Public order and the Bill of Rights in Fiji: R. v. Butadroka[1]

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In 1977, Sakeasi Butadroka, a prominent Fijian politician, was charged with unlawful assembly, with having made statements likely to prejudice the public peace, and with having counselled disobedience to the law under the Fiji Public Order Ordinance 1969. His trial raised important questions about the conflict between the Government's duty to maintain public order, and the constitutional guarantees of freedom of speech and assembly. This article examines the Bill of Rights contained in the Fiji Constitution, and compares it with similar legislation in other countries.

I. THE FIJI BILL OF RIGHTS

Fiji's present constitution was adopted in 1970, the year in which Fiji became an independent country within the British Commonwealth.[2]

The Fiji Constitution was drafted in terms very similar to those of many other new Commonwealth constitutions, particluarly those of Nigeria and Mauritius, and therefore borrowed significantly from the European Convention on Human Rights. In following the pattern of these other countries, Fiji rejected the traditional doctrine of the supremacy of Parliament in favour of the supremacy of a constitution containing an entrenched Bill of Rights.

Section 2 of the Fiji Constitution reads:

> This Constitution is the supreme law of Fiji and if any other law is inconsistent with this Constitution, that other law shall, to the extent of the inconsistency, be void.

Further, section 52 states: "Subject to the provisions of the Constitution, Parliament may make laws for the peace, order and good government of Fiji."

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1 Unreported, Supreme Court of Fiji, 9 August 1977. Reproduced in the Appendix to this paper.

2 For a fuller discussion of Fiji's political background, see the original of this paper deposited in the V.U.W. Library, and R.K. Vasil "Communalism and Constitution Making in Fiji" (1972) 45 Pacific Affairs.

Section 67 specifies that the Constitution may be changed only by a majority of two-thirds in Parliament, but, in the case of the provisions relating to fundamental rights, Fijian land and some other matters, a three-quarters majority is required.

The Fiji courts' power to interpret the Constitution and to declare any laws contrary to its provisions to be invalid or partially invalid is clearly indicated in section 17 of the Constitution,[3] which provides individuals whose fundamental rights may be infringed with a right to direct relief from the Supreme Court[4] and section 97 provides a similar right for other sections of the Constitution.

The courts in Fiji have therefore been given an important role in checking that the legislature does not exceed its powers. In this respect, they are in a very different position from the courts in New Zealand or the United Kingdom, which are limited to interpreting and applying laws as passed by Parliament and where there is no organic or higher law against which the validity of those laws can be tested.

Chapter II of the Fiji Constitution contains guarantees for the "protection of fundamental rights and freedoms of the individual". These include the right to personal liberty, freedom of religion and conscience, freedom of assembly and expression, protection from discrimination and from deprivation of property.[5]

The inclusion of an enforceable Bill of Rights in the Constitution reflects a change away from the old British view that a Bill of Rights was actually a hindrance to good government. Such traditional objections were voiced by the Simon Commission on the Indian Constitution in 1934.[6]

> Either the declaration of rights is of so abstract a nature that it has no legal effect of any kind, or its legal effect will be to impose an embarrassing restriction on the powers of the legislature and to create a grave risk that a large number of laws will be declared invalid by the courts.

While these objections have some validity, particularly as to whether a declaration of rights should be drafted broadly, as is the United States Constitution, or more narrowly, as is the case of most Commonwealth constitutions, the attitude towards Bills of Rights has changed markedly since the Second World War, gaining momentum with the many new states which became independent in the

3 "If any person alleges that any of the provisions of this Chapter has been, is being or is likely to be contravened in relation to him . . . then without prejudice to any other action with respect to the same matter which is lawfully available, that person . . . may apply to the Supreme Court for redress."

4 Thus, in the case of Butadroka, it was open to the defence to argue that the provisions of the Public Order Ordinance 1969, under which he was charged were invalid as being inconsistent with the Constitution.

5 These are all freedoms which can be exercised under the Common Law, which applies in Fiji. However, it was felt desirable to include them as constitutional guarantees as an additional safeguard. Unlike several earlier Commonwealth constitutions, where fundamental rights provisions are expressed as objects of or in a preamble to the Constitution, (or, as in the case of Ghana, as a Presidential decree, and Canada, in an ordinary Act of Parliament), in Fiji these rights are directly enforceable, as indicated by section 17.

6 *Report of the Indian Statutory Commission*, Cmnd. 3569 (H.M.S.O. London 1930).

1960s. This trend was shown in the adoption of the Universal Declaration of Human Rights in 1948, followed later by more specific United Nations covenants, and also by the European Convention on Human Rights in 1950. Britain is bound by this Convention and extended it to cover Fiji, among other British colonies, in 1953.

The newer Commonwealth countries, particularly those with significant ethnic or religious minorities and those where democratic ideas might not be so well established as in Britain, have usually favoured the inclusion of a Bill of Rights in their independence constitution. The British Minorities Commission of 1958, looking at the position of minority groups in Nigeria before independence accepted this when it said:[7]

> A [Bill of Rights] defines beliefs widespread among democratic countries and provides a standard to which appeal may be made by those whose rights are infringed. A Government determined to abandon democratic courses will find ways of violating them but they are of great value in preventing a steady deterioration in standards of freedom and the unobtrusive encroachment of a Government on individual rights.

It is worth noting that many Bills of Rights, particularly in the African Commonwealth countries, have not managed to withstand the political and social pressures placed on them and have either been suspended or are no longer enforced.[8] This fact supports the view of the Minorities Commission that a Bill of Rights is not an ultimate solution, and that, as de Smith states: "It may well be found that . . . basic rights of individuals receive firmer protection from the courts than the legislature."[9]

It is too early to tell if a Bill of Rights will act as a bulwark against the encroachment of fundamental rights in Fiji, but its very existence probably provides a measure of security to its citizens. When for instance Sakeasi Butadroka began agitating for the removal of Indians from Fiji or for denying them their rights within Fiji, people were able to point to the Bill of Rights and reassure themselves that if any attempt was made to implement such ideas, it would be declared unconstitutional. Later, Butadroka himself was able to plead that the Ordinance under which he was being prosecuted was unconstitutional as infringing the rights protected by the Constitution.

Commenting on the Fiji Constitution, M.S. Sahu Khan said:[10]

> It seeks to balance the claims of a pluralistic society. It has a Bill of Rights as a check on the illegal exercise of governmental and legislative powers and it also has corresponding provisions for their enforcement . . . . Thus, the Constitution in Fiji attempts to establish an equilibrium not only between the state on one hand and the individual on the other, but also amongst the ethnic groups of a pluralistic society . . . . in Fiji, if there is an irreconcilable difference between an act of Parliament and a provision of the Constitution, the Constitution must prevail.

7 *Nigeria: Report of the Commission Appointed to enquire into the Fears of Minorities and the Means of Allaying them.* Cmnd. 505 (H.M.S.O. London 1958).

8 For instance, the Nigerian, Ghanaian, Ugandan and Pakistani constitutions, all of which have been substantially changed since independence.

9 S.A. de Smith "Fundamental Rights in the New Commonwealth" I and II (1961) 10 I.C.L.Q. 83, and 215 at 236.

10 M.S. Sahu Khan *The Constitution of Fiji* Ph.D. thesis, University of Auckland, 1975, 230-231.

II. THE BUTADROKA TRIAL

The charges against Butadroka arose out of the political turmoil of 1977 in Fiji, and the circumstances which led up to the case had a major impact on Fiji's multi-ethnic community.

Butadroka was the leader of the Fijian Nationalist Party, which was a newly formed, small but influential party committed to a "Fiji for the Fijians", and which argued for the expulsion of all Indians, or at least their removal from all positions of power within Fiji. This was in marked contrast to the attitude of the two major political parties, the Fijian dominated Alliance, and the predominantly Indian National Federation Party, both of which were committed to multi-racialism. However, when General Elections were due, in April 1977, both major parties were facing considerable internal dissension and defections, and many Alliance supporters turned to the Fijian Nationalist Party.

The election results came as a shock to almost everyone in Fiji. Of the 52 seats in the House of Representatives, 26 had gone to the National Federation Party, only 24 to the Alliance, one to the Fijian Nationalist Party (Butadroka himself) and one to a Fijian independent. As neither Butadroka, nor the independent member would ally themselves with the major parties, the Alliance Government resigned and the National Federation Party seemed set to become Fiji's first predominantly Indian Government.[11]

Three days after the result of the election became known, the Fijian Nationalist Party held a large meeting in the Suva Civic Centre. The meeting was restricted to Fijians, but was later held by the Supreme Court to constitute a public meeting.

A number of Fijian Nationalist Party leaders spoke, including Butadroka, and two other leading party members, Iona Walisoliso and Jone Kama. Butadroka's speech said (among other things):[12]

> This meeting will decide the destiny of Fiji tomorrow, whether it will be destroyed by fire or not, live or die . . . . from the time the results were known, I changed the colour of my bow tie. Red for danger, red for bloodshed . . . . This is Easter — die — be beaten to death in Fiji, those who wanted to sell the Fijian race . . . . This is the end of Ratu Mara's political life, as well as the Alliance. Give it a hand . . . . Fijians be prepared . . . . Police, Army or whatever is nothing to us . . . . all Fiji will march on 23rd May — we'll convene an emergency meeting 30 days from the 23rd of April. This is our demand in our land here — and it's got to be accepted; if they don't accept, bloodshed . . . . This meeting has agreed . . . . to inform the Government to amend the Constitution [so] that all Cabinet members are all Fijians. That we get a reply 31 days from 23rd April . . . . if not, then I don't

11 As it turned out, the National Federation Party did not immediately take up the chance to form a government. With its bare majority and internal dissension, it was slow to nominate a Prime Minister, and, in the interim, the Governor-General asked Ratu Mara to form a minority government. (The propriety of this action is another constitutional saga in itself). This Alliance Government was soon defeated in a no-confidence vote and new elections were called for September 1977, when the Alliance Party retained a large majority of seats, including the one Butadroka had held.

12 Extract from the depositions at the preliminary hearing of *R.* v. *Butadroka.* Original speech made in Fijian.

know the end . . . . our document will go to an Indian Government . . . . The Fijians demand their rights which they want back.

It is clear from these statements that though Butadroka was talking of bloodshed, he envisaged that this might take place over a month away, once the Government had failed to act on the Fijian Nationalists' petition, and not immediately. His statements were followed by those of Walisoliso, which were more violent and anti-Indian than Butadroka's, and possibly more likely to provoke an immediate reaction.

Despite an enthusiastic reaction from the crowd to these statements, the meeting dispersed without any disturbance. Later that same day, it was announced that Ratu Mara, the leader of the Alliance Party and Prime Minister up to the 1977 elections, had been sworn in as Prime Minister, and much of the apprehension at the prospect of an Indian government abated.

Nine days later, on April 16, Butadroka, Walisoliso and Kama were arrested. All three were charged with taking part in an unlawful assembly contrary to section 80 of the Penal Code 1967,[13] read with section 11 of the Public Order Ordinance 1969.[14] Section 11 states that any public meeting or procession shall be unlawful unless a permit has been issued pursuant to section 8 of the Ordinance,[15] which outlines the role of the "appropriate authority" in deciding whether to issue such a permit. In this instance, no application had been made to the appropriate officer for a permit.

Butadroka and Walisoliso were also charged with "inciting racial antagonism" contrary to sections 17(1)(a)(iii) and 17(1)(c) of the Public Order Ordinance 1969 as amended by the Public Order Amendment Act 1976,[16] although in fact neither of these subsections, which relate to statements likely to prejudice the public peace and counsel disobedience to the law, contain any specific reference

13 "Any person who takes part in an unlawful assembly is guilty of a misdemeanour, and is liable to imprisonment for one year".

14 "Any meeting or procession convened or taking place in a public place for which no permit has been issued under the provisions of subsection (1) of section 8 of this Ordinance . . . shall be deemed to be an unlawful assembly within the meaning of section 79 of the Penal Code."

15 "Any person who wishes to organise or convene a meeting or procession in a public place shall first make an application for a permit in that behalf to the appropriate authority and, unless such authority is satisfied for good reason that such a meeting or procession is likely to prejudice the maintenance of peace and good order, he shall issue a permit . . . . "

16 "Inciting Racial Antagonism. 17(1) If any person who by words, either spoken or intended to be read or by signs or by visible representation or otherwise —
(a) spread any report or makes any statement which is likely to —
(i) incite racial dislike or hatred or any race or community; or
(ii) promote feelings of enmity or ill-will between different races or communities; or
(iii) prejudice the public peace;
(b) makes any intimidating or threatening statement in relation to a race or community other than his own, which is likely to arouse fear, alarm or a sense of insecurity amongst members of that race or community;
(c) spreads any report or makes any statement which incites to violence, counsels disobedience to law . . . shall be guilty of an offence . . . . [sic]."

to inciting racial antagonism, which is merely the marginal note which applies to all of section 17(1) of the Ordinance.[17]

Butadroka alone was charged with "incitement to violence and disobedience of the law", under section 16(c) of the Public Order Ordinance 1969,[18] but this charge, referred to in the judge's ruling on the case, was later dropped.

The trial of the three defendants was held in the Supreme Court in August 1977.[19] The Crown Prosecutor called witnesses who testified that they had been

17 The Ordinance was amended in 1976, to cover specifically incitement to racial antagonism. According to the Attorney-General, this change was recommended by the Fiji Royal Commission on Crime which presented its report that year. (*Fiji Parliamentary Debates*, August 1976, p.688).

When the amending Bill was introduced in Parliament, the Attorney-General said he thought that all parties, with the exception of one, were committed to racial harmony and would support the amendment, which he said was intended to create a strict liability offence. It was clear from frequent references to Budadroka, that his actions, especially in seeking to have Indians deported from Fiji, were at the time very much in the minds of members of Parliament. The Attorney-General made this obvious when he said he could already "identify the first person who would be a recipient of attention by the Police". Predictably, Butadroka opposed the amendment on the ground that a law cannot prevent people from saying what they want to say. The Opposition, while supporting the amending Bill, felt concerned that it was not "positive enough" and that they would have preferred a Race Relations Bill. On the other hand they argued that making section 17 a strict liability offence was too restrictive of statements made without any ill-will. They also expressed their concern that decisions to prosecute would be made by the Government instead of the Director of Public Prosecutions, as s.17(4) of the Ordinance states: "No prosecution shall be instituted under this section without the consent of the Attorney-General."

18 Any person who, without legal excuse, the burden whereof shall lie upon him, utters, spreads or publishes any words or does any act or thing, knowing or implying that it is or may be desirable to do, or omit to do, any act, the doing of or the omission to do which is calculated — . . . .

(c) to prevent or defeat by violence or by other unlawful means the execution of or the enforcement of any written law or lead to the defiance or disobedience of any such law, shall be guilty of an offence . . . .

The defence had contended that this section contravened section 10(2) of the Constitution, which states that every person who is charged with a criminal offence shall be presumed innocent until he is proved or has pleaded guilty.

While Kermode J. correctly states that section 16(c) is not a strict liability offence, he went on to say that the prosecution must prove all the elements of the offence, without defining what the parameters of the offence are. Clearly the prosecution must prove the actus reus of the offence, but the mens rea is presumed unless the defence can prove otherwise. This raises the question whether proof of guilt includes proof of a guilty mind as well as a guilty act. Presumably it does not necessarily do so in regard to either strict liability offences, or those which, like section 16, presume mens rea. It is submitted that section 10(2)a is merely a codification of the Common Law presumption of innocence and as such, would cover strict liability offences.

This is certainly the view taken by the Supreme Court of Mauritius in dealing with the same section in the Mauritian Constitution *Parmessur* v. *The Queen* (1979) No. 323; *D.P.P.* v. *Labavarde* [1965] M.R. 74; and *Babet* v. *The Queen* (1979) No. 359.

19 There is no record of the actual trial, and the case was not appealed. Therefore reliance is here placed on the depositions and newspaper accounts of the actual trial. It appears no new evidence was brought forward at the trial.

frightened by what the accused had said, and that they had been afraid there would be a breach of the peace.

The defendants did not call any witnesses and did not give evidence. Instead, their counsel relied on the argument that sections of the Public Order Ordinance 1969 violated sections 3, 12 and 13 of the Fiji Constitution[20] and that therefore no offence had been committed. Section 3 is a general fundamental rights provision, while section 12 relates to freedom of speech and section 13 to freedom of assembly.

In his ruling, the presiding judge, Kermode J., rejected the defence's argument and held that the Public Order Ordinance was not contrary to the Constitution.[21] His ruling dealt only superficially with the fundamental rights provisions and did not address the issue of the paramount position of the Constitution, nor examine what constitutes public order in any detail.

20 "3. Whereas every person in Fiji is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedom of others and for the public interest, to each and all of the following — namely —

(a) life, liberty, security of the person and the protection of the law;

(b) freedom of conscience, of expression and of assembly and association; and

(c) protection for the privacy of his home and other property and from deprivation of property without compensation,

the provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any person does not prejudice the rights and freedoms of others or the public interest."

12 (1) Except with his own consent no person shall be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions and to receive and impart ideas and information without interference . . . .

(2) Nothing contained or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes a provision —

(a) in the interests of defence, public safety, public order, public morality or public health;

(b) for the purpose of protecting the reputations, rights or freedoms of other persons . . . .

(c) for the imposition of restrictions upon public officers,

except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society."

13 Except with his own consent, no person shall be hindered in the enjoyment of his freedom of assembly and association, that is to say, his right to assemble freely and associate freely with other persons . . . . "

[Section 13(2) is essentially the same as s.12(2)].

21 The three court assessors (who decide questions of fact while the judge decides questions of law) found all three accused guilty of taking part in an unlawful assembly, under section 11, but discharged them in respect of that offence. Walisoliso was found guilty under section 17(1)(a)(iii) of prejudicing the public peace and fined $F100, while Butadroka was found guilty under both sections 17(1)(a)(iii) (prejudicing the public peace) and section 17(1)(c) (inciting violence) and sentenced to six months imprisonment on each count, each sentence to be served concurrently.

Kermode J. began by comparing the provision contained in sections 12 and 13, that recognises that legislation may be passed "in the interests of defence, public safety, public order, public morality or public health", with the wording of section 17(1)(a)(iii) of the Public Order Ordinance 1969, which makes it an offence to make statements likely to "prejudice the public peace."[22] He said that "The words 'public order' have been treated as synonymous with 'breach of the peace' by Lord Parker in *Ward* v. *Holman* [1964] 2 All E.R. 729, 731."

However, Lord Parker did not equate 'public order' and 'breach of the peace'. In *Ward* v. *Holman*, the question had arisen whether a neighbourhood dispute constituted a breach of the peace which came within the ambit of section 5 of the Public Order Act, 1936 (U.K.), an Act which, as its preamble stated, had been passed with the object of controlling political demonstrations. Section 5[23] of the Act is more general in its language, and does not itself use the expression 'public order.' Lord Parker was quite clear that he had to decide the case on the basis of the words used in section 5, which were not ambiguous, and that in such an instance, resort to the preamble of the Act would be incorrect. The words which Kermode J. appears to have relied upon are:[24]

> In my judgement, these words are plain; they are intended to preserve peace and order not only to preserve public order in the sense of many people being involved, but to preserve public order in the sense of preserving public order in a public place.

It would seem that in his cryptic statement, Kermode J. was relying on Lord Parker as an authority for holding that the constitutional recognition of legislation in the interests of public order was wide enough to authorise an Ordinance which made it an offence to make a "statement which is likely to . . . prejudice the public peace."

It is submitted, however, that the *Ward* v. *Holman* situation was entirely different from that with which Kermode J. was faced, both in law and fact. Lord Parker was dealing with a straight question of statutory interpretation, while Kermode J. was dealing with an issue of constitutional validity, as to whether the authority granted to legislate in derogation of the rights to freedom of expression and assembly in the interests of public order would encompass the provisions for public order before him. Nor, it is submitted, is the factual situation of *Ward* v. *Holman* relevant to the present case, where there is no actual public dispute, and the likelihood of the meeting prejudicing the public peace is more remote.

Neither *Ward* v. *Holman* nor Kermode J.'s ruling answer the essential question as to what is meant by "public order" and whether it extends beyond acts likely to prejudice the public peace. While the Public Order Act 1936 (U.K.) seems to adhere to the rather narrow definition of "public order", both the Public Order Ordinance 1969 and the Fiji Constitution seem to envisage a more general

22 Supra n.16.

23 "Any person who in any public place or at any public meeting uses threatening, abusive or insulting words or behaviour with intent to provoke a breach of the peace or whereby a breach of the peace is likely to be occasioned, shall be guilty of an offence."

24 [1964] 2 All E.R. 729, 731.

definition. Sections 8 and 15 of the Ordinance refer to "peace and good order" and sections 12 and 13 of the Constitution use the phrase "in the interests of defence, public safety, public order, public morality and public health". Both of these suggest that "order" could encompass concepts of public regulation and organization, even public harmony, that extends beyond merely preventing breaches of the peace, as is the case with the European Convention on Human Rights, from which the Fiji fundamental rights provisions derive.

Therefore, the "public peace" referred to in section 17(1)(a)(iii) of the Public Order Ordinance 1969 is a narrower concept than "public order" as used in sections 12 and 13 of the Constitution. However, as keeping the peace is an integral part of public order it is submitted that Kermode J. was correct in his conclusion that section 17(1)(a)(iii) is the sort of law envisaged by section 12 of the Constitution. But this is not necessarily to say that the whole of section 17 is intra vires the Constitution, as Kermode J. assumed, nor does it mean that any law relating to public order is automatically protected by the limits to section 12 of the Constitution.

Whether in fact such a law is constitutional will also depend on whether it is "reasonably justifiable in a democratic society", as stated in sections 12 and 13. In discussing this, Kermode J. states that democracy does not permit a person to say whatever he likes, and that the freedoms granted by the Constitution must be limited so as not to infringe on the legitimate rights of others. He quotes the following from Wooding C.J. in *Collymore and Abraham* v. *Attorney-General*[25]:

> My first observation is that individual freedom in any community is never absolute. No person in an ordered society can be free to be anti-social. For the protection of his own freedom everyone must pay due regard to the conflicting rights and freedoms of others. If not, freedom will become lawless and end in anarchy. Consequently, it is and has in every ordered society always been the function of the law so to regulate the conduct of human affairs as to balance the competing rights and freedoms of those who comprise the society.

The *Collymore* case, which concerned the right of trade unions in Trinidad to go on strike despite legislation forbidding "essential industries" from doing so, went to the Privy Council, where the Board referred with approval to Wooding C.J.'s dictum and stated:[26]

> freedom to associate [as guaranteed in the Trinidad Constitution] confers neither right nor licence for a course of conduct or for the commission of acts which in the view of Parliament are inimical to the peace, order and good government of the country.

It is on the basis of this "balance of freedoms and rights" that Kermode J. concluded: "In my view section 17 of the Ordinance is not ultra vires the Constitution." In reaching this conclusion, he did not examine whether section 17(1)(a)(iii) (which relates to making statements likely to prejudice the public peace), section 17(1)(c) (which relates to counselling disobedience of the law), or the many other parts of section 17, do in fact reflect the balance of which he spoke. Nor did he discuss the strict liability nature of section 17(1)(a)(ii) and whether

25 [1967] 12 W.I.R. 5, 9.
26 [1970] A.C. 538, 547.

it is "reasonably justifiable" not to require intent in such an offence. In order to determine these questions, Kermode J. would have had to look at section 17 in detail to decide whether the provisions were justifiable and reasonably so.

Had he done so, Kermode J. would have found some significant differences between section 17(1) (inciting racial antagonism) and similar legislation overseas, for example in the United Kingdom and New Zealand.

A separate offence of inciting racial antagonism is relatively new in many countries, although previously it would have been covered by laws against abusive and threatening language, sedition or criminal libel. This change has come about partly as a result of ratification of the United Nations Convention on All Forms of Racial Discrimination, and in particular article 4 of the Convention, under which the states party to the agreement undertake to "adopt immediate and positive measures designed to eradicate all incitement to or acts of [racial] discrimination".

Although Fiji did not become bound by the Convention on Racial Discrimination until at least 1978, section 17 of the Public Order Ordinance was amended to specifically cover racial propaganda. Similarly, new legislation was adopted in the United Kingdom in 1965, with the Race Relations Act, and in New Zealand, with the Race Relations Act 1971 and Human Rights Commission Act of 1977.

Section 6(1) of the Race Relations Act 1965 (U.K.) and section 25 of the Race Relations Act 1971 (N.Z.) are essentially the same, although section 25 is worded in more detail. The marked difference between these provisions and section 17(1) of the Ordinance is that the Race Relations Acts require that statements must be made with intent to cause hatred or ill-will, and that they be made in public, whereas neither of these criteria are present in Fiji.

The absence of intent in the Fiji legislation raises the question whether it is reasonably justifiable in a democratic society. It is significant that section 9A[27] of the New Zealand Race Relations Act 1971 is also a strict liability provision. However, this section creates not an offence but an unlawful act which can provide the basis of conciliation proceedings.

As both the New Zealand and British legislatures have seen fit to include intent as an element of the offence of inciting racial hatred, is it reasonably justifiable that this is not the case with the Fiji legislation? It could be argued that racial propaganda is undesirable whatever its intent, and that the fact that the speaker did not intend his words to have the effect they did, would serve as little compensation to members of the race or group maligned. It could therefore be argued that preventing such statements from being made at all is more important than the possibility that a person could be unjustly punished, particularly in Fiji, with its multi-racial society.

It is worth noting here that intent is not a necessary criterion of section 5 of the Public Order Act 1936 (U.K.), which, although not designed specifically

27 Inserted by s. 86 of the Human Rights Commission Act 1977.

to deal with racial propaganda, could be used in such situations, just as section 17(1)(a)(iii) of the Fiji Public Order Ordinance, which also does not mention racial antagonism, was used in Butadroka's case.

On the other hand, it can be argued that criminal offences of this nature should not be ones of strict liability, particularly when they restrict fundamental freedoms. In fact, there is still a considerable body of opinion that believes that offensive statements, even those made with intent to cause ill-will or hostility, should be restricted as little as possible. In the *Handyside* case, decided by the European Court, it was held:[28]

> Freedom of expression constitutes one of the essential foundations of a democratic society; subject to paragraph 2 of Article 10, it is applicable not only to information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that shock or disturb the state or any sector of the population.[29]

A A similar view was taken in *Terminello* v. *Chicago*[30] where Douglas J. held in relation to racial propaganda:

> A function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea . . . .

It is submitted that such views are particularly relevant in relation to section 17(1)(a)(iii) of the Public Order Ordinance, which relates to statements likely to prejudice the public peace. A speaker will usually be able to determine when his words are likely to incite racial hatred, are intimidating towards other races or counsel disobedience to the law, and therefore such statements are unlikely to be made without intent. However, it is much more difficult to gauge when there may be a breach of the peace. There are many situations where speakers must be free to voice their opinions on very controversial issues (other than just racial propaganda) which may possibly cause a breach of the peace.

Whether in fact it does so will depend on the nature of the speaker's audience, as well as what is said. There are many, often conflicting cases, on this subject, two of the better known being *Beatty* v. *Gillbanks*[31] and *Duncan* v. *Jones*.[32]

28 Quoted in *Sunday Times* judgment (1979) European Court of Justice, at p.29.

29 Article 10(2) of the European Convention on Human Rights reads:
Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority . . . .
The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety for the prevention of disorder or crime, for the protection of health or morals, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

30 337 U.S. 1,4 (1947).

31 (1882) 9 Q.B.D. 306.

32 [1936] 1 K.B. 218.

In *Beatty* v. *Gillbanks* the Salvation Army were held not to be responsible for the violent reaction their peaceful march caused, whereas in *Duncan* v. *Jones*, Mrs Duncan was responsible for the reaction her speech caused. In general it seems that speakers should not be guilty under section 17(1)(a)(iii) unless a reasonable person in their position could apprehend that a breach of the peace was likely to result from his/her statements.[33]

As for the question about whether the offence should be limited to statements made in public, it is submitted that it is clear that they should. There is no way of policing statements made in private, and any attempt to do so would definitely constitute an intrusion of privacy. It is significant that section 17(3) of the Ordinance makes it an offence to possess any document which might incite racial disharmony, unless the person can prove that he had no intention of passing the document on to others. Even if a similar test was adopted with respect to statements made with the intention that the recipient does not pass the statements on, this may constitute an unwarranted restriction on freedom of expression.

Therefore it appears that section 17(1) may not be a law which is "reasonably justifiable in a democratic society", and as such Kermode J. should have considered whether to declare section 17(1) to be unconstitutional. Alternatively, it is submitted that he should at least have examined the facts of the case closely to determine whether there actually was an infringement of sections 17(1)(a)(iii) and 17(1)(c), which is an approach frequently adopted by United States' courts to avoid having to rule on the constitutionality of a provision. Had Kermode J. taken such an approach, he could well have found that there was insufficient likelihood of a breach of the peace occurring and that the statements made by Butadroka did not amount to counselling disobedience to the law, certainly not in the immediate future. As it was Kermode J. did not examine the content of section 17(1)(c) at all.

The defence also contended that sections 8 and 11 of the Public Order Ordinance 1969, were in breach of the Constitution, in part because they conferred an unfettered discretion on the authority issuing the permit.

Kermode J. pointed out that a whole range of activities listed in section 8(5), which covers such things as sporting, social and religious or charitable purposes, do not require a permit. Those meetings which are not covered by these exceptions, he says, are not necessarily prohibited as, "the authority concerned is bound to issue a permit unless he is satisfied for good reason that such a meeting is likely to prejudice the maintenance of peace and good order."

Therefore, he decided there was not an unfettered discretion on the part of the authority for "If the authority acts capriciously and in an arbitrary manner in refusing a permit an aggrieved person is not left without a remedy at law". As sections 8 and 11 purport to make provisions in the interests of "public order",

33 This is quite different from the restrictive "reasonable man" test adopted in *Gitlow* v. *New York* 268 U.S. 652 (1925).

Kermode J. finds that they fall within section 13(2) of the Constitution, which limits the rights of assembly and so are not ultra vires.

Kermode J. did not attempt to answer the question whether sections 8 and 11 were "in the interests of . . . . public order" or were "reasonably justifiable in a democratic society". Although he said that meetings were not prohibited, in fact all but the exempted categories were unlawful, unless a permit has first been obtained.

In order to determine whether sections 8 and 11 of the Fiji Public Order Ordinance, relating to unlawful assembly, are in fact "reasonably justifiable in a democratic society", it is useful to compare them with similar legislation overseas. This provides a means of testing legislation to see whether it reflects the balance of rights and freedoms Kermode J. desires.

The Public Order Ordinance 1969 is similar in scope to the Public Order Act 1936 (U.K.), in that both Acts are primarily concerned with making sure that public meetings are peaceful. However, the statutes differ significantly in their methods of authorising public meetings.

Whereas the Fiji Public Order Ordinance in section 8 provides that a permit must first be issued by the appropriate authority, the Public Order Act in section 3, gives the chief officer of police the power to intercede if he thinks a meeting or procession will constitute a threat to the public peace. In such cases, he may direct the meeting to be held elsewhere, or at another time, but he does not have the power to prohibit the meeting entirely without the consent of the Secretary of State. Even then, the meeting can be banned only for a maximum period of three months. Thus, while in Britain, meetings are prima facie legal and are difficult to ban, there are far fewer safeguards against restrictions in Fiji. As the District Officer is required to grant permission before a meeting is legal, he is probably more likely to decide that there are reasons not to issue the permit, than a chief officer of police in Britain would be likely to actively intervene to stop a meeting taking place. In the United States, there has been considerable antipathy towards permits as constituting a "prior restraint" on the freedom of speech and assembly. In *Hague* v. *C.I.O.*, the Supreme Court held:[34]

> Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and . . . for the purposes of assembly, communicating thoughts between citizens, and discussing public questions . . . . The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interests of all; it is not absolute, . . . but it must not, in the guise of regulation, be abridged or denied.

If a permit is refused in Fiji, there is no procedure for an appeal to a higher administrative level, although, as Kermode J. mentions in his ruling, there is still a remedy at law. Presumably this would be through a writ of mandamus or an appeal to the Ombudsman. However, it may be difficult to prove that the District Officer has actually abused his discretion. The law provides that the authority may refuse to issue a permit if he "is satisfied, for good reason, that

34 307 U.S. 496 (1939).

such a meeting or procession is likely to prejudice the maintenance of peace and good order". A court must decide what constitutes "good reason".

It seems quite clear from the development of English and Commonwealth law since the decision of *Liversidge* v. *Anderson*[35] that the courts will no longer adopt the subjective criteria used in that case, and will instead be prepared to examine critically the exercise of a discretion by public authorities, even in cases where this discretion is not as specifically limited by "good reason" or similar words, as it is in the legislation concerned here.[36] Also, the court's role in seeing the Constitution is upheld seems to necessitate such an inquiry. As section 8 of the Ordinance is one which restricts the rights of assembly, the court must be in a position to ensure that this fundamental right is not unjustly curtailed. This approach has been evident in several West Indian cases, where legislation requiring permits has been held unconstitutional in that it conferred an unfettered discretion on the issuing authority.[37] However, in *Francis* v. *Chief of Police*[38] both the Privy Council and West Indian appeal court upheld legislation requiring a permit to use a loud hailer for a public meeting, a situation which it is submitted is very different from merely holding a public meeting. Similarly, in the United States, the courts have been more ready to uphold legislation requiring permits for loud hailers[39] than general requirements of a permit for any public meeting.

It is therefore submitted that while sections 8 and 11 do not obviously grant an unfettered discretion upon the issuing authority, the experience of other countries suggests that Kermode J. should have examined this question more closely than he did.

It can be argued that this requirement is both unnecessary to maintain public order and an unjustifiable derogation from the right to assemble freely, and that there must be clear and compelling reasons for section 8 and 11 to exist before they can be regarded as constitutional. Kermode J. did not justify the restrictions. Instead, he took the view that as the law is not overly oppressive, and because the sections concerned purport to deal with public order, they must be constitutional. This approach is not the one envisaged by section 13 of the Constitution, which begins with the proposition that there is a right to assemble freely, and this right is only to be restricted under certain conditions, and then only if the restrictions are reasonably justifiable. Instead of adopting the analysis suggested in section 13,

35 [1942] A.C. 206. Described by Lord Reid in *Ridge* v. *Baldwin* [1964] A.C. 40, 73 as "the very peculiar decision of this house . . . "

36 See *Attorney-General of St. Christopher, Nevis and Anguilla* v. *Reynolds* [1980] A.C. 637, and *Reade* v. *Smith* [1959] N.Z.L.R. 996.

37 *Chief of Police* v. *Powell* [1968] 12 W.I.R. 403, and *St. Luce's Speaking Case* (1973), an unreported case from Antigua (quoted in Phillips, *Freedom in the Caribbean* Oceana, 1977) are examples of this.

38 [1973] A.C. 761, and [1970] 15 W.I.R. 1.

39 *Kovacs* v. *Cooper* 336 U.S. 77 (1949).

Kermode J. assumes the sections are constitutional to begin with. This approach would not be approved by the Privy Council, which held in *Olivier* v. *Buttigieg*[40]

> where "fundamental rights and freedoms of the individual" are being considered a court should be cautious before accepting the view that some particular disregard of them is of minimal account.

While it is true that there would be remedies against "capricious or arbitrary" refusal to grant a permit, either through the courts or the Ombudsman, such procedures will be slow and possibly not very effective, unless the courts are prepared to review critically the authority's exercise of discretion. Kermode J. concludes by admitting that both sections 16 and 17(1) are drawn in wide terms, but states that he regards them as still being enforceable, and so not unconstitutional. It is unfortunate that he did not attempt to define their meaning in order to substantiate this view.

III. INTERPRETATION OF FUNDAMENTAL RIGHTS PROVISIONS

Kermode J.'s handling of fundamental rights issues in the Butadroka case raises the question of how the courts should interpret constitutional provisions in order to achieve the "balance of interests" he recommends.

The approach taken by the United States is that freedom of assembly and speech are basic and any limitations of those rights must be imposed only when strictly necessary. This is the view of most United States courts interpreting the First Amendment which reads: "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble . . . ."

Schenk v. *United States* held that these rights could only be restricted when:[41]

> the words are used in such circumstances and are of such a nature as to create a *clear and present danger* that they will bring about the substantive evils that Congress has a right to prevent.[42]

In *Thomas* v. *Collins* this view was further expanded into the principle known as the "preferred position" doctrine:[43]

> This case confronts us . . . with the duty our system places on this court to say where the individual's freedom ends and the State's power begins. Choice on that border, now as always delicate, is perhaps more so where the usual presumption supporting legislation is balanced by the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the 1st Amendment . . . . That priority gives these liberties a sanctity and a sanction not permitting dubious intrusions. And It is the character of the right, not of the limitation, which determines what standard governs the choice . . . .
>
> For these reasons, any attempt to restrict those liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger. The rational connection between the remedy provided and the evil to be curbed, which

40 [1967] 1 A.C. 115, 136.
41 249 U.S. 47, 52 (1919).
42 Emphasis added.
43 323 U.S. 516, 530 (1945).

> in other contexts might support legislation against attack on due process grounds, will not suffice. These rights rest on firmer foundations. Accordingly, whatever occasion would restrain orderly discussion in persuasion . . . must have clear support in public danger, actual or impending. Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation.

The European Convention, as already noted, provided the basis for many Commonwealth constitutions, and as a result, the fundamental rights provisions are drafted very similarly. Article 10(2) of the Convention,[44] which relates to freedom of expression was interpreted by the European Court in the *Sunday Times Case* when it held:[45]

> It is not sufficient that the interference involved belongs to that class of the exceptions listed in Article 10(2) which has been invoked; neither is it sufficient that the interference was imposed because its subject-matter fell within a particular category or was caught by a legal rule, formulated in general or absolute terms: the Court has to be satisfied that the interference was necessary having regard to the facts and circumstances prevailing in the special case before it.

Most of the recently independent Commonwealth countries have freedom of expression and assembly provisions similar to those of the European Convention on Human Rights and sections 12 and 13 of the Fiji Constitution, with slight changes of wording. While article 10 of the Convention allows for laws which are "necessary in a democratic society", some countries use the words "reasonably required."[46]

It can be seen that while the United States First Amendment is couched in very broad terms, leaving it up to the court to work out what the legitimate limitations of the rights are, Commonwealth Bills of Rights tend to spell out the limitations more specifically in the Constitution itself. The crucial question to determine is how the judges interpret the various terms and whether their wording, or even their very existence, makes any difference in guiding the courts in their interpretation of fundamental rights.

Perhaps the most important aspect of interpretation of fundamental rights is the "presumption of constitutionality". Courts, both in the Commonwealth and even at times the United States, have tended to adopt the approach that a law is presumed to be intra vires the Constitution until it is shown not to be.

This presumption reflects the view that the legislature, as a body elected by the people, has the best idea what laws are needed and does not intentionally pass laws which are ultra vires. The Privy Council stated that:[47]

> Unless it becomes clear beyond reasonable doubt that the legislation in question transgresses the limits laid down by the organic law of the Constitution, it must be allowed to stand as the true expression of the national will.

44 Supra n.29.

45 (1979) European Court of Justice.

46 It appears that the precise wording rarely makes any difference to the decisions Commonwealth courts reach on questions of fundamental rights. In all the cases, the courts are involved in similar situations of balancing the competing rights of the individual and the state, therefore the role taken by the courts is likely to depend far more on the overall situation of the country and the position of the judiciary within that society.

47 *Shell Co of Australia Ltd* v. *Federal Commissioner of Taxation* [1931] A.C. 275, 298.

This view was recently reiterated in the case of the *Attorney-General & an.* v. *Antigua Times* where the Privy Council held:[48]

> In some cases it may be possible for a court to decide from a mere perusal of an Act whether it was or was not reasonably required. In other cases, has evidence to be brought before the court of the reasons for the Act and to show that it was reasonably required? Their lordships think that the proper approach to the question is to presume, until the contrary appears or is shown, that all Acts passed by the Parliament of Antigua were reasonably required. This presumption will be rebutted if the statutory provisions in question . . . are so arbitrary as to compel the conclusion that it does not involve an exertion of [a legitimate] power but constitutes in substance and effect, the direct execution of a different and forbidden power.

This view is no doubt prompted by most courts' reluctance to enter into the political arena unless absolutely necessary, and is an attitude shared by most Commonwealth courts, not only the Privy Council but also the Nigerian courts in the early 1960's, and on occasion the Indian and West Indian courts.

This view is understandable, as, if the courts regularly become involved in conflicts with the legislature, their reputation and independence could be considerably undermined. This could reinforce the pressures to appoint "politically suitable" judges. There is also the fear that if the courts take too active a role in determining the validity of legislation, they will take over the role of the legislators, making decisions of vital importance without being accountable to the citizens in the way elected representatives are. This is a criticism that has been made of the United States Supreme Court decisions, and is something which the less well established courts of the new Commonwealth would probably be anxious to avoid.

In the case of the Commonwealth courts, there is also the tradition of parliamentary sovereignty to overcome. In most countries, the Constitution is relatively new, and often judges have not adjusted to the additional powers they now possess. This is particularly the case with regard to the judges of the Privy Council who, for the most part are acting as British judges, but who occasionally have to don the hats of judges of some Commonwealth country, far removed from their own situation. Given both their lack of everyday experience with written constitutions, and their remoteness from the country involved, it is hardly surprising that the Privy Council tends to take the attitude that the "legislature knows best". As the Privy Council held in *Akar* v. *Attorney-General of Sierra Leone*[49] it was not concerned with "the wisdom, or desirability or fairness of passing a measure . . . but only with its validity". However, it went on to say that it felt the Act concerned "offends against the letter and flouts the spirit of the Constitution". Despite the fact that the legislation was clearly discriminatory, a dissenting judge still held that the law was probably passed in good faith and so should be upheld.

Recently the Privy Council has also been concerned to ensure that the objects of fundamental rights provisions are not negated by too narrow a construction

48 [1976] A.C. 16, 32.
49 [1970] A.C. 853.

of the actual words used in the Constitution. This acknowledgement that a Constitution should not be interpreted as strictly as non-organic legislation can be seen in *The Attorney-General of St. Christopher, Nevis and Anguilla* v. *Reynolds* where the Council held:[50]

> It is inconceivable that a law which gave absolute power to arrest and detain without reasonable justification would be tolerated by a Constitution such as the present, one of the principle purposes of which is to protect fundamental rights and freedoms. Their lordships do not consider that there is any difficulty in construing the Order in Council by modification, adaption, qualification or exception so as to bring it into conformity with the Constitution. As stated in the judgment of their Lordships' Board in *Minister of Home Affairs* v. *Fisher* [1980] A.C. 319 a Constitution should be construed with less rigidity and more generosity than other Acts.

In this case the Privy Council did not strike down the offending legislation, but instead restricted the use of a discretionary power. In the other recent case cited by the Privy Council, *Minister of Home Affairs* v. *Fisher*[51] the Council, in establishing that illegitimate children were protected by the fundamental rights provisions of the Bermudan Constitution in the same way as other children, looked towards provisions in the European Convention on Human Rights and the United Nations Covenant on Civil and Political Rights to provide substance for its liberal interpretation of the Constitution even though, as the Privy Council states, the covenant had no legal force in Bermuda at the time the case arose.[52]

The attitude of the Privy Council appears to be that while it is prepared to strike down laws which discriminate only against certain sections of the population, it is much more reluctant to interefere with laws which contain general restrictions on the freedoms of citizens, regarding these as political questions to be left to the legislators.

This approach can be seen from the decision in *Akar* v. *Attorney-General*[53] where the Privy Council struck down legislation that was racially discriminatory, and also in *Olivier* v. *Buttigieg*,[54] where an executive decision which restricted freedom of expression of one particular political party was held to be unconstitutional. In other recent cases, the Privy Council has upheld legislation which curtailed freedom of speech and assembly in general, as in the case of *Attorney-General* v. *Antigua Times*[55] where a law placing very stringent requirements on the registration of newspapers was held to be constitutional.

On the whole, other Commonwealth courts seem to have taken a slightly less conservative approach towards fundamental rights issues, as seen in some of the decisions of the West Indian courts and the Supreme Court of India, which overrule

50 [1980] A.C. 637, 655.
51 [1980] A.C. 319.
52 But see *Jaulim* v. *D.P.P.* (1976) Supreme Court of Mauritius, No. 89, where the court upheld legislation which the defence contended, discriminated against women, by applying a restrictive interpretation of the general fundamental rights provision. In this case, the court seemed to be more concerned with what the custom of the country was than with the aims of the Constitution in protecting individual's rights.
53 Supra n.49.
54 Supra n.40.
55 Supra n.48.

unconstitutional legislation. However, these courts have also tended on the side of caution.

This attitude suggests that many courts are not really fulfilling their role in ensuring that fundamental rights are protected, or perhaps that it was unreasonable to think that courts could play a major role in the first place. While courts may be reluctant to handle politically sensitive issues, they were granted such powers by the constitution precisely because it was felt that the courts would be the best guardians of those rights.

This point is clearly expressed in *The Board of Education* v. *Barnette* in 1943:[56]

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of magistrates and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty and property, to free speech, a free press, freedom of worship and assembly and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

When the courts do decide to look critically at legislation, they are faced with the very difficult task of deciding what really is "reasonably justifiable in a democratic society". This problem was dealt with in the Indian case of *Madras* v. *Rowe*:[57]

> In evaluating such elusive factors and forming their own conception of what is reasonable in all the circumstances of a given case, it is inevitable that the social philosophy and the scale of values of the judges participating in the decision should play an important part, and the limit to their interference with the legislature's judgement can only be dictated by their sense of responsibility and self-restraint and the sobering reflection that the Constitution is meant not only for people of their own way of thinking but for all, and that the majority of the elected representatives of the people have, in authorizing the imposition of the restrictions, considered them to be reasonable.

Though this is no easy task, judges have to try to balance the conflicting interests. This will involve them in questions of policy into which courts are usually reluctant to enter. They will have to look at the reasons for the legislation, and at the general circumstances surrounding the case. Much of the evidence before the court has to be of a nature which would not be admissable in normal court proceedings. All of this will place a considerable burden on the courts to decide just what factors are relevant to the case. Whereas the United States Supreme Court has a long tradition of such enquiries, very few Commonwealth judges will have the same experience and precedents to guide them. However, while this is an acknowledged problem associated with a justiciable Bill of Rights, the framers of the various Commonwealth Constitutions have decided to give the courts this interpretive role, and they must attempt to fulfil it.

It is most likely that the Fiji courts will follow the trend of most other Commonwealth countries in adopting the presumption of constitutionality and gen-

56 319 U.S. 624, 638 (1943).

57 [1952] S.C.R. 597, 607.

erally refusing to take an active role in questioning the validity of laws.[58] This is not only because of their recent tradition of parliamentary sovereignty and reluctance to become involved in political arguments, but also suggested by the limitations provided in the provisions themselves, unlike the United States provisions which contain no such limitations.

Sections 12 and 13 state that laws which provide for the maintenance of public order and other aspects of public interest, will be constitutional even if they restrict citizens' fundamental freedoms, unless such laws are shown not to be reasonably justifiable in a democratic society. This suggests that as long as a law falls within one of the exceptions mentioned in the Constitution, it will be treated as prima facie valid, and can only be invalidated if it is shown not to be. This places the burden of proof on the person challenging the legislation, instead of on the legislature, or body responsible for the restrictions.

As one of the first cases involving an interpretation of the Fiji Constitution, the case of *R.* v. *Butadroka* is of considerable importance, particularly as it relates to such basic rights as freedom of assembly and expression. In glossing over crucial questions of constitutional interpretation, Kermode J. has set a vague and doubtful precedent for later courts.

The approach taken suggests that Fiji courts may not be prepared to take an active role in examining the constitutionality of legislation, and so the courts may not fulfil their role in protecting the rights of citizens against legislative abuse. This restrictive approach has certainly been the practice of many of the Commonwealth courts, which have tended to presume that legislation is constitutional unless it is clearly proven not to be so. This is a practice which could undermine the value of fundamental rights provisions significantly, and Fiji should consider its ramifications carefully.

58 It is worth noting here the approach taken in one of the two other known cases involving an interpretation of the Fiji Constitution. In the unreported case of *R.* v. *Mohammed Hanif* (No. 12 of 1972), which involved an illegal search by the police, it was argued that evidence obtained in this search should be excluded as it was gathered in breach of s.9 of the Constitution, which provides that " . . . . no person shall be subjected to the search of his person or his property . . . . " except in the same circumstances as outlined in ss.12(2) and 13(2) above, or with a court order. The judge, Grant J., it seems, ignored the effect of s.9 and the Constitution when he held:

> In view of the power to enforce protective provisions and provide redress conferred on the Supreme Court by section 17 of the Fiji Constitution [which provides access to the Court where there has been a breach of fundamental rights], I am not persuaded that the Supreme Court would be justified in implying an exclusionary rule and I think, on balance that the Common Law principle should prevail.

The other case *Mam Chand alias John Mam Chandra* v. *Reginam* [1971] 17 F.L.R. 86 involved an alleged breach of s.10(2)(c) of the Constitution which states that the person accused "shall be given adequate time and facilities for the preparation of his defence." The judge held that as the accused pleaded guilty, the fact that he did not have time to prepare a defence was not material.

APPENDIX

R. v. SAKEASI BUTADROKA & ORS

RULING

I have fully considered the argument by learned Queen's Counsel for the accused and learned Counsel for the prosecution and the authorities quoted.

The main argument is that certain sections of the Public Order Ordinance are ultra vires the Fiji Independence Order 1970 which embodies the Constitution of Fiji.

In particular the Ordinance is alleged to infringe sections 12 and 13 which deal with two fundamental rights and freedoms of the individual, namely protection of freedom of expression and freedom of assembly and association.

Both section 12 and 13 contain similar restrictions of such freedoms and so far as the instant case is concerned the limitations are contained in subsections 2 of each of the sections as follows:

> Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision — (a) in the interests of . . . public order, . . .

Section 17 1(a)(iii) of the Public Order Ordinance as amended by the Public Order (Amendment) Act 1976 refers to "prejudice the public peace".

The words "public order" have been treated as synonymous with "breach of the peace" by Lord Parker in **Ward** v. **Holman** (1964) 2 All E.R. 729 at page 731.

The Public Order Ordinance dealing as it does in section 17, with reports or statements likely to prejudice the public peace is a law which makes provision in the interests of public order envisaged by section 12 of the Constitution.

Both section 12 and section 13 however contain a further qualification namely that the law must be shown not to be reasonably justifiable in a democratic society.

So far as the principles of democracy are concerned I do not consider such principles permit a person to say what he likes under the banner of freedom of speech. Such freedoms as the Constitution confer on an individual must be exercised so as not to infringe the legitimate rights and freedoms of others.

I find myself in agreement with the dictum of Wooding C.J. in **Collymore and Abraham** v. **Attorney-General** (1967) 12 W.I.R. at page 9, quoted in **Francis** v. **Chief of Police** (1970) 15 W.I.R. at page 8. I quote:

> My first observation is that individual freedom in any community is never absolute. No person in an ordered society can be free to be anti-social. For the protection of his own freedom everyone must pay due regard to the conflicting rights and freedoms of others. If not; freedom will become lawless and end in anarchy. Consequently, it is and has in every ordered society always been the function of the law so to regulate the conduct of human affairs as to balance the competing rights and freedoms of those who comprise the society.

In my view section 17 of the Public Order Ordinance is not ultra vires the Constitution.

Mr Newman also argued that sections 8 and 11 of the Ordinance are ultra vires the Constitution and criticised the unfettered discretion of the authority concerned to withhold a permit. Subsection 5 of section 8 exempts a very wide range of meetings. It exempts sporting recreational or social events or fixtures, any private entertainment or assembly for religious or charitable purposes. This covers a very wide area of human activity in which the freedom of an individual to assemble and associate is unrestricted.

Section 8(1) is limited to any meeting or procession other than those excluded by subsection 5 which are held in a public place. For such meetings or processions a permit must first be obtained.

Section 8(1) does not prohibit such meetings. The authority concerned is bound to issue a permit unless he is satisfied for good reason that such a meeting is likely to prejudice the maintenance of peace and good order.

In my view section 8(1) does not confer an unfettered discretion on the authortiy to refuse a permit. If the authority acts capriciously and in an arbitrary manner in refusing a permit an aggrieved person is not left without a remedy at law.

Sections 8 and 11 of the Ordinance make provision in the interests of public order within the meaning of section 13(2) of the Constitution and are not in my view ultra vires the Constitution.

As regards section 16 of the Ordinances and the provision which throws on the defence the burden of establishing a lawful excuse for his actions. This provision is in my view merely declaratory of the law where the offence is not one of absolute liability. The section does not absolve the prosecution from its obligations to establish **all** the elements of the offence beyond reasonable doubt. It is then open to the defence to establish that there was a lawful excuse for his actions.

Section 16 does not infringe section 10(2)(a) of the Constitution — the prosecution must establish the guilt of the accused. Nor for reasons which I have given as regards section 17 is the section ultra vires the Constitution.

Both section 16 and section 17 are drawn in wide terms but they are not in my view vague or too wide. Section 17 could have been set out more clearly but there is no doubt that the offence referred to in subsection 1(c) also refers to subsections (a) and (b).

I hold that the sections of the Public Order Ordinance relevant in this case are not ultra vires the Constitution, nor are they vague or unenforceable.

I have expressed doubts about the vagueness of the 4th count but as Mr Lindsay has undertaken to furnish more particulars I say no more about this count.