

THE CONSTITUTION: ITS PURPOSES AND UNDERLYING VALUES

3.1 In Chapter 1 we discussed what we see as the major constitutional issue for the people of the Fiji Islands: how they can best give themselves multi-ethnic governments. In this chapter we discuss a number of related issues centering on the nature of the Constitution itself. We look at its role, not only in establishing and controlling the operation of the main institutions of government, but also in setting the tone for the working relationships among individuals and groups within Fiji society. In particular, we look at the various ways in which the Constitution can reflect or promote the important values referred to in our Terms of Reference.

WHY COUNTRIES HAVE A CONSTITUTION

3.2 Why do countries feel the need for a constitution? The reasons are varied and inter-related. The following seem likely to be relevant in the Fiji Islands.

To make a fresh start

3.3 Often, people draw up a new constitution when they want their country to be governed in a new way. That was true of Fiji in 1970 and 1990. It may be true again. If the people of Fiji wish to embark in a new constitutional direction - one which will enable all ethnic communities to share in the country's government - they may also wish to set out their revised constitutional arrangements in a new document. It would be a way of signalling the change of course, as well as helping them to reach their destination.

To set out the conditions on which the people agree to be governed

3.4 Government should rest on the consent of the people. Consent was the basis of the Deed of Cession under which Fiji became a British colony. Today, it is the justification for government by the people's elected representatives.

3.5 A constitution should therefore be generally acceptable to all citizens. This does not mean that everyone must agree with every detail. If a constitution is the product of a democratic process, some disagreement is inevitable. But the process by which it is developed and adopted should be generally accepted, and disagreement about its terms should be kept within reasonable limits. Those who

would have preferred a different constitution must be able to accept the one actually adopted.

To control the actions of governments

3.6 Most constitutions are based on a belief that governments should have only limited powers. Sometimes those limitations affect the relationships between governmental institutions - *how* they must go about the business of governing. Sometimes they affect *what* the government is permitted to do. Rules about what a government may do and how it may do it provide the checks and balances that are a main purpose of requiring a country to be governed under a constitution.

To guarantee the rights of individuals and groups

Individual rights

3.7 Both the 1970 and the 1990 Constitutions contained a chapter on the protection of fundamental rights and freedoms of the individual. In many constitutions, such provisions are called a Bill of Rights. Their purpose is to prevent the *state* from interfering with individual rights and freedoms, either by the laws that it makes or by its administrative action. A number of submissions reaffirmed the need for Fiji's Constitution to contain a Bill of Rights, expressed in positive terms, without too many qualifications. Chapter 7 contains our recommendations for a new Bill of Rights which would set out rights clearly, with only such limitations as are justified.

Group rights

3.8 Our Terms of Reference require us to recommend constitutional arrangements which, among other things,

- guarantee full protection and promotion of the rights, interests and concerns of the indigenous Fijian and Rotuman people;
- have full regard for the rights, interests and concerns of all ethnic groups in Fiji.

We began a discussion of some of these rights, interests and concerns in Chapter 2 and continue it in this chapter. A constitution can guarantee group rights in various ways.

3.9 Some individual rights benefit the members of a group. Examples include a person's rights to manifest his or her religion in community with others, to assemble freely and associate with other persons, and not to be subjected to discriminatory treatment.

3.10 The rights of particular groups may be constitutionally protected. The legislation recognising the rights to land of Fijians, Rotumans and Banabans and providing for their governance as a community, and also the legislation protecting the rights of agricultural landlords and tenants, are entrenched by the Constitution. In each case the Act can be amended only with the consent of special majorities in Parliament.

3.11 In Chapter 2 we explained the need for Fiji to move away from a system of communal representation, but as long as any part of that system remains, it will continue to give rise to constitutionally-protected group rights. We return to that question in a later section of this chapter and make detailed recommendations in Chapters 9 and 10.

To promote important values

3.12 A constitution usually reflects the values that a people hold dear and wish to live by. Some of these values will reflect the country's own history and experience. Others are widely recognised as positive forces in most if not all countries' constitutional arrangements. We look briefly at the range of values likely to be important to the people of Fiji.

The values referred to in our Terms of Reference

3.13 In recommending constitutional arrangements, the Commission is required to

- promote racial harmony and national unity;
- promote the economic and social advancement of all communities;
- bear in mind internationally recognised principles and standards of individual and group rights.

In later sections of this chapter we look at how these values can be reflected in Fiji's Constitution.

Sovereignty, democracy and the rule of law

3.14 Both the 1970 and 1990 Constitutions described Fiji as "sovereign" and "democratic". The Preambles to both referred to the importance of maintaining "the rule of law". In Chapter 5 we make recommendations about the way in which the Constitution should continue to refer to and reflect these values.

The separation of powers

3.15 Again, both the 1970 and 1990 Constitutions were based on the constitutional principle of the separation of powers. This principle requires the functions of making the law, carrying out the law, and judging whether things have been done in accordance with the law, to be kept distinct. Generally speaking, they should be carried out by different bodies. Experience elsewhere has shown that, if the roles of the legislative, executive and judicial branches of government become confused, tyrannical government is likely to result.

3.16 In the Westminster parliamentary system, there are important connections between the three branches of government. For example, the individual and collective responsibility of ministers to Parliament is the only means of securing a democratically accountable executive. But the fact that some legislators are also ministers is offset by the duty of a politically neutral public service to administer the law and give ministers free and frank policy advice. That helps to reinforce the distinct role of the executive.

3.17 Another example of links between the three branches of government is the role that both the executive and Parliament may have in appointing - or if need be, dismissing - judges of the superior courts. However, in carrying out this role and all other aspects of the administration of the courts, the executive and the legislature must fully respect the independence of the judicial branch of government. This point is developed further in Chapter 13.

Other values

3.18 A constitution should reflect other, less specific values arising from the country's history and the identity of its people. We have in mind the spiritual and traditional values important to the various ethnic communities. Wherever possible, the Constitution should reflect not only the different values of particular communities but also those which all communities share. These can help bring them together. For example, the submissions showed clearly that, within the different spiritual traditions of the people of Fiji, there are universal elements such as the recognition of one God, the need to distinguish right from wrong, and to love your neighbour as yourself. Reconciling community values when they conflict, and recognising how often they are shared, are major themes of this report.

To act as an enduring basis for government

3.19 People make constitutions because they want the basis of their government to be enduring, outlasting the lives of particular parliaments or governments, just

as the rules of a game outlast a particular match. The procedure for amendment of the constitution should not allow it to be changed too easily. It must also be fair. In a country like Fiji it should not be possible to amend the Constitution without the participation of all ethnic communities.

To foster shared loyalty to the country and a sense of common purpose

3.20 The earliest written constitution - that of the United States of America - and the most recent - that of the Republic of South Africa - show that a constitution can capture people's imagination. If a constitution is to have the symbolic function of fostering a shared loyalty to the country and a sense of common purpose, it must be written in accessible language. Fiji's Constitution must be translated into Fijian and Hindi. It must not be too long or too technical, though it must be clear.

THE CONSTITUTION IN ITS WIDER SETTING

3.21 A constitution is not isolated, either from the country's legal system and political culture, or from the history and present circumstances of its people. We look briefly at some features of both.

The legal system and political culture

3.22 By itself, the Constitution can never give a complete picture of how a country is governed. Its provisions are often filled out by Acts of Parliament or regulations which deal with matters of detail. The Standing Orders of Parliament contain rules about the way the business of Parliament is carried out. The common law, as well as the words of the Constitution itself, guides the courts in interpreting and applying its provisions. Their rulings become law about the Constitution's meaning and effect.

3.23 Another set of unwritten rules, usually called constitutional conventions, may provide guidance about the way in which particular powers are to be exercised. In Fiji, some of the British constitutional conventions about the powers and duties of the Sovereign and the Prime Minister have been codified in the Constitution and now apply between the President and the Prime Minister. Others, though not codified, may still be relevant or may have been replaced by constitutional conventions specific to Fiji. In rather different contexts, guidance may be obtained from the traditional practices of the indigenous Fijians, for example those pertaining to the Bose Levu Vakaturaga. Finally, a great deal depends on whether the Constitution is respected and obeyed by all organs of government and the people themselves.

3.24 All of these sources contribute to the country's constitutional arrangements. The Constitution, however, is the key document. There is always a choice to be made about which rules should go into the Constitution and which should be made or recorded in some other way. Obviously, the Constitution should include the rules which the people regard as specially significant. For example, many countries leave the detail of the arrangements for electing members of Parliament to the ordinary law. In Fiji, however, the electoral arrangements have always been included.

3.25 Even though something is not dealt with in the Constitution, it may still need to be done. Sometimes, it can be made a requirement of the ordinary law. Sometimes it can be done as a matter of government policy. Sometimes, legislators or administrators or judges, or citizens generally, will need to be aware of the principles on which the Constitution is based and take account of them when they act. The Commission makes a number of recommendations that certain requirements or principles should be implemented in one or other of those ways instead of being written into the Constitution itself.

The people of Fiji

3.26 In Chapter 1 we examined the consequences of Fiji's constitutional arrangements from before independence to the present day. Here we refer briefly to the significant events in the life of the people. Some of them may call for specific mention in the Constitution. We also describe the present and projected demographic makeup of Fiji's population. That, too, will continue to influence the country's constitutional arrangements.

3.27 It seems likely that the first indigenous inhabitants of the Fiji Islands arrived about 4,000 years ago. The social and political organisation that evolved was based on ties of kinship, the emergence of a chiefly hierarchy and the people's sense of identification with the vanua. For most Fijians, as for other indigenous peoples in the Pacific, all three elements remain a strong motivating force.

3.28 Christian missionaries first arrived in 1835. Fijians soon afterwards embraced the gospel teachings. Most Fijians are Methodists, but other denominations also have their adherents. Other great spiritual traditions of the world, Hinduism and Islam, are also present in Fiji.

3.29 By the mid-nineteenth century, Fiji was beset by struggles for power among leading chiefs and by the impact of European traders and settlers. The

latter obtained land and began to exploit it with the help of labour from what are now Papua New Guinea, the Solomon Islands and Vanuatu. In their wake came the colonial powers vying for influence and territory. These pressures eventually led Cakobau, as Tui Viti, to cede Fiji to Her Majesty Queen Victoria and her successors on 10 October 1874.

3.30 In the language of the times, the English version of the Deed of Cession recited that Cakobau and other high chiefs were “desirous of securing the promotion of civilization and Christianity and of increasing trade and industry within the said islands”. Accordingly, “relying upon the justice and generosity of Her said Majesty”, they had agreed to cede to Queen Victoria “the possession of and full sovereignty and dominion over” the Fiji Islands. In return, Her Majesty promised, among other things, “that the rights and interests of the said Tui Viti and other high chiefs the ceding parties hereto shall be recognised so far as is and shall be consistent with British sovereignty and Colonial form of government”.

3.31 The first resident colonial Governor, Sir Arthur Hamilton Gordon, came to Fiji in 1875, after service in Trinidad and Mauritius, where the sugar plantations were worked by Indian indentured labourers. Gordon persuaded the Australia-based Colonial Sugar Refining Company to extend its operations to Fiji. In May 1879 the first group of indentured workers arrived from India to work on its plantations.

3.32 They and those who followed them were a diverse group comprising people of different religions and social levels, coming first from North India and later from South India. They called themselves the ‘girmitiya’, after the agreement which bound them to indentured service. Under its terms, they became free labourers after five years’ service. Later they were joined in Fiji by a small number of free immigrants from the Punjab and Gujarat.

3.33 The humanitarian objections to the importation of indentured labourers led to the cessation of the system in 1916. The last of those already in Fiji were freed in 1920. The immigrants from the Indian sub-continent were British subjects. They were recognised by the British government as having the right to make their permanent homes in Fiji, as in other colonies.

3.34 After Cession, other Europeans came to Fiji to settle or to work for the colonial administration and the various companies which established themselves in the new colony. A number of Chinese arrived to establish agricultural and commercial ventures. During the period of colonial administration the people of

Banaba and some from Tuvalu were re-settled in Fiji. Other Pacific Islanders were also attracted by Fiji's relative prosperity. Some of these people made their permanent homes in Fiji. Many intermarried. Their descendants, together with more recent immigrants from all over the world, make up what has come to be recognised as Fiji's third community.

3.35 In this way were sown the seeds of Fiji's multiracial and multicultural society. Even within Fiji's two main communities, people are not as homogeneous as our short account might suggest. We prefer to use the term "multi-ethnic society" to describe the many strands making up the fabric of Fiji's present-day population. The latest census was taken in 1986. The 1996 census is being taken at present. Its results will begin to become available early in 1997. Table A in Appendix J compares the total population and its distribution among the three main communities at the time of the 1986 census, with the total population and its distribution as estimated at 31 December 1995 by the Bureau of Statistics. Table B shows projections based on the 1986 census of the number and percentages of people aged 18 and over as at 30 June 1996 and 30 June 1999. The figures are broken down to show distribution among ethnic groups.

3.36 The most important demographic features are the changes in the proportions of the three main communities. In 1986, 46% were indigenous Fijians, 49% were Indo-Fijians and 5% were from other ethnic groups. The present distribution is estimated to be indigenous Fijians 50.7%, Indo-Fijians 43.5% and other ethnic groups 5.8%. The projections show the following trends:

- continued growth in the population but at a low rate;
- growth in the labour supply;
- an increase in the population share of indigenous Fijians;
- a slowing in the growth of the school age population;
- an increase in the average age of the population.

3.37 We look at the advantages Fiji derives from the makeup and other characteristics of its population, as well as its other circumstances, when we consider how the country's constitutional arrangements can promote the economic and social advancement of all communities.

THE CRITERIA IN THE COMMISSION'S TERMS OF REFERENCE

3.38 The Commission began its review of the 1990 Constitution by closely examining the criteria in its Terms of Reference unanimously approved by Parliament. While the language suggested differences in the weight to be given

to each, the Commission saw the question of weight as becoming important only if the application of the criteria were to lead it to conflicting conclusions. Happily, this has not been the case. Taken together, all the criteria point the Commission in the same direction.

3.39 In essence, the criteria set goals. We are required to ascertain whether these goals can be achieved under the 1990 Constitution as it stands or whether changes are necessary. As can readily be seen from their terms, many of the goals concern the attitudes or expectations of individuals and groups. The country's constitutional arrangements can affect attitudes and expectations, but cannot impose them. Therefore, in pointing out the need for change in people's hearts and minds, we do not restrict ourselves solely to changes which can be brought about by the Constitution. Ultimately, however, we are required to recommend constitutional arrangements that will promote the desired goals. Our recommendations about the nature of constitutional arrangements for this purpose are set out at the end of this chapter.

Fiji's communities

3.40 The Commission's Terms of Reference refer to Fiji's "communities" and "ethnic groups" and describe some communities or groups as a "people". We do not think that the use of the different terms is intended to convey subtle distinctions between the status of a "community", an "ethnic group" and a "people". In this report, we similarly use all three terms as they are popularly understood, and, in the light of that understanding, regard an "ethnic community" as perhaps including various ethnic or other groups.

3.41 The modern approach to the identification of different groups or communities within a society is to move away from the unscientific concept of "race". "Ethnicity" is the term usually employed to distinguish groups of people within the state who, by reason of their descent, religion, place of origin or other shared attributes or beliefs, regard themselves as having a common identity. This approach permits people to stress different aspects of their ethnicity in different contexts. Being a member of an ethnic group depends both on self-identification by the individual person concerned and also on acceptance by the group itself.

3.42 Membership of an ethnic community or group does not prevent a person from being, at the same time, a member of sub- or cross-cutting communities or groups that reflect different facets of his or her identity. For example a Fijian may be a Methodist, a soccer player and a mother. An Indo-Fijian may be a Catholic,

a public servant and a weight lifter. These different facets of a person's identity mean that his or her interests are not limited to those stemming from ethnicity. They are likely to include many interests shared by members of other ethnic groups.

3.43 We discuss later in this chapter the connection between membership of an ethnic community and communal representation in Parliament, to the extent that it remains part of Fiji's electoral system. For the moment, we simply make the point that all ethnic communities make a valuable contribution to the national life of Fiji. This must be recognised. Only then can Fiji achieve racial harmony and national unity, as we shall now explain.

Promoting racial harmony and national unity

3.44 Racial harmony and national unity are two sides of the same coin. Both depend on the relations among ethnic communities. Racial harmony focusses on people's interaction when their different community identities are to the fore. National unity focusses on people's awareness of their common identity as members of the wider community composed of all citizens. People are unlikely to have a sense of national unity unless, at the same time, they have self-respect and self-confidence as members of their own community.

3.45 Racial harmony is not merely an absence of conflict. It connotes a positive attitude by the members of each community towards those of other communities, based on mutual respect and trust, a sympathetic appreciation of one another's values and traditions, and tolerance of different beliefs, customs and cultural attitudes. Trust, however, has to be earned. To be trusted one must be trustworthy.

3.46 The members of every community should respond positively to opportunities to widen their knowledge and understanding of the values, traditions, customs and ceremonies of other communities. Every community should be willing to share knowledge about its values and traditions with members of other communities and encourage them to follow its customs and take part in its ceremonies in appropriate ways.

3.47 National unity connotes a willingness of all communities to work towards common goals. It must be built on the existing foundation of shared interests and values, including the loyalty and commitment to the country of all its citizens. The shared citizenship of the members of the indigenous and the non-indigenous communities alike gives all of them the right to participate in national life and the conduct of government.

3.48 A first step in promoting racial harmony and national unity should be a Constitution which treats all citizens equally. National symbols such as the flag and the national anthem should be a unifying force. They should recognise the unique history and character of Fiji. This principle applies to the office of Head of State which has symbolic significance. The Fijian, Hindi and English languages should be equally respected.

3.49 Racial harmony and national unity should be promoted by reducing or eliminating sources of tension between communities. Their shared interests, values and priorities should be recognised. All communities are interdependent. Every community should therefore regard the major concerns of another community as national concerns, whose solution is essential in their own interests, as well as the interests of the whole country.

3.50 Political, religious and other community leaders, together with individual community members, have a responsibility, both in public and in private, to show good sense, moderation and sensitivity in their comments on, and behaviour towards, members of other communities. They should refrain from attributing characteristics to the members of other communities on the basis of a stereotype or the behaviour of a particular person. They should also refrain from displaying racial prejudice themselves or attributing racial prejudice to others.

3.51 Different communities in Fiji have different cultural traditions about voicing criticism. This can lead to difficulties because, in public life, the conduct of individuals and institutions often comes under attack. Fijians make important decisions in a highly structured way, showing great deference to their elders and chiefs. The tradition of Indo-Fijians encourages the free and frank debate on which democracy depends. Members of both communities should be conscious of, and make allowances for, these differences, while seeking to develop further an acceptable mode of vigorous discussion about matters of public importance.

3.52 Civil society, comprising the churches, educational institutions, professional bodies, trade unions, sports and social clubs and other non-governmental organisations and groups, has a vital role to play in promoting racial harmony and national unity. It can provide opportunities for members of different communities to learn about one another, speak one another's languages, and develop shared values and interests.

3.53 Finally, everything possible should be done to encourage economic growth and promote social justice so that all citizens have sufficient opportunities and adequate access to resources. Then, the sense of competition between communities

will be reduced. The diversity of Fiji's population should be seen as enriching its social and cultural life and strengthening its ability to compete in the world economy. We now turn to these important goals.

Promoting the economic and social advancement of all communities

3.54 Among Pacific Island countries, Fiji is well-placed, both socially and economically. Its advantages include

- a comparatively large population and territory;
- an equable climate, except for occasional cyclones or droughts;
- abundant natural resources and exceptional scenic beauty;
- a well-educated, friendly population, including a workforce with a wide range of professional and trade skills;
- an entrepreneurial class;
- health standards that have shown a significant improvement over time;
- a good physical infrastructure;
- a position at the hub of Pacific Islands' transport routes, tourism and commercial activity.

3.55 Despite these advantages, various aspects of Fiji's economic performance and social well-being give rise to concern. This emerges from the submissions and also from the statements and reports of government and international bodies. On the crucial economic issues there is little disagreement. Even so, it would not be appropriate for us to attempt any appraisal of Fiji's overall economic and social situation or seek to evaluate government policies.

3.56 Therefore, in looking at how Fiji's constitutional arrangements could promote the economic and social advancement of all communities, we shall concentrate on the problem areas where the nature and content of the Constitution are likely to make a difference.

The low level of private investment

3.57 One is the low level of private investment in Fiji. Vigorous economic growth depends heavily on the substantial ploughing back of resources into the economy through investment. Only in that way is it possible to build up the country's productive capacity. Although Fiji's economic performance has improved in recent years, the level of investment is still comparatively low.

3.58 Unless a country has economic growth, living standards cannot improve. The level of growth also affects the ability of government to provide for the community. Greater investment is essential to help overcome the problems that people referred to in their submissions, or, if that is not possible, to reduce their adverse impact.

3.59 The growth in unemployment was one of the problems mentioned by many. Only about 1,000 new jobs are being created each year in the formal employment sector. The number of school leavers is about 13,000, of whom about 8,000 actively seek employment. It is reasonable to suppose that the large gap contributes to both increasing poverty and the rising crime rate - other concerns raised in the submissions. Families and young people come into the urban areas in search of work. Many do not find it. Squatter settlements are growing. Some people turn to crime to support themselves.

3.60 Total investment in Fiji fell from 20% of GDP in 1985 to 13.6% in 1995. It is now well below the regional average. Most of the reduction in total investment is accounted for by a fall in private investment, despite the fact that the level of private saving has remained stable. Most commentators attribute the low levels of both domestic and foreign private investment in Fiji to weak investor confidence. No doubt many factors affect the confidence of both local and overseas investors, but political uncertainty is seen as a main one. Another is the comparatively low productivity of the labour force. A third is uncertainty about the security of property rights and the enforcement of contracts. We have looked at whether any of these concerns could be met or lessened by changes in Fiji's constitutional arrangements.

3.61 The submissions left us in no doubt that Fiji's present constitutional arrangements do contribute to political uncertainty. The feeling that they are not a satisfactory long-term basis for the country's government has a pervasive, destabilising effect. There is also disquiet about particular aspects of the Constitution, including the weighting of political representation in the House of Representatives in favour of Fijians discussed in Chapter 2; the reservation of a minimum 50% of public service and judicial positions at all levels for indigenous Fijians and Rotumans; and the constitutional direction to the government to establish affirmative action programmes for indigenous Fijians and Rotumans, without mention of the need to assist the disadvantaged members of other communities.

3.62 Fiji's present constitutional arrangements have undermined the confidence of many Indo-Fijians about the future in Fiji for themselves and their children.

These arrangements prevent the country from making good use of all the talent available and discourage some Indo-Fijians from making a long-term commitment through the investment of their savings. A low level of local investment tends to undermine the confidence of overseas investors.

3.63 The electoral arrangements under the Constitution also put obstacles in the way of the Government's implementation of policies that would contribute to investor confidence. The arrangements for the election of Fijian members to the House of Representatives favour rural Fijians in comparison with Fijians in urban areas. The heavily populated Western provinces are under-represented in comparison with other provinces. Taken together, these factors mean that narrow, provincial interests tend to overshadow the wider national interests on which effective economic and social policies must be based.

3.64 The second factor we have identified as contributing to investor uncertainty is a drop in the overall productivity of the labour force. Again there are a number of contributory reasons, most of which are not directly attributable to Fiji's constitutional arrangements. However, one factor in low productivity has been the scale on which skilled workers have emigrated since the 1987 coups. Between January 1987 and December 1995, the net outflow of Fiji residents was 53,532. That figure includes only people who indicated an intention to emigrate on their departure card. In fact many who departed temporarily in search of other opportunities did not return. One estimate of *implied* emigration is that it is 58% higher than the official figures.

3.65 Many of those who left had significant entrepreneurial and technical skills. In the private sector, skill shortages are evident in the areas of finance, tourism, engineering, telecommunications and business services. Our discussions with public sector administrators showed that there, too, there is a shortage of well-trained, experienced personnel. This shortage affects the education, health, legal and police services, as well as the efficiency of departmental administration.

3.66 There are many reasons why people decide to emigrate, particularly those who have the skills to make them acceptable as permanent residents in other countries and are able to find jobs there. A steady outflow must be expected from among the best-qualified members of all ethnic communities.

3.67 In the period between 1987 and 1995, the official figures showed a net outflow of 2,501 Fijians, 40,113 Indo-Fijians and 2,401 from other communities. It is reasonable to suppose that many of the Indo-Fijians who left did so out of a sense of insecurity about their future in Fiji.

3.68 A country which loses a disproportionate number of its skilled people suffers a severe direct loss on the investment it has made in training them, as well as losing the benefit of their future input into the economy. If they have to be replaced by people from overseas, the cost is several times greater. If they are replaced by less-skilled, inexperienced workers, there is also a high cost in reduced productivity.

3.69 The third factor contributing to insecurity, both among citizens and also potential foreign investors, is uncertainty about property and contract rights, particularly as they relate to land. If land is a necessary ingredient of an investment, as it is for agriculture, including sugar production, forestry and tourist accommodation, investors need security of tenure, either through ownership of the freehold or secure, long term leases.

3.70 We do not think that the uncertainties for investors who need to lease land can be directly addressed in the Constitution. However, as a main concern of the Indo-Fijian community, we refer to it later in this chapter and make recommendations in Chapter 17 about the process that might be followed in seeking a solution. There is, of course, no question of dealing with the problems of lessees by interfering with the land rights of Fijians. Indo-Fijians, in particular, stressed that those rights were sacrosanct. They accepted that they and their descendants would always remain tenant-farmers of the land.

3.71 However, the Constitution can strengthen, as against the state, the rights of all persons who own or have an interest in land, whether they are Fijians with customary land rights, other owners of the freehold or lease-holders. At present the state has an unfettered power to take land compulsorily for a public purpose, subject to the payment of prompt and adequate compensation. We believe that this power should be severely limited. This will give greater security to all who own or lease land. It will reassure Fijians that their land is not at risk if governments become multi-ethnic. Our detailed recommendation is made in Chapter 7.

3.72 We consider that investor confidence would be increased if new constitutional arrangements provided greater political certainty, and gave those in a position to emigrate a greater sense of security about their future in Fiji. We also hope that, as explained in Chapter 2, our recommended changes to Fiji's constitutional arrangements will lead to the emergence of broadly-supported multi-ethnic governments. In itself that will enhance the government's credibility in implementing effective economic and social policies in all areas of concern.

The need for enhanced international competitiveness

3.73 We have dwelt on Fiji's need to improve levels of investment (among other ways of promoting economic growth) because the international terms of trade are likely to move against Fiji. Changing external conditions include the global trade liberalisation under the auspices of the World Trade Organisation, the effect on Fiji exporters of trade liberalisation in Australia and New Zealand, and, eventually, the likelihood of some reduction in the price Fiji receives for its sugar, nearly half of which is now sold at well above world market prices. Producers in Fiji will have to be more innovative and competitive to sell their products at a profit on world markets.

3.74 This makes it more important than ever for Fiji to put its own house in order by revising its constitutional arrangements. There are many things its people and government can do, working together in a constructive partnership, to take full advantage of the country's agriculture, fisheries, forestry, mining, tourism, manufacturing and business services potential. At the moment, however, we see the lack of cohesion among the ethnic communities in the institutions and operations of government as placing Fiji under a grave handicap - like a man working hard, but with one hand tied behind his back.

Bearing in mind internationally recognised principles and standards of individual and group rights

3.75 In reviewing the 1990 Constitution and recommending future constitutional arrangements for the people of Fiji, the Commission is required to bear in mind internationally recognised principles and standards of individual and group rights ("the international standards"). They are to be found mainly in the widely accepted international human rights instruments often called the *International Bill of Human Rights*. This name signifies that these instruments are regarded as setting out generally accepted principles of international law binding on all states whether or not they have accepted a particular treaty.

3.76 In addition, we have looked at the international instruments or draft instruments dealing with the rights of indigenous peoples although they do not yet form part of the *International Bill of Human Rights*.

3.77 The content of the international standards has to be ascertained by examining treaties and other instruments within the framework of international law. While the Commission paid close attention to the provisions of treaties to which Fiji is a contracting party (signified by an asterisk in the list below), it

concluded that it should give equal weights to treaties to which Fiji is not a party and provisions of treaties in respect of which Fiji has entered a reservation (signified by the # sign). To do otherwise would be inconsistent with the direction in its Terms of Reference and ignore the way in which the international community makes judgments about the human rights situation in particular countries.

3.78 The instruments studied by the Commission as sources of the international standards included the following:

General instruments

Charter of the United Nations*
Universal Declaration of Human Rights
International Covenant on Civil and Political Rights
International Covenant on Economic, Social and Cultural Rights
Apartheid Convention
Convention on the Elimination of All Forms of Racial Discrimination*#
Convention on the Elimination of All Forms of Discrimination against Women*#
Convention on the Rights of the Child*
Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities
ILO Convention No 169 on Indigenous and Tribal Peoples
Draft Declaration on the Rights of Indigenous Peoples

Regional Instruments

European Convention on Human Rights
American Convention on Human Rights
African Charter on Human and Peoples' Rights.

The Commission examined other international instruments where relevant in a particular context. It also took state practice into account, as showing whether or not a proclaimed international standard is in fact generally adhered to.

3.79 In reviewing the 1990 Constitution, the Commission has identified the provisions which appear to conflict with, or not to give adequate protection to, the international standards. In formulating its recommendations for changes, it has borne the international standards in mind. In fact, the Commission found that there was no significant area where the international standards appear to clash with what is in the best interests of Fiji.

3.80 The international standards are particularly relevant in the following contexts:

- the structure of the political system, with particular reference to communal representation;
- the affirmation of fundamental rights and freedoms, including
 - the question of which rights and freedoms should be constitutionally protected,
 - the grounds on which protected rights and freedoms may be limited,
 - the prohibited grounds of discrimination,
 - the authorisation of affirmative action, to the extent that it conflicts with freedom from discrimination, and
 - derogations from fundamental rights in time of emergency;
- any constitutional recognition of particular religions or languages;
- the protection of the special rights of indigenous Fijians and Rotumans and of minorities;
- the acquisition and loss of citizenship.

3.81 For the most part, we discuss the application of the international standards in the relevant context in the following chapters of the report. In this chapter, however, we look at the way in which the international standards bear on the political rights of individuals and groups. That issue is fundamental to our inquiry.

The political rights of individuals and groups

3.82 The international standards make it clear that political rights are human rights. A number of international human rights instruments expressly recognise political rights.

3.83 Article 21 of the *Universal Declaration of Human Rights* provides that

- (1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives. ...
- (3) The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

3.84 Article 25 of the *International Covenant on Civil and Political Rights* provides as follows:

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in Article 2 [discrimination on the listed grounds or other status] and without unreasonable restrictions:

- a. To take part in the conduct of public affairs, directly or through freely chosen representatives;
- b. To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;

3.85 The *First Protocol to the European Convention on Human Rights* provides in Article 3:

The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.

3.86 Article 5 of the *International Convention on the Elimination of all forms of Racial Discrimination*, to which Fiji is a party, provides as follows:

In compliance with the fundamental obligations laid down in article 2, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: ...

- c. Political rights, in particular the rights to participate in elections, to vote and to stand for election on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service;

The Government of Fiji maintains the following reservation to the *Racial Discrimination Convention*:

To the extent, if any, that any law relating to elections in Fiji may not fulfil the obligations referred to in Article 5(c) ... the Government of Fiji reserves the right not to implement the aforementioned provisions of the Convention.

3.87 Because some of the submissions laid considerable emphasis on the political rights of Fijians and Rotumans as the indigenous people, the Commission also carefully examined the provisions of both *ILO Convention No 169 on Indigenous and Tribal Peoples* and the draft *Declaration on the Rights of Indigenous Peoples*. The last-mentioned instrument is still under negotiation in

United Nations bodies. Therefore it cannot be regarded as an authoritative source of the international standards. Nevertheless, the Commission gave full weight to its provisions.

3.88 *ILO Convention No 169 on Indigenous and Tribal Peoples* was adopted in June 1989 as a revision of *ILO Convention No 107 on Indigenous and Tribal Populations*. The latter had addressed the living and working conditions of indigenous and tribal peoples but had assumed that all relevant decisions would be taken by the government and that indigenous and tribal peoples would eventually be assimilated into the wider community. When this approach became discredited, the ILO adopted *Convention No 169* which assumes that indigenous and tribal peoples will continue to have a separate identity within their national society. However, that *Convention*, too, has failed to attract wide support in the international community.

3.89 The draft *Declaration on the Rights of Indigenous Peoples* originated from a sub-commission of the United Nations Commission on Human Rights. The process of its negotiation has involved representatives of indigenous peoples themselves. Its focus is on recognising greater autonomy for such peoples within the states in which they and their lands are now situated. The draft is now under consideration by the United Nations Economic and Social Council.

3.90 The Commission took the provisions of each instrument into account in the following contexts dealt with elsewhere in this report:

- the protection of the land rights of the Fijian, Rotuman and Banaban peoples and provision for their separate governance, dealt with in Chapter 17;
- affirmative action programmes for the benefit of Fijians and Rotumans, dealt with in Chapter 8;
- rights in connection with the exploitation of natural resources such as minerals, dealt with in Chapter 17.

3.91 Neither instrument assumes that tribal and indigenous peoples will necessarily be a minority in the country where they live. However, they are concerned with situations in which the land, culture and separate identity of indigenous peoples may be at risk from situations comparable with those faced by Hawaiians, Maori and Australian aborigines as a result of colonisation. For that reason they are not wholly relevant to indigenous Fijians. During the colonial period, Fijian land and distinct identity were protected, and are still protected, by

the Native Lands Act and the Fijian Affairs Act. Since before independence, indigenous Fijians have had a full part in their country's government.

3.92 The two instruments focus on the special rights of indigenous peoples as a distinct community, but make it clear that indigenous people also enjoy equal rights with all other members of society. For example, Article 2 of *Convention 169* requires governments to take measures for

ensuring that members of these peoples benefit on an equal footing from the rights and opportunities which national laws and regulations grant to other members of the population.

Article 3(1) provides:

Indigenous and tribal peoples shall enjoy the full measure of human rights and fundamental freedoms without hindrance or discrimination. ...

Similarly, Article 1 of the draft *Declaration* provides:

Indigenous peoples have the right to the full and effective enjoyment of all human rights and fundamental freedoms recognised in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law.

Article 4 provides:

Indigenous peoples have the right to maintain and strengthen their distinct political, economic, social and cultural characteristics, as well as their legal systems, while retaining their rights to participate fully, if they so choose, in the political, social and cultural life of the State.

3.93 The clear inference is that, at the national level, the political and other rights of indigenous peoples are on exactly the same footing as those of other members of the national society. Both instruments see the special rights of indigenous peoples as distinct communities as supplementing the fundamental human rights and freedoms they already share with all other citizens. Nothing in either instrument gives an indigenous people superior or paramount rights in taking part in the government of their country.

3.94 Because of its importance, we considered the significance of a right of indigenous peoples to "self-determination". In drawing up *Convention No 169* on indigenous or tribal "peoples", the International Labour Organisation was careful expressly to exclude "any implications as regards the rights which may attach to the term [people] under international law". The draft *Declaration*, however, provides in Article 3:

Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

The right of an indigenous people to “freely determine their political status” must be read in context. It refers to their political status in taking control over their own affairs, not to their political status as it affects their participation in the national government.

3.95 The reference to self-determination revives in the minds of some governments the battle they fought and lost in seeking to keep a reference to a right of self-determination of all peoples out of the *International Covenants*. Then, the emphasis was on the right of non-self-governing peoples to self-government or independence. Now, references to the right to self-determination of a distinct “people” within a national society create fears that the people may claim the right to secede and form a new state of their own. We think that, for indigenous peoples, self-determination has more positive connotations than a focus on the question of secession would suggest. The issue is still to be settled in United Nations forums.

3.96 “The principle of the equal rights and self-determination of peoples” is referred to in Article 1(2) of the *United Nations Charter*, and again in Article 55. It will always be invoked whenever a people wish to maintain their group identity and express it politically. However, nothing in United Nations doctrine supports a claim that a right to self-determination entitles a particular “people” within a country, whether or not indigenous, to exercise political domination over other “peoples” or citizens.

3.97 It is convenient to refer at this point to suggestions in the submissions that “sovereignty” still resides or ought to reside in the Fijian people or their chiefs by virtue of the Deed of Cession, and justifies constitutional provisions guaranteeing Fijian political paramountcy. People sought to draw analogies with the position of Maori under the *Treaty of Waitangi*.

3.98 Today, many New Zealanders would acknowledge that Maori deserve a special place and treatment within the legal system, both as the people of the land and by virtue of their *Treaty* rights. However, although some Maori often couch their claims to that special place and treatment in terms of their “sovereignty”, neither the courts nor the Waitangi Tribunal have taken that approach. Two quotations will suffice, the first from a decision of the Court of Appeal, and the second from a report of the Waitangi Tribunal:

On the Maori side it has to be understood that the Treaty gave the Queen government, Kawanatanga, and foresaw continuing immigration. The

development of New Zealand as a nation has been largely due to that immigration. Maori must recognise that it flowed from the Treaty and both the history and the economy of the country rule out extravagant claims in the democracy now shared. (*Tainui Maori Trust Board v Attorney-General* [1989] 2 NZLR 513,530. Court of Appeal, Cooke P)

From the Treaty as a whole it is obvious that it does not purport to describe a continuing relationship between sovereign states. Its purpose and effect was the reverse, to provide for the relinquishment by Maori of their sovereign status and to guarantee their protection upon becoming subjects of the Crown. In any event on reading the Maori text in the light of contemporary statements we are satisfied that sovereignty was ceded. Tino rangatiratanga [literally, full chieftainship] therefore refers not to separate sovereignty but to tribal self-management on lines similar to what we understand by local government. (*Muriwhenua Fishing Report* Wai 22,1988, 187.)

The Tribunal which produced the *Muriwhenua Report* comprised the Chairman, Chief Judge Durie, Bishop Manuhua Bennett, the late Sir Monita Delamere, Georgina Te Heu Heu, M P K Sorrenson and W M Wilson.

3.99 The Commission does not go so far as to say that the concept of “sovereignty” can never legitimately be invoked to support the right of groups to form a political community. In this context it has a powerful symbolism. We are simply saying that no political community, by reference to either “self-determination” or “sovereignty”, can legitimately claim that it has political rights which entitle it to a position of dominance over other groups forming part of the same national society.

3.100 After studying the international instruments and other material evidencing the international standards, the Commission reaches the following conclusions:

- The express recognition of individual political rights in an international instrument, without mention of group rights, does not necessarily mean that group political rights are unlawful at international law.
- The international focus of political rights is on the provision for the election of the legislature, as distinct from the executive, and on the main law-making body if there are two chambers. It is sufficient if persons appointed to political office in the second chamber or the executive are in some way accountable to the people’s representatives elected on the basis of equal suffrage.

- The concept of “equal suffrage” means that, within reasonable limits, every vote is to be given the same weight. It does not imply that every vote must have the same effect in electing members of Parliament. Therefore it does not mandate a particular system for translating votes into seats.
- When the effect of votes is skewed by gerrymandering that discriminates against certain groups of voters or is otherwise void of all reasonable justification, this violates the principle of equal suffrage.
- In giving effect to the virtually universally recognised principles of equality of treatment and equal suffrage, voting arrangements based on group identity for which voluntary affiliation is possible, do not appear, in themselves, to be unlawful.
- International law allows to states a “margin of appreciation” in determining what constitutional arrangements are reasonable in a particular society, in the light of its cultural and other characteristics.
- In particular, the international standards appear to allow considerable latitude for national political systems to accommodate groups based on racial or ethnic factors as a way of ensuring their representation, as long as these arrangements
 - are not explicitly and permanently racially-based, and
 - do not have the intention and effect of reducing the voting power of a particular group.
- Short-term differentiations based on race and ethnicity may be lawful if, historically, they have been generally accepted as the basis of political representation. Constitutional or other legal regimes may not, however, be explicitly based on them or operate so as to segregate racially. Ultimately, the international legality of the arrangements will turn on their reasonableness in their unique context.

3.101 Some may wonder why the international standards are seen as relevant to the decisions that the people of Fiji must make for themselves about their own constitutional arrangements. The answer is that they are the standards by which the outside world will judge Fiji and also the standards by which the people of Fiji have chosen to judge themselves. The international human rights movement is based on the willingness of states to undertake obligations about the way in which

they will treat their own citizens, and the vigilance of the international community in holding states to their international human rights obligations.

3.102 In making decisions about aid and trade relationships, as well as political ties, other governments can be expected to take Fiji's human rights record into account. Human rights concerns can also affect private foreign investors, not only because they may affect the country's political stability, but also because individual shareholders increasingly focus on human rights and environmental issues in giving directions to management about investment portfolios.

3.103 However, the main reason why the people of Fiji should take the international standards into account is because they are themselves loyal members of the international community. Fiji has become a party to some of the main human rights instruments, although with some reservations. By its membership of the United Nations, Fiji has bound itself in general terms to promote and encourage respect for human rights and fundamental freedoms for all without distinction as to race, sex, language or religion. As an aspect of Fiji's United Nations membership, its people have taken a particular responsibility for peace-keeping operations, often in countries torn by racial strife, and at a cost to their own lives. Many of them have seen for themselves the terrible consequences of failing to respect the human rights of all a country's citizens. It would be strange if they did not take this lesson to heart by agreeing to apply human rights norms in governing their own country.

Rights, interests and concerns

3.104 As soon as the Commission began to discuss the kind of constitutional arrangements which seem likely to meet the needs of all people in Fiji, it was inevitably dealing with the rights, interests and concerns of indigenous Fijians and Rotumans, as well as those of other ethnic communities. Therefore this and the next section will be a stocktaking. How does the Commission see its broad approach as guaranteeing the rights, promoting the interests and meeting the concerns of Fijians and Rotumans as well as those of other communities ?

3.105 People sometimes speak of moral rights or natural rights, as well as legal rights. It is clear, however, that, in our terms of reference, "rights" mean legal rights. We have taken the term to mean existing rights under the Constitution or other law of Fiji, or rights recognised at international law. When we talk of recognising "new" rights, it is because there is a sound basis for protecting an interest by a legally enforceable right.

3.106 We have also thought about whether it is possible to draw a precise line between interests and concerns, but have concluded that it is not. We therefore propose to treat all concerns as giving rise to interests.

Guaranteeing full protection and promotion of the rights, interests and concerns of the indigenous Fijian and Rotuman people

3.107 What are Fijian rights? One is their right to their land guaranteed through the recognition in the Native Lands Act of customary title. The Native Land Trust Act provides that Fijians may not dispose of their land except to the government or through the Native Land Trust Board.

3.108 *ILO Convention No 169* and the draft *Declaration on the Rights of Indigenous Peoples* both recognise that the land rights of an indigenous people may need to be protected by restrictions on their right to dispose of their land. Otherwise there is a danger that people may part with their land for short-term gain, to the detriment of future generations. As we explain below, the mechanism of the Native Land Trust Board, devised by Ratu Sir Lala Sukuna, benefits all communities. Fijian traditional fishing rights are protected by the Fisheries Act. The 1990 Constitution gives all landowners, including indigenous Fijians, the right to a share of the royalties from the exploitation of minerals in the subsoil of their land or the seabed over which they have traditional fishing rights.

3.109 Fijians also have rights to their traditional chiefly institutions, including the Bose Levu Vakaturaga, and the other separate administrative systems set up for their governance under the Fijian Affairs Act. We propose that the Bose Levu Vakaturaga, and its membership and functions should be provided for in the Constitution itself. Otherwise the Fijian Affairs Act should be retained in its present form until Fijians wish to revise it. We mention in Chapter 17 some contexts in which review seems desirable. In the same chapter we also propose a voluntary dispute-settlement mechanism which will enable Fijians (and others) who so agree, to settle their relatively minor disputes in accordance with Fijian traditional practice.

3.110 Rotumans have similar rights to Fijians to the protection of their land and the arrangements for their government as a separate community. Again, review may be desirable, specially in the case of the legislation relating to Rotuma. Better communications have made some of the existing provisions thoroughly out of date. Chapter 17 deals in detail with the rights, interests and concerns specific to Rotumans.

3.111 Provision should be made to ensure that all entrenched legislation for the benefit of particular communities or groups may be amended only with the participation of their representatives. Our recommendations about the process are set out in Chapter 20.

3.112 The 1990 Constitution places on governments and Parliament a duty to implement affirmative action programmes for the benefit of Fijians and Rotumans. The purpose is to turn around their continuing inability to break into the commercial life of Fiji in significant numbers as entrepreneurs or proprietors. Any duty gives rise to rights for those whom it benefits. We think the duty on the part of governments and the corresponding rights for Fijians and Rotumans should remain, though the government should also be required to put in place social justice programmes for the benefit of disadvantaged individuals or groups in all communities. The allocation of resources among the different programmes should be one that all communities can accept as broadly fair. We spell out this approach in Chapters 5 and 8.

3.113 Foremost among Fijian and Rotuman interests are the propositions about Fijian paramountcy. Some submissions argued that Fijians have a *right* to the paramountcy of their interests, and specifically to political paramountcy. The arguments reflected the universal tendency, in a negotiating forum, to maintain that interests are backed by rights. We believe, however, that arguing for paramountcy as a right, not an interest, turns a strong case into a weak one.

3.114 We have found no basis on which the paramountcy of Fijian interests or Fijian political paramountcy can be elevated into a right. As explained in the last section of this chapter, the international standards, including the two instruments dealing with the rights of indigenous peoples and the concepts of “self-determination” and “sovereignty”, give no support to that proposition. On the contrary, arrangements for the election of members of Parliament that involve a weighting in favour of Fijians conflict with the international standards. They are also inconsistent with the goals of promoting racial harmony and national unity, and the economic and social advancement of all communities. These findings strengthen the overwhelming interest of all communities in working towards genuinely multi-ethnic governments.

3.115 In Chapter 2 we looked at the context in which the paramountcy of Fijian interests was first articulated as a matter of principle. Fijians then formed the view that, to protect their interests, they needed to have political paramountcy. The Commission has suggested that, if the Constitution can give Fijians an

assurance that their *interests* will be treated as paramount, they will have a basis for reconsidering the question of *political paramountcy*. Because the principle that Fijian interests are paramount makes it clear that the interests of other communities must also be taken into account, we look at the means of reconciling the interests of all communities in a later section of this chapter.

3.116 We also recommended in Chapter 2 that the people of Fiji should move gradually but decisively away from the system of communal representation. We said "gradually", because it would be difficult to move immediately from Fiji's present electoral arrangements to a system which did not reserve any seats for communities. We propose that communal representation should be phased out as not being in the best interests of any ethnic community, including Fijians and Rotumans, or the country as a whole. However, to provide reassurance to all communities which at present have communal seats, some reserved seats should be retained as a transitional measure.

3.117 The allocation should be based on the proportions in which the community is represented in the population as a whole, but some account should be taken of historical and other factors, so far as relevant. In our view, the international standards are sufficiently flexible to accommodate such a process of adjustment. Our detailed proposals are set out in Chapter 9.

3.118 Fijians also have a special interest in the office of President. It was widely held among all communities that the holder of the office should be Fijian. We recommend in Chapter 9 that the Bose Levu Vakaturaga should nominate three to five candidates who are indigenous Fijians. The President, and a Vice-President from another community, should be elected by both Houses of Parliament coming together as an electoral college. In this way the President will be seen as representing all communities. The office should continue to carry with it the duties of Head of State and of providing moral leadership to the nation.

3.119 Fijians and Rotumans have an interest in making sure that they are proportionately represented in all aspects of state service. But, apart from the office of President, no positions or proportion of public offices should be reserved for the members of a particular community. Again, such reservations are contrary to the international standards. We propose, however, that proportionality of representation should be listed in the Constitution among the factors to be taken into account in appointing, promoting and managing the state services. If, after taking occupational preferences into account, a particular community is found not to be represented in any area of service to the state or at any level of service, in

proportion to its population share, its under-representation should be addressed by affirmative action.

3.120 The remaining special interest of Fijians and Rotumans that calls for comment is the proposal of some that the Constitution should declare Fiji to be a Christian state. This proposal said more about the Fijian sense of identity than about the constitutional effect of such a declaration.

3.121 Those who supported the proposal argued that it was unobjectionable because people of other faiths would retain their freedom to practise them. Those who opposed the proposal saw it as unnecessarily divisive. The argument on both sides was linked to arguments about the desirability or otherwise of continuing the so-called "Sunday ban". That was not a constitutional issue and has since been resolved.

3.122 We believe there are strong arguments for maintaining the separation of church and state. Such a separation avoids any suggestion that a community whose members mainly belong to a particular religion is entitled to political control of the state, or that the state should support that religion financially, in preference to other religions. Church and state should each be free to carry out their roles with integrity and without risk of being drawn into an exploitive relationship. The preamble to the Constitution should, however, continue to reflect the importance of Christianity in Fiji, as well as the universal love of God shared by people of all religious faiths.

Having full regard for the rights, interests and concerns of all other ethnic communities

3.123 Inevitably, the discussion of Fijian and Rotuman rights and interests just completed deals also with how those rights and interests should be reconciled with those of other communities. In fact we do not see any competing rights. Members of other communities are unanimous in agreeing that Fijian rights to land must be protected.

3.124 Members of all communities already have constitutionally protected rights as landlords or tenants under the Agricultural Landlord and Tenants Act. Some people have the impression that that Act itself expires along with the leases to which it applies. That is not the case. Landlords and tenants will remain entitled to its protection including the provision for compensation for improvements if a lease is not renewed. The Act should continue to be protected by constitutional entrenchment in a way that gives representatives of their interests a veto power.

3.125 As mentioned earlier, those seeking to renew or enter into leases of native land also have a strong interest in the maintenance of the Native Land Trust Act as long as that is the wish of indigenous Fijians. Under that Act, a state institution is empowered to negotiate on behalf of the landowners. This means that the interests of individual tenants as well as the overall effect on the economy can be taken into account along with the interests of landowners.

3.126 The government has announced that, as a matter of policy, it will not again extend the terms of leases globally, by statute. That policy reflects the provisions of the Native Land Trust Act which requires the land needs of the land-owning unit to be considered on an individual basis. We have already stated that security of tenure for tenants is not a constitutional question. Nevertheless, the need for greater security was a major issue raised in the submissions. We consider that an all-party process should be put in train for reaching agreement on governing principles that are acceptable both to landowners and tenants. We make detailed recommendations in Chapter 17.

3.127 Otherwise, the rights of members of other ethnic communities are essentially the rights of all citizens. In the final section of this paper we look briefly at why some Fijians find it difficult to accept that non-Fijians have the same rights as Fijians and Rotumans. We are in no doubt, however, that the Constitution must be based firmly on the equal rights of all citizens of Fiji.

3.128 The only justification for departing from this principle would be the need to put in place transitional arrangements for phasing out the present weighted communal representation. Even then, the principle of equal franchise should be adhered to as closely as possible.

3.129 Submissions from some minority groups stated that the way in which they are assigned to communities for voting purposes does not give them adequate opportunities for representation or, in some cases, accurately reflect their personal sense of ethnic identity. For its part, the Commission considers that a clear distinction should be made between a person's ethnic identity in the sense explained in an earlier section of this chapter, and his or her membership of a community for the purpose of communal representation in Parliament.

3.130 We have already explained our view that, to encourage the emergence of multi-ethnic governments, the people of Fiji must move gradually but decisively away from communal representation. Limited communal representation should remain for the time being, but only for the purpose of bringing about an acceptable

transition to a more open system for electing members of Parliament. In these circumstances, the Commission does not favour placing even greater stress on ethnic identity for representation purposes by allocating seats to groups which are not at present separately represented.

3.131 It considers, however, that, so long as an element of communal representation remains, an attempt should be made to ameliorate, so far as possible, any adverse consequences of the present definitions of communities for voting purposes. The remedial measures should include giving persons of mixed descent the same option that Rotumans already have to classify themselves by reference to the ethnicity of either their mother or their father. Pacific Islanders should again vote as part of the Fijian community. Six seats should be set aside in the Upper House of Parliament to be filled by the appointment of members of ethnic communities or other groups, including women, who do not obtain adequate representation through the electoral process. Our proposals are set out in detail in Chapter 10.

3.132 Just as Fijians and Rotumans should continue to have a right to the benefit of affirmative action programmes for the purpose of enhancing their participation in all aspects of the life of Fiji, so also should the disadvantaged members of all ethnic communities and groups have a right to programmes for social justice. We have made the point that the allocation of resources between different programmes must be one which all communities can accept. Our detailed proposals are spelt out in Chapters 5 and 8.

3.133 The interests of non-indigenous communities in the office of President, the need to maintain proportionality in the representation of all ethnic communities in all aspects of state service, and the separation of Church and State have already been referred to in discussing the rights and interests of Fijians and Rotumans.

Reconciling the interests of different communities

3.134 We now consider how the Commission's recommendation that the Constitution should recognise the principle that the interests of Fijians are paramount, would affect other communities. The object of the principle is to ensure that Fijian interests are not subordinated to the interests of any other community. We emphasise, however, that the thrust of the principle is protective. It can never justify ignoring or riding roughshod over other communities' interests.

3.135 For this reason it should be agreed that the interests of all communities will be protected by another principle - one that has emerged in both international law and domestic law as a means of dealing with the complex nature of competing

interests in the modern world. That is the principle that, if interests are seen to conflict, the interested parties must negotiate in good faith in an endeavour to reach agreement. We believe that this principle should apply to the resolution of any conflicts of interest among the ethnic communities in Fiji.

3.136 Negotiations are likely to be necessary about the formation of a multi-ethnic government. They may also be required on important or sensitive matters arising from a government's conduct of the affairs of the nation through the promotion of legislation or the implementation of its policies in other ways. In Chapter 5 we recommend a constitutional provision to deal with these and related matters. It takes the form of a *Compact* among all the people of Fiji. The principle that Fijian interests are paramount should operate in the context of the negotiations which the *Compact* would require.

3.137 Representatives of the General Voters community made the point in a submission that Fijian concerns about paramountcy, in whatever form they are expressed, are not manifestations of an ambition to be racially supreme but expressions of an indigenous people's yearning for survival. Seen in that light, the principle that Fijian interests are paramount, formulated as we have suggested and applying in the context of negotiations, is not contrary to the interests of other ethnic communities. We believe that other ethnic communities should reaffirm their acceptance of it.

The equal rights of all citizens

3.138 We have given much thought to how the different world views of Fijians and members of other communities can be brought together to create a shared vision of the future. Some Fijian interests, including those in their land, and the preservation of Fijian traditions and institutions, including the pre-eminent place of the Bose Levu Vakaturaga, are backed by rights and can easily be given constitutional protection. Other Fijian interests are intangible, especially their desire for their country to remain visibly Fijian in the face it presents to the world. The two are connected, because to many Fijians the ownership of their land in accordance with Fijian custom is what makes them Fijians.

3.139 Not surprisingly, therefore, some see the ownership of the land and ownership of the country as one and the same. They find it difficult to accept that those who do not own the land have the same rights of citizenship, including the right to take part in government, as those who do. Non-Fijians are seen as vulagi, to be treated hospitably, even generously. They should be given the right to make their homes permanently in Fiji, should be allowed to take part in its commercial life, but should not be admitted fully into its decision-making processes. Those

should be reserved for the indigenous people who are the owners of the land. Time and again Fijian submissions likened Fiji to a house. The owner will gladly invite his guests to join him in the living room but not to share the family's private quarters. How then can Indo-Fijians think they have a right to take part in the country's government?

3.140 This way of thinking is understandable in the cultural context in which it is expressed, hurtful though it is to third or fourth generation Indo-Fijians. They, too, see Fiji as their only home and give it their loyalty. Of course they retain many of their own cultural and religious traditions, but they are also adapting to the fact that they are citizens of a multi-ethnic country incorporating Fijian values and culture. Their labour, originally in conditions not far removed from slavery, helped to build this house of modern Fiji.

3.141 Certainly, the foundation of the house is the continuing Fijian ownership of most of the land. Indo-Fijians accept and respect that fact. But, building on that foundation, they have made an essential contribution to the house itself. That is not to dismiss the justified concern among Fijians that, in the commercial sector of the country's economy, Fijians have lagged behind. That gap must be narrowed. But its existence is not a justification for shutting the Indo-Fijian community out of participation in their country's government. Everyone who is a Fiji citizen must have equal rights.

3.142 Among Pacific Island nations, Fiji is uniquely blessed in its combination of natural and human resources. Its citizens can maximise the opportunities to improve the well-being of all communities only if the contribution of each community is equally valued and equally reflected in the country's constitutional arrangements.

RECOMMENDATIONS

8. The Constitution should:

- (a) enable the people of Fiji to make a fresh start in providing for the government of their country;
- (b) be generally acceptable to all citizens;
- (c) control the actions of governments;
- (d) guarantee the rights of individuals and groups;
- (e) promote important values such as the rule of law and the separation of powers;
- (f) act as an enduring basis for government.

- (g) be written in accessible language and translated into Fijian and Hindi.
- 9. In order to promote racial harmony and national unity and the economic and social advancement of all communities; take account of the international standards concerning individual and group rights; and guarantee the rights, protect the interests and meet the concerns of the indigenous Fijian and Rotuman people and those of all other communities and groups, the Constitution should:
 - (a) ensure that the office of Head of State and national symbols, such as the flag and the national anthem, have a unifying force: they should recognise the unique history and character of Fiji;
 - (b) provide a basis on which all citizens can describe themselves by a common name;
 - (c) encourage every community to regard the major concerns of other communities as national concerns;
 - (d) increase investor confidence by providing greater political certainty and reassuring all citizens that they and their children have a secure future in the Fiji Islands;
 - (e) provide for the election of the Lower House of Parliament on the basis of equal suffrage;
 - (f) retain some communal representation, based on the distribution of communities in the total population, as a transitional measure;
 - (g) maintain the separation of church and state, while reflecting the importance of Christianity and all other spiritual traditions present in Fiji;
 - (h) recognise the equal rights of all citizens.
- 10. The Constitution should recognise the principle that, in order to resolve any conflicts of interest among communities and groups in Fiji, the parties should negotiate in good faith in an endeavour to reach agreement. All communities should affirm their willingness, in such negotiations, to apply the paramountcy of Fijian interests as a protective principle, with the object of ensuring that those interests are not subordinated to the interests of other communities.