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**Case Study  
Fiji**

**Jill Cottrell and Yash Ghai  
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# Constitution Making in Fiji: Context and Process<sup>1</sup>

Jill Cottrell and Yash Ghai

## I *Context*

Fiji became a British colony in 1874 when its principal chiefs signed a Deed of Cession of their islands to the British Crown in the hope of securing, in their own words, 'civilisation and Christianity'. For several years before the handover to the British, European and Australians had begun to settle in Fiji and some trade in sandal wood and sea cucumber had commenced. Land was being appropriated by the settlers and some Fijian chiefs had run up debts that they were not easily able to repay. Problems of law and order seemed to loom ahead. It was considered that Britain, which was viewing Fiji with interest, might be able to restore order and financial stability. Thus Fiji embarked on a trajectory as a British colony; the fortunes of Fijians were out of its hands. Unlike other British colonies with outside settlement, the colonial authorities adopted relatively benign policies towards the indigenous people. Britain wanted to protect them from the kind of exploitation that other indigenous peoples in the region—and further afield—had faced, by maintaining their traditional political, social and economic structures. At the same time Britain was anxious to develop the resources of the colony so that it could become self-sufficient and meet the costs of administration. For this purpose it invited external investment, principally by a sugar company from Australia, and secured cheap labour through recruitment from India (then also under British control), sowing the seeds of a market, albeit administered economy.

The policies of the protection of indigenous Fijians through the preservation of their traditional system and economic development by importing capital, management and labour cast Fiji into a deep contradiction. The traditional system was incompatible with a market economy and yet could not be entirely isolated from it. To develop sugar plantations, land was required. But land was owned collectively by indigenous clans and held under rules which did not allow of easy alienation<sup>2</sup>. Alienation would in any case have deeply disrupted traditional political and social orders, since land, as in feudalism, was central to them.

To this conflict between tradition and modernity was added another—the conflict of interests between the three major racial communities. Land was provided on terms that were congenial neither for sound economic development nor good for relations between the racial communities. The segregation of these communities and the isolation of the indigenous people from the market meant that the relations among them were largely

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<sup>1</sup> Of the University of Hong Kong. Ghai is grateful to the University for a Distinguished Researcher Award which has facilitated research and preparation of this paper.

<sup>2</sup> There is considerable controversy on how land was organised traditionally and the British view that it was held communally with superior rights of chiefs has been challenged. For our present purposes, it is sufficient to note that the British view prevailed, with far reaching consequences both internally within the indigenous communities and their relations with others. See Peter French, 'The Founding of an Orthodoxy: Sir Arthur Gordon and the Doctrine of the Fijian Way of Life' 77(1) *Journal of the Polynesian Society* 6-32, and by the same author, *The Charter of the Land: Custom and Colonisation in Fiji* (1969).

determined by administrative policies—and pointed to the importance of the political. Colonial history is interpreted largely in terms of administrative regulation of racial claims and relations<sup>3</sup>. On its independence in 1970, Fiji acquired a constitution which largely adopted the colonial framework, adjusting it, but only slightly, to the reality of British departure. The absence of the Britain in the joint role of participant-umpire left no option but for local communities to negotiate agreements on contentious issues. For better or worse, the 1970 constitution served that purpose for 17 years during which Fiji enjoyed considerable stability and prosperity, even if in that period indigenous Fijian hegemony was firmly established.

The racial factor has thus been central to the organisation of politics, administration and economy. The roots of the crisis which led to the overthrow of an elected government in 1987 and the repudiation of the constitution lie squarely within that colonial system. Major societal changes, through education, the economy, physical and social mobility, urbanisation, and integration into world economy, undermined many of the assumptions of the 1970 constitution. None of the racial communities remained (if they ever were) monolith or unified by common interests. None could be isolated from the mainstream of the economy or administration. Common interests developed which cut across racial divides. Economic incentives and efficiency could not be maintained in the face of interaction of ancient rules and market economy. The traditional system came under great stress. Yet the maintenance of that system was critical to the logic of the political settlement of the 1970 constitution. The steady undermining of the assumptions underlying the 1970 constitution settlement greatly reduced its ability to handle Fiji's problems and intricate racial relations. Nor did its overthrow with the backing of the army produce more workable instruments of governance. It became increasingly evident that a new dispensation, broadly fair and acceptable to all the communities was necessary to restore stability, revive the economy, and produce a modicum of national consensus, and that it had to cut loose from the racial moorings of Fiji towards another mode of accommodation.

This was at heart of the crisis that the new constitution, the subject of this paper, had to resolve. But the problem was not analysed in precisely these terms by the key players. They still saw the problem in terms of adjusting, not transcending, racial claims and entitlements. The constitutional process became the means to wage racial strife by another name. Fortunately there were various aspects of the process, different from earlier attempts, which limited conflict and moved the debate to a different terrain. But now we must retrace our steps if we are properly to sketch the context in which it became necessary to amend or adopt a new constitution.

We begin with a brief account of the adoption and experience of the independence constitution. After the change of the world following the second world war, Britain had little interest in South Pacific colonies although independence to these colonies did not come until nearly a decade after African colonies became independent (mostly in the 1960s). There was precious little pressure on British to quit and while the long term aim was to leave, there seemed no compelling reason to do so soon. Fiji's position was

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<sup>3</sup> See Brij Lal, (1992), an outstanding study of Fiji's history.

somewhat different. By the mid 1960s the Indians, brought as indentured labour, outnumbered indigenous Fijians (240,960 to 202,176) and there were small numbers of other settler communities: 6590 'Europeans', 9687 'part Europeans' and 17314 'others', which included Chinese and other Pacific islanders, including Rotumans, whose island was administered as part of Fiji.

Enjoying a relatively privileged position, the indigenous Fijian elite, in common with the Europeans, was not anxious for independence (and if pressed, would have opted for the status of 'associated state', a proposal rejected by the Britain). The Indo-Fijians, stimulated by Indian nationalism and resentful of their inferior status in the colonial order, and perhaps mindful of their numerical superiority, were ardent supporters of independence. A Labour government in Britain was more disposed to independence and convened a meeting of Fiji legislators in London in 1965 to push them towards the idea of independence. The next stage was secret negotiations between leaders of Fiji political parties in Suva (the capital of the colony), to which even their own members were not privy. A breakthrough was made at these negotiations, as the Indo-Fijians made major concessions to the Fijians, particularly the senate as a second chamber to safeguard their land and other traditional interests and institutions, and to accept parity of representation despite their own larger population (and overrepresentation for other communities who had traditionally allied politically with Fijians). The final stage was held again in London under the chairing of the British government. In the end agreement on most issues was reached relatively easily, although sometimes under pressure from Britain. Agreement was facilitated by the broad acceptance of the colonial constitutional arrangements as the framework for negotiations.

However, the agreement cloaked a fundamental difference between the Indians and the other communities, a difference which was nevertheless reflected in the proposals for the electoral system. In common with several other colonies, especially with a settler community, representation in the colonial legislature and executive was based on race. Legislative seats were allocated to communities and only members of the community could be candidates or vote for seats allocated to it. Majority communities saw this system as driven by 'divide and rule' strategies, while minorities welcomed them as ensuring at least a minimum representation. But the question goes beyond representation. It goes to the fundamental question whether society is to be segregated racially and each community is to see its interests purely in communal terms and generally in opposition to the interests of other communities (producing a zero sum mentality) or society is to move towards political, social and economic co-operation and integration. The view of Indian delegates was that the adoption of separate racial seats and electorates in Fiji had resulted in obsession with race and the absence of any kind of truly Fiji identity or nationalism (to the extent that there was no expression which encompassed all its citizens). Indians had from the very beginning of representative politics opposed racial electorates and lobbied for an integrated, common roll system in which there would no racial reservation of seats. Although accused of aspiring to dominate the political scene, the truth is that Indians were agitating for a common roll of electorates as early as the late 1920s when they were a numerical minority. On the other hand, Fijians and their allies in other communities wanted to preserve separate electorates.

There was no easy resolution of this specific matter, with its tremendous implications for the future development of Fiji society and state. A compromise of sorts, brokered by the British, was achieved. It consisted of two elements. The system of exclusive racial electorates would be modified to permit a certain number of seats (25 out of a total of 52 seats) which would be elected by voters in all the separate electorates, although these seats themselves would be allocated on a racial basis (this would give each elector four votes, one for the elector's main representative drawn from his or her community, and one each for a Fijian, Indian and 'other' candidates standing on what came to be called national, or more colloquially, cross voting seats). This could be interpreted either as a first move toward a fully non-racial system of voting or as limited and final concession. The second element was an agreement among all delegates that after independence, an independent, expert commission would be appointed to examine and recommend on electoral reforms which the parties would accept.

We now turn to the principal provisions of the 1970 constitution. We start with the electoral system. Fiji adopted a bicameral legislature, consisting of the House of Representatives and the Senate. Only the former was elected. It had a membership of 52 members made up as follows. For the purely communal seats, 12 to be elected on a Fijian-Rotuman roll; 12 to be elected on the Indian roll; and 3 to be elected on 'Other's' roll. For the cross voting seats, 10 each for Fijians and Indians, and 5 for others. All the members of the senate was to be nominated: 7 by the prime minister, 6 by the leader of the opposition, 8 by the Great Council of Chiefs (a purely Fijian body), and 1 by the Council of Rotuma. Under these arrangements Fijians were effectively assured a majority in the Senate, and the nominees of the Council of Chiefs had a veto over any amendments to a number of laws designed to protect Fijian interests, particularly land, development assistance, and the Fijian system of local government and the traditional system of chieftaincy through the Great Council. This separate system amounted in a way to a 'state within a state' with a large measure of self-government for Fijians. A parliamentary system was established, with a Governor-General (representative of the Queen who was the notional head of state) who would appoint a member of the House of Representatives who the GG considered commanded the confidence of a majority of that House.

The constitution was thus very favourable to Fijians, indeed one of its leaders said that he considered 'that we Fijian people have come out better under the terms and conditions of this constitution than under the other races'<sup>4</sup>. Given their close association with Europeans and part-Europeans, they were able to muster a majority in the House and formed government continuously from independence until 1987. This period saw a consolidation of the Fijian (largely chiefly) elite and a secure dominance of the apparatus of the state. Fijian institutions like the Council of Chiefs, the Fijian Affairs Board, and provincial council served to maintain communal consensus and cohesion (a contrast to the bitterly divisive factionalism among Indian politicians). The main Fijian-based political party, the Alliance Party, was able to draw greater Indian support than the main Indian party, the National Federation Party, was able to draw Fijian support—this cross communal support was critical for success in the national seats. The pattern quickly and

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<sup>4</sup> Ratu [Chief] William Toganivalu quoted in Lal (1992), p. 212.

firmly became established whereby the Fijians formed government (and included the odd Indian and European ministers) and the Indo-Fijians furnished the leader of the opposition and opposition backbenchers. Fijians also dominated the military (almost all the senior commanders were Fijians, and more than 90 per cent of the rank and file). The government rejected the report of the independent electoral commission chaired by an eminent professor of law from Britain, which had recommended a further move towards non-racial seats using the semi-proportional system of the single transferable vote (SVT). Thus the 1970 electoral arrangements became fixed in stone, and dominated the course of politics and the organisation of political parties.

At first this arrangement worked reasonably amicably as the relations between the (Fijian) prime minister, Ratu Mara and the (Indian) leader of the opposition, Siddiq Koya, were cordial. But the monopolisation of political power by the Fijian party, tied to the considerable resources and authority of the traditional system, produced frustration and resentment among Indians. Discontent also seemed to arise among some commoner Fijians who had acquired education and entered the public service or the professions, but whose political ambitions seemed thwarted by the chiefs.

Fiji politics began to be marked by the intensification of ethnicization. Government policies designed to advance the indigenous community, and an element of virulent racism that entered politics in the mid-1970s, led the Indo-Fijian community to draw together in an electoral sense with the stunning result that in 1977 the largest single party was the NFP - with precisely half the seats in House. The Governor-General ('GG') did the right thing and offered the prime ministership to the NFP leader. The party dithered for a few days and the GG took a decision to invite the leader of the Alliance to form a government. Perhaps if he had done otherwise Fiji would have had its first coup 10 years earlier than it in fact did!

In the mid-1980s there emerged a party based not on ethnicity but more on class interests: the Fiji Labour Party. It was headed by a Fijian doctor/retired civil servant, Dr Timothy Bavadra, and its secretary and some other senior members were Indo-Fijians (defectors from the NFP). But the new party realized that there was a danger that it would simply split the anti-Alliance vote, so it entered into a coalition agreement with the NFP to fight the 1987 election under the leadership of Dr Bavadra. Within the Fijian community the new alignment reflected the distinction between the traditionalist who was happy to uphold the communal traditions, and the role of chiefs in politics, and those who saw the communal lifestyle as holding back the development of the Fijian community, and thought that chieftaincy should be kept separate from 'modern' politics. It also reflected the gap between the Fijians of the western division - more modernizing, less clan and chief bound, with a sense of having been marginalized by the dominant east - and the rest. In response to this coalition the Alliance Party entered into its own coalition agreement with the General Electors (this category consisted of all citizens other than indigenous Fijians and Indo-Fijians)<sup>5</sup>.

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<sup>5</sup> General electors, dominated by the European and part European communities were historically over-represented and always sided with the indigenous Fijians.

The FLP-NFP Coalition won the April 1987 elections 28:24, though voting was still largely on ethnic lines.<sup>6</sup> Bavadra was invited to form government, which consisted of seven Fijian (Home Affairs, Primary Industry, Lands and Minerals, Labour and Immigration, Education, Youth and Sports, Rural Development and Rehabilitation) and seven Indo-Fijian cabinet ministers - these holding portfolios that had very often gone to Indo-Fijians in Alliance governments. One month later, Lt-Col. Sitiveni Rabuka led a military take-over.

Refusal to accept the decision of the voters was the common response of Fijian chauvinists, shaken traditionalists and disappointed aspirants to government office or other lucrative benefits from an Alliance victory. And as well as the victors in the election, the Constitution itself was the target of attack. Soon after the election and before the coup a meeting of 2000 Fijians (the emerging Taukei Movement - *taukei* being the indigenous Fijians) prepared a petition to the GG demanding that the constitution be changed to that the indigenous people 'must always control the government to safeguard their special status and rights'.<sup>7</sup>

As soon as a degree of public order was restored to Suva, and the government headed by Rabuka was installed, the GG indeed set up a Constitution Review Committee in which the Coalition reluctantly agreed to take part though heavily outnumbered by Alliance and Great Council of Chiefs members. Widely conflicting recommendations were made to it, and the committee did produce proposals reflecting Fijian preferences as advanced to it by the Great Council of Chiefs, but there were powerful dissents in favour of the 1970 constitution. Meanwhile violence had erupted and stability and economy was under threat. The Governor General engineered an agreement between the major parties on transitional arrangements built on a government of national unity and a review of the constitution by a cabinet sub-committee chaired by an independent outside expert. There is uncertainty whether Rabuka or the military were consulted. In the event Rabuka did not like the agreement and staged another coup, declared Fiji a republic and soon afterwards the Governor General became President, Sir Ratu Mara was restored to prime ministership and Rabuka entered the cabinet again.

This was clearly no long term solution (it had produced a largely civilian administration, but it was not democratic and operated under the shadow of the military). Another attempt at a formal review was made through a committee consisting principally of politicians (as was the previous committee). Its recommendations became the basis of the 1990 constitution which abolished all forms of non-racial electorates or voting (and even the Rotumans were separated from the Fijians). The 70 members of the House of Representatives consisted of 37 Fijians, 27 Indo-Fijians, the rest being 'Others'. The Senate was two-thirds Fijians. The Constitution mandated affirmative action in favour of Fijians, elevated the status of Fijian customary law, barred access to the ordinary courts in cases involving Fijian customary land law, and provided for human rights provisions to be superseded by a two-thirds majority of both houses in a wide range of circumstances.

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<sup>6</sup> For an account of the election see Brij Lal, "Before the Storm: An Analysis of the Fiji General Election of 1987" (1988) 12 *Pacific Studies* 71.

<sup>7</sup> Lal, *Broken Waves*, p. 272.

Only an indigenous Fijian could be Prime Minister, and the President was appointed by the Great Council of Chiefs.

But what dominated Fijian elite views at this period was not just the question of the Indo-Fijian bogey, but also an outdated perception of Fijian society – rural, land-linked, chief-dominated and cohesive. The Constitution of 1990 was biased towards rural Fijians (the 33% of Fijians who lived in urban areas having only 13.5% of the parliamentary seats). It gave a far more prominent role than in the past to the Council of Chiefs.

Elections were held under this Constitution in 1992, elections in which, after a good deal of soul searching, the Coalition parties participated (though the differences over whether to participate actually broke the Coalition). The election led to Rabuka becoming Prime Minister as an elected politician rather than as a coup-maker. But he could secure this appointment only with the support of the Indian led FLP who exacted from him promise of a speedy review which the 1990 constitution had also mandated. Other pressures, as we discuss, below also dictated a speedy review. The constitution had little legitimacy at home or abroad, even important Fijians expressing misgivings. The next section discusses the precise events leading to the review and its results. But before we proceed to that process, we give a brief account of the state of society and economy which had dominated the politics of the constitution, and which put both constraints and possibilities on reform.

### *Society and economy*

Discussion of Fiji politics has tended to be dominated by the ethnic factor. By the mid-twentieth century the largest community was the non-indigenous Indian one, but the other large community was the indigenous Fijian. This meant that the debate could be conducted in terms of those who ‘belonged’ as against those who did not - and that the indigenous people (or at least politicians and other advocates on their behalf) could couch their arguments in terms of the rights of indigenous people. This was notwithstanding that fact that their situation was very different from that of peoples who had been swamped, marginalized and driven from their lands by incomers. Even though there was this numerical dominance the indigenous people were not driven off their land or marginalized, but they did have a minority complex - which continues even though they are now a majority. On the other hand the Indians too have a minority psychology, which comes from their exclusion from control of land, the sense that they have not been accepted as part of the nation, and from their vulnerability to racist abuse and physical attacks.

The two communities have remained very separate in many ways. Inter-marriage is not common. Lifestyles are different. In the rural areas most Indians live in somewhat isolated farm houses, while Fijians live in villages. Most Indians are Hindu (a smallish proportion are Muslim and even smaller proportion Christian) while Fijians are overwhelmingly Christian - especially Methodist. To a considerable extent the two communities are educated in different schools. While linguistic differences among the Indians were largely lost in a lingua franca known as Fiji Hindi, and most Fijians speak Lauan Fijian, the two communities do not learn each other’s languages in any systematic fashion. This must be qualified to the extent that in rural areas there is more likelihood of



cross-language learning, though more likely that Indians have learned Fijian than the other way round. It is often said that in the rural areas relationships between the two communities are far better than they are in town where they are perhaps manipulated. But in town also at least the younger generation will have acquaintances, old school mates, even friends, from the other community.

The ethnic situation in Fiji has been made more acute because almost every aspect of life is affected by it, or reflects it: religion, language and lifestyle, as we have seen. Particularly problematic is land. Large numbers of Indians have been small scale farmers, mainly cane farmers, who lease their farms for 30 years at a time from Fijians. There is a small amount of freehold land (about 8% of the total) which is held mostly by Europeans and part-Europeans and some government land. But it is not just the Fijian-Indian relationship which is rooted in land, but also relationships within the indigenous community. Most of this land (over 80%) is owned on a customary, communal basis, not by individuals. It is linked to the lineage or *mataqali*. Revenues from the land are allocated on a hierarchical basis: the chief of the *mataqali* receives the largest share and the receipts diminish down through the structure. The benefit thus received by most members of the community from the land is very small. And chiefly dominance is reinforced by the land holding system.

As with immigrant communities in many contexts there is a perception - and not entirely a matter of perception alone - that the Indians are better off than the indigenous people. Until recently few Fijians have gone into business. And there are some very wealthy Indian businessmen, while even the small shopkeepers in town will seem wealthy to the poor rural Fijian. Far higher proportions of Indians than Fijians tend to be in business. In 1993 F\$10.7 million tax revenue was derived from Indian individuals in business, but only F\$1.2 million from Fijian individuals in business. And there were 36,502 Indian taxpayers as opposed to 33,987 Fijian, although by that time the overall ethnic balance in the country was in favour of the latter. In 1970 44.4% of Fijian candidates passed the secondary school entrance exams, as against 69.7% of Indo-Fijians; 22.3% of Fijian candidates for New Zealand university entrance passed as opposed to 33.3% Indo-Fijians. It is this discrepancy in education achievement (the causes of which are very complex) that presumably largely explains the imbalance in the public service by the time of the first coup: while the proportions of general and administrative grades were not grossly disproportionate to population (41% Fijian: 55% Indo-Fijian) and the same is true of teaching (44:54%), the differences were far greater in the more highly qualified grades, such as medical officers (29:57%). The overall numbers in the public service were 5773:6949 (or, ignoring expatriates and 'others', Indo-Fijians comprised 54.62% of the public service at a time when they comprised 51.43% of the population, again ignoring others).<sup>8</sup> But studies on poverty in Fiji have also shown that the very poorest are actually Indian. This however, is lost on those sectors that are determined that the benefits of the ethnic structure are all in favour of the Indo-Fijian community. Living standards in Fiji are by no means as grindingly poor as in some developing countries. But a study in 1997 estimated that overall the percentage of poor households was around 25%.

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<sup>8</sup> The public service figures are taken from Asesela Ravuvu, *The Facade of Democracy: Fijian Struggle for Political Control* (Suva: Reader Publishing House, 1991). p. 77, attributed from the *Fiji Public Service Commission Report 1987*.

## *II The Process*

Since Fijian leadership was well ensconced in power, why did it feel necessary to have a review of the constitution? First, there was a formal reason—the 1990 constitution had, to mute opposition, provided for its review within 7 years. Second, in the 1992 elections the leading Fijian party, led by Rabuka, won the largest number of seats but required the support of the FLP, led now by an Indo-Fijian, Mahendra Chaudhry, to form the government—FLP's price was the review. Third, the economy was stagnating, and there was a widespread perception that this was due to political uncertainty and an unsuitable—and contested—constitution. Fourth, this view was encouraged by international financial institutions, particularly the World Bank, who urged the government to initiate a reform process and to enter into dialogue with the Indo-Fijian community. Fifth, there was considerable pressure from Fiji's principal bi-lateral donors, UK, Australia, New Zealand and the USA, to end its constitutional and racial crisis. Fiji occupies a strategic position in the South Pacific and is the headquarters of many regional organisations, and instability there would impact negatively, economically and strategically, upon other island states and the region as a whole. Sixthly, the government was perhaps aware of the attempts by Indo-Fijians to raise the issue of racial discrimination and the violation of human rights in international fora, particularly the Committee for the Elimination of All Forms of Discrimination, and wanted to forestall those attempts by showing progress at home. Seven, several Fijian leaders and senior military commanders were anxious for Fiji's readmission to the Commonwealth and it had been made clear to them that they had to meet newly established Commonwealth standards of human rights and governance before re-admission could be considered. Finally, shrewd Fiji politicians realised that precisely because the constitution was so heavily skewed in favour of their community, it had fragmented it as demonstrated by the rise of provincialism, disintegration of the Alliance Party, and the emergence of several new Fiji parties—so much so that no Fiji party would be able to form a government without the support of a pre-dominantly Indo-Fijian party.

In 1993 the government set up a committee of the cabinet to examine possibilities and modalities of reform. In order to enhance the credibility of the sub-committee, Rabuka persuaded leaders of the two major opposition parties, FNP and FLP, to join the committee. These two parties, despite their many differences and acute rivalry, agreed to co-operate on the question of constitutional reform. But an agreement was not easy, and took nearly two years. It consisted principally of two elements: the terms of reference of a commission to consult the people and recommend a draft constitution, and the membership of the commission. It was assumed, rather than debated or agreed, that the actual reforms would be adopted by Parliament in accordance with the amendment procedure of the 1990 constitution. That procedure provided for approval by two-thirds of the members of each House, and the votes of a substantial majority of Fijians in the Senate. Under the 1990 constitution both Houses had majorities of Fijians any way. This mode of enactment therefore disadvantaged Indo-Fijians, but they accepted it to ease the decision on review and in reliance on the dynamics of a good process which they laboured for. Nevertheless, the terms of reference and membership generated

considerable controversy and two years expired between the first initiatives of the government and the establishment of the commission.

The Commission's terms of reference were crucial to the nature of the enterprise, and were also the subject of extremely tough negotiation between government and opposition. The Government wanted the starting point to be the 1990 Constitution, and Fijian interests to have pride of place. The Opposition wanted a new start, with the terms of reference reflecting the necessity of national unity and fairness to all communities. The ToR as adopted bear the hallmarks of the ultimate compromise:

The Commission shall review the Constitution promoting racial harmony and national unity and the economic and social advancement of all communities and bearing in mind internationally recognised principles and standards of individual and group rights. Towards these ends, the Commission shall:

- (1) Take into account that the Constitution shall guarantee full protection and promotion of the rights, interests and concerns of the indigenous Fijian and Rotuman people.
- (2) Scrutinise and consider the extent to which the Constitution of Fiji meets the present and future constitutional needs of the people of Fiji, having full regard to the rights, interests and concerns of all ethnic groups of people in Fiji
- (3) Facilitate the widest possible debate throughout Fiji on the terms of the Constitution of Fiji and to enquire into and ascertain the variety of views and opinions that may exist in Fiji as to how the provisions of the Fiji Constitution can improved upon in the context of Fiji's needs as a multi-ethnic and multi-cultural society.
- (4) Report fully on all the above matters and, in particular, to recommend constitutional arrangements likely to achieve the objectives of the Constitutional Review as set out above.

The Commission's terms set the scene for a wide-scale review. The emphasis on 'rights, interests and concerns of the indigenous Fijian and Rotuman people' went further than the Opposition would have in respect of giving specific protection to sectional interests. However, it accepted the compromise in order to get the process started, and in the belief that with an independent and fair commission the precise wording would be matter less. The Opposition was also pleased with references to national unity and racial harmony and international standards of individual and group rights—the first being desirable goals and the second standards to which notions of Fijian paramountcy would be subjected.

As to membership, various ideas were floated—the cabinet as well as the ruling party preferring a significant Fijian majority and the Indo-Fijians a parity. There was also controversy over the chairperson, Fijians preferring the chief justice, a person not trusted by the Indo-Fijians who wanted an outsider. Fijians wanted a party dominated by political parties, Indo-Fijians a more professional body, considering that past constitutional review committees had not had sound professional advice and that the precise communal representation would become less important if the commission was seen as an expert body. After protracted negotiations, agreement was reached on a three member commission under the chairmanship of the Indo-Fijians' proposal for the chair, Sir Paul Reeves, a former Governor General of New Zealand, an Anglican archbishop and a Maori (all factors which should have made him attractive to Fijians). The other members were one Fijian and one Indo-Fijian, the former to be nominated by the government and the latter by the NFP as the senior of the two predominantly Indo-Fijian parties. The

government appointed a politician and former minister, Tomasi Vakatora, known for his anti-Indo-Fijian attitudes (his appointment being interpreted by the Indo-Fijian parties as a bad omen and indication of the intransigence of the government). The Indo-Fijians nominated a distinguished historian and intellectual, Brij Lal, who had taught at the University of the South Pacific, held a chair at Hawaii University and at that time was professor at the Australian National University. At first he and Vakatora seemed a strange pair—but they established an excellent relationship which played a critical role in the success of the review. On balance it may be said that the NFP, under the active and conciliatory leadership of Reddy, did well out of the composition.

The small size of the commission made it impossible to have a wide range of interests directly represented within it. Particularly, it is unsurprising that there was no woman (although it had an influential woman on the staff)<sup>9</sup>. The commission had a small staff (appointed by the government, not the commission): there were two counsel, a New Zealand woman (who was familiar with other Pacific islands states), and was most likely chosen by Sir Paul, and a Fiji ‘General Voter’ (specifically a part-European), and an executive secretary, a Rotuman lawyer. With this number, it was not possible to do much about ‘facilitating the widest possible debate throughout Fiji on the terms of the Constitution of Fiji’ as required by its terms of reference. This could have been done by securing the co-operation of the civic society organisations, but there were not many of them, and there is little evidence that the commission considered this option.

The commission itself was formally set up by the President on 15 March 1995 under section 77 of the 1990 constitution which required the review within seven years, after the agreement of the cabinet committee (transformed and enlarged into a Joint Parliamentary Committee) had been endorsed by both houses of the legislature in September 1993. The commission was given the usual powers of a commission of enquiry. It was required to produce its report by 30 June 1996. This deadline was extended later to 30 September 1993 at the request of the commission.

#### *Timing and sequencing*

The timeline from the appointment of the Reeves Commission until the passing of the Amendment Act was:

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<sup>9</sup> Lal, *Another Way: The politics of constitutional reform in post-coup Fiji* (Canberra: Australian National University, National Centre for Development Studies, 1998) p. 173 relates the complaint of women in Labasa about the absence of any woman on the Commission, and suggests they were silenced by Vakatora’s pointing out the presence of Quentin-Baxter. But this was hardly a satisfactory way to deal with this major omission.

Date/period	Specific events	Ongoing processes						
		Public hearings	Foreign travel	Developing ideas	Backgr'd papers	Public debate	Report writing	Parliament
March 1995	March 15 Commission appointed							
April								
May								
June	Beginning – met for first time Prepared Mission statement June 16 Commission met Joint Parliamentary Committee to brief it Program of work prepared							
July								
August								
September								
October	Last submission October 10 (SVT)							
November	Private meetings with high officers of state, judges etc							
December								
January 1996								
February	Visited Wellington met Electoral Commission and others							
March								
April	Official of Australian Electoral Commission visited Fiji							
May								
June								
July								
August								
September	4-6 Report submitted to President and Parliament and then published Commission winds up							
October								
November								
December								
January - July 1997	House of Representatives Debate June 23- July 3 July 3 Bill passed							

The Commission duly reported in early September 1996. Its nearly 800 page report was a truly remarkable achievement given the time constraints. Timing can be a crucial matter in constitutional reform. A constitution that is produced under excessive pressure of time may not only be defective in a technical sense, but also the commitment of the public necessitates education of and consultation with people. On the other hand, a long-drawn out process runs the risk on the one hand of losing the interest of the public and on the other of 'missing the bus' in the sense that the factors which made the political context receptive to new possibilities may no longer exist.

The Commission's own account of its work shows that the high priority in terms of timing was given to public hearings.<sup>10</sup> But it did not provide or facilitate any discussion of the 1990 Constitution although its task was to review that constitution. Having been appointed in May 1995 the Commission spent most of July, August and September holding public (or occasionally private) hearings around the country.

These hearings were followed up by visits to Malaysia, Mauritius, South Africa, and the US (despite the reluctance of the government to sanction the trip, which was financed by outside donations). Parallel to these information gathering exercises the Commission had asked a number of people to prepare research papers, and also institutions and individuals to supply specific information. But again, these research papers were used, while the deliberations were going on, solely for the purposes of the Commission rather than for informing public debate, and were only published after the Report itself.

The Report was presented to President Mara and then published at the beginning of September 1996. The report was unanimous. This happy result was due to the good relations that developed between Vakatora and Lal under the encouragement of the chair. It seems to have been the experience of travelling around the country listening to the views of the ordinary citizen which brought them together. They realized the reality of life for the ordinary person, the fact that ethnic rivalries did not dominate the lives of people, and that there was a genuine willingness to work together for the common benefit. (This was despite elements of grandstanding on the part of some who gave evidence, and manipulations in the sense mentioned earlier). The very burden of responsibility exercises its own influence. And the Chair took the view that the main responsibility lay upon the two Fiji citizens. Lal quotes him as saying "If you two agree among yourselves, I won't stand in your way".<sup>11</sup> And Vakatora wrote,<sup>12</sup>

...Brij and I were able to iron our differences, sometimes after long and tense talks. ... This was possible because of the mutual trust we had built between ourselves and the confidence and trust placed on us by our Chairman.

In the end the document which the Commission produced was essentially drafting instructions for an entire new Constitution. Especially in the rather complex drafting tradition of the common law, experience suggests that a very important degree of momentum towards change can be achieved by presenting not just the ideas but the actual

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<sup>10</sup> Fiji, *The Fiji Islands: Towards a United Future*, Parl. Paper No 34 (1996). Chap. 4 'How the Commission went about its task'.

<sup>11</sup> *Another Way* p. 174.

<sup>12</sup> *Mangrove Swamps* p. 114.

formulations required to achieve the recommended result. The Commission did not do this - except in some specific instances - but the proposals it made were framed in very precise terms - something that was to a substantial degree the work of the counsel, especially Alison Quentin-Baxter, for it will have been noted that no actual member of the Commission was a lawyer.<sup>13</sup>

That said, it is clear that Vakatora and Lal were thoroughly involved in every aspect of the work, and that the decision making was very much the work of the Commission and not of its technical staff. Vakatora says that he read the final report at least seven times.<sup>14</sup> Perhaps this degree of care was necessary for the report tried to chart a course of fundamentally different political system; its vision for the future was clearly and courageously elaborated, even if its precise recommendations recognised that the advance to the future could not be made in one big leap.

#### *From report to law*

The report was published only in English (not surprising for such a voluminous document, but unfortunate). There was no officially sponsored public debate on the issue. Only the Citizens' Constitutional Forum (see below) tried to inform the public what the implications of the report were. The report itself, and the stages which led to its ultimate enactment as a constitution, disappeared into smoke filled rooms, to emerge only as a constitutional amendment Bill. The parliamentary phase lasted from the completion of the report until the enactment of the amendment Bill, and themselves comprised two elements: the work of the all party Joint Parliamentary Select Committee ('JPSC'), and that of the full parliament. The main work of the Committee took about 6 months, and it produced an agreement dated April 14 1997 on the most important issues, including the electoral system.<sup>15</sup> The Committee continued its work, and was still sitting as the House of Representatives debated the final Bill.

Negotiations in the committee involved a good deal of compromise. The Fijian members did not really want any change to the 1990 constitution; the Indian wanted radical change. Each in the end accepted things that were basically unpalatable to them. If the JPSC was unable to work out an agreement of a particular issue they would turn it over to the party leaders (a practice reminiscent of the South African process where Mandela and de Klerk were used to break deadlocks). The coup leader of 1987, Rabuka and his victim, Reddy, seemed to have achieved a quite remarkable working relationship. One could say that they 'stitched the constitution up' between them.

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<sup>13</sup> A deliberate decision of the Government, according to Brij Lal in the discussion that followed the delivery of this paper.

<sup>14</sup> *From the Mangrove Swamps* (2<sup>nd</sup> edition published by author, and printed by the Government Printer, Suva, 1998). p. 117.

<sup>15</sup> This document is reproduced in Ganesh Chand and Vijay Naidu, eds. *Fiji: Coups, crises and reconciliation 1987-1997* (Suva: Fiji Inst. of Applied Studies, 1997) p. 176.

Table 3 below shows some of the changes between report and law, and how these relate to the party submissions. The most notable examples of acceptance of the SVT proposals in the JPSC are the Senate and the reduction in the number of open seats. This having been done they committed their parties to support the resulting agreed bill, which went to the draftsmen - who put their peculiar stamp on it. And apparently, in possession of the South African constitution, they managed to sneak in an idea or two of their own. It seems that the inclusion of sexual orientation as a prohibited ground of discrimination comes from the drafters; certainly it is not in the Reeves Report!

A very important element in this stage was the fact that the Great Council of Chief agreed to support the Bill. Jai Ram Reddy was invited to address the GCC, the first time that an Indo-Fijian had been so invited. He responded with a much praised speech which he began in Fijian.<sup>16</sup> During the parliamentary debates repeated tribute was paid to the GCC and its role in ensuring acceptance of the Constitution. However, not all members of Parliament were happy about the way the decision making had been done, some alleging that the process was manipulated and rushed and that communications between the JPSC and other MPs was poor.

The Bill was introduced by the Prime Minister on June 23. It was technically an amendment Bill for the 1990 Constitution.<sup>17</sup> In fact it produced a new document and was reprinted in 1998 as the Constitution of the Fiji Islands (the new name intended to solve the problem of nomenclature).

In the debate in the House there was a great deal of rhetoric about tolerance (the greatest acrimony being reserved for exchanges between the FLP and the NFP!). Many Fijian members spoke against aspects of the Bill, most notably arguing for Fiji to be a Christian state, or generally regretting the loss of the Fijian dominance in the 1990 Constitution.

There were very few amendments to the Bill, and most of those were proposed by the Prime Minister and emanated from the JPSC. Among the amendments at this stage were the introduction of compulsory voting (section 56 in the final Constitution), and the requirement that the House have at least 5 sectoral committees (section 74 (3)). Both of these were agreed to without debate or division. The major proposal from the other side came from the Labour Party: Chaudhry wanted an extra Indian communal seat; this was rejected by 59:5.

Every member of parliament (save for 2 absentees) voted for the Constitution. Apparently Rabuka had told his Ministers that if they did not support it they would lose their portfolios.

### **Public participation**

The only form of participation facilitated by the commission were public hearings. It visited far more places than any other previous commission - though interestingly this did not generate a significantly larger number of submissions than were received by the

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<sup>16</sup> Reproduced in Brij Lal, *Another Way* 138ff.

<sup>17</sup> The resultant Act was the Constitution (Amendment) Act 1997 of the Republic of the Fiji Islands Act No. 13 of 1997.



committee in 1989. A quick count of individual submissions (relying on names<sup>18</sup>) indicates that presentations were made by 114 Fijians, 88 by Indo-Fijians and 21 others. Among the organizations that made submissions, local churches clearly predominated. It is clear that many of the views presented were orchestrated. A bit like an Amnesty International campaign, standard forms of presentation were made available by political parties and other groups for their members to sign and submit. Lal wrote of a submission by the Arya Samaj ‘which will be repeated – worse, read word for word – countless times in the days and weeks ahead’.<sup>19</sup> But by no means all were of this type.

The speed with which the commission embarked on tours around the country and overseas was only possible because it made no attempt to undertake any form of civic education (neither its deadline nor resources allowed any other option). Although the level of literacy in Fiji is relatively high, and the previous few years had been very political so there was probably a high degree of awareness of the broad concept of a constitution, the population at large was almost certainly uninformed about the details of the constitutions which had prevailed in the country, and certainly of the options. Indeed, the events of the previous 6-8 years would almost certainly have led the ordinary person to think merely in terms of the system of government and electoral systems - in other words of the question of how the constitution could prevent (for Fijians) or not obstruct (for Indo-Fijians) the coming to power of another ‘Indian dominated’ Government.

It is easy to criticise the commission for lack of civic education, as we do ourselves. But we must remember the constraints of resources and time over which it had no control. We should also note that the commission was under some pressure to dispense even with public hearings (including from both Reddy and Chaudhry), on the grounds that there had been sufficient articulation of constitutional options and presentation of submissions to previous commissions. Lal thinks that those who supported this position perhaps ‘feared that a public enquiry would revive old hostilities, politicise the review and derail the whole process’.<sup>20</sup> Ghai’s impression was the impatience of Reddy and Chaudhry at the slow progress of negotiations and the belief (which had also animated the negotiators of the independence constitution) that a measure of secrecy was essential for concessions and deals in multi-ethnic societies. In other words, many politicians preferred that the process be that of negotiations among political parties rather than engagement with the people.

The commission emphatically rejected this view of the process. Lal writes, ‘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 and not excluded from it: it was, after all, their constitution which was being reviewed’.<sup>21</sup> He says that the ‘consultation was exhaustive, and exhausting’ and engaged individual citizens, community, religious, cultural and other interested groups, and all the major groups. The commission itself had also the benefit of scholarly

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<sup>18</sup> In Reeves Report Appendix D.

<sup>19</sup> *Another Way* p. 167.

<sup>20</sup> Lal, *Another Way*, pp. 60-1

<sup>21</sup> *Ibid.* p. 61.

studies on the socio-economic situation in Fiji and comparative constitutional experiences around ethnicity—but as we note later, they were not, regrettably, available to citizens until after the conclusion of the process.

Lal considers that the process gave an opportunity to the people to express their view of the 1990 constitution. Indo-Fijians regarded it as imposed and divisive, and articulated their vision of Fiji as of harmonious co-existence of all races. He concludes, ‘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 to a range of often diametrically opposed viewpoints. The Commission had fulfilled an important role in re-starting national conversation. And it had acquainted itself with a range of views across the entire spectrum. Armed with this evidence, it began to ponder its recommendations’.

### *Civil society*

The 1987 coups galvanised sections of society to reverse their course. The most prominent was ‘Back to May’ movement (May being the time of the first coup); in this movement several prominent Fijians played a key role. Civil society began a dialogue on constitutional reform early in the 1990s. During the process, groups were established to prepare submissions for the commission, and to lobby for reform and reconciliation. ‘Fiji-I-Care’, another non-racial organisation, played an important lobbying and co-ordinating role. Inter-faith organisations were formed and became an effective vehicle for religious dialogues and political discussions.

The most critical organisation was the Citizens Constitutional Forum (CCF). In December 1993 a consultation on reform led to the setting up of the CCF, which was to become the principal non-politically aligned group discussing the issue. This body was to a considerable extent the brainchild of Yash Ghai, who worked closely with Claire Slatter and Satendra Prasad, USP academics active in politics. Previously there was no forum for public debate and education on the matter. The initiative to set up a civil society group was supported by a number of academics and religious, gender and trade union organizations and funded by International Alert and later the EU through Conciliation Resources. The CCF began in a very small way, with meetings of limited and like minded people. But they did attract a remarkable cross section of Fiji society. People came from all the political parties, religious groups, and social organisations. They would go back to their own organizations and contexts with at least some sort of impact from the event which they had attended. The atmosphere of these events remained almost uniformly positive and without acrimony. The organization had a commendable record of putting the proceedings of its meetings into print and thus they received a wider publicity. It produced its own submission to the Reeves Commission, which made many points similar to those expressed more technically in the FLP--NFP submission, but in a more direct and simpler form.<sup>22</sup> It also remained a very multi-racial organization, which was itself a valuable contribution. Without the CCF the whole issue of constitutional reform might have remained very much more invisible than it did. A measure of its growing

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<sup>22</sup> *One Nation, Diverse Peoples: Building a Just and Democratic Fiji* (CCF 1995).

impact was the fact that the Prime Minister, Rabuka, having shunned all CCF activities during the early stages of the process, asked to be permitted to launch its civic education materials on the new constitution, which were deemed to be much superior to government's efforts!

Over the years from 1993 until the Constitution was adopted, it acted as a kind of an umbrella body and held a series of consultations which brought together a very wide spectrum of people from within and outside Fiji to discuss constitutional issues. These involved a mixture of information papers - on conditions in and possibilities for Fiji itself, and on experience elsewhere in the world - and proposals for specific institutions in the Constitution (frequently these were also published in Fijian and Hindi). It took space in newspapers to disseminate through summaries and cartoons some issues. It used dance and plays to convey images of racial prejudices and ways to overcome them and to demonstrate the richness of culture that comes from Fiji's ethnic and religious diversity. Both when the commission report came out and the constitution was adopted, it produced easily accessible materials to explain their principal features. It also helped to draft legislation to implement the constitution, particularly a Freedom of Information Bill. The consultations were designed to perform a number of functions: not only to inform and to make specific suggestions, but to build bridges between communities and to lay the groundwork for a consensual approach for constitution and nation building. What it could do was limited. But it did manage to place and keep the idea of constitution making, not just as a matter for sectional propaganda, on the agenda of at least the press and the middle classes. And today it is the most effective and influential organization devoted to constitutionalism, national unity and racial amity.

#### *The role of the media*

The media in Fiji is rich and diverse, given its small size. There is radio (with several FM stations), television and newspapers and journals. All of them operate in three languages, English, Fijian and Hindi. They all played an important role in disseminating information about the process and affording outlets for different views from a range of sources—political, social and academic. They provided considerable information on the background of the commission and its staff and gave extensive publicity to the work of the commission, especially the public hearings (most of which were reported). For example, several pages in two consecutive days were devoted by most newspapers to the submission of the NFP-FLP to the commission, and television stations carried long items on the hearings. Lal describes briefly the newspaper and radio coverage, and that on the news television on which 'The words, the gestures, the emotions of the presenters and the audience [were] dissected in minute detail'.<sup>23</sup> They also gave extensive coverage to the meetings and symposia of the CCF (which not only educated the public, but also made the CCF a household name, at least in urban areas). The media carried summaries and long extracts from the Reeves' Commission report, and provided a platform for debate. It provided a similar service when the constitution was adopted.

The existence of three language media meant that the views of different communities were articulated in one or the other language media, and all could claim to be fairly

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<sup>23</sup> Brij Lal, *Another Way* p. 168.

represented. The Hindi media gave prominence, and were sympathetic, to the Indo-Fijian views, while the Fijian media did the same for the views of Fijians. Unfortunately few people read or follow both media and were therefore not fully aware of the dominant views of other communities. For example, the Fijian language media and the Hindi language media presented somewhat different versions or interpretations of the report and the constitution (the Fijian version being quite critical)—and this lack of a common understanding caused major problems later. The English media, which most fairly represented the views of different communities and parties (whatever their own editorial biases), was accessible to only part of the people (mostly the educated and urban) and was perhaps not able to counter-act the most racially biased reporting and analysis in the ‘vernacular’ media. On the whole the media was free—a fact confirmed by the number of times journalists and presenters got in trouble with the government!

The role of the media went beyond reporting and commenting. It also provided forum for people to articulate their own views and to enter the national debate. ‘Letters to Editor’ columns allowed the more energetic members of the public to express their views, often in highly polemical terms. On the radio and television there were chat shows or listeners programmes which also led to interesting exchanges. Certainly most Fiji people had firm beliefs about what makes a good constitution for Fiji: one was not short of advice.

It may therefore be concluded that the media played an active and positive role. Even a casual listener or reader could not escape some knowledge of the background to and purposes of review, its progress, the diversity of views, the recommendations of the commission and the highlights of the new constitution. And when elections were due, the media, together with the electoral commission, again provided background to the new electoral system (although it is evident now that most voters did not understand the intricacies of the system nor how best to register their preferences). So then are we justified in saying, as we do later, that ignorance of the constitution may have fuelled support for the 2000 coup? We believe that there is a limit to how far the media can educate the people. Often articles are written under pressure of time and space. There is seldom opportunity to develop an argument. Many other journalists and other media commentators do not have sufficient expertise to understand the complexities or technicalities around constitutions and therefore are often do not write reliable or helpful articles. The subject lends itself to polemics. Often commentators are talking across rather than to each other, with little engagement on issues. Most people do not have enough confidence to rebut or question demagogues plying self-serving arguments. The media performs its functions well when it gives some background, summarises critical issues, and open its pages or waves to the public. The role of education cannot be confined to the media, partly because many of the most effective methods do not lend themselves to media use.

### *Engendering the process and constitution*

The context for the review of the constitution was not directly related to gender issues. The terms of reference of the commission did not encourage (although they did not necessarily rule out) concern with gender issues. The framework for the review, as we have shown, was the accommodation of ethnicities within the internationally recognised norms of individual and group rights. Inevitably the focus became the articulation and balancing of ethnic claims. Nor was there a significant public perception that women

needed special consideration (and neither the papers requested by commission nor its own report has any extended discussion of international norms relating to women). With two or three exceptions, there were no national women's associations, and ethnic, political or religious women's groups seem not to have focussed on gender issues. The absence of a woman commissioner may also have obscured a specific feminist agenda (and the energetic, experienced and influential woman counsel did not see the gender issue as her special responsibility).

This is not to say that the gender issues were not articulated by some or that they did not receive the sympathetic attention of the commission or that women were not involved in the process. The commission asked Imrana Jalal, a human rights scholar and activist, to prepare a paper on women's situation in Fiji, particularly in the context of constitutional review. In a sophisticated and thoughtful paper, Jalal set out the social context which shapes laws and their application, to the disadvantage of women. She provided a socio-economic-political profile of women in Fiji, highlighting the inferiority in status and opportunities that always surrounds them. She showed how traditional as well as colonial laws and practices marginalised women, in areas such as land, family, employment, criminal law (particularly rape) and how the 1990 constitution consolidated and extended women's disabilities. Through this analysis as well as an examination of the Convention for the Elimination of All Forms of Discrimination Against Women (CEDAW), she presented the commission with a reform agenda.<sup>24</sup> However, none of the papers by overseas experts addressed the gender issue (not even in the context of affirmative action or political representation).

Several women groups, based on religious, ethnic or party groups and numbering over 25, presented views to the commission. Many of them are somewhat conservative and influenced to some extent by ethnic political position, although they highlight some difficulties women faced. More far reaching proposals were advanced by Fiji Women Rights Movement (represented among others by Jalal) and the Women's Crisis Centre (represented by Shamima Ali)—both multi-racial and urban based. Many women made representation on their own behalf and some on behalf of organisations. However, the commission met only one woman (then Director of Prosecution Nazhat Shameem) in private sessions (compared to 24 males).

Women's groups provided evidence of the limited role of women in public and private affairs and pointed to laws and practices that discriminated against them. Many expressed anxiety about the growing violence against women and children, particularly domestic violence, child abuse, rape and other crimes. Lal quotes them as saying that 'these problems stemmed partly from the fact that women's aspirations clashed with men's cultural and traditional values' and that 'there would be less violence if women were recognised as having a real part in decision-making'.<sup>25</sup>

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<sup>24</sup> In Brij V. Lal & Tomasi Rayalu Vakatora, eds., *Fiji in transition* (Suva : School of Social and Economic Development, University of the South Pacific, 1997).

<sup>25</sup> Lal, *Another Way* p. 65

Women participated in various degrees in activities of organisations regarding the review process—particularly of religious communities and those advocating rights for the disabled. Women played a crucial role in the establishment and management of the CCF and ‘Fiji-I-Care’. In some of these organisations, women’s participation drew attention to gender issues. However, women played a relatively small role in the preparation of submissions by political parties (notwithstanding that women volunteers and activists had played an important role in the FLP). Political parties tended to be rather conservative on women’s issues (an early draft of the joint submission of the NFP-FLP contained recommendations for promoting women’s political representation in parliament through the compulsory nomination of a prescribed percentage of woman candidates—this was quickly squashed by the leader of the FLP).

The commission reported that submissions made about or by women concentrated on the gender inequality in the citizenship provisions, some inadequacies in the laws affecting women, and cultural factors that affect the ability of women to play a full part in family, community and national decision-making. It noticed little emphasis on the need for affirmative action and social justice programmes for the benefit of women, but said that some submissions identified gender inequalities that needed to be addressed in this way. There was also demand for the reform of matrimonial laws which should provide adequate protection for divorced women and their children and a more equal sharing of matrimonial property on a basis that recognised the monetary value of women’s domestic contribution to the household. There was also reference to discriminations and negative stereotyping that women faced, particularly Indo-Fijian girls and women said to be ‘doubly discriminated against in the award of scholarships because they faced both gender bias and racial discrimination’.<sup>26</sup>

The Commission was sympathetic to women’s claims and invoked international norms in support. It recommended specific affirmative action for women as a ‘disadvantaged group’.<sup>27</sup> It also recommended abolition of discrimination in obtaining citizenship against a male spouse married to a Fiji women, so placing spouses of Fiji men and women on an equal footing and on the transmission of citizenship, equally by men and women, to their children.<sup>28</sup>

So women’s agenda made gains through the process and in the new constitution. But there was no sustained debate on gender issues. This was due to the pre-occupation of political parties and ethnic associations with racial politics, and the dialectics of individual and group (‘ethnic’ rights) It is a common phenomenon that women’s issues tend to get overlooked when ethnicity dominates, even though in many cases the recognition of group rights aggravates the subordination of women (as happened in the 1990 constitution)—as indeed many other social issues get ignored. Consequently processes which are dominated by the ethnic agenda are impoverished.

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<sup>26</sup> Report, pp.229-31.

<sup>27</sup> P. 248.

<sup>28</sup> Pp. 102-3 and 97 respectively

### *Participation of religious communities*

Religion, mostly 'mainstream', plays a large part in Fiji social and political life. In the aftermath of the first coup the government passed a Sunday Observance law that imposed a positively Victorian notion on the community - including the prohibition of any public transport. This was partly directed at the Indian community. The church has sometimes provided apparently divinely sanctioned backing to attitudes and policies that have driven the wedges between the communities deeper.

On the other hand, religious organizations have provided some very valuable leadership to efforts to reconcile the differences between communities, and to work towards a constitution which respects human rights and all communities. In the aftermath of the coups of 1987 Inter-faith Search and Fiji-I-Care came into existence with the specific object of healing rifts, and they have worked with non-religious organizations, especially with the CCF. Early in the 1990s the Fiji Council of Churches initiated dialogues on constitutional reform, and meetings of this sort were an important catalyst.

In terms of input to the Reeves Commission, their report shows that of 632 submissions from 'groups and organisations', more than half came from religious groups. Of these two religions dominated, Christian groups with 289 and Hindus with about 45. This may over-estimate the Christian input, in the sense that in many villages the church would be the only forum for aggregating views, but those views might well have little religious content.

### *International input and the role of the international community*

A number of international factors were important in various ways. Perhaps there would never have been a review in the 1990s at all if it had not been for international influence. The World Bank put a great deal of pressure, several of its reports taking the position that unless there was a constitution acceptable to all communities, the prospects of economic growth would remain dim. It is clear that individual governments, notably those of the UK, Australian and New Zealand, were putting pressure on that of Fiji to reform the 1990 Constitution. These three states were not only closely associated historically with Fiji, but were also among the largest aid donors and with extensive commercial and educational links. The US ambassador of the time seem to have made constitutional reform his personal agenda, and hosted lunches to bring Rabuka and Reddy together in an informal setting to begin to develop a consensus. Finally, there was the question of Fiji's exclusion from the Commonwealth. Indigenous Fijians were among the most loyal of the Queen's subjects. Even after Fiji became a republic, pictures of the Queen and her heir, the Prince of Wales, were still widely displayed. Fiji's membership of the Commonwealth automatically lapsed when it became a republic and re-admission was rejected due to the racist nature of the state. Many Fijians hoped that Fiji might again become a monarchy - part of the Queen's Dominions. They viewed return to the Commonwealth as associated with this - indeed, many probably did not understand the distinction between the two issues.<sup>29</sup> A lawyer with experience of legal drafting who has worked in various

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<sup>29</sup> The same may well be true of some readers! The Queen is Head of the Commonwealth. She is head of state of only about 17 member countries. There is no necessary connection between membership of the Commonwealth and being a monarchy with the Queen as head of state, though it would be highly unlikely for a country to leave the Commonwealth but remain a monarchy. All the countries of the

Commonwealth countries, John Wilson, was asked to peruse the draft Constitution with a view to saying whether he thought it would satisfy the Commonwealth's conditions for re-entry; and he endorsed it.

The members of the commission, especially the Fiji members, naturally brought their own knowledge, expectations and fears to bear on the process, and almost certainly the input of the lawyers associated with the commission was considerable, but it is clear that the bulk of the particular ideas which found their way into the ultimate draft came from outside the commission. Those ideas came from individuals and groups within Fiji, from political parties, from visits to other countries undertaken by the commission, and from academics.

#### *Experts and Academics - Local and Foreign*

Fiji is a country of only 700-800,000 people, yet contributions to the making of its constitution came from some of the leading constitutional experts of the world. The commission itself commissioned research papers from academics and practitioners of politics locally and overseas<sup>30</sup>. It visited other countries and held discussions with both academics and politicians. It met, for example, Arendt Liphart the theorist of consociationalism, and Donald Horowitz, author of *Ethnic Groups in Conflict*, and a leading expert on institutional approaches to accommodating ethnicity. In South Africa it met Albie Sachs, Cyril Ramaphosa and Desmond Tutu. In Malaysia it met Jomo K Sundaram, and Kirpal Singh, in the UK it met Vernon Bogdanor, David Butler and James Crawford, in the USA Michael Reisman and in Australia Cheryl Saunders - to pick out only the best known.

NGOs - notably the CCF - invited foreign and local academics, experts and politicians to participate in consultations. Academics from the University of the South Pacific wrote papers, and drafted submissions.

Political parties made use of foreign and local input from outside the parties. The FLP invited an Australian politician, Don Dunstan, to advise on its submission, though most of the work on the actual document - which was a joint submission with the NFP - was done by Yash Ghai. The SVT had the benefit of the advice of a retired Malaysian judge, Zacharia. Certainly the FLP/NFP submission was a shoe-string operation: the authors of this paper typed, edited, laid out, proof read and generally oversaw the production of the submission. The ruling party on the other hand had access to the ample human and financial resources of the state.

Research papers for the commission itself were written by some of the people mentioned earlier, as well as by local academics, and people involved in Fiji affairs in a practical way. Authors of the papers were from the Pacific, Australia, India, Sri Lanka, Malaysia, the USA, Mauritius, the UK and New Zealand. One group of papers dealt with

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Commonwealth (other than the UK itself) were British colonies, with the exception of Mozambique (and Cameroon comprises some parts that were a French colony).

<sup>30</sup> The papers were subsequently published in two volumes, the first dealing with the socio-economic situation in Fiji (*Fiji in Transition*) and the other presenting foreign experiences (*Fiji and the World*), edited by Lal and Vakatora and published by the School of Social and Economic Development of the University of the South Pacific (1997).



specifically Fiji issues: ethnicity, economy, religion, education, land. Another group with constitutional issues generally: preambles, electoral systems, chiefs and kings and constitutions, anti-defection provisions, upper houses, accountability institutions, power sharing, directive principles of state policy and human rights national and international.<sup>31</sup> It is hard to think of any other constitution with such respectable academic credentials!

### *Foreign experience*

Visits to Malaysia, Mauritius and South Africa were made for good reason. Nelson Mandela was released from prison in 1990, the interim South African Constitution was enacted in 1993, the first democratic elections in the country were in 1994 and the final constitution was enacted in 1996. South Africa is a country where race was the dominant political issue - and indeed where though blacks are by far the largest group there is also a significant Indian minority. Most observers would agree that the experience of South Africa has offered a model of constitution making and racial rapprochement which though not perfect (not in the latter respect certainly) has been very worthy of study and perhaps emulation.

Mauritius is less well known. The racial element involved a very large Indian community (now about 68% of the whole) and a smaller black one (now 27%). There was a great awareness in Fiji of the riots that had taken place in Mauritius not long before Fiji's own independence, and a desire to learn how this sort of strife could be avoided. Another parallel is the importance of sugar - since cane cultivation is so important part of the Fiji economy, and the structure of the society is so bound up with it, though the Mauritius sugar industry is more technically advanced than that of Fiji.

Malaysia is the most interesting example. Fijian politicians have long looked at the Bumiputra policies of the Malaysian government with admiration. There is a notion that this offers a model for Fiji. If Malaysia can restrict university places to Malays, with very small quotas for Chinese and Indians, if Malaysia can give favoured treatment to indigenous inhabitants in the realms of business and so on, why not Fiji? In the period after the 1987 coups, Mahathir Mohammed, Prime Minister of Malaysia, was invited to offer support - as was Lee Kwan Yew of Singapore, who was less obliging. The rather negative image that Malaysia has in much of the rest of the world because of the government's heavy handed treatment of political dissidents, and even for the way in which these policies of racial preference have had a negative impact in the Indian and Chinese communities has had little recognition in Fiji. Malaysia had offered assistance to Fiji, and various Malaysians had come to Fiji to advise, and a retired judge served as adviser to the government and SVT when the constitution was being negotiated. But interestingly when the commission visited that country the impact was rather the opposite to what one might have anticipated. Far from appealing to Sir Paul Reeves and Brij Lal as a model of racial justice that Fiji might emulate, it appeared to the Fijian member of the commission as a system that should not be emulated! He did not like what he saw as a

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<sup>31</sup> Authors included Guy Powles, Cheryl Saunders, AJ Regan (Australia), Alex Frame (New Zealand), Rohan Edrisinha (Sri Lanka), MP Singh (India), MP Jain, Cyrus Das (Malaysia), Daniel Elazar (Israel), John Darby (UK), Timothy Sisk (USA), Michael Reisman (USA).

system biased in favour of Muslims, and did not want something similar biased in favour of Christians.<sup>32</sup>

### *International Law*

Appeals to international law in the reform process took three main forms. There was a general awareness of international human rights norms, a consequence perhaps of the general international input already mentioned (most of the externally commissioned papers dealt with international norms and practice), and the terms of reference of the Commission required it to bear in mind “internationally recognised principles and standards of individual and group rights”. The submission of the NFP and FLP made considerable reference to international human rights norms, and other writings around the theme of reform did the same. This is reflected in the Reeves Report, which discusses relevant norms at some length.<sup>33</sup> The final document provides, in s. 3(b), that in interpreting the Constitution regard must be had to:

developments in the understanding of the content of particular human rights; and  
developments in the promotion of particular human rights,

which requires reference to international law (and also to foreign law).

Secondly, the Indo-Fijian community had appealed to international norms and the concept of equal citizenship and the rights of the individual as basic building blocks of the constitutional and political system. It had also relied on the Convention on the Elimination of All Forms of Racial Discrimination (“CERD”, was applied to Fiji by Britain during the colonial period), ever since the promulgation of the 1990 Constitution. Indeed at one point there had even been talk of persuading some other country to make a formal complaint against Fiji to the international committee supervising the CERD. Mauritius had already agreed to bring the matter to the committee since the Convention has no optional protocol authorizing individuals or political parties to complain to the committee. It was only when Rabuka agreed to set up a process for constitution review that plans to approach the committee were dropped.<sup>34</sup>

Indigenous Fijians, on the other hand, were powerfully attracted to the concept of indigenous peoples as a form of group rights. They feel that the Indo-Fijian community are incomers who have robbed them not only of power over their own political destiny but also of their land. Though only a small part of the land has been alienated on the basis of freehold, or permanent ownership, many Fijians have felt that the leasehold system has taken the control and the benefits of the cane growing land away from them) and also of power over their own political destiny. In the submission of the SVT to the Reeves Commission<sup>35</sup> (of which the chief craftsman is believed to have been a Muslim Indo-Fijian<sup>36</sup>) considerable reference is made to the Draft Declaration on the Rights of

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<sup>32</sup> Personal information.

<sup>33</sup> See especially Chap 2.

<sup>34</sup> Personal information from Yash Ghai who negotiated the arrangement with Mauritius.

<sup>35</sup> *Respect and Understanding: Fijian Sovereignty, The Recipe for Peace, Stability and Progress* (Suva: SVT, October 1995).

<sup>36</sup> Dr Ahmed Ali, who had been a Minister in the Alliance Party Government, author of a leading book on the *gimit* experience.

Indigenous Peoples (although no indigenous Fijian or the government had participated in the forum which produced the Declaration), and the concept of self-determination, though it also recognizes that the position of indigenous Fijians is not precisely that of indigenous peoples as envisaged in the UN system. Indeed, the difference between the position of Fijians and that of indigenous peoples in many countries was brought out by various contributions to the constitutional debate including that of an official of the World Council of Indigenous Peoples.<sup>37</sup> The Reeves Commission itself was not convinced that the international principles were applicable in the way suggested by the SVT, stating that the position in Fiji is very different from that in countries such as New Zealand. It also took the view that the Draft Declaration does not justify discrimination against other communities.<sup>38</sup>

### *Finance*

Reviewing a constitution is not a cheap enterprise. One elderly, conservative, European resident of Fiji described the Commission as a “Million dollar farce”<sup>39</sup>. The main costs of the enterprise in Fiji were born by the national exchequer. However, the UN (Electoral Assistance Division of the Political Affairs Department) paid for five papers of issues of electoral systems<sup>40</sup> (and facilitated meetings of the commission in the US). The Australian Government paid for foreign visits by the commission, and for the draftsman of the Constitution. The CCF raised money from or through International Alert, Conciliation Resources, the Governments of Australia and the UK, and the World Council of Churches.

### **The issues**

The issues that confronted the commission mainly related to or revolved around ethnicity. Nonetheless, the political parties and NGOs that participated in the process (or at least some of them) responded to the challenge of a comprehensive review in a comprehensive way. And the document itself was a blueprint for a fundamental shake-up of the entire system. The range of submission is dramatized in this section by drawing especially on the submissions of the SVT and the FLP--NFP. This rather distorts the nature of the debate - especially the SVT submission. It should not be thought that all submissions from Fijians were so insistent on maintaining the 1990 constitutional status quo.

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<sup>37</sup> Roderigo Contreras “Indigenous Interests: The Global Picture” in *Protecting Fijian Interests and Building a Democratic Fiji: A Consultation on Fiji’s Constitution Review* (Suva: Citizens Constitutional Forum and Conciliation Resources, 1995) p. 47. The NFP sought the views of the leading authority on indigenous people’s rights at the UN Center on Human Rights when preparing its submission.

<sup>38</sup> See Report chap. 3, esp. paras. 3.89-3.100. On the role of human rights, including the dialectics between individual and group rights, in constitution making in India, South Africa, Canada and Fiji, see Yash Ghai, ‘Universalism and Relativism: Human Rights As a Framework for Negotiating Interethnic Claims’ 21:4 (2000) *Cardozo Law Review*

<sup>39</sup> The individual was presumably Sir Len Usher, though Lal, who mentions this comment, does not give the name (but knights of the realm with newspaper columns are rare in Fiji as elsewhere) – see *Another Way* p. 165 The Fiji dollar is currently worth about 60¢ US.

<sup>40</sup> *Towards a United Future* para. 4.13.

The SVT submission to the Commission basically sought continued dominance of the Fijian people. It described the process thus:

The basic premise of the review is that the 1990 Constitution is here to stay, but that what is desirable in the interests of all communities in Fiji, and to help promote multi-racial harmony and national unity in Fiji, is to make its provisions more considerate of the position and sensitivities of all communities in Fiji's multi-ethnic and multi-cultural society.<sup>41</sup>

Its submission placed emphasis on the non-Fijians as *vulagi* - and the way in which Fijian tradition expected *vulagi* to be humble and to know his place; it contained extended quotations from the work of a Fijian nationalist academic which included the following<sup>42</sup>:

All is well if the *vulagi* is humble, respectful, tolerant and cooperative.

The Submission of the NFP-FLP,<sup>43</sup> by way of contrast, says:

We have not sought to promote the interests of our supporters at the expense of other people of Fiji for we do not think that that approach is fruitful. We believe that all the people of Fiji share a common destiny, and that the country will not progress unless there is a tolerance and accommodation of different views and interests.

The submission goes on to deal with every element one would expect to find in a constitution - right up to the amendment process. The SVT submission viewed that of the NFP--FLP as a further manifestation of Indian hypocrisy, hiding intentions of dominance that it traced back to Nehru.<sup>44</sup>

Fundamentally different approaches to the ethnic issue motivate the two submissions. The SVT document is an acceptance, indeed a glorification and justification, of difference; but difference mediated under the hegemony of one ethnic group. Its proposals would have the tendency - indeed were designed to have the tendency - to reinforce and harden those differences. All they hoped to achieve was an acceptance with a better grace of a subordinate position on the part of the Indo-Fijians, in return for a settlement of economic issues especially those relating to land. That aside the submission was a justification of the 1990 Constitution in terms of constitutional law and legal theory<sup>45</sup> and national need. The NFP--FLP submission does not ignore difference by any means, but it looks forward to a future in which races would work together, and proposes institutions and structures which are positively designed to encourage cross-ethnic collaboration.

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<sup>41</sup> Para. 3.1. (excerpts are printed in Lal, *Another Way* 143-).

<sup>42</sup> From Asesela Ravuvu, *The Facade of Democracy: Fijian struggle for political control, 1830-1987* (Suva: Reader Publishing House, 1991). Professor Ravuvu is writing of the concepts of *tauvei* and *vulagi* in relation to any village or place, but using it to make a point about incomers generally and specifically Indians, (the passage appears in a chapter that covers among other things the 1987 coup), and the SVT is clearly using it in relation to Indian as *vulagi* (the next section of the submission being 'Fijians attitudes towards Indians').

<sup>43</sup> *Towards Racial Harmony and National Unity* (August 1995)

<sup>44</sup> P. 59.

<sup>45</sup> For this they cited Yash Ghai! Actually Ghai and Cottrell, *Heads of State in the Pacific* (Suva: USP, 1990) on the 'successful coup' doctrine.

It is not the purpose of this paper to trace where every recommendation came from (or indeed to indicate how they were dealt with), although we notice that that the NFP--FLP submission was influential and its vision of future Fiji was endorsed by the commission. The following table indicates the relationship (at least in terms of resemblance, which does not mean that the NFP--FLP submission was the, or the only, source of the ideas in question) between that submission and the ultimate report, and the Constitution itself as enacted, and, for the sake of comparison, the SVT submissions also.

**Table 1 Major issues**

<b>Aspect</b>	<b>SVT Submission</b>	<b>FLP/NFP Submission</b>	<b>Reeves Report</b>	<b>Final Version</b>
Seats in lower house	<i>Communal Seats:</i> Fijians 58 Rotumans 2 Europeans 1 Chinese 1 Pacific Islanders 2 Mixed race <sup>46</sup> 2 Muslims 2 Indians <sup>47</sup> 20	<i>Communal Seats:</i> Fijian roll 14 Indo-Fijian roll 14 Rotuman roll 1 Others roll 2	<i>Communal seats:</i> Fijian roll 12 Indo-Fijian roll 10 Rotuman roll 1 Others rolls 2	<i>Communal seats</i> Fijian roll 23 Indo-Fijian roll 19 Rotuman roll 1 Others roll 3
	<i>Open seats:</i> 14	<i>Open seats:</i> 40 for one national constituency	<i>Open seats</i> 45 in 3 member constituencies	<i>Open seats</i> 25
Voting system	No position	AV for communal seats List PR for open seats	AV for all	AV for all

<sup>46</sup> Called 'Vasus' or brothers-in law' in the SVT submission. Elsewhere it uses the expression 'part-Europeans'. Not all people of mixed race are European at all, in fact, or even part-Fijian. 'Other' includes all.

<sup>47</sup> Since virtually all Muslims are ethnically Indian this would produce a House with 24 Indo-Fijians. The Submission argues that Muslims, of whom the author is one, are a distinct ethnic group, and that to include them as Indians disadvantages Muslims, and is a cynical device to swell the Indian population from 38% to 46%.

Upper House	14 appointed on advice of BLV 8 by Prime Minister 5 by Leader of Opposition 1 on advice of Council of Rotuma 6 appointed by President from professions to provide technical and professional advice to Senate	None - but Bose Levu Vakaturanga to have special role with regard to entrenched legislation	Upper House should be mainly elected representing provinces; some appointed members to cater for groups not otherwise represented	14 appointed on advice of BLV 9 on advice of the Prime Minister 8 on the advice of the Leader of the Opposition; 1 on advice of the Council of Rotuma.
Power sharing in government	None	Cabinet to include all parties with >20% seats and ethnic balance to be prescribed	No power sharing requirement	Prime Minister must invite all parties with at least 10% of seats in House
Ethnic balance in civil service etc	Not provided for	Proportionality should be required	Proportionality principle as touchstone of equality of access	Composition should reflect ethnic composition of the population
President	Elected by BLV	BLV to nominate 3 candidates; Parliament to elect	Should be Fijian; nominated by BLV, elected by Parliament	Appointed by BLV after consulting PM
Entrenched legislation	Assumed to continue	BLV to have power to veto any amendments to specified Acts	As FLP--NFP	Amendment must have support of BLV- nominated Senate members
Social justice/affirmative action	Preference for Fijians to continue	Should be Directive Principles which are binding if not directly justiciable Should include social justice, affirmative action, land for landless. Available for the disadvantaged of all ethnic groups	Duty for affirmative action - for Fijian and other people and groups	Right to basic education  Duty to make provision for disadvantaged

This table identifies the most 'ethnic' elements. This is unfortunate in a sense for in a functioning democracy other things may be more important: provisions for government accountability, protection for the rights of women, dealing with corruption, controlling the armed forces, bringing government closer to the people by means of effective local government and so on. All these were also dealt with - but sadly, as seems always to have been the case with Fiji, the ethnic issues again confounded hopes that these constitutional quality of life issues could be really confronted.

## **Sustainability and Aftermath**

### *Reconciliation*

The recommendations of the Reeves Commission and, to a lesser extent, the new constitution aimed at a major change in direction, towards a national and harmonious political community. This seemed to reflect the wishes of all communities, though how this was to be achieved was the subject of very different visions, especially if one contrasts the submission of the SVT with that of the FLP--NFP or the CCF.

The CCF proposed that power sharing should be a feature of the constitution, at all levels of government based essentially upon electoral support for political parties.<sup>48</sup> The FLP--NFP submission also proposed a system under which any party which obtained more than 20% of the parliamentary seats should be represented in Cabinet which should also be racially balanced. The principle of ethnic proportionality should extend to public office, and also to the use of national resources.

The Reeves Commission itself did not accept the proposal for power sharing in Cabinet, though its choice of the AV voting system was directed at the encouragement of inter-ethnic cooperation of a different sort. However, when the matter came to the JPSC the politicians did opt for a model of compulsory power sharing at the Cabinet level. Under s. 99, any party that has won at least 10% of the seats in the House of Representatives has the right to a seat or seats in Cabinet proportional to the number of seats in the House. The Bill as originally drafted provided that every party with 4% of MPs was entitled to be in Cabinet. Fundamental to the Compact, setting out the underlying principles of the constitution, is the provision that 'to the extent that the interests of different communities are seen to conflict, all interested parties negotiate in good faith in an endeavour to reach agreement' (art. 6(i)). A new electoral system was devised to consolidate inter-ethnic cooperation. All the circumstances seemed very propitious for a successful rooting of the constitution.

But only a few weeks after the first election under the new rules, the country was confronted with a coup and the overthrow not only of the government but also of the constitution. Once again a constitution, this time negotiated so laboriously and what seemed consensually, became the object of contention and conflict. How is this to be explained?<sup>49</sup>

The election results seemed a rejection of the two principal architects of the constitution. Rabuka's SVT obtained only 7 seats and Reddy's NFP not a single one! Chaudhry's Fiji Labour Party - no longer in coalition with the NFP but working to some extent with the FA - won a substantial majority, producing again an 'Indo-Fijian' government. A part of the Fijian establishment, united in its opposition to any Indo-Fijian government (albeit in coalition with senior Fijian politicians), showed the superficiality of its commitment to constitutional rule. This time the military intervened reluctantly, and the courts declared

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<sup>48</sup> CCF, above at p. 43.

<sup>49</sup> These issues are discussed in greater detail in our joint paper on Fiji's constitution making process prepared for the constitution project of the United States Peace Institute, 'Between Coups: The Constitution Making Process in Fiji'.

the coup unconstitutional and ordered the restoration of the constitution—but not that of the deposed government. A new election was called which brought to power a Fijian government headed by Laisenia Qarase, who had led the interim, military backed government between 2000 and 2001. Chaudhry was entitled to substantial representation in the cabinet under the power sharing formula, but squabbles between him and the prime minister on the precise number and the modalities of their appointment (and endless litigation) prevented a coalition, inter-ethnic government, leaving all power in the hands of Fijians. Fiji seemed to have come full circle.

## **Conclusion**

In concluding our study, we discuss why the constitution was rejected in this violent manner by a section of the Fijian elite and whether the manner of the enactment of the constitution was in some sense responsible for this fate. Was there sufficient popular commitment to the constitution? Was the unanimity expressed in support of the constitution in parliament deceptive? More fundamentally, what role can constitutions and constitutional negotiations play in the resolution of ethnic conflicts?

There was a brief period of euphoria after the constitution came into force. This did not seem to be restricted to the Indo-Fijian community. Most people were happy to return to a situation in which the constitution had legitimacy at home and overseas. Few wanted to live at odds with their neighbours. It is often suggested that the 1999 elections should be viewed as a referendum on the Constitution – and the verdict as ‘No’. But this view discounts the general sense of relief that there had been a settlement. It also perhaps ignores the possibility that the result in 1999 reflected not so much a rejection, on the part of the Indo-Fijian community at least, of the constitution makers, but a hope that the FLP could deliver in terms of policies.<sup>50</sup> But it is clear that both major communities were worried about the constitution at one level, and it was all too easy for those who wanted to stir up strife to portray it to both sides as some sort of sell-out!<sup>51</sup>

The two main parties - and ultimately the nation - seem to have paid a price for the rather secretive, or at least not fully participatory, way in which the whole process was carried out. It was an advance on previous processes - but by the standards of modern constitution making it left a good deal to be desired. This may seem unfair. But, as pointed out earlier, the Reeves Commission itself offered no options to the people. The people and the parties fed their ideas into the machine that was the Commission and ultimately out popped a complete report. There was no presentation of a draft for public discussion either before or after it was published. And when it came to formulating the actual document for enactment, it again disappeared into a black box, to be adjusted in view of the prejudices and interests of the MPs and the two main parties. The people were again presented with a *fait accompli*. True it may all have been better than earlier constitution making exercises - and perhaps this is why it was deemed acceptable - but in terms of true popular participation it left a good deal to be desired. The failure to carry out any form of civic education in advance may also have contributed.

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<sup>50</sup> The latter is suggested by Krishna Datt (who is, as a Labour politician, not disinterested) in a recent CCF sponsored discussion following a lecture by Andrew Ladley on Multi-party government (publication forthcoming).

<sup>51</sup> See Brij Lal, *Another Way* 81-2 for early and hostile reactions in some quarters.



Nor was there sufficient popular education after the Reeves Report or the final Constitution was produced, though there was some donor-funded education for parliamentarians and the public service.<sup>52</sup> As mentioned earlier the Report (or even a summary) was not translated into Fijian or Hindi. The rationale of the new constitution remained unknown to the people. It certainly would have helped if there had been greater public knowledge of the philosophy and terms of the constitution (for subsequently many groups, including the military expressed support for the constitution once they had studied it).

But this argument should not be overdone (and the ability of the people to defend a constitution in the face of armed force should not be exaggerated). Persons who engineered the coup understood the constitution but had a vested interest in misrepresentation. There are categories of persons whose fortunes are closely tied to control over or access to the apparatus of the state. These include politicians, senior military officers and dubious businesspeople, selling or buying influence. A change of government is usually a traumatic experience for people ensconced in the outgoing regime. In Fiji, with decades of uninterrupted government dominated by elitist Fijian interests and their hangers on, the loss of government spelled an end to wealth and privileges, patronage, and access to state resources. Such was the dependence of this group on state office that they faced penury. It is evidently in its interest to resist the change of government, even more than a change of constitution. An attack on a new constitution is often no more than tactical. This seems to have been the case in this coup as it was in 1987 (in respect of a constitution whose principal beneficiaries until then had been Fijians).

So it may be interesting to consider the argument that the constitution did not represent the views of Fijians but was imposed on them. It is true that several of the SVT proposals were rejected or modified by the Reeves' Commission (but all key Fijian interests were protected), and that some people drummed up opposition to it in some (Fijian) provincial councils. But once the provincial councils were explained the contents of the constitution (as for example, Vakatora did before the 'dissidents' stopped him), they supported it. After all the Great Council of Chiefs, the supreme representatives of Fijians, fully endorsed the document. And it must also be acknowledged that negotiations are about 'give and take' and that Fijians did not get all that they may have wanted is no criticism of the process or its product.

Yet it must be acknowledged that the constitution itself had contradictions. Perhaps these contradictions were not, in the short term, the cause of its misfortunes. But they are likely to affect its full implementation. Drawing upon its sparse terms of reference, the Reeves Commission advanced a vision of Fiji which did not suit all key groups. It embraced an image of a non-racial, multi-cultural Fiji, with full respect for human rights and social justice. It rejected both the consociationalist assumptions of the independence, and the racial hegemonic assumptions of the 1990, constitutions. However, its long term goals were not always consistent with some specific recommendations.

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<sup>52</sup> For example in May 1998 the Inter-Parliamentary Union and UNDP held a workshop on Multi-party Government.

The independence Fiji Constitution, built primarily on the building blocks of racial communities, was an imperfect reflection of consociationalism. It sought to provide fair representation for all communities, but deliberately overrepresented the General Electors to ensure Fijian domination. It did not provide for power sharing at the executive level, nor the principle of proportionality in state services. It did nothing to disturb the monopoly of the armed forces by indigenous Fijians. It provided various forms of self-government and autonomy for Fijians (through Provincial Council, Fijian Administration and the Great Council of Chiefs) and a qualified veto for them, but little for other communities. These were not merely protective provisions—they were at the heart of a distinctive Fijian paramountcy. Yet there were strong impulses of democracy and rights, and the vision of a more integrated political community was hinted at in the agreement to review the electoral system to provide a non-racial element.

The 1990 constitution, described above, was explicitly racist. Its assumptions were the further reinforcement of the separate markers of indigenous Fijians, by resurrection of elements of its customary laws and judicial tribunals, and its hegemony over other communities (in the manner of Jewish hegemony over Arabs in Israel or the whites over the others in apartheid South Africa).

The 1997 constitution, rejecting the racial hegemonic model of the 1990 constitution, made some further moves towards the consociational model, principally in the provision of executive power sharing, while at the same time flagging a more non-racial, even liberal, model. At the same time it was not prepared (perhaps more accurately, was not able) to dismantle the laws and institutions which separated the indigenous Fijians from others (the Great Council of Chiefs, the provincial Councils, the Fijian Administration) although it did claw back some of the 1990 provisions (customary law and tribunals). These Fijian institutions provided a powerful base for ethnic identity and mobilization, and a source of legitimacy which often competed with constitutional values and allocations of authority. And nobody dared touch the question of Fijian land rights and the fairness to Indo-Fijians in the lease arrangements, although most leases were about to expire—perhaps the most contentious public issue of all. The qualified veto, to be exercised in the Senate, was preserved (although the Senate itself would move away from domination by political parties under its recommendations). The concept of citizenship that emerges from its provisions does not conform to the universal and equal citizenship of liberalism. Group rights (despite Reeves correct analysis of indigenous rights) clash with individual rights. The advance to non-racialism and liberalism were signalled by reforms to the electoral system allocating a majority of parliamentary seats to common roll voting, a stronger system, substantively and institutionally, of human rights, and social justice to the disadvantaged of all communities instead of exclusively to one community.

In fairness to the Reeves Commission, it must be clarified that not all the provisions of the constitution were based on its recommendations. For example, it did not support the same degree of consociationalism that is to be found in the constitution. It would have allocated a much higher proportion of non-racial or open seats than in the constitution (45 instead of 25). And it explicitly rejected the model of executive power sharing, relying on the AV voting system for inter-ethnic co-operation. Yet by retaining the Reeves system of AV voting and providing for multi-party executive coalitions, the constitution contains

two somewhat contradictory methods for the same objectives. The logic of adversarial politics and voting won over inter-ethnic co-operation. Political leaders saw the route to government under the coalition formula by building up enough support in their own community to secure a sufficiency of parliamentary seats, putting a severe strain on multi-party government.

This brings us to the context and procedure of constitution making. In terms of institutions, the constitution could perhaps only be interim, marking a departure from old orthodoxies but postponing some of the goals of the new vision. An abrupt shift would have generated tensions and anxieties that would have put the entire project in jeopardy. These constraints operated on the Reeves Commission as on numerous groups and individuals who presented their views to it. The procedure for the making and adopting of the constitution imposed its own constraints.

The type of Commission used in this instance was a great improvement on previous Fiji models. The composition of the Commission, restricting to two local members, representing parties of competing ethnic groups, had not seemed propitious to the definition of national goals and identity—on this point the commissioners confounded the critics and gave the country a wonderful and powerful vision of Fiji and a host of sensible recommendations. Its independence – something that was very lacking in previous commissions, hand-picked as they tended to be to respond to the demands of the moment, and in order to deliver a certain result – was critical. Its independence meant that it was able to stand up to local divisions. And it had a legitimacy both locally and internationally that other bodies had lacked, and as a result was able to promote the genuine involvement of all groups in the country. It is suggested that part of that legitimacy came from the very fact that it was not comprised just of active politicians, and was not seen just as a forum for negotiations about power.<sup>53</sup>

Unfortunately the last word was not with the Commission but with politicians—and more importantly, with the parliament, under the 1990 constitution, which was slated to be reformed in a way that would do away with the assumptions of its own foundation. In other words the future constitutional order depended on MPs who had a vested personal and ethnic interest in the preservation of the then current constitution. And particularly, the requirement of enhanced majorities meant that each major ethnic group had a veto – and in the circumstances that veto was of more value to the Fijian community than to the Indo-Fijian; the negotiations in the JPSC, and even the party submissions, and perhaps the proceedings of the Commission itself, had to be carried out in the shadow of this fact.

Therefore once the Reeves recommendations were out in the public domain, the locus of the process shifted to Parliament and political parties. The primary responsibility for the hammering out of the final decisions lay with an all-party Parliamentary Select Committee, working in secrecy, without the assistance of the legal advisers of the parties. The final report of the Committee is a poor guide to its discussions and the mode of reaching a consensus. Consensus they did reach, but it was a consensus coloured by their experience and predilections as politicians. They were more reluctant to move away as emphatically

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<sup>53</sup> This sentiment would not be shared by one commentator at the meeting where the paper was first presented, who took the view that since politicians had to operate the constitution, they should be left to draft it.

from the older Fiji constitutional assumptions than the Reeves Commission. They stuck to communal seats for the most part (hoping that AV voting, which probably most did not understand, would do the trick). They choose to retain a Senate whose membership had become a form of patronage for leaders of major parties.

Fiji's politics and political and administrative structures have, from the very inception of Fiji as a political entity, been always, thanks to colonial policies, obsessed with race and ethnicity. Every other issue, human rights, trade unionism, land, economy, education, even religion, have been subordinated to it. Constitutional debates have fundamentally been about ethnic allocations of power. They have not been about national unity or identity, social justice, the appropriate sphere of the public, Fiji's place in the world, and myriad other issues that define people's daily life. As happens when with such obsession with race, there is a great distortion of reality. The complexity of Fijian society, with its ethnic divisions and class structures, is obscured so that a regional chiefly class assumes the leadership of the entire community. Such obfuscation, prevalent in other communities as well, is the handmaiden of injustice. The 1997 constitution tries to move to a new paradigm, motivated by newer thinking on ethnic differences, celebrating diversity as a source of enrichment and social justice through a national unity and integration. Its own chequered career shows the difficulties of its project. But there is little doubt that in course of time, its vision will win greater acceptance. A constitution charting a new path does not necessarily achieve its objectives immediately, especially if it operates in a situation where power is fluid and dispersed, the constitution registering no particular class or ethnic victory. What then matters is the persuasive power of its vision and goals. The Reeves Report, a watershed in Fiji, did provide that vision, however incompletely and contradictorily the 1997 constitution conveyed it into law and practice.