

# 10

## Between Coups

### Constitution Making in Fiji

*Jill Cottrell and Yash Ghai*

In 1874, the principal chiefs of Fiji signed a deed of cession of their islands to the British crown in the hope of securing, as they put it, “civilization and Christianity.” In 1970, the country became independent under a newly prepared constitution. In 1997, Fiji adopted a new constitution by a process that is the focus of this paper. In 1999, the constitution came into force and there was a general election in which the two parties that had been the protagonists of constitutional change were decisively rejected. A year later, there was a curious civil coup, during which the government was held captive in the parliament building by a group of indigenous Fijians led by a failed and dishonest businessman;<sup>1</sup> this movement was superseded by a military takeover, which resulted first in its suspension and then in its abrogation, with the military ruling by decree.<sup>2</sup> The seesaw history of the constitution continued with its restoration following a court ruling;<sup>3</sup> its suspension following, oddly, a proconsti-

tution coup in 2006; and its abrogation after a similar court ruling in 2009.<sup>4</sup>

Had this paper been written in April 1999 or even 2000, we would undoubtedly have said that the constitution-making process was a great success, and that the 1997 constitution, though not flawless, was a considerable achievement. Inevitably, we are compelled to address the question of whether the events of 1999, 2000, and after indicate that the constitution or the process that made it was gravely flawed, even a failure. To understand the process, however, it is necessary to have some understanding of the social and economic structures of Fiji society and of the constitution-making enterprises that had preceded that of the early to mid-1990s.

Since Fiji’s inception as a political entity, its politics and political and administrative structures have been obsessed with race and ethnicity, thanks to colonial policies. Every other issue—human rights, trade unionism, land, economy, education, even religion—

has been subordinated to it. Constitutional debates have been fundamentally about ethnic allocations of power; they have not been about national unity or identity, social justice, the appropriate scope of the public sphere, Fiji's place in the world, or the myriad other issues that define people's daily experience. As happens with such an obsession with race, there is a great distortion of reality. The complexity of Fijian society, with its ethnic divisions and class structures, is obscured so that a regional chiefly class assumes the leadership of the entire community. Such obfuscation, prevalent in other communities as well, is the handmaiden of injustice. The 1997 constitution tried to move to a new paradigm, motivated by newer thinking on ethnic differences and celebrating diversity as a source of enrichment and social justice through national unity and integration. Its own checkered career shows the difficulties of its project. But there is little doubt that in the course of time, its vision will win greater acceptance, even if posthumously. A constitution charting a new path does not necessarily achieve its objectives immediately, especially if it operates in a context in which power is fluid and dispersed, with the constitution registering no particular class or ethnic victory. What then matters is the persuasive power of its vision and goals. The Reeves Report on the constitution, a watershed in Fiji, provided that vision, however incompletely and contradictorily the 1997 constitution conveyed it into law and practice.

## Background

### *Society and Economy*

In the decade following Fiji's cession to the British crown in 1874, the foundations of a sugar industry were laid, and in 1879, the first of 60,000 Indian indentured laborers arrived to work on the sugar plantations to help respond to Colonial Office insistence that Fiji pay its own way.<sup>5</sup> The colonial government

**Table 10.1 Population by Ethnicity**

Year	Fijians <sup>1</sup>	Indians	Others	Total
1966	202,176	240,960	33,591	476,727
1976	259,932	292,896	35,240	588,068
1986	329,305	348,708	37,366	715,375
1996	394,999	336,579	41,077	772,655

1. Until 1997, Fiji was the official name of the country, but Fijians were the original inhabitants, whose dominant language is Fijian. In this paper, the word *Fijian* is used to refer to an indigenous Fijian, or the language; the Indian population is referred to as variously *Indian* or *Indo-Fijian*; Fiji is used adjectively, as in the Fiji constitution.

instituted a system of indirect rule—applicable to indigenous Fijians—involving the entrenchment and sometimes distortion of Fiji's chief system and a reinforcement verging on creation of a system of communal land holding.

By the time Fiji became independent in 1970, indenture was a thing of the past, but large numbers of Indo-Fijians were leasing land from Fijians for cane farming, while others were running businesses and entering the professions. Most indigenous Fijians were still engaged in subsistence farming, on land that was, even then, largely communally owned. Table 10.1 shows the breakdown of population over the years.

While other countries have ethnic compositions not dissimilar to that in Fiji, some, such as Trinidad and Guyana, differ in that the two major communities—ignoring the small indigenous Indian population in the latter, which is constantly its fate—are non-indigenous. With a majority of Malays but large ethnic minorities, Malaysia is most similar to Fiji. But in Fiji, by the mid-twentieth century, the largest community was non-indigenous Indian, though it lacked an overall majority. The other large community was indigenous Fijian. This meant that the debate could be conducted in terms of those who belonged versus those who did not, and the Fijians—or at least politicians and other advocates on their behalf—could couch their

arguments in terms of the rights of indigenous people, even though their situation was very different from that of peoples like the Maori, Australian Aborigines, Canadian First Nations, or the Sami, who had been swamped, marginalized, and driven from their lands by incomers. Despite the incomers' numerical dominance, indigenous Fijians were not driven off their land or marginalized, but they did have a minority complex that continues today, even though they are now a majority. For their part, Indians also have a minority mindset that comes from their exclusion from control of land, the sense that they have not been accepted as part of the nation, and their vulnerability to racist abuse and physical attacks.

The two communities have remained very separate in many ways. Though not unknown, intermarriage is uncommon. The groups' lifestyles are different. In rural areas, most Indians live in individual farmhouses, whereas Fijians live in villages. Most Indians are Hindu (a small proportion are Muslim and an even smaller proportion Christian), whereas Fijians are overwhelmingly Christian. To a considerable extent, the two communities are educated in different schools and do not learn each other's languages in any systematic fashion.

The ethnic situation in Fiji has been made more acute because almost every aspect of life is affected by it or reflects it: religion, language, and lifestyle. Particularly problematic is land. As mentioned above, large numbers of Indians have been small-scale farmers, mainly of cane, who lease their farms for thirty years at a time from Fijians. There is a small amount of freehold land (about 8 percent of the total) held mostly by Europeans and part-Europeans and some government land. However, it is not only the Fijian-Indian relationship that is rooted in land, but also relationships within the indigenous community. Most of the indigenously held land (over 80 percent) is owned on a custom-

ary, communal basis, and not by individuals. It is linked to lineage, or *mataqali*. Revenues from the land are allocated on a hierarchical basis: The chief of the *mataqali* receives the largest share and receipts diminish down through the structure. Most members of the community thus receive only very small benefits from the land, and the land-holding system reinforces the chiefs' dominance. For some commentators, the resentment that is felt toward the cane farmers would be more appropriately directed at the clan and land nexus.

As with immigrant communities in many contexts, there is a perception—and not entirely only a perception—that the Indians are better off than the indigenous people. Until recently, few Fijians went into business. Meanwhile, some Indian businessmen are very wealthy, and even small shopkeepers can seem wealthy to the poor Fijians who come to towns to try their luck, perhaps because they are landless. Far higher proportions of Indians than Fijians tend to be in business. But studies on poverty in Fiji have also shown that the very poorest are actually Indian.<sup>6</sup> This, however, is lost on those who are convinced that the benefits of the ethnic structure all favor the Indo-Fijian community. Living standards in Fiji are by no means as grindingly poor as in some developing countries, but a study in 1997 estimated that overall, the share of poor households was around 25 percent.<sup>7</sup>

There is no denying that the two communities could have done more to diminish the tensions between them. Nor was colonial policy directed towards any such result. "Divide and rule" applied in Fiji as elsewhere. There was no encouragement in colonial times for Indians and Fijians to integrate or learn each other's languages. Since independence, far too little has been done to redress the situation. Neither community has had a leader of stature who has been prepared to reach out in a sustained way to the other, though

crucial transitions—especially independence and the 1990s constitution-making process discussed in this paper—have been greatly facilitated by relationships built up between leaders of the communities, such as that between Ratu Kamisese Mara and Siddiq Koya at independence and Sitiveni Rabuka and Jai Ram Reddy in 1995–97.<sup>8</sup>

There are other communities: Europeans, other Pacific Islanders, Chinese, and those of mixed race, some of whom are part-Europeans but others of whom are mixed Fijian–Indo-Fijian or other combinations. The wholly or partly Europeans have tended to be associated with, and to have given support to, the indigenous Fijian population, in political contexts at least. In official terminology, all are sometimes grouped under the rather exclusionary label of “others,” or in voting contexts, as “general voters.” There is even a General Voters Party.

### *Political Developments*

#### *Fiji at Independence and the 1970 Constitution*

The army at independence was and remains overwhelmingly Fijian, a legacy partly of Indian lack of enthusiasm for fighting for the British empire, partly of their reluctance to accept that terms of service for Europeans did not apply to all, and partly of the authorities' disinclination to accept Indo-Fijian soldiers in World War II.<sup>9</sup> The civil service, on the other hand, was more Indo-Fijian than Fijian, though not as greatly so as myth would have it. Political parties were forming with a strong ethnic focus. Seats in the Legislative Council were racially allocated, as they had been ever since the council came into existence. In 1904, only Europeans could elect their representatives. In 1937, there were fifteen members—five Europeans, five Fijians, and five Indians. By the 1960s, the number of members increased to eighteen, six from each race.

A general election was held shortly after Fiji became independent on the basis of a constitution that allocated parliamentary seats ethnically, though some seats were chosen through a common roll of the voters of all communities. 82.6 percent of Fijians voted for the mainly Fijian Alliance Party (AP) and 74.2 percent of the Indo-Fijians for the essentially Indo-Fijian National Federation Party (NFP). The AP had a number of prominent Indo-Fijian leaders, which explains the 24 percent support that party obtained from the Indo-Fijian community. There was also a senate with twenty-two members, of whom eight were nominated by the Great Council of Chiefs (GCC),<sup>10</sup> seven by the prime minister, six by the leader of the opposition, and one by the Council of Rotuma.

Overall, the 1970 constitution fashioned a fairly orthodox Westminster model: a parliamentary system with the queen as head of state, represented by a governor-general who was to act on the advice of the government, except in certain circumstances, such as choosing a head of government. There was a bill of rights on a familiar Nigerian model.<sup>11</sup> However, Fiji's ethnic factor marked this constitution out and affected a number of aspects of it. The ethnic voting setup was particularly unusual, though ethnic representation was not uncommon in colonies with settler populations or that were otherwise ethnically diverse. The constitution also entrenched a number of pieces of legislation protecting the interests of indigenous Fijians, in the sense that enhanced majorities, including the consent of a certain number of GCC Senate nominees, were required to change the laws.<sup>12</sup>

Fiji's process of negotiating and adopting the constitution was also one that had become standard in colonies moving first to self-government and then to full independence. In 1965, Britain called a conference in London, to which all members of the Legislative Assembly were invited. The important



decisions to be made at this conference were not discussed widely in Fiji before the meeting. The next stage comprised secret discussions between the two major parties in 1969. Only four active members from each party were involved; the papers and minutes were kept confidential. There is little evidence that the participants consulted even with members of their own parties. The Fijian Council of Chiefs and the back-benchers of both parties complained about this; the secrecy was also criticized by Lord Shepherd, the British minister invited to review progress, with a view to the third stage of the final constitutional conference in London. Lord Shepherd met with the participants and subsequently, at his suggestion, a meeting of the Legislative Assembly was convened to report on the progress of the talks. A report was issued before Lord Shepherd left Fiji.

When the final conference took place in April 1970, there was considerable confusion as to what had been agreed upon in the preceding stages. There had been little public discussion of the issues before the delegates left for London,<sup>13</sup> where, again, Britain's intercession was required before all outstanding issues could be disposed of.<sup>14</sup> Later Pacific constitutions were generally drawn up in a far more participatory fashion; even before Fiji's constitution, there were South Pacific precedents of somewhat open and participatory processes in Western Samoa and Nauru.<sup>15</sup> After the constitution was agreed, there was no referendum, not even so much as an election.<sup>16</sup> One factor was the fear of violence, fear inspired by recent riots in Mauritius, a country that was deemed to bear strong resemblance to Fiji.

The one issue that the various negotiations did not succeed in resolving, it seemed, was that of the electoral system. The system outlined earlier was only for the first postindependence election. In 1975, in accordance with the independence settlement, a royal commission under the chairmanship of Pro-

fessor Harry Street was appointed to look at the electoral system; it recommended a partial move away from ethnic representation.<sup>17</sup> Although the original understanding—at least in some quarters, though Prime Minister Ratu Mara denied it<sup>18</sup>—had been that the commission's proposals would be binding on the parties, once delivered, they fell like the proverbial lead balloon. The AP had no interest in becoming less communal, and although the NFP accused the government of breach of faith, it has been suggested that the NFP cynically thought that keeping the existing system would be in the interest of the Indo-Fijians as their numbers declined to perhaps less than the indigenous Fijians. As Brij Lal comments,

The Indo-Fijian leaders had succumbed to the political considerations of the moment, with only myopic visions of the long-term interests of their own people and the nation at large. For this, they and their people would pay a terrible price a decade later.<sup>19</sup>

Although the royal commission sat in Fiji, Lal suggests that it elicited little interest there.

*The Ethnicization of Politics, the 1987 Coups, and the Falvey Committee*

Fijian politics after independence was distinguished by intensification of ethnicization. Government policies designed to advance the indigenous community and an element of virulent racism that entered politics in the mid-1970s led the Indo-Fijian community to come together in an electoral sense, with the stunning result that in 1977, the NFP was the largest single party, with precisely half the seats in the House. The governor-general (GG) did the right thing and offered the prime ministership to the NFP leader. As the party dithered for a few days, the GG decided to invite the AP leader to form a government. Perhaps if he had done otherwise, Fiji would have had its first coup ten years earlier than it did.

In the mid-1980s, a party emerged based less on ethnicity and more on class interests: the Fiji Labour Party (FLP). It was headed by a Fijian doctor and retired civil servant, Timothy Bavadra, and its secretary was an Indo-Fijian. As the new party realized that it could simply split the anti-AP vote, it entered into a coalition agreement with the NFP to fight the 1987 election under Bavadra's leadership.<sup>20</sup> Within the Fijian community, the new alignment reflected the distinction between the traditionalists, who were happy to uphold communal traditions and the role of chiefs in politics, and those who saw the communal lifestyle as holding back the development of the Fijian community and thought that chieftaincy should be kept separate from modern politics. It also reflected the gap between the Fijians of the western division—more modernizing, less clan and chief bound, with a sense of having been marginalized by the dominant east—and the rest. In response to this coalition, the AP entered into its own coalition agreement with the general electors, a category consisting of all citizens other than indigenous Fijians and Indo-Fijians, dominated by Europeans and part-Europeans.

The FLP-NFP coalition won the April 1987 elections, though voting was still largely along ethnic lines.<sup>21</sup> Bavadra was invited to form a government, which consisted of seven Fijian and seven Indo-Fijian cabinet ministers, the latter holding portfolios that had very often gone to Indo-Fijians in Alliance governments. One month later, Lieutenant Colonel Sitiveni Rabuka led a military takeover.

Fijian chauvinists, shaken traditionalists, and disappointed aspirants to government office or other lucrative benefits of an AP victory had refused to accept the decision of the voters—and along with the victors in the election, the constitution itself was the target of attack. Soon after the election and before the coup, a meeting of two thousand

Fijians—the emerging Taukei Movement, *taukei* being the indigenous Fijians—prepared a petition to the GG demanding that the constitution be changed to provide that the indigenous people “must always control the government to safeguard their special status and rights.”<sup>22</sup> As soon as a degree of public order was restored to Suva and a government headed by Rabuka was installed, the GG set up a constitution review committee in which the FLP-NFP coalition reluctantly agreed to take part, though they were heavily outnumbered by AP and GCC members. This was the first time that the people of Fiji were seriously asked what they wanted in a constitutional structure.

The committee was chaired by Sir John Falvey, a former attorney general close to indigenous Fijians. The other members of the committee were four nominees each of the GG, GCC, the FLP-NFP coalition, and the AP.<sup>23</sup> Its terms of reference were originally

to review the Constitution of Fiji with the view to proposing to the Governor-General amendments which will guarantee indigenous Fijian political interests and in so doing bear in mind the best interests of other people in Fiji.

After the coalition members objected, the words after ‘interests’ were changed to:

with full regard to the interests of other people in Fiji.<sup>24</sup>

The phrase “in Fiji” rather than “of Fiji” is telling. The committee held hearings in Fiji's four major towns and received 800 written and 160 oral submissions. But the atmosphere in which these consultations took place was hardly conducive to any conciliatory recommendations. The committee did produce a report:<sup>25</sup> By a majority (indigenous Fijians and one general voter) it proposed a single legislative chamber comprising eight nominees of the GCC, twenty-eight Fijian, twenty-two Indo-Fijian, and eight general voter members (plus one Rotuman and up

to four nominees of the prime minister). All voting was to be communal, held and voted for by members of the relevant community. The prime minister was to be Fijian. The nominees of the FLP/NFP coalition (two Fijian and two Indo-Fijians) opposed any change to the 1970 constitution, with which the two Indo-Fijian nominees of the GG largely agreed).

The process was leading nowhere. There had already been violence after the coup, and political and economic stability were clearly under threat. The GG instituted a series of meetings between the political parties, resulting in the Deuba Accord, which was to be announced on September 25. An interim government with members drawn equally from the two main parties was to be set up and a new constitution review committee to be established under a foreign expert to propose a constitution acceptable to all, taking into account the aspirations of not only the indigenous community, but of the others as well.

Rabuka's response was rapid: On September 25, he carried out the second 1987 coup. Unable to get the coalition to accept the GCC model constitution, which had a built-in Fijian majority and allowed only Fijians to hold various offices, including that of prime minister, Rabuka declared Fiji a republic and set up a Taukei Movement-dominated government, headed by himself. The GG resigned a month later. By the end of the year, Rabuka had left the position of prime minister, though he remained in the cabinet, and the former GG had become president. The latter then invited former prime minister Ratu Mara to resume that post—he had served from independence until the 1987 election—thus returning the country to civilian if not constitutional rule.

The cabinet then put forward a draft constitution<sup>26</sup> that owed a good deal to the GCC proposals of 1987. It was prepared by a committee comprising nine Fijians, two Indo-Fijians, and one general elector. The Fijians

included Rabuka, Apisai Tora (a Fijian nationalist, even chauvinist), Tomasi Vakatora (later to be on the Reeves Commission), and the moderate Josefata Kamikamica. The Indians were “marginal and discredited” within their own community, Brij Lal observes.<sup>27</sup> This draft was translated into Fijian and Fiji Hindi.

#### *The Manuelli Committee and the 1990 Constitution*

The government then established the Constitution Inquiry and Advisory Committee, chaired not by a foreign expert but by a retired colonel, Paul Manuelli, from the small island community of Rotuma. The committee included six Fijians, five Indo-Fijians, and four general voters.<sup>28</sup> Its terms of reference related strictly to public reaction to the draft, and to making proposals based on that reaction. Ratu Mara observed: “Citizens throughout the country were given the opportunity of making their views known, and eminent legal experts were called on for advice.”<sup>29</sup> Yash Ghai had a different view:

The Interim Government claims that [the Constitution] is a reflection of the will of the people, when no real opportunity was given to them to participate in its making and they were denied the right to vote on it. The various committees which have made recommendations on its provisions were handpicked by the interim regime and enjoyed neither popular support nor public credibility. The views they presented were not those of the majority of Fiji's citizens. Even the most ardent supporters of the regime have not understood the terms of the Constitution.<sup>30</sup>

Brij Lal's evaluation of the process was a little less harsh:<sup>31</sup>

The Committee conducted 32 hearings at 14 centres in the first half of 1989 and received oral and written submissions reflecting many perspectives.

The committee itself reported that at first, it received few submissions because the Internal Security Decree remained in full force.<sup>32</sup>

Delay in distributing the Fijian and Hindi versions of the draft constitution reduced the number of submissions from non-English speakers, and it seems that Fijians tended to rely on their provincial representatives. The result was that the committee received verbal submissions from 174 groups and 175 individuals, in addition to written submissions from 104 individuals and 105 groups. While 82 Fijians made individual submissions, only 39 Indo-Fijians did so, along with 22 Fijian groups and 141 Indian groups.

Among the submissions the committee received was one from the military that can hardly have failed to have a profound effect, in view of the two still recent coups. Theirs was a vision of a country in which Fijians enjoyed "absolute political dominance," where the press was controlled, judges appointed who would "accept the reality of the situation," workers unable to form trade unions, and the church cut off from what were viewed as subversive foreign influences, while the nation was subject to discipline and deprived of constitutional rule for 15 years. The military also called for a state religion. And in order to ensure that the military could carry out its "monitoring role," it should be "given executive authority."<sup>33</sup>

One of Ratu Mara's experts was the late Albert Blaustein, who was engaged as a draftsman of the 1990 constitution and found himself in a delicate position, trying to persuade the government to moderate some of the worst elements of the draft while being employed to deliver a document with a racist foundation. On the proposal to require that the prime minister must be Fijian, he commented: "With an indigenous Fijian majority in the House, this guarantee may be considered superfluous and will only lead to further criticism." Arguing for the abandonment of communal rolls, he wrote, "Rolls based on race—especially a special roll for voters who are neither Fijian, Indian, or Ro-

tuman—sounds much too South African. . . . But while we know the difference, you can be sure that the South African label will be attached to such proposals."<sup>34</sup> On both counts, his efforts failed.<sup>35</sup>

The Manuelli report and the 1990 constitution based on it were both racially based and racially biased documents. The report has been described as enshrining "the exploitative ideology of indigenous Fijian paramountcy."<sup>36</sup> The committee rejected, however, the idea that Fiji should be declared a Christian state, as well as the proposal that the commander of the military forces be a member of the lower House of Parliament, a view with which the military had concurred. Under the committee's approach, all voting would be on an ethnic basis. Thirty-seven of the seventy seats in the lower house would go to Fijians and twenty-seven to Indo-Fijians. An appointed upper house would be over two-thirds Fijian. The constitution mandated affirmative action in favor of Fijians, elevated the status of Fijian customary law, barred access to the ordinary courts in cases involving Fijian customary land law, and provided for human rights provisions to be superseded by a two-thirds majority vote of both houses in a wide range of circumstances. Only an indigenous Fijian could be prime minister, and the president was to be appointed by the GCC.

But Fijian elite views were dominated not only by the question of the Indo-Fijian bogeyman but also an outdated perception of Fijian society as rural, land-linked, chief-dominated, and cohesive. The 1990 constitution was biased toward rural Fijians: The 33 percent of Fijians who lived in urban areas had only 13.5 percent of the parliamentary seats, and the document gave far more prominence to the GCC than that organization had had the past. Events since 1987 have involved the exploitation of tradition, and of religion, and reinforcement of militarism, by



the Fijian elite to the detriment of the ordinary Fijian.<sup>37</sup>

Elections were held under the 1990 constitution in 1992. After a good deal of soul searching, the coalition parties participated in them, though differences over whether to do so actually broke the coalition. The election led to Rabuka becoming prime minister as an elected politician rather than as a coup maker. By this time Bavadra had died. We cannot know how the history of Fiji might have been different if this statesman had not died then. He was a key Fijian politician totally committed to the vision of a nonracial and just Fiji, and with his passing, there was no one of his stature who could carry Fijians with him on this platform.

It seemed that the Fijians had won everything they wanted. Writing not long after the constitution came into force, an Indo-Fijian wrote that, for his community, the constitution

does not lay to rest the ghost of the *girit* [indenture] experience, but raises the spectre of a new one, a life of subservience, lived as a *vulagi* "foreigner" on the sufferance of the Fijian people. While the original *girit* lasted only five years, this one, they feel, is intended as a permanent arrangement.<sup>38</sup>

Yet five years after these words were published, Fiji had a new name and a new constitution that was firmly within the tradition of modern constitutions: It recognized human rights, and its electoral system, while not purged totally of racial elements, was designed to counteract ethnic tensions. The commission that prepared the constitution included the same Indo-Fijian who wrote the above despondent words. Most remarkably—but perhaps fatally—eighteen months further on, the country had an Indo-Fijian prime minister. How was all this possible? First, how was the idea of a process even capable of producing such a constitution acceptable to the apparent victors of the events of 1987? Second,

which influences led to the proposals taking the form they did? Third, how could the proposals be enacted by a parliament formed under the 1990 constitution?

## The Reform Process

### *Why More Reform at All?*

The 1990 constitution itself provided that it should be reviewed within seven years (the army's view on this did not prevail). In the second reading debate in parliament on the bill for the 1997 constitution, Colonel Manuelli said:

At the time I believed that the 1990 Constitution was the best we could achieve given the circumstances prevailing then. Those of us who were involved were very much aware of its shortcomings. This was the reason why we made it mandatory for the Review of the Constitution at the end of seven years.<sup>39</sup>

The prime minister, Ratu Mara, in a report to the president in May 1992, observed:

The document you finally promulgated in 1990 was not perfect. . . . It is the centre of controversy during the current election campaign. . . . I am confident that negotiations between the two communities will be possible if goodwill and trust can be established among the political leaders.<sup>40</sup>

The Labour Party, which won thirteen seats in the 1992 election, supported the largest party: the newly founded Soqosoqo ni Vakavulewa ni Taukei (SVT),<sup>41</sup> set up by the GCC specifically to champion Fijian interests. One condition of support was that the government should pursue constitutional reform as a priority. Rabuka agreed, though with no evident enthusiasm,<sup>42</sup> and once in power, he dragged his feet on the issue.

However, Rabuka raised an issue with important constitutional implications when he suggested in late 1992 that there should be discussion on the possibility of forming a government of national unity (GNU). But

the GNU idea was designed as sugar for the bitter pill of the 1990 constitution, something to make the existing setup palatable to the Indian community and more acceptable overseas. The government's expectation seemed to be that the fundamentals of the constitution would not change. Even Mara described it as "a realistic framework for taking the country back to constitutional government."<sup>43</sup>

However, by mid-1993 the Fijian political elite was beginning to talk openly about a constitutional review, and in June, Rabuka met with the leaders of the opposition parties—the FLP and the NFP—after which he expanded the membership of an existing cabinet committee on constitutional review to include them. In August 1993, the NFP produced a paper exploring issues of reform that foreshadowed many of the points that were to be at issue when the formal review process got under way. The following month, the parliament agreed to set up a review commission.

A number of factors worked together to lead to the government being prepared to embark on a serious reform exercise. First, leaders realized that Fiji's economy suffered when a large sector of the domestic population was alienated and the outside world viewed Fiji with suspicion; private investment as a percentage of GDP dropped markedly after 1987. Second, there was active pressure from the outside to reform (touched on below). Third, Rabuka's government was unable to sustain its credibility. There were some scandals involving corruption and incompetence, and the 1993 budget was defeated as some dissident Fijian members of parliament voted with the opposition, though Rabuka was returned to power in the consequent election. To be fair to the SVT, discussion about constitutional reform began before the budget defeat.

The 1990 constitution was leading to the political fragmentation of the Fijian

community, as demonstrated by the rise of provincialism, disintegration of the AP, and the rise of several new Fijian parties. The fragmentation meant that any Fijian faction seeking to form a government would need the parliamentary support of at least some Indo-Fijian members, prompting the realization among Fijians that a majority of Fijian seats in the House of Representatives was insufficient for Fijian domination. Moreover, some elements of the fear felt by Fijians over the risk of Indian dominance were moderated when it was realized that the population balance was shifting, largely as a result of Indian migration and their lower birth rate (see Table 10.1).

### *Structure of the Process*

Once the Fijian political leadership decided that there would be a commission to review the constitution, it was some time before agreement was reached on the commission's structure, size, and membership. At least four basic models were floated (see Table 10.2).

The commission chair ultimately appointed was Sir Paul Reeves, a Maori, former archbishop and former governor-general of New Zealand. The other members of the commission were a Fijian politician, Tomasi Vakatora (nominated by the government), and an Indo-Fijian academic historian, Brij Lal (nominated by the opposition). Counsel to the commission were a New Zealand woman who was familiar with other Pacific island states and a Fiji general vote, a part-European. The commission's secretary was a Rotuman lawyer. The small size of the body made it impossible to have a wide range of interests directly represented within the commission. It is unsurprising that there was no woman on the commission itself, and the presence of one foreign woman as counsel was no answer to this shortcoming, however important that function was.<sup>44</sup>

Table 10.2 Proposed Models for Fijian Constitutional Commission

	Proposed by Cabinet	Proposed by SVT	Proposed by NFP	Actual commission
Size	8	11	6–7	3
Makeup (apart from chair)	3 Fijian 2 Indo-Fijian 1 Rotuman 1 general voter	Deputy chair Indo-Fijian 2 nominees of SVT 1 general voter 1 NFP 1 Fijian Association 1 All National Congress 1 Rotuman 1 state services	1–2 foreign constitutional lawyers or distinguished political scientists with relevant knowledge 1 eminent economist 3 local, chosen for knowledge of law and other relevant fields	1 Fijian 1 Indo-Fijian
Chair	Foreigner (preferably from Malaysia)	Fijian	Not specified	Foreigner (New Zealand)

It took nearly two years from the time when the government began to think about such a commission until the Reeves Commission came into existence. The negotiations over the identity of the chair alone, which happened within the cabinet committee, took about six months. The opposition was determined to reject the SVT government scheme to have a Fijian chair the commission—especially the proposal to designate as chair the chief justice at the time.<sup>45</sup> The opposition was equally adamant that the chair should be a non-Fiji person. Sir Paul Reeves was chosen because of his ethnic and religious background and because he was perceived to be fair-minded.<sup>46</sup>

The commission’s terms of reference, crucial to the nature of the enterprise, were the subject of extremely tough negotiations between the government and opposition in the cabinet constitution committee. The government wanted the starting point of review to be the 1990 constitution, and Fijian interests to have pride of place. The opposition wanted the entire constitutional structure to be up for grabs, with the terms of reference reflecting fairness to all communities and the necessity of national unity. The terms of ref-

erence as adopted bear the hallmarks of the ultimate compromise:

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

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

They set the scene not for a tinkering with the 1990 constitution but for a total overhaul, though the emphasis on “rights, interests and concerns of the indigenous Fijian and Rotuman people” went further than the opposition would have wanted in giving specific protection to sectional interests. In the end, the opposition accepted the compromise to get the process started; it also believed that an independent and just commission would recommend provisions fair to its community.

Brij Lal<sup>47</sup> and Tomasi Vakatora<sup>48</sup> have written about the *modus operandi* of the commission, which, due to its size, depended very much on the personalities of its members. Initial auguries were not encouraging. Lal was very clearly identified as an NFP sympathizer and had written in fairly strong terms about developments in Fiji up to the early 1990s. Vakatora was a fairly hardline Fijian politician; the first edition of his autobiography indicated few positive feelings toward the Indian community.<sup>49</sup> His appointment initially filled opposition leaders with despair. However, being on the commission wrought a remarkable change in both men. They ended as friends<sup>50</sup> and the report they produced was unanimous. It seems that the experience of traveling around the country listening to the views of ordinary citizens brought them together. They realized the reality of life for the ordinary person, the fact that ethnic rivalries did not dominate their lives, and that there was a genuine willingness to work together for the common benefit. The very burden of responsibility exercises its own influence as well. The chair took the view that the main responsibility lay with the two Fiji citizens. Lal quotes him as saying, “If you two agree among yourselves, I won’t stand in your way.”<sup>51</sup> As Vakatora wrote,<sup>52</sup>

Brij and I were able to iron our differences, sometimes after long and tense talks. . . . This was possible because of the mutual trust we had

built between ourselves and the confidence and trust placed on us by our Chairman.

The commission ultimately produced a document that essentially contained drafting instructions for an entirely new constitution. Especially in the rather complex drafting tradition of the common law, experience suggests that a very important degree of momentum toward change can be achieved by presenting not just the ideas but the actual formulations required to achieve the recommended result. The commission did not do this, except in some specific instances. But the proposals it made were framed in very precise terms, which was, to a substantial degree, the work of the counsel, especially Alison Quentin-Baxter, as no member of the commission was a lawyer.<sup>53</sup> That said, it is clear that Vakatora and Lal were thoroughly involved in every aspect of the work, and that the commission and not its technical staff made the decisions. Vakatora says that he read the final report at least seven times.<sup>54</sup>

### *Timing and Sequencing*

Table 10.3 shows the timeline from the appointment of the Reeves Commission until the passing of the Amendment Act.

The process involved neither a referendum nor an election before the constitution was adopted. The task of preparing a draft was given entirely to the commission, and enactment was a matter for parliament, as regularly constituted.

### *The Commission Phase*

The commission was originally given just over one year to complete its work, but this was extended by three months. Even so, producing the nearly eight-hundred-page report was a remarkable achievement in the time allotted. This is not just a pleasantry. Timing can be crucial to constitutional reform.



**Table 10.3 Timing of Reform Process in Fiji**

Date/period	Specific events	Ongoing processes						
		Public hearings	Foreign travel	Developing ideas	Background papers	Public debate	Report writing	Parliament
March 1995	March 15 commission appointed.							
April								
May								
June	Beginning: met for first time. Prepared mission statement. June 16 commission met joint parliamentary committee for briefing. Program of work prepared							
July								
August								
September								
October	Last submission October 10 (SVT).							
November	Private meetings with high officers of state, judges, etc.							
December								
January 1996								
February	Visited Wellington; met electoral commission and others.							
March								
April	Official of Australian electoral commission visited Fiji.							
May								
June								
July								
August								
September	Reports submitted to president and parliament and then published. Commission winds up.							
October								
November								
December								
January–July 1997	July 3 bill passed.							

A constitution that is produced under excessive time pressures—whether internally linked to electoral or conflict resolution factors, or deadlines imposed from outside, as in East Timor and Afghanistan—may not only be defective in a technical sense but also lack the commitment of the public, or “sense of ownership,” to use the currently fashionable phrase. Developing that commitment requires time to educate and consult the people. On the other hand, a long, drawn-out process runs the risk, on one hand, of losing the interest of the public, and on the other, of missing the bus in that the factors that made the political context receptive to new possibilities may no longer exist.

The commission’s own account of its work shows that in terms of timing, it gave high priority to public hearings.<sup>55</sup> It did not simply present a draft to the people and ask them what they thought of it. This was perhaps less necessary, as the 1990 constitution could have been used as the basis for discussion, though the commission appears not to have provided or facilitated any public education about its contents.<sup>56</sup> Appointed in May 1995, the commission spent most of July, August, and September holding public and occasionally private hearings around the country. These hearings were followed by visits to Malaysia, Mauritius, South Africa, and the United States, despite government reluctance to sanction the trip, which was financed by outside donations. Parallel to these information-gathering exercises, the commission had asked a number of people to prepare research papers and institutions and individuals to supply specific information. These research papers were used during deliberations, solely for the purposes of the commission and not to inform public debate; they were only published after the report itself.

The report was presented to President Mara and then published at the beginning of September 1996. It was submitted not to official popular debate but to parliament, where the main work was done by a select committee.

#### *From Report to Law*

The report was published only in English—not surprising for such a voluminous document, but unfortunate. There was no officially sponsored public debate on the report. Only the Citizens’ Constitutional Forum (see below) tried to inform the public about the implications of the report. The report itself, and the stages that led to its ultimate enactment as a constitution, disappeared from public view to emerge only as a constitutional amendment bill.

The primary responsibility for hammering out the final decisions lay with an all-party Joint Parliamentary Select Committee (JPSC), which worked in secrecy without assistance from the parties’ legal advisers. The parliamentary phase lasted from the completion of the report to the enactment of the amendment bill, and itself comprised two elements: the work of the JPSC and that of the full parliament. The main work of the committee took about six months and produced an agreement dated April 14, 1997, on the most important issues, including the electoral system.<sup>57</sup>

The committee’s final report is a poor guide to its discussions and mode of reaching consensus, which they did, but the consensus was colored by their experience and predilections as politicians. The JPSC proceedings were very much a matter of negotiation. More important, the negotiations took place between Sitiveni Rabuka and Jai Ram Reddy, the leaders of the government and opposition, or the SVT and the NFP,

respectively. The coup leader of 1987 and the Indian leader seemed to have achieved a quite remarkable working relationship. If the JPSC could not work out an agreement on a particular issue, they would turn it over to the party leaders, a practice reminiscent of the South African process by which Mandela and de Klerk broke deadlocks.

The negotiations in the committee involved a good deal of compromise. The Fijian members did not really want to change the 1990 constitution; the Indo-Fijians wanted radical change. Each in the end accepted things that were basically unpalatable to them. Politicians were more reluctant to move away as emphatically from the older Fiji constitutional assumptions than was the Reeves Commission. They stuck to communal seats for the most part, hoping that an alternative-vote electoral system, which probably most did not understand, would do the trick. They also chose to retain a senate, the membership of which had become a form of patronage for the leaders of the major parties. This having been done, the leaders committed their parties to support the resulting agreed bill, which then went to the draftsmen, who put their peculiar stamp on it. Apparently, in possession of the South African constitution, they managed to sneak in an idea or two of their own. It seems that the drafters included sexual orientation as a prohibited ground for discrimination; certainly it is not in the Reeves Report.

The GCC's support of the bill was a very important element in the negotiation stage. Jai Ram Reddy was invited to address the GCC, the first time such a thing had ever happened; he responded with a much-praised speech, which he began in Fijian.<sup>58</sup> During the parliamentary debates, repeated tribute was paid to the GCC and its role in ensuring acceptance of the constitution.

Not all members of parliament were happy about the way the decision making had been done. V.S. Tunidau objected:

Using the Joint Parliamentary Select Committee, then lobbied through the Great Council of Chiefs, and formulating the passage of the JPSC Report straight into a Bill form is to me a very clever ploy denying us the fundamental process of parliamentary democracy.<sup>59</sup>

K.R. Bulewa commented that

the negotiations process from my Party's perspective left a lot of room for improvement. Communications between caucus and the Party's representatives on the Joint Parliamentary Select Committee were haphazard at the best of times and sometimes non-existent. Negotiating strategies were non-existent and were regularly overridden by decisions reached at the top. . . . The fact that our party was able to reach agreement on issues under discussion is a tribute to the strong leadership of our leader, the Prime Minister, the fair mindedness of the Opposition and the statesmanship-like qualities of my colleagues.<sup>60</sup>

The bill, technically an amendment bill for the 1990 constitution, was introduced by the prime minister on June 23.<sup>61</sup> It produced a new document: the Constitution of the Fiji Islands, the new name intended to solve the problem of nomenclature (see note 1 in Table 10.1). In the debate in the House, there was a great deal of rhetoric about tolerance, the greatest acrimony being reserved for exchanges between the FLP and the NFP. Many Fijians spoke against aspects of the bill, most notably arguing for Fiji to be a Christian state, or generally regretting the loss of Fijian dominance in the 1990 constitution.

There were very few amendments to the bill; most of them were proposed by the prime minister and emanated from the JPSC, which was still sitting as the debate in the full house went on. Among the amendments at this stage were the introduction of compulsory voting (section 56 in the final constitution)

and the requirement that the House have at least five sectoral committees (section 74[3]). Both amendments were agreed to without debate or division. The major proposal from the other side came from the Labour Party: Chaudhry wanted an extra Indian communal seat, which was rejected by a vote of fifty-nine to five.

Every member of parliament, save for two absentees, voted for the constitution. Apparently, Rabuka had told his ministers that if they did not support it, they would lose their portfolios.

### **Public Participation**

#### *The Commission's Consultations*

The Reeves Commission had no structure outside its members and supporting staff, and no local organization.<sup>62</sup> It simply announced that on a certain day, it would sit in a certain place—a court room, a civic building, a school—to receive views. The commission visited far more places than any other previous commission, though interestingly, this did not generate a significantly larger number of submissions than the Manuelli Committee had in 1989.

A quick count of individual submissions (relying on names)<sup>63</sup> indicates the following breakdown: 114 Fijians, 88 Indo-Fijians—of whom 10 seem to be probably Muslim—and 21 others. This is itself interesting, for in some other contexts, the Indian community is more likely to express its views than is the Fijian community, which one might expect in view of the higher average level of education among the former, though the breakdown of submissions to the Manuelli Committee was similar. Among the organizations that made submissions, local churches clearly predominated. Many of the views presented were clearly orchestrated. Like an Amnesty International campaign, political parties and other groups made standard forms of presentation available for their members to sign

and submit. Lal wrote of a submission by the Arya Samaj “which will be repeated—worse, read word for word—countless times in the days and weeks ahead.”<sup>64</sup> But by no means were all of this type.

The speed with which the commission embarked on tours around the country and overseas was only possible because it made no attempt to undertake any form of civic education. Fiji's literacy level is relatively high and the previous few years had been very political, so there was probably a high degree of awareness of the broad concept of a constitution. However, the population at large was almost certainly uninformed about the details of the constitutions that had prevailed in the country, and even more certainly uninformed about the options available to them. Indeed, the events of the previous six to eight years would very likely have led the ordinary person to think about constitutional issues merely in terms of the system of government and electoral systems—in other words, of the question of how the constitution could prevent (for Fijians) or not obstruct (for Indo-Fijians) the coming to power of another Indian-dominated government.

How far it is either possible or desirable to go in the area of civic education is debatable. While a little learning may indeed be a dangerous thing, there is evidently room for people at large to be given some basic information about what a constitution might do before they are approached for their views. And there is rather more room for specific interest groups to be educated in the devices and institutions that could improve their own situation; women and people with disabilities are only two of the obvious groups that could benefit from such information. But in Fiji, the commission made no attempt and had no mandate to carry out any education of this sort.

That said, the considerable publicity attached to the commission's work, especially the public hearings, was an education tool.



Describing the newspaper, radio, and television coverage, Lal notes that “the words, the gestures, the emotions of the presenters and the audience [were] dissected in minute detail.”<sup>65</sup>

### *Civil Society*

Civil society began a dialogue on constitutional reform early in the 1990s. In December 1993, a consultation on reform led to the establishment of the Citizens’ Constitutional Forum (CCF), which was to become the principal non-politically aligned group discussing the issue. To a considerable extent, the CCF was the brainchild of Yash Ghai, working closely with Claire Slatter and Sattendra Prasad of the University of the South Pacific (USP), academics active in politics. While in Fiji in 1992–93 to advise the coalition parties in the context of the impending issue of a review of the constitution, Ghai realized that there was really no forum for public debate and education on the matter. He therefore met with a number of academics and religious, gender, and trade-union organizations to propose that they consider setting up a civil-society group for just this purpose. The suggestions having been received with enthusiasm, Ghai obtained financial assistance from International Alert, the organization founded by human rights activist Martin Ennals. International Alert funded the initial consultations; later, Conciliation Resources, a breakaway organization of International Alert, provided financial assistance and some help in the form of international linkages.

The organization began in a very small way. At a meeting in Nadi (western Fiji) in 1995—one of the first held outside the capital, Suva—very few people came who were not in some way associated with CCF already, and the meetings never grew to be large public affairs. But they attracted a remarkable cross section of Fijian society. People from all po-

litical parties and religious groups attended, returning to their own organizations and contexts affected in some way by the event. The atmosphere of these events remained almost uniformly positive and without acrimony. The organization had a commendable record of printing the proceedings of its meetings, and thus, the meetings received wider publicity. The organization also produced its own submission to the Reeves Commission; many of the points in the submission were similar to those expressed in the FLP-NFP submission, but they were simpler and more direct.<sup>66</sup> Finally, the organization remained very multiracial, which was itself a valuable contribution. Without the CCF, the issue of constitutional reform might have remained much less visible than it was. That the prime minister, Rabuka, having shunned all CCF activities during the early stages of the process, asked to be permitted to launch its civic education materials on the new constitution, which were deemed to be much superior to the government’s efforts, was a measure of CCF’s growing impact.

From 1993 until the constitution was adopted, the CCF held a series of consultations that brought together a very wide spectrum of people from within and outside Fiji to discuss constitutional issues. These involved a mixture of information papers—on conditions in and possibilities for Fiji itself and on experience elsewhere in the world—as well as proposals for specific institutions in the constitution, which were published frequently in Fijian and Hindi. It also helped to draft legislation to implement the constitution, particularly a freedom of information bill. The consultations were designed to perform a number of functions, not only to inform and make specific suggestions, but to build bridges between communities and lay the groundwork for a consensual approach to constitution and nation building. What the CCF could do was limited. But it managed to place, and keep, the idea of con-

stitution making on the agenda of at least the press and the middle classes, and not just as a matter for propaganda. Today, the CCF is the most effective and influential organization devoted to constitutionalism, national unity, and racial amity.<sup>67</sup>

The flavor of the contribution that the CCF made to the debate can be gathered from the topics of one of the consultations held in 1994. The topics involved the electoral system, Fijian interests, Indo-Fijian and minority concerns, rights and religious issues, land, power sharing, affirmative action, and state and civil society. Speakers at that event included leaders of the Labour Party, SVT, Fijian Association Party, NFP, and one other Fijian party; a Fijian senator; a Fijian high chief; an Indo-Fijian academic; a Fijian academic; the director of research of the Fiji Council of Churches; and a speaker from Interfaith Search. Various foreign experts spoke as well: an academic from New Zealand, Nigel Roberts; Helmut Steinberger from the University of Heidelberg, who discussed Belgium and Bosnia; Jomo K. Sundaram, who spoke on Malaysia; and Yash Ghai, who addressed power sharing.

### *The Religious Input*

Religion, and for the most part mainstream religion, plays a large part in Fijian social and political life. Most Fijians are Methodist, but whereas in the United Kingdom the Methodist Church has a reputation for a degree of broad-mindedness, the Fiji Methodist Church has been very rigid and at times somewhat racist in its views. After the first coup, the government passed a Sunday observance law that imposed a Victorian notion on the community, including the prohibition of any public transport. This was partly directed at the Indian community. The church has sometimes backed attitudes and policies that have driven the wedges between the communities deeper.

On the other hand, religious organizations have sometimes led efforts to reconcile the differences between communities and worked toward a constitution that respects human rights and all communities. After the 1987 coups, Interfaith Search and Fiji-I-Care came into existence with the specific object of healing rifts, and they have worked with nonreligious organizations, especially the CCF. Early in the 1990s, the Fiji Council of Churches initiated dialogues on constitutional reform, and meetings of this sort were an important catalyst.

The Reeves Commission report shows that of 632 submissions from groups and organizations, roughly 341 came from specifically religious and mostly Christian groupings but included 47 Hindu or Sikh congregations or organizations. This may overestimate Christian input in the sense that in many villages, the church would be the only forum for aggregating views, and those views might well have little religious content.

### *International Input and the Role of the International Community*

International factors were important in various ways. There might never have been a review in the 1990s at all if not for international influence. The World Bank put a great deal of pressure on the constitution-making process, with several of its reports taking the position that unless there was a constitution acceptable to all communities, the prospects for economic growth would remain dim. Individual governments, notably those of the United Kingdom, Australia, and New Zealand, pressured Fiji to reform the 1990 constitution. These three states were not only closely associated with Fiji historically but also were among its largest aid donors, with extensive commercial and educational links. The U.S. ambassador at the time seems to have made constitutional reform his personal agenda, hosting lunches to bring Rabuka and

Reddy together in an informal setting to begin to develop a consensus.

Finally, there was the question of the Commonwealth. Indigenous Fijians were among the most loyal of the Queen's subjects. Fiji's membership in the Commonwealth automatically lapsed when it became a republic, and the racist nature of the state at the time led to restoration of membership—automatic when a country becomes a republic in normal circumstances—being denied. Many Fijians hoped that Fiji might again become a monarchy, part of the Queen's dominions. They viewed return to the Commonwealth as associated with this—indeed, many probably did not understand the distinction between the two issues.<sup>68</sup> John Wilson, a lawyer with experience of legal drafting in various Commonwealth countries, was asked to peruse the draft constitution to see if it would satisfy the Commonwealth's conditions for re-entry, and he endorsed it.

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

#### *Experts and Academics: Local and Foreign*

Fiji is a country of only seven to eight hundred thousand people, yet contributions to the making of its constitution came from some of the leading constitutional experts in the world. They came from all directions. The commission itself commissioned research papers from academics and practitioners of politics locally and overseas.<sup>69</sup>

It visited other countries and held discussions with both academics and politicians. It met Arend Lijphart, a theorist of consociationalism,<sup>70</sup> and Donald Horowitz, author of *Ethnic Groups in Conflict* and a leading expert on institutional approaches to accommodating ethnicity. In South Africa, it met Albie Sachs, Cyril Ramaphosa, and Desmond Tutu. In Malaysia, it met Jomo K. Sundaram and Kirpal Singh; in the United Kingdom, Vernon Bogdanor, David Butler, and James Crawford; in the United States, Michael Reisman; and in Australia, Cheryl Saunders—to mention only the best known. Non-governmental organizations (NGOs), notably the CCF, invited foreign and local academics, experts, and politicians to participate in consultations. Academics from the USP wrote papers and drafted submissions.

Political parties used foreign and local input from outside the parties. The FLP invited an Australian politician, Don Dunstan, to advise on its submission, though much of the work on the actual document—which was a joint submission with the NFP—was done by Yash Ghai. The SVT had the benefit of the advice of a retired Malaysian judge.

Research papers for the commission itself were written by some of the people mentioned earlier, as well as by local academics and people involved in Fiji affairs in a practical way. Authors of the papers were from the Pacific, Australia, India, Sri Lanka, Malaysia, the United States, Mauritius, the United Kingdom, and New Zealand. One group of papers dealt with specifically Fijian issues: ethnicity, economy, religion, education, and land. Another group dealt with constitutional issues generally: preambles, electoral systems, chiefs and kings and constitutions, antidefection provisions, upper houses, accountability institutions, power sharing, directive principles of state policy, and national and international human rights.<sup>71</sup> Few con-

stitutions have such respectable academic credentials.

How did such extensive foreign-expert involvement come about? No doubt it helped that one of the commission members was himself an academic. Seeking the views of scholars would not necessarily come naturally to politicians, or even archbishops. In addition, Fiji houses the main campus of the USP, an institution that at that time was very respectable in academic terms, with a number of academics in the social sciences who were committed to Fiji. Suva is a small city, Fiji staff at the university are linked to the society, and it seemed perfectly natural for religious and secular organizations to work closely with academics. Personal and accidental factors also play their part. Notably, Yash Ghai could contribute directly to the debate through his involvement with the CCF and by advising the FLP-NFP coalition. He also contributed indirectly by introducing the individuals from overseas who came to CCF consultations—and very much more discreetly, by feeding suitable names for research papers to the Reeves Commission. Other names were suggested by the United Nations.

#### *Finance*

Reviewing a constitution is not a cheap enterprise; one elderly, conservative, and European resident of Fiji described the commission as a “million dollar farce.”<sup>72</sup> The main costs of the enterprise in Fiji were borne by the national exchequer, though the United Nations (Electoral Assistance Division of the Political Affairs Department) paid for five issue papers on electoral systems<sup>73</sup> and facilitated commission meetings in the United States. The Australian government paid for foreign visits by the commission and for the draftsman of the constitution. The CCF raised money from or through International Alert, Conciliation Resources, the governments of

Australia and the United Kingdom, and the World Council of Churches.

#### *Foreign Experience*

Why were Malaysia, Mauritius, and South Africa examined? South Africa is easy: Nelson Mandela was released from prison in 1990, the interim South African constitution was enacted in 1993, and the final constitution was adopted in 1996. In South Africa, race was the dominant political issue—and though blacks are by far the largest group, there is also a significant Indian minority. Perhaps South Africa also appealed to indigenous Fijians because some of their myths of origin suggest that Fijians came from Africa. Most observers agreed that South Africa’s experience (see the chapter in this volume) offered a model of constitution making and racial rapprochement that was very worthy of study and perhaps emulation.

Mauritius is less well known. That country has a very large Indian community (now about 68 percent of the entire population) and a smaller black one (now 27 percent). Another parallel is the importance of sugar, as cane cultivation is an important part of Fiji’s economy and its social structure is so bound up with the crop, though the Mauritius sugar industry is more technically advanced than that of Fiji.

Malaysia is the most interesting example. Fijian politicians have long admired the Bumiputra policies of the Malaysian government restricting admission quotas to local universities for Chinese and Indians, favoring treatment to indigenous inhabitants in the realms of business, and so on. There was very little recognition in Fiji of the government’s heavy-handed treatment of political dissidents, or even of the way in which these policies of racial preference have negatively affected the Indian and Chinese communities. After the 1987 coups, Mahathir Mohammed, prime minister of Malaysia, visited



Fiji to offer support, as did Lee Kwan Yew of Singapore.<sup>74</sup> Various Malaysians had come to Fiji to advise, and a retired judge advised the government and SVT when the constitution was being negotiated. But when the commission visited Malaysia, the effect was rather the opposite of what one might have anticipated. Far from appealing to Sir Paul Reeves and Brij Lal as a model of racial justice that Fiji might emulate, it appeared to the Fijian member of the commission that the Malaysian system should not be emulated. He did not like what he saw as a system biased in favor of Muslims and did not want something similarly biased in favor of Christians.<sup>75</sup>

#### *International Law*

Appeals to international law in the reform process took three main forms. First, there was a general awareness of international human rights norms, a consequence perhaps of the general international input already mentioned, and the terms of reference of the commission required it to bear in mind “internationally recognized principles and standards of individual and group rights.” The submission of the NFP and FLP referred considerably to international human rights norms, and other writings around the theme of reform did the same. This is reflected in the Reeves Report, which discusses relevant norms, at some length.<sup>76</sup> Section 3(b) of the final constitution provides that in interpreting the constitution, regard must be had for “developments in the understanding of the content of particular human rights; and developments in the promotion of particular human rights,” which requires reference to international as well as foreign law. This formulation was apparently added at the drafting stage.

Second, the Indo-Fijian community had appealed to international norms, the con-

cept of equal citizenship, and the rights of the individual as basic building blocks of the constitutional and political system. It had also, ever since the promulgation of the 1990 constitution, relied on the Convention on the Elimination of All Forms of Racial Discrimination (CERD), which Britain had applied to Fiji during the colonial period. At one point, there had been talk of persuading another country to make a formal complaint against Fiji to the international committee supervising the CERD. Mauritius had already agreed to bring the matter to the committee, since the convention has no optional protocol authorizing individuals or political parties to complain to the committee. Only when Rabuka agreed to set up a process for constitution review were plans to approach the committee dropped.<sup>77</sup>

Third, indigenous Fijians were powerfully attracted to the concept of indigenous peoples having group rights. Though only a small part of the land has been alienated on the basis of freehold, or permanent ownership, many Fijians have felt that the leasehold system has taken the control and benefits of cane-growing land away from them; they also feel that they have lost power over their own political destiny. In the SVT submission to the Reeves Commission,<sup>78</sup> of which the chief craftsman is believed to have been a Muslim Indo-Fijian,<sup>79</sup> considerable reference is made to the Draft Declaration on the Rights of Indigenous Peoples and the concept of self-determination, though it also recognizes that the position of indigenous Fijians is not precisely that of indigenous peoples as envisaged in the UN Draft Declaration.<sup>80</sup> The last point was brought out by various contributions to the constitutional debate, including that of an official of the World Council of Indigenous Peoples.<sup>81</sup> The Reeves Commission was unconvinced that the international principles were applicable in the way that the SVT suggested, stating that Fiji’s situation is

very different from that of countries such as New Zealand. It also thought that the Draft Declaration did not justify discrimination against other communities.<sup>82</sup>

### *The Issues*

#### *Ethnicity*

The issues that confronted the commission mainly related to ethnicity. This was inevitable in view of the background—and the composition of the commission, while it responded to the element of ethnicity, also ensured that it remained central. Nonetheless, at least some of the political parties and NGOs that participated in the process responded to the challenge of a comprehensive review in a comprehensive way. The document itself was a blueprint for a fundamental shake-up of the entire system. The range of submissions is dramatized in this section by drawing especially on the submissions of the SVT and the FLP-NFP, though particularly the former submission rather distorts the nature of the debate. It should not be thought that all submissions from Fijians insisted on maintaining the 1990 constitutional status quo.

The SVT submission to the commission sought, in essence, the continued dominance of the Fijian people. It described the process thusly:

The basic premise of the review is that the 1990 Constitution is here to stay, but that what is desirable in the interests of all communities in Fiji, and to help promote multi-racial harmony and national unity in Fiji, is to make its provisions more considerate of the position and sensitivities of all communities in Fiji's multi-ethnic and multi-cultural society.<sup>83</sup>

Its submission placed emphasis on the non-Fijians as *vulagi*, and the way in which Fijian tradition expected *vulagi* to be humble and to know their place; it contained extended quotations from the work of a Fijian nationalist academic, which included the following:<sup>84</sup>

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

The submission of the FLP-NFP,<sup>85</sup> by way of contrast, reads:

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

The submission goes on to deal with every element one would expect to find in a constitution, right up to the amendment process. The SVT submission viewed that of the FLP-NFP as a further manifestation of Indian hypocrisy, hiding intentions of dominance that it traced back to Jawaharlal Nehru.<sup>86</sup>

Fundamentally different approaches to the ethnic issue motivate the two submissions. The SVT document accepts, and even glorifies and justifies, difference but it is a difference mediated under the hegemony of one ethnic group. Its proposals tended to reinforce and harden those differences and perhaps were designed to do so. They hoped to get the Indo-Fijians to accept their subordinate social position gracefully, in return for a settlement of economic issues, especially those relating to land. The submission also justified the 1990 constitution in terms of constitutional law, legal theory,<sup>87</sup> and national need. For its part, the FLP-NFP submission does not ignore difference by any means, but it looks forward to a future in which races work together and proposes institutions and structures that are positively designed to encourage cross-ethnic collaboration.

#### *Political Control*

Political control involved two main issues: the number of parliamentary seats that the two main ethnic groups would hold and the

ethnic identity of the prime minister. The commission did not recommend any limitation on the latter. The former involves mainly the question of ethnic seats, and also whether there would be a first-past-the-post, or majoritarian, electoral system or some form of proportional representation. The lines were clearly drawn: The SVT and many other Fijian organizations wanted the retention of a system that ensured that Fijians maintained political control, rejecting a common roll and formal provisions for power sharing, mentioned below. The opposition parties were prepared to accept that the GCC would nominate the president, almost certainly ensuring that he would always be a Fijian. They were also prepared to accept the retention of some seats elected on a communal basis, but wanted to move further away from ethnic voting. The final decision departed from the Reeves recommendations and was an area in which Rabuka and Reddy reached a compromise that they managed to sell to their respective parties. The commission recommended forty-five open seats, twelve Fijian seats, and ten Indo-Fijian seats. The constitution prescribes twenty-five open seats, twenty-three Fijian seats, and nineteen Indo-Fijian seats.

The system of voting for the seats received particular attention, though the SVT did not address it. Other groups focused on encouraging cross-ethnic cooperation, or in other words, diluting ethnic control. The CCF urged a system of proportional representation. It had held a number of meetings on the issue of electoral systems, inviting various overseas experts; one very active member, Father David Arms, a Catholic priest, produced various models of possible systems. The FLP-NFP proposed a preferential voting system for communal seats and a nationwide party list system of proportional representation for the national seats. As it turned out, the system chosen was crucial for the control issue in the

first general election after the new constitution was enacted.

The system adopted in section 54(1) of the constitution is the alternative-vote system—known as AV for short—proposed by Donald Horowitz and accepted by the commission.<sup>88</sup> Under the system, each elector indicates first choice of candidate, second choice, and so on. When first preferences are counted, if no candidate obtains over 50 percent of the votes cast, the candidate with the fewest first preferences is eliminated and the second preferences of that candidate's voters are distributed among the remaining candidates. In open (noncommunal) seats especially, the hope was that parties would plan second preferences to be given according to party strategy, which would involve cross-ethnic cooperation. The system was incorporated into electoral law, dividing ballot papers so that voters who wanted to exercise their individual choice could do so by numbering individual candidates on the list on the bottom segment of the ballot paper. But voters could leave the choice to their party and just tick the name of their party above the line, on the top of the ballot paper.

The other structural issue related to the senate. The commission recommended a mainly elected body, though the final version involves appointed members, fourteen selected by the GCC, nine by the prime minister, and eight by the leader of the opposition.

### *Fijian Interests*

There was much talk in the negotiations about the "paramountcy" of Fijian interests. The rationale lay in the concept of indigeneness, with much being made in some quarters of the history and myths of the Fijian people. The corollary was argued that Fijians should maintain political control, as well as traditional forms of social organization. But for some commentators on the constitutional

debate, including some Fijians, the real issue lay in the tension between tradition—or imagined tradition, some might say—and change, and between the chiefly elites and the ordinary person. The traditionalists insisted that once primacy of the Fijian interests was recognized, the foundation would be laid for a harmonious existence for all. In fact, neither the Indo-Fijians nor other communities challenged the Fijians' key legitimate interests. The Indo-Fijians had argued for equality and rights of individuals but were prepared to accept a very significant degree of group rights for indigenous Fijians. The Indo-Fijians even recommended that legislation protecting Fijians—including their land rights, which greatly disadvantaged Indo-Fijians—should remain entrenched, a national role for the GCC should be acknowledged, and effectively the president should always be an indigenous Fijian, to symbolize indigenous Fijians' special status.

The commission rejected notions of a right to Fijian paramountcy but did propose what they described as a "protective principle" of the paramountcy of Fijian interests, the idea of which was to ensure that these interests were not subordinated to those of other ethnic groups.<sup>89</sup>

### *Religion*

Some churches argued that Fiji should actually be designated a Christian state, though precisely what this might mean was not clearly articulated, and it was as much political as religious. A speaker at a CCF consultation said of a leader who would like Sunday observance written into the Constitution:

I said "How do you justify this, from our teachings from the Bible?" He said "This is not biblical or theological, this is political. This is for Fijians."<sup>90</sup>

The Reeves Commission recommended maintaining the separation of church and

state. This issue resurfaced as late as the debate on the constitution amendment bill, when a number of Fijian members emphasized that the GCC attached importance to Fiji being a Christian state. In fact, one of the amendments that was made at a very late stage was moved by the prime minister, presumably to take some of the heat out of the issue; it elaborated the preambular reference to adopting Christianity, with specific reference to conversion from heathenism—no doubt viewed by many Hindus as a dig at their religion.<sup>91</sup>

### *Land*

As mentioned earlier, land was a key issue that has proven remarkably difficult to deal with. Even the CCF, which tackled so many contentious issues, tended to shy away from it. The CCF's own submission to the Reeves Commission makes no specific suggestions on land. The FLP-NFP proposed that the legislation protecting Fijian interests, including those in land, should continue to have special protection. It also proposed a requirement of affirmative action to provide land to the landless. Although all parties and communities realized that land was a major issue requiring constitutional settlement—especially as the leases of many farms that Indo-Fijians rented from indigenous Fijians were to expire shortly—they also felt that putting the issue on the current agenda would overburden it, and that a settlement might be easier once a power-sharing system was in place. Rabuka certainly took this view, and he persuaded a reluctant Reddy.<sup>92</sup>

### *Human Rights*

The 1970 constitution contained a bill of rights of its time, with no recognition of economic, social, and cultural rights. The 1990 constitution also contained a wide provision for suspension of its broadly similar rights.



The SVT conceived of rights as a group matter, but other political parties and civil society laid greater emphasis on individual rights. As mentioned earlier, everyone resorted to international law to support their positions. The SVT referred to the Draft Declaration on Indigenous Peoples and the UN Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion and Belief; others relied on the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights.

Human rights can be profoundly subversive of accepted institutions or perceived as so, and in Fiji, human rights not only affected the relations between the two major communities but potentially challenged the current Fijian social organization. Even in the past, notions of human rights had affected traditional structures: Many of the provisions of the Native Regulations imposing restrictions on commoners had been removed shortly before independence. There was also general unease among the chiefly class regarding notions of liberal individual rights.

The bill of rights ultimately adopted includes full versions of familiar rights, such as those of free speech, association, and assembly, as well as freedom from discrimination. There are also more modern rights, such as the right to privacy and to basic education, though there is no mention of rights to health, housing, and food, such as one finds in the South African and some other recent constitutions. Noting that the Reeves report incorporated some rights from the legislation of New Zealand and Canada, Vakatora concluded, "I believe that the Bill of Rights we have recommended is one of the best in the world."<sup>93</sup>

#### *Affirmative Action*

Since 1987, the government had embarked on a major program of affirmative action

to benefit the Fijian community, mainly in education and economic opportunity. There were far more scholarships for Fijians and special loan programs, as well as a Fijian holding company designed to hold commercial assets on behalf of the Fijian community. After 1987, the balance in the civil service had radically shifted. The SVT wanted the pro-Fijian programs to continue, while the coalition submission argued that affirmative action should not be restricted to one community.

The Reeves Commission proposed the inclusion of a provision about social justice, targeted at those in need rather than one ethnic group specifically. This was to impose a duty on the state to institute programs, by legislation, particularly in the areas of housing, education, and participation in commerce and in public service. Programs were to have clearly established criteria for participation and measuring success. Such programs would also expire after ten years, though they could be reinstated.<sup>94</sup> The final constitution largely enacts these proposals.<sup>95</sup>

#### *Reconciliation*

It was the almost universal hope that a new constitution would lead to a more harmonious relationship between the ethnic communities in Fiji, though visions differed regarding how this was to be achieved, especially if one contrasts the SVT submission with those of the FLP-NFP and CCF.

The CCF proposed that power sharing should be a feature of the constitution, at all levels of government, based essentially upon electoral support for political parties.<sup>96</sup> The FLP-NFP submission also proposed a system under which any party that obtained more than 20 percent of the parliamentary seats should be represented in the cabinet, which should be racially balanced. The principle of ethnic proportionality extended to public office and the use of national resources.

The Reeves Commission itself did not accept the proposal for power sharing in the cabinet; its choice of the AV voting system was directed at encouraging interethnic co-operation of a different sort. However, when the matter came to the JPSC, politicians opted for a model of compulsory power sharing at the cabinet level. Under section 99 of the constitution, any party that has won at least 10 percent of the seats in the House of Representatives has the right to a seat or seats in the cabinet proportional to the number of seats in the House.

## The Aftermath

### *The 2000 Coup and Abrogation of the Constitution*

There was a brief period of euphoria after the constitution was passed, not restricted to the Indo-Fijian community. Most people were happy to return to a situation in which the constitution had legitimacy at home and overseas. Few wanted to live at odds with their neighbors. The constitution became law in 1997 but came into effect with the dissolution of parliament in 1999. Various institutions were set up under it, including a human rights commission. The first elections under the new electoral system in 1999 produced results more remarkable even than those in 1987: Rabuka's SVT obtained only seven seats and Reddy's NFP not one. The Fiji Labour Party—no longer in coalition with the NFP, but working to some extent with the Fijian Association—won; Mahendra Chaudhry had to be invited to form a government. Chaudhry seemed to begin well, appointing a cabinet in which a majority of the members were Fijian, including his deputy prime minister. But a year later, there was another coup.

The suspension of the constitution was challenged in court, and the government relied on the successful coup doctrine that the

SVT had invoked in its submission to Reeves, as well as on the doctrine of necessity. Both the court of first instance and the Court of Appeal rejected these arguments. The Court of Appeal held, first, that even if necessity could justify temporary exceptional measures in an emergency, the temporary measures must be directed toward restoring constitutionality. Second, the court held that there was insufficient evidence of a new legal order having been effectively established. The 1997 constitution remained in force.<sup>97</sup> However, Chaudhry's government was not restored. A new election brought to power a Fijian government headed by Laisenia Qarase, who had led the interim military-backed government between 2000 and 2001.

### *Interpreting the Aftermath*

Should we view the results of the 1999 election as a verdict on the constitution? Is the coup of 2000 damning evidence that the constitution was a failure?

To view the 1999 election as a popular vote against the constitution is to oversimplify. Such a view ignores the possibility that the vote reflected not only a rejection of the constitution makers, at least on the part of the Indo-Fijian community, but also a hope that the FLP could deliver in terms of policies.<sup>98</sup> There may have been some element of Rabuka and Reddy taking victory for granted, as they let the campaigning initiative pass to others. And Labour also seems to have latched on to the possibilities created by the new electoral system with more success than any other party.

However, clearly both major communities were worried about the constitution at some level and even harbored a sense that they had been betrayed. At pre-election meetings, Reddy tried to persuade NFP members to see things to some extent from Fijian perspectives, in some eyes thereby dooming himself to lose the election.<sup>99</sup> It was all too

easy for those who wanted to stir up strife to portray the constitution to both sides as a sellout.<sup>100</sup>

Of course, it is impossible to tell what would have happened if the FLP had not won the elections in 1999. That said, if Rabuka had won and the NFP had made a good showing, there is some reason to suppose that they could have worked together harmoniously in a power-sharing arrangement. Various factors contributed to the coup: Chaudhry's personality and political miscalculations; the personal circumstances of George Speight, who led the civil coup; and the Fijian elite's fears and ability to play on those of the ordinary Fijian, combined with the fact that most people did not understand the constitution and thus could readily believe that it disadvantaged them.

The two main parties and, ultimately, the nation seem to have paid a price for the rather secretive way in which the constitution-making process was carried out. The Reeves Commission itself offered no options on content to the people. The people and the parties fed their ideas into the machine that was the commission and ultimately out popped a complete report. When it came to formulating the actual document for enactment, the draft again disappeared into a black box, to be adjusted in view of the prejudices and interests of members of parliament and the two main parties. The people were again presented with a *fait accompli*. True, it may all have been better than earlier constitution-making exercises—which is perhaps why it was deemed acceptable—but in terms of true popular participation it left a good deal to be desired. The failure to carry out any form of civic education in advance may also have contributed.

There was also insufficient popular education after the Reeves Report or the final constitution was produced, though there was some donor-funded education for parliamentarians and the public service. The report was

not translated into Fijian or Hindi—understandable given that it was over seven hundred pages long, but it thus remained largely unknown to a majority of the people,<sup>101</sup> including the army.<sup>102</sup> The problem continued with the actual constitution, which was supposed to be translated into the two main local languages but never was. As a consequence, the constitution that people criticized, and which disaffected parties used as a rallying cry—especially on the Fijian side, which said that Fijian interests had been sacrificed—was not the real document at all, but a figment of people's fears and imaginations. When the CCF, undaunted by the coup, continued to introduce people to the constitution's ideas and contents, they were repeatedly met with comments along the lines of "It is a good constitution—we did not know!" Much of the myth and manipulation was deliberate, but was much easier to accomplish because people had no real way of knowing the truth of what they were being told. For these various reasons, important groups, such as the military and the people generally, did not understand the constitution or feel that it was theirs.

Ignorance of the constitution perhaps contributed to fears of what an Indian victory—as the result of the election was regarded—meant for the Fijian community. People felt that their land was going to be taken away, a perception that some politicians were only too happy to encourage. In fact, the constitution retained the existing land system and the entrenched status of land legislation.

The introduction of the new constitution was bound to be a delicate moment. Perhaps there was not enough realization of this. Especially since 1987, certain sections of the Fijian community had formed vested interests in the current system, involving an amalgam of chiefly tradition, commercial enterprise, land, and military force. These would all be threatened by a genuinely democratic system and more so by a transition that placed

political power in the hands of Indo-Fijians as well as ordinary Fijians. It was evidently in elites' interest to resist the change of government even more than a change in the constitution. An attack on a new constitution is often no more than tactical, as perhaps was the case in the coup after the 1999 general elections. The moment was especially delicate in Fiji, where the coup taboo had been broken: It was not unthinkable that the military could take over.

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

The independence Fiji constitution, built primarily on the idea of racial communities, was an imperfect reflection of consociationalism. It sought to give all communities fair representation but deliberately overrepresented the general electors to ensure Fijian domination. It did not provide for power sharing at the executive level, nor the principle of proportionality in state services. It did nothing to disturb indigenous Fijians' monopoly of the armed forces. It provided various forms of self-government and autonomy for Fijians through the Provincial Councils, Fijian Administration, and the GCC, as well as a qualified veto for them, but it gave little to other communities. These were not merely protective provisions; they were at the heart of a distinctive Fijian paramountcy. Yet there were strong impulses of democracy and

rights, and the vision of a more integrated political community was hinted at in the agreement to review the electoral system to provide a nonracial element. The 1990 constitution was explicitly racist. Its assumptions were the further reinforcement of the separate markers of indigenous Fijians by resurrecting elements of their customary laws and judicial tribunals as well as their hegemony over other communities.

Rejecting the racial hegemonic model, the 1997 constitution moved further toward the consociation model, principally in providing for executive power sharing while flagging a more nonracial, even liberal, model. However, it was unprepared—or perhaps more accurately, unable—to dismantle the laws and institutions that separated the indigenous Fijians from others, such as the GCC, the Provincial Councils, and the Fijian Administration, though it did claw back some of the 1990 provisions on customary law and tribunals. The Fijian institutions provided a powerful base for ethnic identity and mobilization, and a source of legitimacy that often competed with constitutional values and allocations of authority. Moreover, nobody dared to touch the question of Fijian land rights and fairness to Indo-Fijians in lease arrangements, although most leases were about to expire—perhaps the most contentious public issue of all. The qualified veto, to be exercised in the senate, was preserved, although the senate would move away from domination by political parties. The concept of citizenship that emerges from the constitution's provisions does not conform to the universal and equal citizenship of liberalism. Despite Reeves's correct analysis of indigenous rights, group rights may clash with individual rights. The advance to nonracialism and liberalism was signaled by reforms to the electoral system, allocating a majority of parliamentary seats to common roll voting; a stronger system of human rights, substantively and institutionally; and social justice



for the disadvantaged of all communities, instead of exclusively for one community.

The problems of the constitution-making process were not all the fault of the Reeves Commission, as we have seen. The commission did not support the same degree of consociationalism as is found in the constitution. It proposed a much higher proportion of nonracial seats than was finally adopted. And it explicitly rejected the model of executive power sharing. By retaining the Reeves system of AV voting and providing for multiparty executive coalitions, the constitution contains two somewhat contradictory methods to reach the same objectives and allows the logic of adversarial politics and voting to prevail over interethnic cooperation. Political leaders saw the route to government under the coalition formula as building up enough support in their own community to secure sufficient parliamentary seats, severely straining multiparty government.

This brings us to the effect of context and procedure. In terms of institutions, the constitution could perhaps only be interim, marking a departure from old orthodoxies but postponing some of the goals of the new vision. An abrupt shift would have generated tensions and anxieties jeopardizing the entire project. These constraints operated on the Reeves Commission as they did on numerous groups and individuals who presented their views to it. The procedure for making and adopting the constitution imposed its own constraints. The commission's composition, restricted to two local members representing parties of competing ethnic groups, was not propitious for defining national goals and identity, though on this point the commissioners confounded the critics and gave us a wonderful and powerful vision of Fiji and a host of sensible recommendations. However, the last word was not with the commission, unfortunately, but with politicians—and more important, with the parliament under the 1990 constitution, which was slated to be

reformed in a way that would do away with the assumptions of its own foundation. In other words, the future constitutional order depended on members of parliament, many of whom had a vested personal and ethnic interest in preserving the current constitution. The requirement of enhanced majorities for passing the amending bill meant that each major ethnic group had a veto, which was of more value to the Fijian community than to the Indo-Fijian. The negotiations in the JPSC, the party submissions, and the proceedings of the commission itself had to be carried out in the shadow of this fact.

## Conclusion

Some commentators have concluded that the constitution was fundamentally flawed because it permitted the emergence of an Indo-Fijian prime minister, which was unacceptable to the Fijian community. We find this to be a simplistic analysis. It is true that the prime minister was perhaps particularly hard for the other community to swallow. But the result of the 1999 election also made it much easier for those sections of society that really did not want any change in the constitutionally sanctioned reinforcement of Fijian paramountcy—meaning the paramountcy of a particular class and a particular structure for society—to portray the entire constitutional settlement as a disaster for Fijians. It was easier to do this because so few people really understood the document. How much could have been done by way of public education within the time frame is unclear. But we have shown that the process was far less transparent and participatory than it might have been, and we have also tried to show why this was so. The experience of other countries has shown that in the final analysis, what matters may be more the views of community leaders than the participation of the people themselves. And though Rabuka and Reddy may have tried to lead in one di-

rection, other leaders were marching determinedly in another.

The content of the constitution itself may share some of the blame. The electoral system, which hardly anyone understood, was somewhat responsible for the 1999 election results. A power-sharing arrangement that is technically clumsy and politically unworkable with the current players gave the Qarase government a good reason to press for constitutional amendment. And we have noted the constitution's awkward marriage of the liberal and the consociational that retained many ambiguities of the past.

A constitution is not established in a vacuum. For a new and just constitutional system to take root in Fiji, a great deal of damage from the past must be undone. Much of that damage can be traced to the colonial experience; other elements originate in the post-1987 period. The Reeves Commission aimed for a radical restructuring of the values and institutions of the state, and though the people may have been ready for such fundamental change, politicians clearly were not. Experience shows that if politicians, who have a special purchase on state institutions, are not committed to a constitution, its prospects remain dim. In trying to please many groups, the thrust of the constitution was blunted. One critical factor was the reversal of the Reeves Commission's proportion of racial to nonracial seats, with the result that ethnic politics remained dominant. Constitutions that aim for fundamental change need much more care and nourishment than this one got. Had its principal proponents, Rabuka and Reddy, won the elections, more concerted efforts might have been made to observe its spirit and implement its provisions. Certainly little was done to prepare the public, in terms of information and persuasion, for the new constitution and the radical changes that it was intended to promote. The new constitution remained hostage to con-

tingencies it could not control: The election of a prime minister with little respect for the aspirations and conciliatory procedures embodied in the new constitution, an unsuccessful businessman cut off from the largesse of the state who capitalized on ethnic fears, and the easing of external pressures on constitutionalism all damaged the fortunes of the constitution.

In an earlier draft of this paper we concluded that "the constitution survives, and there remains considerable support for it among sections of the population. The vision of Fiji on which the constitution rests still has its admirers. It is too early to write it off." This is not the place to explore the reasons behind the 2006 and 2009 coups (the first military and the second presidential, but both at the behest of the commander of Fiji's military forces). The latter insisted that he supported the 1997 constitution (except for its electoral system); he acted in 2006 to prevent the government from subverting the spirit of that constitution with laws designed to benefit Fijian land owners, and to give amnesties to the 2000 civil coup leaders. However, faced with the decision of the Court of Appeal that his government was illegal, he seems to have jettisoned both the constitution and the judiciary readily, insisting that this is all in the interests of achieving the radical reforms that his government is set on.<sup>103</sup> All this says much more about personalities than it does about the 1997 constitution.<sup>104</sup> Indeed, the 2006 coup prematurely ended the first government to be constituted in a multiparty way as directed by the constitution, though Jon Fraenkel suggests that this government was already falling apart, and had it held together, there would have been no 2006 coup.<sup>105</sup> How much of the spirit of the 1997 constitution will survive into the next constitutional phase can be a matter of conjecture only.

## Notes

1. George Speight was dismissed soon after the 1999 election as chair of the Fiji Hardwood Corporation and prosecuted for offenses connected with foreign exchange and extortion. See Michael Field, Tupeni Baba, and Unaisi Nabobo-Baba, *Speight of Violence: Inside Fiji's 2000 Coup* (Auckland: Reid Publishing, 2005), especially chap. 7, "Speight, Son of Sam: Failed Businessman."

2. Fiji Constitution Amendment Act 1997 Revocation Decree 2000, followed by Constitution Abrogation—Interim Military Government and Finance Decree.

3. *Republic of Fiji v. Chandrika Prasad* ABU0078/2000S, reported (2001) 2 *Law Reports of the Commonwealth* 743. The Court of Appeal consisted for the purposes of this case of three Australian judges (Sir Maurice Casey, Sir Ian Barker, and Mr. Justice Handley), Sir Mari Kapi from Papua New Guinea, and Mr. Justice Gordon Ward, then of the Tongan judiciary though appointed in 2004 to head the Fiji Court of Appeal.

4. The new case is *Qarase v. Bainimarama* (2009) FJCA 10 April 9 2009 (available at the Pacific Island Legal Information Institution Web site at [www.paclii.org/fj/cases/FJCA/2009/10.html](http://www.paclii.org/fj/cases/FJCA/2009/10.html)), reversing the decision of the High Court on October 9, 2008. That case was strongly criticized, including by George Williams, Graham Leung, Anthony Regan, and Jon Fraenkel in *Courts and Coups in Fiji: The High Court Judgment in Qarase v. Bainimarama* (Research School of Pacific and Asian Studies, Australian National University, "State, Society and Governance in Melanesia" Discussion Paper 10 of 2008).

5. Adrian C. Mayer, *Indians in Fiji* (London: Oxford University Press, 1963), p. 11.

6. Around the time of the constitutional debate, the main source was the UN Development Programme's (UNDP) *Fiji Poverty Report*, available at [www.undp.org/fj/index.cfm?si=main.resources&cmd=forumview&cbegin=0&cuid=publications&cid=117](http://www.undp.org/fj/index.cfm?si=main.resources&cmd=forumview&cbegin=0&cuid=publications&cid=117).

7. See UNDP, *Fiji Poverty Report*.

8. Robert Norton, "Reconciling Ethnicity and Nation: Contending Discourses in Constitutional Reform," *The Contemporary Pacific*, vol. 12, no. 1 (2000), pp. 83–122.

9. Brij Lal, *Broken Waves: A History of Fiji in the Twentieth Century* (Hawaii: University of Hawaii Press, Pacific Islands Monograph Series, no. 11,

1992). The background section of this chapter relies heavily on this book.

10. The Council of Chiefs was originally set up by the first colonial governor, Sir Arthur Gordon. It is now known as the Great Council of Chiefs (GCC), or Bose Levu Vakataranga (BLV), and has taken on an aura of antiquity and acquired various forms of status and power. It has been used to legitimize events such as the 1987 coup that have little or nothing to do with chiefly traditions.

11. That was based (though with some differences) on the European Convention on Human Rights, to which the United Kingdom had adhered in 1954, and was copied in many colonies. See Stanley de Smith, *The New Commonwealth and Its Constitutions* (London: Stevens & Sons, 1964), chap. 5.

12. The laws were the Fijian Affairs Act; the Fijian Development Fund Act; the Native Land Act; the Native Land Trust Act; the Rotuma Act; the Rotuma Land Act; the Banaban Land Act; and the Banaban Settlement Act, and other laws which affect Fijian land, customs or customary right.

13. The narrow range of consultation and discussion in Fiji is clear from Kamisese Mara, *The Pacific Way: A Memoir* (Honolulu: Center for Pacific Studies, University of Hawaii, 1977), chap. 11.

14. For an account of the attitudes of the two communities, especially the Fijian community, see Mara, *The Pacific Way*. Mara states that at the 1970 constitutional conference, he would have preferred to keep people in Fiji better informed, but it did not seem to be the practice at such conferences where difficult issues were to be resolved (p. 102).

15. For an overview of constitution-making processes in the South Pacific, see Yash Ghai, "Constitution Making and Decolonization," in *Law, Politics and Government in the Pacific Island States*, ed. Yash Ghai (Suva: Institute of Pacific Studies, USP, 1988), p. 1; and J.W. Davidson, *Samoa Mo Samoa* (Melbourne: Melbourne University Press, 1987).

16. According to Mara, it was the leader of the Indian Party, Siddiq Koya, who proposed that there should be no election. See *The Pacific Way*, p. 97.

17. The Street Report was Parliamentary Paper no. 24 of 1975.

18. Mara, *The Pacific Way*, p. 126, pointing to the fact that the constitution said "if Parliament subsequently makes any alteration"—a somewhat weak argument, for presumably Street might have recommended no change.

19. Lal, *Broken Waves*, p. 224.
20. Pronounced *bavandra*. In Fijian, *d* is pronounced *nd* and *b* is pronounced *mb*; hence, Rabuka is *rambuka*. Further, *g* is pronounced as a soft *ng* and *q* as a hard *ng*; hence, the prime minister, Qarase, is *ngarase*. Finally, *c* is pronounced *th*, so Timoci is *Timothy*.
21. For an account of the election see Brij Lal, "Before the Storm: An Analysis of the Fiji General Election of 1987," *Pacific Studies*, vol. 12, no. 1 (1988), pp. 71–96.
22. Lal, *Broken Waves*, p. 272.
23. The committee had available the services of a retired professor of law from the United Kingdom, Keith Patchett.
24. Interestingly, the Manuelli Report—of the body that followed the failure of the Falvey Committee—used the original phrase in quoting its predecessor's terms of reference (para. 1.3).
25. *Report of the Constitution Review Committee July/August 1987*, Parliamentary paper No. 21 (1987) (Suva: Parliament of Fiji, 1987). See Lal, *Broken Waves*, 286–9, for an account of the commission, including of some of the submissions to it.
26. Draft Constitution for the Republic of Fiji, September 1988.
27. Brij Lal, *Another Way: The Politics of Constitutional Reform in Post-Coup Fiji* (Canberra: Australian National University, National Centre for Development Studies, 1998), p. 10.
28. *Report of the Fiji Constitution Inquiry and Advisory Committee*, August 1989 (personal files of authors).
29. Mara, *The Pacific Way*, p. 223.
30. *The Fiji Constitution of 1990: A Fraud on the Nation* (A Report by the Fiji Labour Party and the National Federation Party) (Nadi: Sunrise Press, 1991), p. 2. Written by Yash Ghai on behalf of the NFP-FLP Coalition.
31. Lal, *Another Way*, p. 12.
32. Tomasi Vakatora, *From the Mangrove Swamps*, 2nd ed. (Suva: Government Printer, 1998), p. 97, comments that the public was "afraid to speak their minds" to both the Falvey and Manuelli committees.
33. See Lal, *Another Way*, p. 14.
34. On file with the authors.
35. Blaustein was reported as distancing himself from the constitution once it was passed, saying that he had wanted a "multi-racial and proportional system." See *Fiji Voice*, no. 15 (September–October 1990), p. 15. *Fiji Voice* was published by the Fiji Independent News Service, PO Box 106, Roseville NSW 2069, Australia.
36. Winston Halapua, *Tradition, Lotu, and Militarism in Fiji* (Lautoka, Fiji: Fiji Institute of Applied Studies, 2003), p. 196. Halapua, a Fiji citizen of Tongan origin, is now Anglican Bishop for the Diocese of Polynesia in Aotearoa, New Zealand.
37. Argued in Halapua, *Tradition, Lotu, and Militarism*.
38. Lal, *Broken Waves*, p. 328.
39. Fiji, *Parliamentary Debates*, House of Representatives, June 30, 1997, p. 569 of published parliamentary debates.
40. Mara, *The Pacific Way*, p. 223.
41. Soqosoqo ni Vakavulewa ni Taukei, roughly translated as Fijian Political Party.
42. In Mahendra Chaudhry, "Why We Backed Rabuka," *Fiji Voice*, no. 22 (July–August 1992), p. 3, and the following article; the correspondence between the FLP and the SVT is reproduced.
43. Mara, *The Pacific Way*, p. 223.
44. Lal, *Another Way*, p. 173, relates the complaint of women in Labasa about the absence of any woman on the commission and suggests they were silenced by Vakatora's pointing out the presence of Quentin-Baxter.
45. The chief justice was a Fijian, Sir Timoci Tuivaga, whom the Indo-Fijian parties to the negotiations viewed with some distrust. Though the judges, including the chief justice, told the government in 1987 that the coups were unlawful, in 2000 Sir Timoci was viewed in some quarters as having been too ready to embrace the coup.
46. His name was put forward by Yash Ghai. Several other names were being bandied about, but in the end Reeves and one other, a former colonial civil servant, were interviewed by Filipe Bole, chair of the Joint Parliamentary Select Committee.
47. Especially in Lal, *Another Way*.
48. Vakatora, *Mangrove Swamps*.
49. Ibid.
50. Lal, *Another Way*, especially pp. 174–75.
51. Ibid., p. 174.
52. Vakatora, *Mangrove Swamps*, p. 114.
53. This was a deliberate decision of the government, according to Brij Lal in a discussion with the authors.
54. Vakatora, *Mangrove Swamps*, p. 117.



55. Fiji, *The Fiji Islands: Towards a United Future*, Parliamentary Paper no. 34 (1996) ("Reeves Report"), chap. 4, "How the Commission Went about Its Task."

56. In Kenya, the chair of the constitution review commission—Yash Ghai—prepared a book reviewing the structure of the existing constitution and suggesting alternative approaches, without advocating any. See *Reviewing the Constitution* (Nairobi: CKRC, 2001). The commission also produced a set of questions, titled "Issues and Questions," perhaps rather too detailed and tending to focus the attention of citizens on minutiae rather than on fundamentals.

57. This document is reproduced in Ganesh Chand and Vijay Naidu, eds., *Fiji: Coups, Crises, and Reconciliation 1987–1997* (Suva: Fiji Institute of Applied Studies, 1997), p. 176.

58. Reproduced in Lal, *Another Way*, p. 138 ff.

59. Parliamentary Debates (HR), June 26, 1997, p. 403.

60. Parliamentary Debates (HR), June 26, 1997, p. 414.

61. The resultant act was the Constitution (Amendment) Act 1997 of the Republic of the Fiji Islands, Act no. 13 of 1997.

62. This is in marked contrast to the Kenyan Commission, which had district coordinators for each of seventy districts and a system of constituency committees. These were all designed to provide a basis for civic education and also for organizing the people in the locality for the visits of the commissioners, whether for civic education, collection of views, or information sessions on the draft constitution once prepared.

63. *The Fiji Islands: Towards a United Future*, appendix D.

64. Lal, *Another Way*, p. 167.

65. *Ibid.*, p. 168.

66. Citizens Constitutional Forum, *One Nation, Diverse Peoples: Building a Just and Democratic Fiji* (Suva: CCF, 1995).

67. Its Web site is at [www.ccf.org.fj](http://www.ccf.org.fj).

68. The same may well be true of some readers. The Queen is head of the Commonwealth. She is head of state of only about seventeen member countries. There is no necessary connection between membership in the Commonwealth and being a monarchy with the Queen as head of state, though it would be highly unlikely for a country to leave the Commonwealth but remain a monarchy.

69. The papers were subsequently published in two volumes, the first dealing with the socioeconomic situation in Fiji and the other presenting foreign experiences. See Brij Lal and Tomasi Vakatora, eds., *Fiji in Transition* (Suva: School of Social and Economic Development of the University of the South Pacific, 1997); Lal and Vakatora, eds., *Fiji and the World* (Suva: School of Social and Economic Development of the University of the South Pacific, 1997).

70. See, e.g., Arend Lijphart, *Democracy in Plural Societies: A Comparative Exploration* (New Haven, CT: Yale University Press, 1977).

71. Authors included Guy Powles, Cheryl Saunders, Anthony J. Regan (Australia), Alex Frame (New Zealand), Rohan Edrisinha (Sri Lanka), M.P. Singh (India), MP Jain, Cyrus Das (Malaysia), Daniel Elazar (Israel), John Darby (United Kingdom), Timothy Sisk (United States), and Michael Reisman (United States).

72. The individual was presumably Sir Len Usher. Lal, who mentions this comment, does not give the name, but knights of the realm with newspaper columns are rare anywhere. See Lal, *Another Way*, p. 165. The Fiji dollar is currently worth about forty-six U.S. cents.

73. *The Fiji Islands: Towards a United Future*, para. 4.13.

74. At least in Lee Kwan Yew, the Fiji government got more than it bargained for. He actually criticized the government's racist policies and told them that Fiji would not progress without the Indians. Yash Ghai was told that he said this in a public talk that was being broadcast live. The government ordered the rest of the broadcast of the speech to be blocked.

75. Personal information.

76. See especially *The Fiji Islands: Towards a United Future*, chap. 2.

77. Personal knowledge of Yash Ghai, who negotiated the arrangement with Mauritius.

78. *Respect and Understanding: Fijian Sovereignty, The Recipe for Peace, Stability and Progress* (Suva: SVT, 1995).

79. Dr. Ahmed Ali, who had been a minister in the Alliance Party Government and was author of a leading book on the *girmit* experience.

80. The Declaration in its final form was adopted in 2007, see [www.un.org/esa/socdev/unpfii/en/declaration.html](http://www.un.org/esa/socdev/unpfii/en/declaration.html).

81. Roderigo Contreras, "Indigenous Interests: The Global Picture," in *Protecting Fijian In-*

terests and Building a Democratic Fiji: A Consultation on Fiji's Constitution Review (Suva: Citizens Constitutional Forum and Conciliation Resources, 1995), p. 47. The NFP sought the views of the leading authority on indigenous people's rights at the UN Center on Human Rights when preparing its submission.

82. See *The Fiji Islands: Towards a United Future*, chap. 3, especially paras. 3.89–3.100. On the role of human rights, including the dialectics between individual and group rights, in constitution making in India, South Africa, Canada, and Fiji, see Yash Ghai, "Universalism and Relativism: Human Rights as a Framework for Negotiating Interethnic Claims," *Cardozo Law Review*, vol. 21, no. 4 (2000), pp. 1095–1140.

83. *Respect and Understanding*, para. 3.1; excerpts are printed in Lal, *Another Way*, p. 143.

84. From Asesela Ravuvu, *The Facade of Democracy: Fijian Struggle for Political Control, 1830–1987* (Suva: Reader Publishing House, 1991). Professor Ravuvu is writing of the concepts of *taukei* and *vulagi* in relation to any village or place, but using the concepts to make a point about incomers generally and specifically Indians (the passage appears in a chapter that covers, among other things, the 1987 coup). The SVT clearly used the concept of *vulagi* in relation to Indians (the next section of the submission being "Fijians' attitudes towards Indians").

85. *Towards Racial Harmony and National Unity*.

86. *Ibid.*, p. 59.

87. For this they cited Yash Ghai and Jill Cottrell, *Heads of State in the Pacific* (Suva: Institute of Pacific Studies of the University of the South Pacific, 1990) on the successful coup doctrine.

88. See Brij Lal and Peter Larmour, eds., *Electoral Systems in Divided Societies: The Fiji Constitution Review* (Canberra and Stockholm: NCDS, Australian National University and IDEA, 1977), which contains articles by, among others, Horowitz, Lal, and Arms.

89. Especially paras. 3.113–19.

90. Rev. Paula Niukula, research director of the Fiji Council of Churches in *Report on Consultation on Fiji's Constitution Review, University of the South Pacific, Suva, Fiji 21–23 April 1994*. (Suva: International Alert and School of Social and Economic Development, 1994), p. 101.

91. Interestingly, when Rabuka introduced the bill he indicated that the JPSC had reached agreement on the request of the GCC (Parliamentary Debates (HR) June 23, 1997, p. 312); one would read that as saying that they had agreed with it. But in the event, what was introduced was weaker.

92. Personal information.

93. Vakatora, *Mangrove Swamps*, p. 114.

94. *Ibid.*, chap. 8.

95. *Ibid.*, chap. 5 (sec. 44).

96. CCF, *One Nation, Diverse Peoples*, p. 43.

97. *Republic of Fiji v. Chandrika Prasad*.

98. The latter was suggested by Krishna Datt (who is, as a Labour politician, not disinterested) in a recent CCF-sponsored discussion following a lecture by Andrew Ladley on multiparty government.

99. Personal comment made to Yash Ghai.

100. See Lal, *Another Way*, pp. 81–82, for early and hostile reactions in some quarters.

101. One of the reasons that the draft constitution and short report of the Constitution of Kenya Review Commission was warmly received in general was that the report was short and written in accessible language, and it and the actual draft constitution were translated into Swahili and published as pullout sections of the daily newspapers.

102. As Yash Ghai relates, "When I was in Fiji in October 2000, the head of the armed forces invited me for consultations, particularly in view of the impending Court of Appeal decision on the legality of the coup. All senior officers were carrying copies of the constitution. During our conversation, I was told that the army had only begun to study it and, to their surprise, found it was an excellent constitution and a better one could not be imagined. But they had not known this when they more or less supported the coup!"

103. See speeches of the prime minister and the attorney general in the aftermath of the 2009 events, available on the government Web site at [www.fiji.gov.fj/publish/cat\\_speeches.shtml](http://www.fiji.gov.fj/publish/cat_speeches.shtml).

104. Jon Fraenkel, "Addendum" to Jon Fraenkel and Stewart Firth, *From Election to Coup in Fiji: The 2006 Campaign and Its Aftermath*, (Canberra: ANU e-Press and Asia Pacific Press, 2007), p. 420. Available at [eprint.anu.edu.au/fiji\\_citation.html](http://eprint.anu.edu.au/fiji_citation.html).

105. Fraenkel, "Addendum," p. 442.