that would be appropriate only if everyone spoke the Fijian language. Some Fijians took the view that 'Fijian' should be reserved for those registered in the *Vola Ni Kawa Bula*. Alternative common names were 'Fiji Citizens', or 'Fiji Islanders'. The suggestion that indigenous Fijians should be known as '*Taukei*' was deplored by some on the assumption that only members of other groups would be called Fijians, thus defeating the purpose, but welcomed by others on the ground that it would free up 'Fijian' for use by all.

The relationship between church and state was hotly debated. A number of Fijians, including the Methodist Church and many of its

members, wanted Fiji to be declared a Christian state. Most saw no need to give reasons, but those that did suggested that the principles of the Christian faith would be enriched and protected by the government; Christianity would spread among non-Christians, and the introduction of new cults under the guise of religion would be stopped. With one or two exceptions, Fijians did not see the declaration of Fiji as a Christian state as affecting the freedom of non-Christians to practice their own religions. Many Fijians and predominantly Fijian religious groups expressed support for the Sunday ban. They thought that Sunday should be a day of rest, except for travelling and the provision of essential amenities.

Others, however, thought that the constitution should ensure that Fiji remain a secular state. Some saw an element of compulsion in declaring Fiji a Christian state as inconsistent with true Christianity. Privileging one religion over others would not be conducive to an atmosphere of trust and understanding. Religion should not be used by political leaders to further their own ends. The Sunday ban was opposed on grounds of principle, such as the conflict with freedom of worship and religious belief, and elements of inconsistency and hypocrisy. It also had socioeconomic consequences. Taken with a large number of holidays, the Sunday ban had caused a drop in production. The point was made that the ban was imposed by parliament, not by the constitution. It was therefore deemed to be a matter for parliament to resolve.

Citizenship was another issue that featured prominently in the submissions. The majority of those who addressed it, both Fijian and Indo-Fijian, opposed the idea of permitting dual citizenship. Belonging to a place required commitment. The Fijian view was that 'citizen' denoted someone who was entitled to land, a right which a person should not have in more than one place. Some, with backgrounds from all communities, however, favoured permitting dual citizenship, arguing that it would encourage skilled citizens who had chosen, or felt they had been forced, to live and work abroad to return to Fiji. Others thought that those registered in the *Voka ni Kava Bula* should be allowed to retain Fiji citizenship even if they became citizens of another country.

Many, particularly women, considered that the citizenship rights of men and women should be the same. The foreign husband of a woman who was a Fiji citizen should have the same right of entry to Fiji and

access to citizenship as the foreign wife of a male citizen, whether the right be citizenship by registration, or only permanent residence. They also thought that the child of a female citizen born abroad should have the same right to Fiji citizenship as the child of a male citizen. Such distinctions were seen to infringe international conventions. The policy reasons for treating men and women equally in matters of citizenship included the need to facilitate the return of women students who married overseas and the humanitarian need to allow a woman to choose whether to live in her own country or that of her husband.

There was strong support, among men as well as women, to enshrine gender equality in the constitution, and representatives of women's groups urged that laws and practices that discriminated against women be changed. These included rape laws, inadequate maternity leave and the absence of paternity leave, the absence of family support benefits, particularly for women, and the absence of laws against people trafficking. Many women expressed anxiety about the growing violence against women and children, particularly domestic violence, child abuse, rape and other crimes. These problems stemmed partly from the fact that women's aspirations clashed with men's cultural and traditional values. There would be less violence if women were recognised as having a real part in decision-making.

Evidence was produced to show inadequate participation of women in politics. The barriers were tradition, family commitments and an underestimation of women's capabilities, as well as men's intimidation and desire for power. Others stressed the need to recognise the equality of women at all stages of education, and to discourage gender stereotyping. Indo-Fijian girls were doubly discriminated against in the award of scholarships. Women and men should have equal remuneration and treatment, particularly in terms of promotion to senior positions in both public and private sectors.

Many submissions raised the question of land, which was sometimes seen as a more important concern than the constitution. Many Fijians wanted to be sure that their ownership would not be disturbed. Most Indo-Fijians agreed. A number of Fijians thought that some or all state-owned land should be returned to Fijians. Freehold land, alienated before Cession, should also be returned to its rightful owners. Some submissions

insisted that the renewal of leases to Indo-Fijians should be conditional upon their accepting the principle of Fijian political paramountcy. As one submitter told the commission, ‘the question of Fijian leadership in this country is an important equation in the debate [and] it would be naive to ignore that point’. To ‘ignore the relation between tenancy and political power would be to misunderstand the post 1987 Fiji’.

Others disagreed. For Indo-Fijians, the main issue was not ownership but constitutional guarantee of security of tenure. They wanted the constitution to place some obligation on the government to provide land for those in all communities who became landless. For many tenants, a 30-year lease, as provided under ALTA, was insufficient to encourage good husbandry and land improvement. They wanted longer leases. Alternatively, if the land-owning *mataqali* wanted the land returned, the displaced tenant should be compensated to enable him to start again elsewhere. There was deep concern that many leases were on the verge of expiring and many were not likely to be renewed. They urged constitutional machinery to resolve the problem.

On the nature and character of representation in parliament, opinions divided sharply. Many indigenous Fijians saw themselves as having an inviolable, God-given right to govern Fiji for all time, since it was their leaders who had ceded Fiji to Great Britain in 1874. They argued that at independence Fiji should have been returned to the Fijian people and their chiefs. The newcomers, the *vulagi*, were entitled to remain in the country where they were born, to work and prosper, but they had no right to aspire to political leadership. Some Fijians saw the ownership of the land as giving them the right to control the state. As Sevoki Matanainiu, of the Taukei Movement, said, Fijians should have 86 per cent of the seats in parliament because they owned 86 per cent of the land (*Daily Post*, 3 April 1997). Unless Fijian paramountcy, understood as political control, was accepted by the other communities, some Fijians suggested, Fiji would be fated to go through another, possibly worse, crisis. They saw the 1990 constitution as near-perfect. It had been blessed by the Bose Levu Vakaturaga. Through the preponderant number of Fijians in parliament, it assured their political leadership, thus protecting their traditional way of life. For these reasons, many considered that the 1990 constitution should remain unchanged. It was suggested that other races’ claim to equality of

treatment was itself an abuse of the democratic right that those races had been accorded. The other races, with their superior commercial skills, should help the Fijians, not try to jump ahead of them.

Indo-Fijians saw the 1990 constitution as having been imposed on them. They regarded it as discriminatory in not allocating seats to communities on the basis of their population ratio. Consequently they saw themselves relegated to permanent opposition, to third-rate citizenship, to use their words: a state of affairs which did not reflect their earnest desire to coexist with all races and make a full contribution to the country and its government. They saw the 1990 constitution as dividing the people along racial lines, so that people focused on the advancement of their own community rather than that of the nation. Because the government was required to be an indigenous Fijian institution, it was perceived as having lost the ability to mediate fairly between the communities. Indeed, some regarded the constitution as a mandate for widespread arbitrary discrimination against them. They wanted the new constitution to heal the wounds—to include express recognition that there was a permanent place for them in the country of their birth.

The submissions were deeply moving in the transparency of thoughts and emotions they expressed. For the commission, listening to submissions was profoundly educative and humbling. The country listened again to a range of often diametrically opposed viewpoints. The commission had fulfilled an important role in restarting national conversation. And it had acquainted itself with a range of viewpoints across the entire spectrum. Armed with this evidence, it began to ponder its recommendations.

It is neither possible nor desirable to cover all areas in the commission's report. Here, two sets of issues will be discussed. The first, and perhaps the most critical, concerns the election to, and composition of, parliament. That question lay at the centre of the 'web'—Mr Vakatora's phrase—and was at the forefront of all the submissions, as the way power is acquired and used lies at the heart of politics. It was the one area of central disagreement between the major parties and 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 problem were clearly understood, there

was little hope of devising arrangements that would not give rise to the same problems in the future. From the evidence, the commission concluded that it was Fiji's constitutional arrangements that hampered the process of nation-building and impeded effective cooperation among the communities, which otherwise had shown remarkable tolerance and respect for each other's traditions. Fiji's constitutional 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; and two reflected the Westminster system of government that Fiji inherited at independence: the role of political parties and the principle that a government must command the support of a majority in parliament. These four issues underpinned the 1970 as well as the 1990 constitution.

The principle that Fijian interests should always remain paramount was expressly enunciated by the colonial government from the early years of this century, partly reflecting genuine concern for the position of indigenous Fijians, partly serving to deflect the Indo-Fijian demand for equal political representation, and partly serving to guide political change at a pace acceptable to the colonial state. Nonetheless the principle became an accepted 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.

The Fijian view on the eve of independence was that their interests would be secure only if Fijians had political paramountcy as well. As other communities dominated the economy, Fijian leaders pointed out, it was only fair that Fijians should dominate in government. 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 the perpetual re-election of a predominantly Fijian government. If the democratic process gave them the opportunity, Indo-Fijian leaders saw no reason why they should not vote in a government in which they could participate. Differing interpretation 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 had been communal. This

arrangement grew out of the colonial government's view that separate representation of different communities was natural and desirable. And the system enabled the government to keep the communities apart as much as possible, accentuating its own role as an impartial and indispensable mediator. Until 1966, Fiji had only communal rolls, with voters in each community electing members from that community. Later, the communal rolls were complemented by cross-voting rolls, allowing members belonging to the three main communities to be elected by all voters. This system also represented a compromise between the Fijian and European desire for communal representation and the Indo-Fijian commitment to a non-racial common roll. The compromise spawned more problems than it resolved.

The third feature of Fiji's political arrangement was that all parties were essentially ethnic. The National Federation Party, formed in the aftermath of the strike in the sugar industry in 1960, was based in the Indo-Fijian community, attracting only a handful of Fijian supporters despite its non-racial political platform. The Alliance Party, formed in 1966 at the behest of Governor Sir Derek Jakeway, was a Fijian-dominated party supported by the General Electors Association and the Indian Alliance. The Alliance was more multiracial, but at each election the predominant ethnic basis of the two main parties was clear.

The final feature of Fiji's political arrangement was the Westminster system, where the prime minister is the leader of the party or combination of parties that commands 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. If the party in power is defeated in a general election, control of government passes to the winning party.

These arrangements were reflected in both the 1970 and the 1990 constitutions. At the beginning, there were hopes for the development of multiracial politics. In the 1972 elections, both the Alliance and the National Federation Party made genuine attempts, with limited success, to attract voters from all communities; but communal politics gained the ascendancy. This was a logical consequence of the constitutional arrangement, combining the Westminster system with communal representation. The communal system provided little incentive or

opportunity for voters or candidates to concern themselves with the problems of other communities. It followed that those elected from the national (cross-voting) seats were not regarded as really legitimate representatives. Third, political parties focused their energy on the community whose interests they were formed to promote. Those parties that were originally committed to multiracialism were inevitably driven back to promoting the interests of the community from which historically they derived their support.

Because the parties 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 thus came to be seen as the defeat of one community by another. In 1987, when the Alliance was defeated by the NFP-FLP coalition, many Fijians thought that their community was defeated and their sacred institutions imperilled. Because so much weight was placed on political paramountcy, Fijians were unwilling to accept the outcome of the election, and saw the defeat of their party as a breach of the Indo-Fijians' tacit acceptance of that principle. By contrast Indo-Fijians saw no inconsistency in their recognition of the principle of Fijian paramountcy, as they understood it, and seeking to become government. The result was the military overthrow of the coalition government.

Yet the outcome of the 1987 election was entirely consistent with the nature of the 1970 constitutional arrangements. No democratic constitution could guarantee government to a particular party. Nor could it possibly guarantee that the majority party would always represent a particular ethnic community. The essence of a democratic system is the ability of elections to change the government, to maintain their accountability and responsiveness to the people.

The 1990 constitution embodied what Fijians believed to be the remedy for their predicament. That constitution was a drastic response to a drastic situation. Its underlying assumption was if Fijians had more than half the seats, they could govern in perpetuity. An indigenous Fijian party winning all 37 seats could form a government where splinter Fijian parties would submerge their differences and come together in the interests of the larger Fijian cause. And Rotumans and general electors could be counted on for support. That was the hope, but in fact there

was considerable divergence of interests across occupations and regions, created by the effects of the money economy, which no amount of political engineering could hide. Even with 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 unity in all circumstances, 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 had a high cost for Fijians themselves. Second, in the absence of unity, even a constitution as heavily weighted as the 1990 constitution could not prevent a minority of Fijians from joining with an Indo-Fijian party or parties to form a government. Third, trying to keep a predominantly Fijian government in office in perpetuity was not the best way to secure the paramountcy of Fijian interests. In short, the assumptions that underpinned the 1990 constitution had proved untenable, indeed counterproductive. Fiji would need a new course to move away from the *cul-de-sac* of communal politics.

The commission was convinced after listening to submissions that the people wanted all communities to play some part in the cabinet, and that voters should be able to cast votes for at least some candidates from communities other than their own. They disagreed on the means of achieving that end and the pace that should be adopted in the direction of multiethnicity, but it was agreed that this broad goal was widely shared. The commission agreed that progress towards the genuine sharing of power 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 promote multiethnic government should be the primary goal.

Such arrangements, moreover, should protect the rights and interests of all citizens, particularly of the indigenous communities. And they should provide incentives to parties to strive for multiethnic cooperation, and for the political process to move gradually but decisively away from communal 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, 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 those of other communities. Ultimately, however, the best guarantee of the interests of all communities was a constitution that gave all parties a strong inducement to view the important interests of each community as national interests.

This goal of 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 'Fiji Islanders'. The constitution should accord Fijian, Hindi and English equal status and, wherever possible, offer services to the public in all three languages. The preamble should be broadly acceptable to all citizens, touching on the history of Fiji's multiethnic society and its shared beliefs and values. Perhaps most important, the values and principles which should be taken into account when forming governments should be stated in a compact, an artefact of moral, as distinct from legal, force.

These included 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 interests; 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 those 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.

These principles were given concrete constitutional form in the commission's recommendations on the structure of government. They

represented significant shifts from the 1990 and 1970 constitutions. To begin with, the commission recommended that the Bose Levu Vakaturaga should not only be recognised in the constitution (as in 1990), but that its composition, powers and functions should be further specified. There was widespread support for this view, reflecting the respect that institution was accorded. Some Fijians wanted to return the Bose Levu Vakaturaga to its original status, restricting membership predominantly to chiefs and according a privileged role to the descendants of those who had ceded Fiji to the United Kingdom.

The commission regarded that view as impracticable and anachronistic. It recommended instead that the Bose Levu Vakaturaga 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 for Fijian affairs. The Bose Levu Vakaturaga 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 that the attorney general certified as affecting Fijian land or customary rights. To exercise its functions impartially, the Bose Levu Vakaturaga 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 wanted a body similar to the Bose Levu Vakaturaga 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, with much the same powers as the governor general in the Westminster tradition. 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 continue to be important, with the incumbent expected to symbolise the unity of the nation, command the loyalty and respect of all the communities and be impartial in the

discharge of duties. It would be clearly spelt out on which matters the president could act in his or her 'own deliberate judgment', but these instances would be 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 recognition of Fijians as the indigenous people of the land, but they suggested that this be balanced by the provision that there should be a non-Fijian vice president. The president (and the vice president, who would be the president's running mate as in the United States) would be elected without debate by the Electoral College, comprising both houses of parliament, from a list of three to five names submitted by the Bose Levu Vakaturaga. A President's Council of 10–15 distinguished citizens from all ethnic communities and walks of life would provide their well-informed, non-partisan 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 had been in existence in Fiji for nearly 30 years, but suggested important changes in the composition of the two houses as well as the method of election. Both houses should be elected. The Upper House, to be renamed Bose e Cake, should comprise 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 organisations, women, youth). The commission recognised that members of all communities have a strong sense of territorial identity through birth and residence as well as shared or complementary interests.

In rural areas, most people were able to speak both Fijian and Hindi; indeed, in several places, some Indo-Fijians indicated 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, 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

racial perspective. 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 understandably attracted the greatest attention nationally and internationally. The commission approached the delicate issue with certain objectives in mind: they should encourage 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 arrangements. Applying these criteria made it clear that 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 are some members elected or appointed to the legislature to represent particular groups; but in each case, the proportion of special seats is very small.

Many submissions supported the existing arrangements, and many Fijians wanted to see them even more heavily weighted in favour of the indigenous community. Equally, many submissions from all communities wanted at least some seats to be filled on a non-racial basis. Many advocated a return to the cross-voting seats under the 1970 constitution, but that arrangement was fraught and only marginally successful in bringing about more conciliatory politics. The commission recommended that a 70-seat Lower House, to be called the Bose Lawa, made up of 45 seats elected from open constituencies (with no restriction of race for voters or candidates) and 25 from reserved seats: Fijians (including Pacific Islanders) 12; Indo-Fijians 10, general voters 2 and Rotumans 1.

Communal representation is not 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. Hence any deviation from the principle of equality could be accommodated within the 'margin of appreciation' that international law allows to states in applying human rights standards. The allocation of reserved seats is broadly based on population figures, taking account of historical and other factors that have affected the present and past allocations of communal seats. The point

was that the allocation should be seen to be fair. The 25 reserved seats represented approximately 36 per cent of the seats in the Bose Lawa and the open seats 64 per cent, the minimum necessary to allow them to spur the development of multiethnic politics. As a further incentive to the emergence of multiethnic governments, the commission recommended that 45 open seats should be elected from 15 three-member constituencies, the boundaries drawn in such a way as to ensure that the constituencies are heterogeneous while taking traditional criteria into account, such as geographical features, administrative and recognised traditional areas, means of communication and mobility of population. That is, they should be composed of members of different communities to force political parties to appeal for votes from communities other than their own. The chances of 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, but the principle of multiethnicity should be borne in mind when drawing 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. 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 such boundaries.

The electoral system also plays an important role in promoting multiethnic cooperation. Fiji, like most ex-British colonies, inherited the British voting system at independence, best known as first-past-the-post, in which the winning candidate is the one who gets the greatest number of votes. A logical system when the choice is only between two candidates, first-past-the-post is widely considered unfair where there are more than two candidates. It also denies voters the possible range of preferences. 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 votes cast. Several of these systems were put forward to the commission for its consideration.

Acknowledging the critical role of electoral systems in determining political outcomes, the commission identified and ranked a number of

criteria against which available options could be evaluated. These, in order of importance, included the encouragement of multiethnic government; recognition of the role of political parties; incentives offered 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 met some of these criteria, and some more than others. The single transferable vote, which was recommended by the Street Commission in 1975, for example, mitigates against the winner-takes-all outcome of the first-past-the-post, and achieved better proportionality of seats to votes. 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—and by privileging the representation of community interests, it failed to meet the commission's most important criteria: the promotion of multiethnic governments. The list system's proportional representation allocates seats to parties in proportion to the number of votes cast for the party. While it had considerable merit, its weakness was that by treating the whole country or major region as a single constituency, it failed to provide links between the voter and his or her member. It also provoked fears of small parties exercising disproportionate influence.

In the commission's view, the alternative vote, also known as preferential vote, best met all the criteria. The alternative vote 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 first-past-the-post 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 1. 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 alternative vote system provides incentive for vote pooling by requiring the winning candidate to obtain more than 50 per cent. In heterogeneous constituencies, this threshold increases the need for a candidate to have multiethnic support. The system allows parties to trade preferences.

Again, only moderate parties with conciliatory policies would agree to trade preferences, and persuade their supporters to honour the agreement. The system therefore encourages such parties. Constituents are effectively represented at least insofar as candidates represent territorial constituencies, and citizens are given considerable opportunity to affect the outcome by expressing preferences. As a majoritarian, rather than a proportional system, alternative vote is likely to encourage the emergence of a strong party or pre-election government. The commission recommended that the alternative vote system be used in multi-member constituencies, but there was nothing to stop its use in single member constituencies.<sup>1</sup>

The commission recommended the retention of the Westminster system. 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, opposition criticism of a government proposal, no matter how valid or rational, was often portrayed essentially as Indo-Fijian 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.

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, 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 sector: economic services, social services, natural resources, foreign relations and administrative services. These committees would 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 chair and the deputy chair to come from opposite sides of the house. All these mechanisms

are designed to achieve an open, representative, inclusive and multiethnic government that protects the interests and addresses the concerns of all communities and groups. That was the only way all the people of Fiji could aspire to realise a prosperous and united future.

While questions surrounding the election of parliament occupy centre stage in any constitutional review, other areas impinge on the daily lives of the people. These include provisions for the acquisition and deprivation of citizenship, fundamental freedoms and a Bill of Rights, the independence and functioning of the judiciary, the enforcement of accountability in the public sector, and equal access to state services. 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.

To illustrate, the 1990 constitution already had a Bill of Rights, called fundamental rights and freedoms, adapted with few changes from the one present in the 1970 constitution. But the independence Bill of Rights was in a form developed by the Foreign and Commonwealth Office and was included, with only slight variations, in the constitutions of most former British colonies. It 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 international human rights standards but rather give effect to them where appropriate. It recommended that a three-member Human Rights Commission be created 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 exercising any other functions conferred by the Act. The commission adopted a similar approach to citizenship. Fiji's existing citizenship laws reflect the thinking of an earlier generation and were in some important respects archaic. The independence constitution

and its 1990 counterpart allowed non-citizen women the automatic right to acquire Fiji citizenship on marriage to a male citizen, but did not accord the same privilege to non-citizen husbands. 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 to 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 impartial state services. Although the objectives of economy, efficiency and effectiveness in state services had a long history in Fiji, they were never expressly required in the constitution. Because they were fundamental to the functioning of all state services, the commission felt that they should be reflected in a constitutional provision. A related issue 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 compelled the government to ensure that each level of each department comprised not less than 50 per cent of Fijians and Rotumans, and not less than 40 per cent members of other communities. But this quota was not observed, nor was it possible to achieve it at every level within every department.

Indo-Fijians complained of a significant reduction in their numbers in the state services, particularly at the senior levels. They expressed concern at their falling representation in the police force and their almost total absence from the armed forces. Whatever the reason—occupational preferences, active discouragement, emigration—the complaint was empirically 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.

To that end, the commission proposed a new general provision in the constitution. In recruiting and promoting members of all state services—including the public service, the police force and the military forces—and in the management of those services, the following factors were to

be taken into account: ensuring that government policies are carried out effectively; achieving efficiency and economy; making appointments and promotions on the basis of merit; providing men and women and members of all ethnic groups with adequate opportunities for training and advancement; and all levels of services broadly reflecting the ethnic composition of the population, taking into account occupational preferences.

Closely related to the provision of state services was the issue of ethnic and social justice. Section 21 of the 1990 constitution enjoined the government to introduce affirmative action programs for the Fijian and Rotuman communities, notably in the areas of education, commerce and participation at the higher levels of the public service. These policies 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, 6 were Indo-Fijians and 3 general voters. Indo-Fijians accepted the principle of affirmative action to redress imbalances, but wanted to include disadvantaged members of all communities, not just the indigenous people. Their submission drew attention to the growing levels of poverty among sections of their people, and their growing numbers in squatter settlements.

The commission agreed that the government needed to continue implementing policies and programs to reduce inequalities between different ethnic communities, but since there were areas in which other communities were also disadvantaged, social inequalities should not be neglected. It was recommended that a social justice and affirmative action program be implemented for Rotumans and Fijians and other ethnic communities, and for men as well as women. This program would ensure 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. The program should be authorised by an artefact (following parliamentary debate) which would specify the goals of the program, identify the persons or groups it was intended to benefit,

and outline the means by which those goals would be achieved, and highlight performance measures and criteria for the selection of the members of the group entitled to participate. In short, it was the commission's view that, in order to be effective, affirmative action policies should be transparent, properly debated and carefully monitored.

For state services and institutions to be effective and impartial, they needed to be subject to strict rules of accountability. The commission received many submissions proposing constitutional provisions to prevent official corruption and achieving 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 government and the integrity of its leaders. Existing statutes, regulations and orders contained ethical standards and rules which 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. Such a code would require them not to place themselves in positions where they 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, or demean their office or position. These principles were to 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 Fiji's particular circumstances. The commission also recommended that the Office of Ombudsman be strengthened, allowing it to investigate allegations of corruption or mismanagement of public office. In an important and innovative stand, the commission recommended that a new Constitutional Offices Commission be created; this body would directly appoint the Solicitor General, the Director of Public Prosecutions, the Secretary General to Parliament, the Supervisor of Elections and the Commissioner of Police, and would put forth recommendations to the President on the appointment of the Ombudsman and the Auditor General.

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; protect the vital interests and concerns of the indigenous communities and all the other groups, within the inclusive and overarching framework of democracy.

## **Note**

- <sup>1</sup> Subsequent experience shows that political parties, including the Labour Party, would trade preferences with anyone in order to win, including their sworn opponents.