

Constitution-making in Fiji: the search for a practical solution

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The author's purpose in writing this article is to place on record the process surrounding the promulgation of a new Constitution for Fiji and the reasoning behind it. His insights were gained first hand in his position as advisor to the Governor-General. Fiji's constitutional history from Cession to Queen Victoria in 1874 to the present is canvassed. It is the author's view that the use of a Committee to obtain the views of the population before the adoption of the 1990 Constitution was the optimal practical solution given the plural character of Fijian society.

I INTRODUCTION

Constitution-making in any country is always a difficult process, even in the best of times. The process is made all the more difficult when that country is characterised by a proud and demanding indigenous population on the one side, and an equally proud and successful immigrant population on the other side. As if those problems were not enough, the Military Coups of 1987, with all their associated difficulties, became the primary focal point in the Constitution-making process.

It was against this tense and racially charged background that the various political administrations in Fiji since 1987 had to work to produce the new Constitution for the Republic of Fiji, which the President, Ratu Sir Penaia Ganilau, promulgated on 25 July 1990. Each of the political administrations had its own area of emphasis so far as the content of the new Constitution is concerned. The purpose of this paper is to place on record the process and the reasoning behind the same. An attempt will also be made to explain why some of the alternative methods for Constitution-making, put forward by some academic commentators, were canvassed but not followed.

An understanding of the difficulties associated with the process of Constitution-making in Fiji since 1987 requires a brief outline of the constitutional history of Fiji and some of the relevant general background. This paper will not discuss the text of the newly promulgated Constitution; rather it seeks only to explain the rationale behind the process that produced it.

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II OUTLINE OF THE CONSTITUTIONAL HISTORY AND OF RELEVANT GENERAL BACKGROUND

A *The Instrument of Cession*

By an instrument of Cession dated 10 October 1874, the King of Fiji (known by the title Tui Viti and Vunivalu) together with other High Chiefs of Fiji voluntarily and unconditionally ceded to Her Majesty Queen Victoria possession of and full sovereignty and dominion over the Fiji Islands and over the inhabitants thereof. By the resolution and instruments of Cession,¹ the said Tui Viti and several High Chiefs recorded that they "trust and repose fully in Her Majesty, that she will rule Fiji *justly and affectionately*, that we may continue to live in peace and prosperity" and further that "they are desirous of securing the promotion of *civilisation and Christianity*, and of increasing trade and industry within the said islands".

Fiji comprises some 302 islands. The islands are grouped within Confederacies (Matanitu Vanua), and within the Confederacies under tribal High Chiefs there exists a patriarchal chiefly system.² Before 1874, tribal jealousies and warfare had racked the population.

The quality of colonial "buccaneers", many of European origin, had been very mixed and the native population had been greatly affected also by foreign diseases. Trade had increased but a short lived cotton boom ended in the early 1870s. It is against this background and with what seems like an extraordinary breadth of vision that the High Chiefs decided to place their trust in a Queen thousands of miles away from Fiji. In part, this trust may have been influenced and stimulated by the enthusiasm with which the Fijians had adopted Christianity, principally through Methodist missionaries.

The fact of voluntary cession has had deep and meaningful consequences. It was cession to the English Crown personally, accepting, of course, rule though its government, but the personal nature of the act has never lost its significance. The link with the Crown for the Fijians has therefore always been quite different to any other colonial link with the Crown. The Fijians, through their Chiefs, had direct access to the Crown. Indeed, until some few years before independence in 1970, there was an annual personal message of loyalty and a report (sometimes a complaint) made direct by the Chiefs to the Monarch. The Monarch was not just a King or Queen of Fiji in the conventional colonial sense, but truly a Tui Viti or Fijian Monarch of Fiji.

1 Fiji Government Gazette, 1874, No 1, 10 October 1874.

2 See RR Nayacakalou *Leadership in Fiji* (Oxford University Press in association with the University of the South Pacific, Melbourne, 1975) 31-52; and GK Roth "Native Administration in Fiji During the Past 75 Years" (1951) Royal Anthropological Institute Occasional Paper No 10.

Quoted here in full is the text of one such letter personally expressing the loyalty of the Chief of Fiji to His Majesty King George V:³

The Council House
Bau, Fiji, 20th November 1933

To His Majesty George the Fifth King of the United Kingdom of Great Britain and Ireland, Emperor of India and the British Dominions beyond the Seas,

May it please your Majesty,

We, Your Majesty's faithful subjects, are assembled in the Council of Chiefs of Fiji.

1 In the year 1930 the Council of Chiefs met at Suva, and it is a source of great satisfaction to us, your people, that the Council of Chiefs is being held this year in the great and historic town of Bau, the old capital of Fiji.

2 In 1929 and again in 1930 disaster overtook us in the form of hurricanes and floods, which destroyed many of our plantations and gardens and caused distress in some of the Provinces.

Truly our sufferings were great during those years but the burden which we had to bear was greatly lightened by the constant assistance and relief that was provided by the Government to us in our time of trouble.

3 Now we are suffering from the low price of copra and of the other products from which we derive our income. Truly these things trouble us in our minds, but our courage is restored because we know that the Government is taking every step possible to find fresh markets and higher prices for our products.

4 It is a matter of the greatest satisfaction to us, your faithful subjects, that we can tell Your Majesty that the Fijian population is increasing in numbers. We realise that this is one of the fruits of the devoted work that is being carried on among us by the nurses, European and Native, engaged in the Child Welfare Campaign. The doctors, too, are co-operating fully in this great work, and our women are being taught to care for their children.

5 We, your faithful subjects, wish to express to Your Majesty our grateful appreciation of the bestowal by Your Majesty on two of us Fijians of the high distinction of a Companionship of the Imperial Service Order. We rejoice greatly at this for we thus realise that Your Majesty ever remembers your faithful Fijian people.

6 It is with deep sorrow that we have to report the deaths of Ratu Epeli Ganilau, Roko Tui Cakaudrove, Ratu Tevita Nawaqa, Tui Nadi, Ratu Taione Rosivela, Tui Ba, and Ratu Peceli Derederenalagi, Buli Naqalimare. All these were Chiefs of high repute and loyal servants of the Government. They ruled their people wisely and they were all members of the Council of Chiefs.

3 Report of the Council of Chiefs - 1933, p 13.

- 7 We are glad to have this opportunity of assuring Your Majesty, our great ruler, in all reverence and respect of our unswerving loyalty to you and your Government.
- 8 We humbly pray that the Almighty will lengthen Your Majesty's days and the days of Her Majesty the Queen: that Your Majesty's Royal House will be blessed and that peace and prosperity will be the lot of all who live under its benign production.

We, the Members of the Committee of the Council of Chiefs selected to write this letter, humbly beg to subscribe our names.

We are,
Your Majesty's most humble and obedient servants

P VELI
A LATIANARA
J R CAKOBANU
E SERU
M RAIBE
D TOGANIVALU
GEO C TUISAWAU

B The Instrument of Cession - as the Fijians see it

The instrument of Cession contained no article to the effect that the interests of the Fijians were to be paramount, but a voluntary and unconditional cession of sovereignty and the expressed declarations of trust in Her Majesty to undertake the government for the Fijians necessarily give rise to such an implication. Any other interpretation would defeat the main object of cession. Subsequently the Fijians have repeatedly asserted the principle. It has not been denied, but its application to changed circumstances has come into issue. Its application in a multi-racial society manifestly gives rise to difficulties.

It is beyond doubt that a belief in the principle that the interests of the Fijians were, and are according to the Deed of Cession, to be paramount has been fixed in Fijian thinking for decades. It is essential to an accurate understanding of recent events in Fiji to remember the significance to Fijians of this voluntary cession of the territory and its people to the Crown. It was not colonisation by settlement or cession after conflict (the most common route to colonisation) but colonisation by an act of faith in the Crown as the provider of security, good government, justice and protection for Fijian interests. Fiji, with its chiefly system, is a deeply patriarchal society. Response to authority by loyalty and allegiance are first principles of Fijian conduct. It was the Deed of Cession which forged the special and historic link with the Crown to which the Fijians have attached fierce loyalty and allegiance, and which today still lives in spirit without the link.

In 1987 the link was severed following the abrogation of the 1970 Constitution. Before the general election of that year, there had developed a fairly widespread belief among Fijians that the interests of the Fijians (in particular land interests) were no longer adequately protected by the 1970 Constitution. When an Indian dominated

government was elected in 1987, to the Fijians it was the conclusive proof of a flawed Constitution. The strain was too great and impatience for a new Constitution precipitated the abrogation of the 1970 Constitution, the declaration of a republic and an end to the link with the Crown.

The final fracture came haltingly and after various attempts at compromise and when, according to a powerful section of the Fijian perception, no compromise was possible, which would give the indigenous Fijians the political dominance they required, and through which they could in turn have what they perceived as the necessary protection for their interests.

C The 1970 Constitutional Conference - Some Relevant Points

It is difficult to assess the relative weight to be attributed to the two factors of political dominance and protection of Fijian interests. The desire of an indigenous population to govern really needs no explanation. The legitimacy of that desire or the extent to which effect can be given to it, is the essentially unique problem which events in Fiji have thrown up. The desire for political dominance is not new. It too dogged the negotiations leading to independence.

On 30 April 1970, the Chief Minister (Ratu Sir K K T Mara) reported to a plenary session of the Constitutional Conference in London as follows:⁴

The Alliance Party stated that as in 1965 they recognised that election on a common roll basis was a desirable long term objective but they could not agree to its introduction at the present stage.

There was little doubt in the minds of the Fijians that the proposed electoral system based on "one man one vote" would have led to an Indian dominated parliament. The impasse led to the adoption of a compromise formula for the voting system thus creating a very complex system indeed. A Royal Commission reviewed the electoral system after Independence. The Commissioners, Professors Harry Street and Harry Keith-Lucas, reported to the Parliament in 1975.⁵

The Commission heard evidence on fears of Indian domination and on race relations generally, and although it concluded that there should be an increase in national roll seats and a reduction in communal roll seats, the Commission concluded:

The conclusion to which we come, therefore, is that race must remain a significant factor in the electoral system for some time to come.

The Commission's recommendations were not implemented. The demand in 1970 for the protection of Fijian interests led to entrenched provisions protecting Fijian legislation. These factors are symptomatic and indeed evidence of the strength of

4 I Lasaqa "Indian Ascendancy and Fijian Dominance" unpublished paper, 1988.

5 Fiji Parliamentary Paper No 24 of 1975.

identity, culture, custom and tradition among the Fijian population. Some movement of Fijians to the urban areas has affected the depth of tradition but in essence the social structure, custom and tradition has remained unchanged. There has been little inter-marriage with the Indian population, and that population's strong and individual custom, religion and tradition has co-existed for decades with the Fijian. The co-existence has, while subject to racial tension at times, been harmonious but differences have not really narrowed and the struggle for political power has been vigorous, and communal.

In 1975 the Royal Commission reported on tension, particularly in the electoral context, but concluded:

In spite of these tensions there is undoubtedly a degree of racial harmony in many quarters and in many relationships.

Given the communal character of the political environment, it is perhaps not surprising that the election of an Indian dominated government in 1987 was perceived by many, not only as emotionally unacceptable, but as a threat.

D Indentured Labourers from India

As part of its commitment to its obligation in the Deed of Cession to promote trade and industry, the Colonial Government introduced into Fiji between 1879 and 1917 indentured labourers from India to work in the sugar cane plantations. After their period of indenture many Indians chose to stay and the majority bought or leased land. It is estimated that only about 40% of the indentured labourers from India returned at the end of their contract period.

In the early 1880s the number of Indians arriving in Fiji was smaller than that of indentured Pacific Islanders, but after 1885 the number of Polynesians diminished and Indians increased. The period of indenture was 5 years for which period the Indians were attached to an estate. After 5 years they could reside where they wished. After a further period of 5 years they could obtain a free return passage to India or remain as free settlers.⁶

The size of the Indian population and its need for land inevitably created a problem. The extent to which land should be made available became a constant and major cause for concern in Fiji throughout this century. The policy of the colonial administration was from the very beginning to control alienation of Fijian land. The presence of a landless immigrant population desirous of obtaining land presented too attractive a market to Fijians to be left to market forces.

6 KL Gillion *The Fiji Indians: Challenger to European Dominance* (ANU Press, Canberra, 1977) 1-15.

Controls were required. Indeed one of the first notices issued by the Government was to the effect "that no sale, transfer or assignment of land" would be recognised by the Government until a decision had been made on the settlement of existing titles.⁷

E Fijian Affairs and the Great Council of Chiefs

From the beginning of the Colonial Administration the Chiefs were the means through which Fijian affairs were handled. As an institution of Government, the Great Council of Chiefs, containing as it does the highest representatives of the Fijian people, became central to the implementation of the obligation to give paramountcy to the protection of Fijian interests. A Commissioner or Secretary for Fijian Affairs (later to be a Minister) was established. It is a mark of the importance of his role that he had direct access to the Governor and the Colonial Secretary.

Matters touching Fijian interests, customs, health and social organisation were codified. The fact is that under the Colonial Administration Fijian affairs were dealt with completely separately from other affairs of government. This unusual, unique and potentially divisive feature was a matter of concern to the administration in a multi-racial society. Attempts to lessen the policy of separate treatment were objected to by the Fijian people.

Later in this paper, a brief review of the 1970 Constitution will refer to provisions reflecting this special treatment for Fijians and entrenching Fijian Affairs Legislation. The Great Council of Chiefs became recognised by statute and has been central to the administration of Fijian Affairs, its powers and duties provided for by the Ordinance⁸ and subsequently by the 1970 Constitution and statutes thereunder. Under the 1990 Constitution, the Great Council of Chiefs is specifically recognised.⁹

It will be apparent from this cursory historical insight that the vigour of the Fijian identity and its interests was such that statutory provisions had to be made for it. Indeed this was consistent with the fulfilment of the terms of the Deed of Cession. But a process of such special treatment and separate administration was not conducive to the development of a multi-racial society with a climate which would be receptive to concepts of full and equal political treatment for a large immigrant race. Particularly so when it was the case that the Indians, by their hard work and skills, were achieving considerable commercial and professional power and influence, and had a need for land for development and a natural ambition for political power.

The political conflict which triggered the 1987 Coups was simply a sharper and more significant example of the conflict which had been present for years. One method

7 Fiji Government Gazette No 2, 12 October 1874. Also Ordinance XI of 1875 prohibited the alienation of Native Land, save in accordance with the terms laid down by the Ordinance.

8 Fijian Affairs Ordinance, Cap 100.

9 Section 3, 1990 Fiji Constitution.

of seeing the depth and history of concern is through the records of the Great Council of Chiefs.

From its inception until independence, the Great Council of Chiefs reported annually to the Governor. The reports are an official and informative guide to social developments touching Fijians and their responses to events. A report of the Great Council of Chiefs which best reflects the Fijian concern which underlay the Military Coups of 1987, was that of 1959.¹⁰ At the time of the writing of the report, concern in relation to land, population and Fijian affairs generally had grown to such an extent that a Commission of Inquiry into Land and Population Problems was set up in 1959 under the chairmanship of Sir Alan Burns. Whilst the whole document needs to be read, for present purposes attention is drawn to paragraph 3 of the Preamble of the Address which states:¹¹

3 In the deliberations which took place - leaving aside for the moment the questions of the availability of land and population trends - a single unequivocal thought protruded itself and, in fact, dominated the thoughts of members of the Council; it was that the Fijian people, chiefs and commoners, severally and jointly re-affirm and pledge their loyalty to the Crown and their unshakable faith in the continued honouring of those pledges embodied in the Deed of Cession and reiterated from time to time. Uppermost in the minds of members of Council was the notion that *the Fijians' rights and interests in Fiji which have always been acknowledged to be paramount must continue to remain so*. The Council, while not unaware of the changed and changing conditions, hold that much of the changes that have taken place, whether for the good or the bad, was not of the Fijians' making.

Again in the same context in 1960 the Great Council of Chiefs responded to the recommendations of the Burns Commission and responded to the Governor in the following terms:¹²

The thought that dominated Council regarding our lands and their administration was the unshakable faith in the sanctity of the pledges made in the Deed of Cession - pledges which have a firm basis in the Fijian mind that the Colony was ceded in a spirit of mutual faith and goodwill. The Fijian people today continue to look to Her Majesty the Queen and Her Government to place the maintenance of *Fiji interests paramount in the Colony*. In saying this Council hastens to add that it recognises with gratitude the efforts that have been made in the past by Her Majesty's Government to promote our progress in a changing world. Council is not unmindful of the fact that the standard of living that obtains in this Colony is higher than those of other Colonial Territories. The time has arrived, however, when we should take stock of ourselves, to consider firstly those things which are of direct interest to us, leaving aside as secondary those matters which affect others.

10 Report of the Council of Chiefs, Legislative Council Paper No 29 of 1959.

11 Above n 10, 4.

12 Report of the Council of Chiefs, Legislative Council Paper No 33 of 1960, at p 15.

Earlier in 1946 during the debate in the Legislative Council, a European elected member, AA Ragg, moved:¹³

That in the opinion of this Council the time has arrived - in view of the great increase in the non-Fijian inhabitants and its consequential political development - to emphasize the terms of the Deed of Cession to assure the interests of the Fijian race are safeguarded and a guarantee given that Fiji is to be preserved and kept as a Fijian country for all time.

The debate that followed the moving of the above motion, centred on the threat of Indian domination, the swamping of the Fijians by a rapidly increasing Indian population and Indian demands for a more secure tenure for Native land. The motion was carried unanimously after it was amended thus:¹⁴

That in the opinion of this Council the Government and the non-Fijian inhabitants of this colony stand by the terms of the Deed of Cession and shall consider that document as the charter of the Fijian people.

Some feel that the demands for the maintenance of Fijian interests to be paramount in the administration of the colony were compromised during the negotiations for the 1970 Independence Constitution.¹⁵

F *The 1970 Constitution*

The Fiji Independence Order of 1970 to which the terms of the Constitution are scheduled, came into operation on 10 October 1970 (10 October being the date of Cession in 1874). It is arranged in eleven chapters. Reference to each is not necessary for the purpose of this paper.

Entrenchment (or protection) of certain rights and legislation was provided for in sections 67 and 68. It is common form to entrench, for example, fundamental freedoms. Entrenchment takes the form of a requirement for a specified majority of the House. In this instance not less than three-quarters of all the members were required to support an amendment to specified parts of the Constitution (Chapter 11 on fundamental freedoms). Unusually, however, in demonstrating the priority to be given to matters affecting Fijian land, customs and customary rights, specific "Fijian" statutes¹⁶ were entrenched by a requirement for a three-quarters majority and the votes of at least six of the Great Council of Chiefs' nominees on the Senate.

It is clear that even in the 1970 Constitution the interests of the Fijian were given dominant consideration. It is under that Constitution that Fiji achieved full independence and became a member of the Commonwealth and a Sovereign Democratic State, with the Queen as Head of State, represented by the Governor-General.

13 Legislative Council Paper No 7 of 1946, at p 196.

14 Above n 13.

15 See Sakeasi Butadroka's statement reported in *Fiji Sun*, 15 May 1987, p 5.

16 Examples are: Fijian Affairs Act; Fijian Development Fund Act; Native Land Act.

III 1987 AND BEYOND

A *The General Election 1987*

On 12 April 1987 the results of the General Election were announced. A coalition, headed by a Fijian Dr Timoci Bavadra, won 28 seats in the House of Representatives. The Coalition comprised the Indian-backed National Federation Party and the multi-racial Fiji Labour Party.

The Alliance headed by Ratu Sir KKT Mara and backed by native Fijians won 24 seats.

B *The First Military Coup*

14 May 1987. At 10 am Lieutenant Colonel Sitiveni Rabuka (as he then was) and some members of the Royal Fiji Military Forces entered the Parliament Chambers of Government Buildings, Suva. The members of the Bavadra Government were rounded up and taken into custody at the Queen Elizabeth Barracks in Suva. They were not released until 19 May 1987 and only after personal intervention of the Governor-General Ratu Sir Penaia Ganilau.

Lieutenant Colonel Rabuka carried out the Coup because he felt it was his duty to:

- 1 preserve traditional Fijian leadership in Fiji; and
- 2 ensure that political leadership remains in the hands of the Taukei (ie Fijian).

The Coup itself was preceded by much agitation in the community especially from the newly formed Taukei Movement.¹⁷ This Movement appeared to have the support of the great majority of the Fijian population in the areas where it was active. Taukei members organised public protest marches, with placards stating "Fiji for Fijians", "Bavadra Traitor", "We want political dominance" etc. At the height of their protestations, it has been estimated that up to 10,000 Fijians were marching in the streets of Suva¹⁸. The leaders of the Taukei Movement, which included some Ministers in the defeated Alliance Government, were demanding the removal of the Bavadra Government, the vesting of the political leadership in Fijian chiefs and the review of the 1970 Constitution to ensure that Fijians would for ever remain the political masters of Fiji.

On 15 May 1987, Rabuka announced a Council of Ministers. It contained ex-Alliance Ministers including Ratu Sir KKT Mara. Following this announcement, the Coup leader requested the Governor-General to abrogate the 1970 Constitution. The request was refused. The judges refused to accept the directives of the newly installed

17 The Taukei Movement was formed immediately after the 1987 election. The word "Taukei" literally means "the owner". It is a reference to Fijians being the owner of the land in Fiji. Membership is open only to Fijians.

18 *Fiji Sun*, 15 May 1987.

Council of Ministers and informed the Governor-General of their opposition. After further intense discussion and debates amongst negotiators, legal advisors, Rabuka, the Governor-General and members of the judiciary, a consensus was reached that the Governor-General should assume full executive authority of Government.

On 19 May 1987, Dr Bavadra met with the Governor-General, Ratu Sir Penaia Ganilau. Amongst the matters raised by Dr Bavadra was the release of the members of his party from military custody. The Governor-General also raised for Dr Bavadra's attention the demands of the military and the fact that there was overwhelming support from the Great Council of Chiefs for these demands.¹⁹ A special meeting of the Great Council of Chiefs had been convened on the morning of 19 May 1987. Later that day the Governor-General in a speech to the nation, outlined the steps he intended to take, including the following:

- (i) to dissolve Parliament; and
- (ii) to establish a Council of Advisers with the Governor-General as Head of Government to assist him in day to day administration and to consider possible amendments to the Constitution "taking into account existing practicalities and the social structure of Fiji".

Dr Bavadra called on the Governor-General at 11 am on 20 May 1987 and offered him his support for the scheme outlined in the previous night's broadcast. Parliament was dissolved on 21 May 1987 and a Council of Advisers was appointed.

C The Great Council of Chiefs and the Constitution

A significant decision of the Great Council of Chiefs Meeting held in May 1987 was the appointment of its own Constitution Review Committee. This Committee had representatives from each of the 14 provinces in Fiji and was chaired by Ratu Sir KKT Mara. The Committee deliberated over the following eight weeks and produced its report to another special meeting of the Bose Levu Vakaturaga (BLV) convened in July 1987. The report of the Committee was adopted with minor changes by the Great Council of Chiefs. One of the significant changes was the increase of the seats allocated to Ba Province to 4, with the resultant reduction in the number of seats allocated to Serua and Namosi Provinces to 1 each. The Committee had recommended that each of the 14 Provinces in Fiji return 2 members of Parliament each in addition to the 8 members to be appointed by the BLV.

The BLV presented its report on the Constitutional changes to the Governor-General. The report was in turn presented to the Falvey Committee, a Committee set up by the Governor-General to review the 1970 Constitution. It should be noted that many of the recommendations of the Committee of the BLV regarding changes to the Constitution have been adopted as part of the newly promulgated Constitution of Fiji.

¹⁹ See report in *Fiji Sun*, 21 May 1987.

Each of the 14 Provincial Councils had met at least once before the July 1987 BLV meeting. These meetings were often lively and emotional. The unanimous view was that the 1970 Constitution needed review to enshrine in the clearest way possible the desire of the Fijian people to:

- (i) maintain political dominance in the affairs of the nation;
- (ii) ensure the maintenance and enhancement of chiefly leadership amongst the Fijian people and respect of that institution by others in Fiji; and
- (iii) see Christianity become the religion of everyone in Fiji.

These same views were put with vigour and conviction to the Falvey Committee.

D The Falvey Committee

This Committee was appointed by the Governor-General to review the 1970 Constitution. It had representatives from the major political parties, the Great Council of Chiefs and a few independent members.²⁰ The Committee was chaired by the late Sir John Falvey QC. It was given the following terms of reference:

To review the Constitution of Fiji with the view to proposing to the Governor-General any amendments which will guarantee indigenous Fijian political interests with full regard to the interests of other people in Fiji.

Full publicity on the Committee's terms of reference and work programme was given in the local media in Fijian, Hindi and English. The Committee met in plenary session on 24 occasions and it visited centres outside Suva to receive oral and written submissions from the community at large. A total of 800 written submissions and 161 oral submissions were received by the Committee and it reported to the Governor General on 14 August 1987. The Committee members were not unanimous in their report.

The BLV also appeared before the Falvey Committee through the auspices of the Minister of Fijian Affairs who made a full submission both oral and written. There were many submissions received from the Indian community which could generally be summarised as opposed to the review of the 1970 Constitution. It seems as a result of the Falvey Committee deliberations that some consensus could be reached on the political front. There were private meetings initiated by the Governor-General involving the representatives of the Coalition Party and the Alliance Party.

²⁰ The Committee was comprised of: 4 members appointed on the advice of the Alliance Party; 4 members appointed on the advice of the Coalition; 4 members appointed on the advice of the Council of Chiefs; and 4 members appointed by the Governor-General acting on his own deliberate judgment.

E The Deuba Accord

The Deuba²¹ Accord was an agreement reached by consensus between the leader of the Coalition, Dr Bavadra, Ratu Sir KKT Mara and the Governor-General, Ratu Sir Penaia Ganilau. The Accord was in two distinct parts. The first part related solely to the formation of a Caretaker Government, made up of equal number of Parliamentarians from the Alliance Party and the Coalition. The equivalent of the Cabinet was referred to as the Council of State - eleven members each from the two main parties. Six of the Councillors of State were to be without portfolio, and were to be members of the Constitution Review Committee.

The second part of the Accord related to the Review of the Constitution. It was agreed that a Commission of Inquiry, with an independent Chairman, would be established with the following terms of reference:

To make proposals for a permanent constitutional solution acceptable to the people of Fiji, and in particular:

- (i) To recommend arrangements for the early return to full parliamentary democracy;
- (ii) To take full account of the aspirations of the indigenous Fijians for the betterment of their constitutional, economic and social interests;
- (iii) To provide a framework for the multiracial society in which the rights and interests of all the communities are safeguarded, thereby laying a foundation for just and harmonious relations between all communities.

It was also agreed by the participants to the Deuba Accord that if the Commission of Inquiry came up with a recommendation for changes to the Constitution, either of the following three options were to be open to the Governor-General to promulgate the changes to the Constitution:

- (a) the recall of the dissolved Parliament for the purpose of enacting the changes in accordance with the special procedures laid down in section 67 of the 1970 Constitution;
- (b) the creation by Proclamation of a Constituent Assembly, the members of which would be elected in accordance with any new electoral procedures proposed for inclusion in the new Constitution;
- (c) the implementation of the changes by Proclamation after those changes had been presented to the country in a referendum and had received the approval of a substantial proportion of the electorate of Fiji.

In the view of this commentator, the single most important oversight of the Deuba Accord discussions was the fact that the Military was left out of it. It was plainly obvious that whatever agreement the two major political parties reached could only be

21 The name "Deuba" is taken from the tourist resort where the Accord was discussed and signed. For details of the circumstances surrounding the Deuba Accord see E Dean and S Ritora Rabuka: *No Other Way* (Doubleday, Sydney, 1988) 104-108.

implemented if the Military accepted it. This oversight was to be the cause of the second Military Coup in 1987. As one of the advisors on the Governor-General's staff at that time, I observed that some of the legal advisors were unable to fathom the irrelevance of some of the orthodox principles of constitutional law, which most of them seemed to worship as inviolable.²²

The other important aspect associated with Constitution-making in Fiji is the incompatibility of the traditional aspirations of the Fijian people with the values inherent in the imported legal system which was imposed upon them. The latter system, based as it was on English cultural values, was simply irrelevant in many important respects and counter-productive to the newly found aspirations of the indigenous Fijians in the 1980s.

Perhaps in hindsight it can be fairly said that the Deuba Accord was doomed to failure because it tried to resurrect the dissolved Parliament which in the eyes of many Fijians, and certainly in the view of the Military, was synonymous with the resurrection of an Indian dominated Government .

F 25 September 1987 - The Second Military Coup

Colonel Rabuka carried out the Second Military Coup because, on his assessment of the agreed terms of the Deuba Accord, he was unable to see how the paramountcy of indigenous Fijian aspirations would be achieved in the kind of machinery that would be put in place. A Military Government was set up with Colonel Rabuka as the new Head of State and Chairman of the Council of Ministers.

The Attorney-General and Justice Minister in the Military Government was given the task by the new Head of State of preparing a draft Constitution. With the assistance of a Sydney-based lawyer, a draft was prepared. This was duly submitted to the Head of the Military Government. A copy was given to the Army Legal Unit for its comments, and the latter in turn produced a Military Draft. It must be stated clearly that it was deemed necessary for the Military Draft to be prepared, because the one prepared by the Attorney-General and Justice Minister differed in several major respects from the views expressed and contained in the BLV submission to the Falvey Committee.

During the two and a half months in which the Military Government was in existence, little, if any, Constitution-making process was evident. It would be fair to say that if the senior Military officers at the time were not exerting pressure on this front, very little indeed would have been achieved. Once the Military Draft was given to the Government, it became "the" draft, which was later given to the First Interim Government under the leadership of Ratu Sir KKT Mara together with the Falvey Committee Report.

²² This is a purely personal observation.

G *6 December 1987 - The First Interim Administration*

Fiji was declared a Republic on 6 October 1987. The Military Government was dissolved on 5 December 1987 and Ratu Sir Penaia Ganilau assumed the post of President of the Republic. Ratu Sir KKT Mara was appointed Prime Minister in the First Interim Government and he in turn nominated 21 members of his Cabinet, whom the President duly appointed. Ratu Sir Kamisese Mara made it very clear that his administration was interim and had a life span of two years. In that time the President has directed that it address two specific matters:

- (i) recovery of the economy; and
- (ii) review of and promulgation of a new Constitution.

The First Interim Administration did not waste time. It started working in earnest on both the areas stipulated by the President. The economy recovered well. A Cabinet Committee under the Chairmanship of Ratu W Toganivalu considered the Military Draft, the BLV Draft, and the Falvey Committee Report. From the Committee's deliberations on these source documents it produced the first Cabinet Draft.

It is important to remember that the Military Draft, the BLV Draft and the Falvey Committee Report all took the 1970 Constitution as their base document in their respective deliberations. Each removed the parts that were inconsistent with their respective briefs and proposed replacements. Otherwise their proposed draft Constitutions were still, in a large measure, the 1970 Constitution.

H *Constitution Inquiry and Advisory Committee - The Manueli Committee*

After the Cabinet Sub-Committee on the Constitution had completed its deliberations, it submitted a Draft to Cabinet for its consideration. On 5 October 1988, on the advice of Cabinet, the President appointed the Manueli Committee. The terms of reference of that Committee were:

- (i) To scrutinise and consider the extent to which the Draft Constitution submitted by Cabinet to the Committee meets the present and future constitutional needs of the people of Fiji, having regard in particular to the failure of the 1970 Constitution to provide adequate and full protection of the rights, interests and concerns of the indigenous Fijian people, and having regard to all the circumstances prevailing in Fiji;
- (ii) To facilitate the widest possible debate throughout Fiji on the terms of the Draft Constitution and to inquire into and ascertain the variety of views and opinions that may exist in Fiji as to the provisions of the Draft Constitution;
- (iii) To invite and receive to the extent that is reasonably practicable, representations from the people of Fiji as to the provisions of the Draft Constitution, and to determine the degree of acceptability among the people of Fiji to the provisions of the Draft Constitution;
- (iv) To report fully to Cabinet on all the above matters and in particular to report upon the degree of acceptability of the terms of the Draft Constitution found by the Committee among the people of Fiji and where the Committee considers

appropriate to recommend amendments or additions to the Draft Constitution likely in its view to achieve the objects of the Draft Constitution or its general acceptability.

The Committee received submissions from 15 November 1988 to 20 May 1989. A total of 32 hearings were conducted in 14 urban and rural centres. The Committee had 15 members; 6 ethnic Indians, 5 ethnic Fijians, 1 ethnic Chinese, 3 part Europeans. The Chairman was Colonel Paul Manueli. The Committee reported to the President on 30 August 1989 in the following terms:

The Committee took into account the prevailing circumstances, evaluated public opinion and has put together what the Committee believes are proposals for a constructive Constitution. Some of these proposals contain recommendations for various changes. The Committee believes that these proposals should lead to the building of an inter-dependent, multi-racial, multi-cultural society in Fiji. It could, given goodwill on all sides, ultimately pave the way for a better future.

The following points are particularly noteworthy:

- (i) The Committee was unanimous in its recommendations;
- (ii) It accepted that as a process, Constitution-making has to start somewhere, and that its report provides a useful starting point;
- (iii) The success of any Constitution-making process rested in the depth of goodwill that was available.

I Constitution-making and the Cabinet

At the end of the two year life span of the First Interim Administration, the national economy had fully recovered, but Fiji was still without a Constitution. The members of the First Interim Administration all resigned and the President re-appointed Ratu Mara for a second term on 6 December 1989. A small Cabinet was also appointed, minus all the Military officers who had been in the First Interim Administration.

The Constitution was now the primary focus. A Cabinet Sub-Committee with the assistance of lawyers from the Office of the Attorney-General was preparing the Constitution. This was ready for submission to the March 1990 BLV held at the Queen Elizabeth Barracks in Suva. The chiefs proposed several changes, which were made and the final draft was again put to a BLV meeting in June 1990, also held at the Barracks in Suva.

After the June 1990 BLV meeting, all that was left to be done was for the draftsman to do some tidying up. The Cabinet further considered it and advised the President that it be promulgated as the Constitution of the Sovereign Democratic Republic of Fiji. On 25 July 1990, the President promulgated the new Constitution.

IV CONCLUSIONS

This part of the paper discusses the reasons for the process of Constitution-making in Fiji. Much of the criticism levelled against the circumstances surrounding the making of the 1990 Constitution are really ill-informed. The manner in which the Constitution was given birth to, as opposed to its content, is criticised as:

... undemocratic - because there was no referendum taken to adequately ascertain the honest views of all the people in Fiji.

The implied assertion in this view is that a referendum is the only legitimate way of seeking out the view of the people of Fiji. The fact of the matter is that a referendum is but one way of obtaining the views of the people. If anything it is probably the least appropriate form of gathering views in a country like Fiji, where important decisions are generally not taken individually, certainly in the case of the Fijians. Fijians decide matters of importance affecting them on a communal base, be it at Village, Tikina or Provincial level. The process involves a lot of informal discussion about the major issues of concern. Thus, any attempt at formalising the system of gathering views, such as formal meetings etc, counteracts the free flow of ideas and expression of honest views.

It was evident amongst the Fijians' representations that they were much happier for the Provincial Council to be the vehicle of their views, rather than to express them individually. This is not to say that there were no Fijians who were able to articulate their views individually. Those in this category, however, comprise the exceptions to the rule. These Fijians were able to go before the Falvey and the Manueli Committees to express their views.

In the case of the Indian community, a referendum would not have obtained an honest and representative view of the rank and file membership, because of the political pressures that their respective religious and political organisations would have exerted on them. Recent surveys conducted in 1986²³ show that approximately 60% of the Indians live in the sugar cane growing districts of Fiji. The literacy rate amongst this group is less than 50%. This would mean that in a referendum on Constitutional issues, close to one third of the Indian population would be expressing secondary viewpoints. Most of their views would probably have been merely views articulated by their "leaders", most of whom do not depend on Native Land leases for their livelihood.

In briefly referring to the argument that a referendum is the only way to obtain the views of the people in a nation State, it is hoped that some of its inherent weaknesses have been made clear. Essentially, it is arguable that a referendum can be a tool whereby the "majority" dictates over the "minority".

²³ Social Indicators for Fiji: Issue No 5 Prepared by Bureau of Statistics, Fiji Government, Suva, 1989. Pp 11-13.

In Fiji, for the purpose of the 1990 Constitution-making process, it was decided that the Government would generate in the widest manner possible discussion of the provisions of the draft Constitution before the Manueli Committee was set up to travel throughout Fiji seeking the views of everyone who wished to express a view. Previous to that, the Falvey Committee had undertaken a similar task.

All these were in addition to the attempts of other government functionaries, doing their own outreach activities in attempts to really get the honest views of everyone. It is a fact that many who were reached in this way expressed views they would not express in public for fear of being made outcast within their own community.

It would be foolhardy to say that the Committee approach was ideal. However, given the plural character of Fijian society and the fact that even within the two major racial groups variance of opinions on certain constitutional issues was not only stark but vociferous, the use of the Committee system appears to have been the optimal practical solution.