

THE ADMINISTRATION OF JUSTICE

13.1 In this chapter we review most of Chapter VIII of the 1990 Constitution, entitled "The Judicature". We leave until Chapter 17 a discussion of two provisions - section 100, dealing with customary laws and decisions of the Native Lands Commission, and section 122, dealing with Fijian courts.

13.2 The Commission approached its review of Chapter VIII knowing that in 1994 the structure and operation of the judicial system of Fiji had been the subject of a wide-ranging report by the Honourable Sir David Beattie, who was appointed as a Commission of Inquiry to review those matters (the *Beattie Commission*). Some recommendations made by the *Beattie Commission* are already being implemented, but we understand that those which would involve an amendment of the 1990 Constitution have been left aside, for consideration after our report is available.

13.3 This Commission has studied the *Beattie Commission* report thoroughly, so far as it affects the Constitution. In our own recommendations on the Bill of Rights and other matters we take account of relevant recommendations. In this chapter, we discuss and adopt, occasionally with some modifications, all recommendations in the *Beattie Commission* report which affect the provisions of the 1990 Constitution dealing with the courts.

13.4 In our discussion of the policy issues, we have been assisted by a number of helpful submissions. We have not attempted to relate the policy issues to the present text of the Constitution quite as closely as we have in other areas. In constituting the superior courts and dealing with their jurisdiction and powers, a number of technical issues need to be considered. If the Constitution is rewritten, that rewriting will need to involve a consideration of whether there are fundamental provisions now to be found in statute that should be included in the Constitution. Conversely, it may be that some of the present constitutional provisions on matters of detail can safely be left to legislation or to rules of court.

THE JUDICIAL POWER

13.5 In keeping with our recommendations about the legislative power and the executive authority of the Republic of the Fiji Islands, the Commission

considers that the Constitution should vest the judicial power of the Republic in a Supreme Court, a Court of Appeal and a High Court, and such other courts as may be established by law. Each of the named courts should be constituted by the Constitution. Section 101(1) should be rewritten accordingly.

The High Court

13.6 There is no question about the continuing need for the High Court, which is a superior court of general jurisdiction, and exercises appellate and supervisory jurisdiction in respect of the lower courts, tribunals and other persons or bodies exercising quasi-judicial or executive powers. As further discussed below, it also has original and other jurisdiction in respect of constitutional questions.

The Court of Appeal

13.7 The court at present called the “Fiji Court of Appeal” is also essential, empowered as it is to hear appeals from the High Court in both its original and appellate jurisdiction. We consider, however, that, for the sake of consistency with the names of the other superior courts, which do not include the word “Fiji”, it should revert to its original name, the “Court of Appeal”. (The recommendation of the *Beattie Commission* that, in the event that the Court of Appeal becomes the final appellate tribunal, it should continue to be called the Fiji Court of Appeal (Recommendation 13) was, we believe, directed to the point that the court should not be renamed the Supreme Court, rather than to the retention of the word “Fiji”.)

The Supreme Court

13.8 The Supreme Court was created by the 1990 Constitution to provide a second tier appeal system, because the former right of appeal to the Judicial Committee of the Privy Council was no longer available. The *Beattie Commission* looked at whether the Supreme Court should be retained - a question raised expressly in its terms of reference.

13.9 At the time of the inquiry, no sitting of the Supreme Court had been convened. The *Beattie Commission* recommended that

It is desirable to retain the Supreme Court in the short term, monitor its performance and review the need for it after two years.
(Recommendation 3)

Shortly after we began our work, a first sitting of the Supreme Court took place. As well as the Chief Justice, its members include distinguished judges from

Australia and New Zealand.

13.10 More than two years have passed since the presentation of the *Beattie Commission* report. The Supreme Court is operating effectively as the final court of appeal for the Fiji Islands. Without taking a position on the question whether, in the longer term, a second tier of appeal is both affordable and desirable, we consider that the Supreme Court should be retained for the time being. The need for its retention should be considered again when it has heard a sufficient number of cases to allow a study of the number of appeals considered, the grounds for appeal, the outcome on appeal, the time lag involved in hearing a second appeal, and the jurisprudence created by its decisions, as well as the cost involved.

13.11 Like other Pacific Island countries, Fiji is fortunate in being able to obtain the assistance of serving or retired judges from larger neighbouring countries to help service not only the Supreme Court but also the Court of Appeal. If the eventual conclusion in Fiji, as in many other countries in the region, is that a second tier appeal is not justified, there is every reason to believe that judges of the same high calibre as those now serving on the Supreme Court would be available to sit in a permanent Court of Appeal.

The Magistrates' Courts

13.12 The only provision in the Constitution expressly referring to the Magistrates' Courts is that contained in section 124 and the Second Schedule providing for the appointment of Magistrates by the Judicial and Legal Services Commission. The *Beattie Commission* recommended that the Magistrates' Courts should retain their basic framework as courts of summary jurisdiction (Recommendation 38). It recommended the creation of a Family Division of the Magistrates' Court, to be called the Family Court (Recommendations 55-66), the abolition of the different classes of magistrate (Recommendation 51), and the need for all magistrates to be legally qualified with at least five years practice since qualification (Recommendation 52). The Commission also recommended that, when the magistrates have the confidence of judges, the Law Society and the public, an increase in status to that of District Court Judge and an increase in jurisdiction should be considered (Recommendation 53).

13.13 Submissions were made to this Commission that the Magistrates' Courts should be recognised in the Constitution. Although we are aware that the Magistrates' Courts are the indispensable workhorses through which justice is administered in the Fiji Islands, constitutions do not usually constitute courts of summary jurisdiction. That is left to the legislature. Certainly, it would be

premature to give constitutional recognition to the Magistrates' Courts before they are ready to be given the title and status of District Courts, as contemplated in the *Beattie Commission* report. However, our recommendations in the next section of this chapter about the independence of the courts will apply to the Magistrates' Courts in the same way as they apply to all other courts, whether or not they are constituted by the Constitution.

Other courts

13.14 Parliament's power to establish other courts by law should be retained. Sometimes it will be thought that particular matters, such as those affecting relationships within the family, or between workers and employers, should be dealt with by a specialised court which has the necessary expertise. The Bill of Rights of 1688 makes it clear that Parliament's power to establish courts is exclusive. The purported creation of courts by the executive was declared "illegal and pernicious".

RECOMMENDATIONS

- 407. The Constitution should vest the judicial power of the Republic of the Fiji Islands in a Supreme Court, a Court of Appeal and a High Court, and such other courts as may be established by law.**
- 408. The court at present called the "Fiji Court of Appeal" should be renamed the "Court of Appeal".**
- 409. The Supreme Court should be retained for the time being. The need for its retention should be considered again when it has heard a sufficient number of cases over a period to allow a study of the number of appeals considered, the grounds for appeal, the outcome on appeal, the time lag involved in hearing a second appeal, and the jurisprudence created by its decisions, as well as the cost involved.**
- 410. The Constitution should constitute the Supreme Court, the Court of Appeal and the High Court. It would be premature to give constitutional recognition to the Magistrates' Courts before they are ready to be given the title and status of District Courts, as contemplated in the *Beattie Commission* report.**
- 411. It should empower Parliament to create other courts by Act.**

THE INDEPENDENCE OF THE COURTS

13.15 A number of submissions urged that the independence of the courts should be spelt out in the Constitution. In fact, the 1990 Constitution, unlike its predecessor, makes express provision for this purpose. Section 101(3) states categorically:

Every court shall in the exercise of its judicial functions be independent of the executive or any other authority.

The Constitution should continue to affirm the independence of the courts. It should do so in slightly wider terms by providing that the judicial power of the Republic of the Fiji Islands is independent of the legislative power and the executive authority of the Republic. There are other ways, too, in which the independence of the courts should continue to be protected, and in some cases enhanced, by the Constitution.

Judicial oath

13.16 As now, judges should be required to take the judicial oath or affirmation. We suggest that, in keeping with our earlier recommendation about the form of the oath of allegiance, its form should be slightly revised to read as follows:

I, _____, do swear [or solemnly affirm] that I will well and truly serve the Republic of the Fiji Islands, in the office of _____. I will in all things uphold the Constitution; and I will do right to all manner of people in accordance with the laws and usages of the Republic, without fear or favour, affection or ill will. So help me God. [To be omitted in affirmation.]

The protection of judicial salaries

13.17 Section 110 provides that “[t]he remuneration and other terms and conditions of a judge shall not be altered to his disadvantage after his appointment”. Its substance is repeated in section 146. The provisions under which judicial salaries, among others, are required to be prescribed by law and are charged on the Consolidated Fund are discussed in Chapter 16. They provide a constitutional assurance that the remuneration of judges is not at risk, no matter what decisions they may give in respect of the state, its institutions and officers. These safeguards are universally recognised as providing an important guarantee of judicial independence. Their substance should be retained.

Judicial office not to be equated with other “public office”

13.18 A source of considerable confusion about the status of the judges under the Constitution is the provision in section 150:

In this Constitution the expression “public office” shall be construed -

- (a) as including the office of any judge of the High Court, the Fiji Court of Appeal or the Supreme Court, and the office of member of any other court of law in Fiji, unless the context otherwise requires.

Despite the qualification, “unless the context otherwise requires”, the provision creates the general impression that the judges are generally to be equated with civil servants and other officers of the executive branch of government. The *Beattie Commission* recommended that, insofar as the Constitution may imply that the judiciary and/or the magistracy are public officers or servants, its review should result in wording that reinforces the principles of the independence of the judiciary and the separation of powers (Recommendation 137). We endorse this recommendation. In any drafting provision applying to all persons in the service of the state, care should be taken to avoid referring to members of the judiciary in a way that appears to equate them with persons serving in the executive branch of government.

Other measures enhancing judicial independence

13.19 In later sections of this chapter we endorse the recommendation of the *Beattie Commission* that the Judicial and Legal Services Commission be reconstituted to deal only with judicial appointments, and become responsible for judicial study and refresher programmes, and deal in the first instance with complaints about judicial officers. We propose that the new Judicial Service Commission should have a clearer responsibility for recommending persons for appointment as judges of the superior courts. The executive should also have a clear but limited role in the making of those judicial appointments, and a Select Committee of the Bose Lawa should have the opportunity to approve recommended appointments before they are made.

13.20 We also endorse the proposal made by the *Beattie Commission* for a separate Courts Administration Department. Increasingly, the way in which the courts are administered and resourced is being recognised as an important element in ensuring their independence. Finally, we propose that a judge of a superior court should be removable only by Parliament. Taken together, all these safeguards

will strengthen the independence of the courts under the Constitution and in the eyes of members of the public.

RECOMMENDATIONS

412. **The Constitution should provide that the judicial power of the Republic of the Fiji Islands is independent of the legislative power and the executive authority of the Republic.**
413. **Judges should be required to take the judicial oath or affirmation in the following slightly revised form:**
- I, _____, do swear [or solemnly affirm] that I will well and truly serve the Republic of the Fiji Islands, in the office of _____. I will in all things uphold the Constitution; and I will do right to all manner of people in accordance with the laws and usages of the Republic, without fear or favour, affection or ill will. So help me God. [To be omitted in affirmation.]**
414. **The substance of the provisions which prohibit the remuneration and other terms and conditions of a judge from being altered after appointment to the judge's disadvantage, and require judicial salaries to be prescribed by law and charged on the Consolidated Fund, should be retained.**
415. **In drafting any provision of the Constitution applying to all persons in the service of the state, care should be taken to avoid referring to members of the judiciary in a way that appears to equate them with persons serving in the executive branch of government.**

JURISDICTION OF THE COURTS

13.21 Broadly speaking, the term "jurisdiction" is used to describe how the judicial power is shared among the country's various courts. The Constitution should continue to embody the basic common law rule enunciated in section 101(2) that a court has only such jurisdiction as is given to it by the Constitution or by law. We have already seen that no court can be created except by law. Similarly, the executive has no power to give a court jurisdiction to hear and determine particular kinds of cases, or grant particular remedies or impose particular punishments. All those things must be prescribed by Parliament.

13.22 Jurisdiction may be original, appellate, supervisory or advisory. The hearing of all cases involving a dispute between parties must take place in a court

with original jurisdiction. As the name suggests, appellate jurisdiction involves the reopening of a matter decided by a lower court. The appellate court may be empowered to overturn the decision of the lower court on the ground that it was wrong in law, or on the facts, or both. Supervisory jurisdiction involves the review of whether a subordinate court or tribunal or other body or person invested with discretionary powers should or should not exercise its powers or has exceeded its powers or failed to exercise them in accordance with the law or the rules of natural justice. Advisory jurisdiction involves the reference of a question to a court otherwise than in the context of a dispute, in order to obtain the court's opinion.

13.23 The jurisdiction of different courts is often overlapping. It may be based on a number of variables, such as the kinds of claims that may be brought in the court concerned, the kinds of remedies the court may grant, the kinds of people who may bring a claim or against whom they may bring it. It follows that, except where it is desired to confer exclusive jurisdiction on a particular court for a particular purpose, references in the Constitution to the jurisdiction of a court should be seen as descriptive rather than prescriptive. Subject to the Constitution, Parliament should be free to vary the allocation of jurisdiction as among the different courts.

Jurisdiction of the High Court

Original jurisdiction

13.24 Under section 111(1), the High Court has unlimited original jurisdiction to hear and determine any civil or criminal proceeding. It may be given other jurisdiction and powers by the Constitution or by law. This provision should be retained. It allows the High Court to exercise jurisdiction in all matters not assigned to some other court by Parliament.

13.25 Section 112 is a transitional provision vesting in the High Court, which was first created by decree, the jurisdiction and powers vested by the law in force immediately before 5 December 1987 in the former court of unlimited jurisdiction, the Supreme Court which was constituted by the 1970 Constitution. The Supreme Court Act (Cap. 13) conferred various types of jurisdiction on the former Supreme Court by reference to the powers of corresponding courts in England.

13.26 The *Beattie Commission* recommended that the conferment of jurisdiction on the High Court by reference to English law and practice should be discontinued and replaced by modern local legislation. (Recommendation 17). The requisite jurisdiction should be conferred directly on the High Court by a new High Court

Act, obviating the need for the re-enactment of section 112. If that cannot be done by the time that it is desired to put new constitutional arrangements in place, the substance of section 112 should be moved to a separate chapter of the Constitution containing transitional provisions.

Jurisdiction in constitutional questions

13.27 Section 113 gives persons who claim that any provision of the Constitution other than a provision of the Bill of Rights has been contravened, and that their interests are being or are likely to be affected, the right to apply to the High Court for a declaration as to whether or not there has been a contravention. If the Court declares that there has been a contravention, the person may apply for and be granted relief. This provision corresponds to the High Court's original jurisdiction under section 19 to hear and determine applications and questions concerning the contravention of the Bill of Rights, discussed in Chapter 7. Its substance should be retained.

13.28 The drafting of the section needs to be examined, taking account of the issues raised in discussing sections 19 and 46 among others. In particular, it should be made clear that there is no power under this provision to raise issues which are to be determined exclusively under an election petition or a proceeding alleging that a seat of a member of Parliament has become vacant. The section should not be made subject to other sections of the Constitution except in those cases where a limitation on the ability to call a matter in question in the courts concerns an alleged contravention of the Constitution itself.

13.29 Section 114(2) and (3) require a subordinate court to refer to the High Court any substantial question of law as to the interpretation of any provision of the Constitution other than the Bill of Rights. The subordinate court is required to dispose of the matter in accordance with the decision of the High Court or any higher court to which the matter is referred on appeal. These provisions, too, should be retained.

13.30 The jurisdiction conferred on the High Court in respect of constitutional questions, including questions about the contravention of the Bill of Rights, should be seen as an exclusive code. Parliament's power to create courts and confer jurisdiction upon them would not permit any modification of the comprehensive provision made by the Constitution for the disposition of constitutional questions and other questions in respect of which jurisdiction is expressly conferred by the Constitution.

Appellate and supervisory jurisdiction

13.31 Section 111(2) gives the High Court

jurisdiction to hear and determine appeals in both civil and criminal matters from courts subordinate to it as may be conferred on it by this Constitution or any other law.

This wording, which follows that of the 1970 Constitution, is ambiguous. It is not clear whether the appellate jurisdiction is to be conferred by law, or the right of appeal, or both. The Constitution should confer appellate jurisdiction on the High Court to hear and determine appeals from courts subordinate to it in those cases where a right of appeal is conferred by law.

13.32 Section 114(1) gives the High Court jurisdiction to supervise any civil or criminal proceedings before any subordinate court. Its substance should be retained.

Jurisdiction of the Court of Appeal

13.33 The jurisdiction of the Fiji Court of Appeal under the 1990 Constitution is not set out expressly in the Constitution, but, under section 116, it “shall include the jurisdiction and powers vested in the Court of Appeal under the laws existing prior to December 5, 1987 ...”. The Constitution should expressly confer on the Court of Appeal jurisdiction in respect of appeals from decisions of the High Court.

13.34 To the extent that the jurisdiction and powers of the Court of Appeal are not fully set out in the Constitution, it should be described as having “such other jurisdiction and powers as are conferred by law”. A transitional provision should provide that the renamed court is the same court as the Fiji Court of Appeal. It should be noted that the jurisdiction of the Fiji Court of Appeal is not wholly appellate. Under section 37 of the Court of Appeal Act (Cap. 12), that court has power to determine a question of law of general public importance coming before the High Court and reserved by that court for the consideration of the Fiji Court of Appeal.

Jurisdiction of the Supreme Court

13.35 The appellate jurisdiction of the Supreme Court is provided for in section 118. Because there is no statute governing the functioning of the Supreme Court, it is more detailed than the constitutional provisions conferring jurisdiction on other courts. The Constitution should continue to confer on the Supreme Court

exclusive jurisdiction to determine finally any appeal from a final decision or order of the Court of Appeal.

13.36 The question whether the Constitution should continue to articulate the doctrine of precedent as it applies to the Supreme Court should be examined in consultation with the Solicitor-General and the judiciary, as should the power of the Supreme Court to review its own decisions. We are not in a position to comment on the legal implications. The Constitution should continue to empower the President of the Supreme Court to make rules of court.

13.37 In Chapter 7 we referred to the advisory jurisdiction of the Supreme Court conferred by section 120. The President, acting on the advice of the Cabinet or a Minister, may,

in the public interest, refer to the Supreme Court for its opinion any question as to the effect of any provision of this Constitution which has arisen or appears likely to arise

The Supreme Court is required to give its opinion on any question referred to it in open court.

13.38 This useful jurisdiction should be retained but not over-used. The tradition of the common law is that the courts give decisions in the context of particular disputes, and have the benefit of the arguments made by opposing counsel under the adversary system. Although the Attorney-General and the Solicitor-General would appear on the hearing of a question referred to the Supreme Court for its opinion, this does not give the court the same opportunity to hear opposing arguments on behalf of persons with an interest.

13.39 Moreover, experience shows that, in interpreting a constitution that is supreme law, a country's highest court needs to have ways of not deciding issues unless they are essential to the disposition of the particular case. The court can give a provision a meaning and effect in the context of a particular fact situation. It does not have to consider how the provision might apply in different circumstances that are not before the court. This means that the law of the Constitution can be developed cautiously and realistically, and that its application can change over time, as discussed in Chapter 5. It may be harder for the Supreme Court to observe this doctrine of judicial restraint if it is required to give advisory opinions on a wide range of matters.

RECOMMENDATIONS

416. **The Constitution should continue to provide that a court has only such jurisdiction as is given to it by the Constitution or by law.**
417. **The High Court should continue to have unlimited original jurisdiction to hear and determine any civil or criminal proceeding and such other jurisdiction and powers as are conferred on it by the Constitution or by law.**
418. **The jurisdiction conferred on the High Court by the transitional provision contained in section 112 should be conferred directly on the High Court by a new High Court Act. As recommended by the *Beattie Commission*, that Act should not describe the jurisdiction by reference to English law and practice, but should use modern terms. If that cannot be done by the time that it is desired to put new constitutional arrangements in place, the substance of section 112 should be moved to a separate chapter of the Constitution containing transitional provisions.**
419. **The Constitution should retain the substance of section 113 which gives persons who claim that any provision of the Constitution other than a provision of the Bill of Rights has been contravened, and that his interests are being or are likely to be affected, the right to apply to the High Court for a declaration and relief. In exercising this right, there should be no power to raise issues which are to be determined exclusively under an election petition or a proceeding alleging that a seat of a member of Parliament has become vacant.**
420. **The substance of section 114(2) and (3) requiring a subordinate court to refer to the High Court any substantial question of law as to the interpretation of any provision of the Constitution other than the Bill of Rights should be retained.**
421. **The Constitution should confer appellate jurisdiction on the High Court to hear and determine appeals from courts subordinate to it in those cases where a right of appeal is conferred by law.**

422. **The substance of section 114(1) giving the High Court jurisdiction to supervise any civil or criminal proceedings before any subordinate court should be retained.**
423. **The Constitution should expressly confer on the Court of Appeal jurisdiction in respect of appeals from decisions of the High Court and such other jurisdiction and powers as are conferred by law. A transitional provision should provide that the renamed court is the same court as the Fiji Court of Appeal.**
424. **The Constitution should continue to confer on the Supreme Court exclusive jurisdiction to determine finally any appeal from a final decision or order of the Court of Appeal.**
425. **The question whether the Constitution should continue to articulate the doctrine of precedent as it applies to the Supreme Court should be examined in consultation with the Solicitor-General and the judiciary, as should the power of the Supreme Court to review its own decisions. The Constitution should continue to empower the President of the Supreme Court to make rules of court.**
426. **The Constitution should continue to empower the President, acting on the advice of the Cabinet or a Minister, to refer questions as to the effect of any provision of the Constitution to the Supreme Court for its opinion. The power should not be over-used.**

CONTEMPT OF COURT

13.40 Section 121 provides that the superior courts have power to punish persons for contempt of court in accordance with the law. The law relating to contempt of court has developed over the centuries as a means by which the courts may act to prevent or punish conduct which tends to obstruct, prejudice or abuse the administration of justice, either in relation to a particular case or generally. The law relating to contempt has to draw the line between protecting the judicial system against improper attack and recognising that the courts operate in a democracy and must be subject to criticism.

13.41 The constitutional provision allowing the courts to punish for contempt "in accordance with the law" makes it clear that the power is subject to the Bill of Rights with its guarantees of freedom of expression and personal liberty. It would

also allow Parliament to intervene if necessary, to control its exercise. On this basis, the provision in section 121 should be retained.

RECOMMENDATION

- 427. The Constitution should continue to provide that the superior courts have power to punish persons for contempt of court in accordance with the law.**

RIGHTS OF APPEAL

13.42 The Constitution does not deal comprehensively with rights of appeal. That is understandable, in view of the fact that Parliament may create courts and confer jurisdiction upon existing courts and other courts created by law. The question is how far the Constitution should go in conferring rights of appeal on the one hand or restricting them on the other.

Appeals to the High Court and Court of Appeal

13.43 We have already referred to the fact that rights of appeal from subordinate courts to the High Court in the exercise of its appellate jurisdiction are those conferred by law. It should also be left to Parliament to prescribe the rights of appeal from the High Court to the Court of Appeal in the exercise of its original civil and criminal jurisdiction and its appellate jurisdiction, except in those cases where a constitutional question is involved.

13.44 That would be the effect of section 115(1)(d) of the Constitution, were it not for the cross-reference in section 115(1)(b) to section 111 of the Constitution. That appears to be a mistake. The reference should have been to section 113. At present, unless a court is prepared to rectify the mistake, there is no right of appeal under the Constitution in respect of decisions made under section 113. That section gives the High Court power to determine whether any provision of the Constitution, other than the Bill of Rights, has been contravened.

13.45 The Constitution itself should provide that appeals from final decisions of the High Court lie to the Court of Appeal as of right

- in the exercise of its original or appellate jurisdiction, on questions as to the interpretation of the Constitution;
- in the exercise of its original jurisdiction to determine claims that the Bill of Rights or other provisions of the Constitution have been contravened; and

- in the exercise of its jurisdiction to determine whether a taking of property is constitutional, and if so, the amount of compensation (if any) that is payable.

It should also provide that, as of right or with leave, appeals shall lie in such other cases as may be provided by law, consistently with the Constitution. We have recommended the inclusion in the Bill of Rights of a provision that every person convicted of a criminal offence has the right to have recourse by way of appeal to or review by a higher court.

13.46 On the other hand, we have recommended that there should be no right to appeal against a determination of the High Court on an election petition or a claim that the seat of a member of Parliament has been vacated. It is in the public interest that these matters be determined quickly and finally by the High Court.

Appeals to the Supreme Court

13.47 Section 117(1) of the Constitution provides a right of appeal to the Supreme Court

- (a) from final decisions in any appeal to the Fiji Court of Appeal on any constitutional questions;
- (b) from final decisions in any civil proceedings where the matter in dispute is of the value of 20,000 dollars or upwards or where the appeal involves, directly or indirectly, a claim to or a question respecting property or a right of the value of 20,000 dollars or upwards; and
- (c) in such other cases as may be prescribed by law.

Other provisions permit appeals to be brought in certain cases with the “leave” or the “special leave” of the Supreme Court.

13.48 By inference, appeals lie as of right in the cases referred to in section 117(1). The reference to “constitutional questions” in section 117(1)(a) is therefore confusing, as section 115(3) provides that, on the specific constitutional, and other, questions referred to in that section, appeals lie to the Supreme Court subject to the special leave of the Supreme Court.

13.49 On the model of the constitutional provisions originally applying to appeals to the Judicial Committee of the Privy Council, section 117(2) provided for appeals to the Supreme Court with the leave of that court in the following cases:

- from decisions in any civil proceedings where in the opinion of the court the question involved in the appeal is one that, by reason of its great general or public importance or otherwise, ought to be submitted to the Supreme Court; and
- in such other cases as may be prescribed by law.

Section 117(3) preserves the power of the Supreme Court to grant special leave to appeal from the decision of any court in any civil or criminal matter.

13.50 The *Beattie Commission*, after considering submissions from the Chief Justice, the President of the Court of Appeal and the Fiji Law Society, recommended that there should be no appeals to the Supreme Court as of right, as there are now. Appeals should lie only by leave as follows:

- by leave of the Court of Appeal on a question certified by that court to be of great general or public importance; and
- by special leave of the Supreme Court in any criminal or civil matter (Recommendation 5).

13.51 This Commission endorses that recommendation. The provision that the Court of Appeal may grant leave to appeal on a question certified by that court to be of great general or public importance will encourage it, in its judgments, to recognise the significance of particular cases coming before it. Having heard the case on appeal, the Court of Appeal is in the best position to consider an application for leave to appeal on the ground that the case is of “great general or public importance”.

13.52 The residual power of the Supreme Court to grant special leave to appeal to the Supreme Court from a decision of the Court of Appeal in any criminal or civil matter would be needed only when the Court of Appeal has refused leave to appeal. We consider that this power would rarely need to be exercised. However, it is an important safeguard which will allow allegations of a miscarriage of justice to come before the Supreme Court.

13.53 We expect, too, that, if the Bill of Rights is made more accessible to the people of Fiji, there will be more appeals arising out of allegations that its provisions have been contravened. Such allegations are likely to be made not only in the context of proceedings brought to vindicate constitutional rights, but also in the course of other proceedings. Although they may not raise issues of “great general

or public importance”, there may nevertheless be good reason to allow the Supreme Court to consider them, at least until the jurisprudence has become well-developed.

RECOMMENDATIONS

428. The Constitution should provide that appeals lie to the Court of Appeal as of right from final decisions of the High Court

- (a) in the exercise of its original or appellate jurisdiction, on questions as to the interpretation of the Constitution;
- (b) in the exercise of its original jurisdiction to determine claims that the Bill of Rights or other provisions of the Constitution have been contravened; and
- (c) in the exercise of its jurisdiction to determine whether a taking of property is constitutional, and if so, the amount of compensation (if any) that is payable.

It should also provide that appeals shall lie, as of right or with leave, in such other cases as may be provided by law, consistently with the Constitution.

429. As recommended by the *Beattie Commission*, the Constitution should provide that appeals from the Court of Appeal to the Supreme Court should not lie as of right. Such appeals should lie only

- (a) by leave of the Court of Appeal on a question certified by that court to be of great general or public importance; and
- (b) by special leave of the Supreme Court in any criminal or civil matter.

COMPOSITION OF THE COURTS

13.54 The principle of the separation of powers requires the composition of the courts to be prescribed in the Constitution, subject only to the power of the legislature or the executive to increase the number of judges if the workload of a particular court increases. It would be potentially dangerous if the legislature could reduce the number of judges. Against that background, we consider the present provisions of the Constitution and the recommendations of the *Beattie Commission*.

Composition of the High Court

13.55 Section 102 of the Constitution provides that

The judges of the High Court shall be the Chief Justice and not more than eight puisne judges or such other number as Parliament may prescribe.

The *Beattie Commission* recommended that

[p]ursuant to the Prescription of Judges Act 1971, the numbers of judges of the High Court should be increased by one to nine judges plus the Chief Justice; [and] the maximum permitted number should be increased to twelve judges apart from the Chief Justice (Recommendation 16).

13.56 We accept the substance of that recommendation but, for the reasons mentioned, consider that the Constitution should provide that the High Court consists of the Chief Justice and not fewer than nine puisne judges or such greater number of puisne judges as Parliament may prescribe.

Masters of the High Court

13.57 The *Beattie Commission* considered a submission of the Chief Justice that there was a need for a person who could perform judicial work in chambers, issue directions on practice and procedure and deal with many interlocutory matters. It therefore recommended that the office of Master of the High Court should be created, and that a Master should possess the same qualifications as a High Court judge (Recommendations 35 and 37). This Commission therefore proposes that provision should be made in the Constitution for the appointment of not more than two Masters of the High Court or such greater number as Parliament may prescribe. Their jurisdiction and powers should be prescribed by Act.

Composition of the Court of Appeal

13.58 Under section 106(1) of the Constitution, the Fiji Court of Appeal consists of a Judge, other than the Chief Justice, who is the President of that Court; such Justices of Appeal as may be appointed by the President after consultation with the Judicial and Legal Services Commission; and the puisne judges of the High Court. A number of questions arise.

13.59 The first is the role of the Chief Justice. For historical reasons, the office of Chief Justice was originally situated in the High Court rather than the Court of Appeal. The *Beattie Commission* considered that it would be more appropriate for the Chief Justice to preside in the country's highest court or courts,

assuming that they sit continuously, but thought that neither the Supreme Court nor the Court of Appeal would do so for some time to come. Therefore the Chief Justice should remain a member of the High Court. He should also continue to be the President of the Supreme Court.

13.60 The *Beattie Commission* recommended, however, that the Constitution should be amended to allow the Chief Justice to sit in the Court of Appeal and preside over it when he sits (Recommendation 14). This Commission considers, first, that such an arrangement would involve too great an aggregation of power in the one individual. It would also compound the problem of the same persons sitting as members of all three superior courts. The requirement for a judge who has participated at an earlier stage of a particular case to disqualify himself or herself from sitting on an appeal is well understood, though it should be reinserted in the Constitution as a general principle. Even so, such a provision does not dispose of the problems that can arise if all or most judges sit both at first instance and on appeal.

13.61 Perceptions may arise of a certain unwillingness to overturn the decisions of judges who may themselves sit on appeals from decisions of the judges concerned. Most developing countries have to accept such an arrangement, at least to some extent, because they do not have the resources to do otherwise. Nevertheless, we consider that the composition of both the Court of Appeal and of the Supreme Court, as far as possible, should continue to ensure that there is not a complete overlap between their membership and that of the High Court.

13.62 The provision for appointing Justices of Appeal gives the power to determine the *number* of appointments as well as the *appointing power* to the President, after consultation with the Judicial and Legal Services Commission. Although, in principle, the number of Justices of Appeal should be specified by the Constitution or by law, an open-ended provision suits the circumstances of the Fiji Islands. The Justices of Appeal, other than the President of the Court of Appeal, are judges or former judges from other countries who are appointed on contract. It is necessary to have a moderately large pool, because a particular Justice of Appeal will not necessarily be available on all occasions when the Court of Appeal is sitting. Three judges are normally required to constitute the Court of Appeal, but, if the matter being considered on appeal is particularly important, the President of the Court is likely to constitute a Court of at least five members.

13.63 In the light of these considerations, we consider that, as now, the Chief Justice should not be a member of the Court of Appeal. We propose that the Constitution should provide that the Court of Appeal consists of:

- a Justice of Appeal who is appointed to be the President of the Court of Appeal;
- such other Justices of Appeal as are appointed to be members of that Court; and
- the puisne judges of the High Court.

Composition of the Supreme Court

13.64 We propose no change in the present composition of the Supreme Court. It should consist of:

- the Chief Justice, who shall be the President of the Supreme Court;
- such Justices of the Supreme Court as are appointed to be members of that Court; and
- the Justices of Appeal, other than the President of the Court of Appeal.

RECOMMENDATIONS

- 430. The Constitution should provide that the High Court consists of the Chief Justice and not fewer than nine puisne judges or such greater number of puisne judges as Parliament may prescribe.**
- 431. It should provide that there may be not more than two Masters of the High Court, or such greater number as Parliament may prescribe. They should have the jurisdiction and powers conferred by Act.**
- 432. The requirement for a judge who has participated at an earlier stage of a case to disqualify himself or herself from sitting on an appeal should be reinserted in the Constitution as a general principle.**
- 433. As now, the Chief Justice should not be a member of the Court of Appeal. The Constitution should provide that the Court of Appeal consists of:**
 - (a) a Justice of Appeal who is appointed to be the President of the Court of Appeal;**
 - (b) such other Justices of Appeal as are appointed to be members of that Court; and**
 - (c) the puisne judges of the High Court.**

- 434. The Constitution should provide that the Supreme Court consists of:**
- (a) the Chief Justice, who shall be the President of the Supreme Court;**
 - (b) such Justices of the Supreme Court as are appointed to be members of that Court; and**
 - (c) the Justices of Appeal, other than the President of the Court of Appeal.**

THE QUALIFICATIONS OF JUDGES

13.65 In this and the following sections of this chapter we deal with the qualifications, appointment and tenure of office of all judges of the superior courts, who comprise the Chief Justice and the puisne judges of the High Court, Masters of the High Court, acting judges of the High Court, Justices of Appeal and Justices of the Supreme Court. Generally speaking, the rules should be uniform, but we propose special provisions for particular offices whenever that is necessary.

13.66 Under section 103(3) of the Constitution, a person is not qualified to be appointed as a judge of the High Court unless:

- (a) he holds, or has held, high judicial office in Fiji or in any other country that may be prescribed by Parliament; or
- (b) he is qualified to practise as a barrister or solicitor in such court or a court of equivalent jurisdiction and has been so qualified for not less than five years.

Sections 106(2) and 107(2) apply the same requirements to Justices of Appeal and Justices of the Supreme Court.

13.67 The *Beattie Commission* recommended that judges of the High Court should have at least seven years practice after qualification (recommendation 34). By "practice", that Commission meant actual experience in legal work, rather than being qualified to practise. However, it noted that "practice" should not mean continuous and active practice because that might exclude otherwise suitable people, although it thought it would be very rare for anyone to be appointed who had not actively been in practice. The definition should be wide enough to include state employees, for example the Solicitor-General and Director of Public Prosecutions, Legal Defenders, legally qualified registrars, and academic lawyers who also practise in the Courts.

13.68 On an analogy with section 103(4), “practice” would include a period of service as a judicial officer. The *Beattie Commission* considered that there should be no institutional procedure for promotion from a Magistrate’s Court to the High Court bench, but noted that magistrates of high ability may be suitable for appointment to the High Court.

13.69 This Commission endorses the recommendation of the *Beattie Commission* that a person should be qualified to be appointed as a judge of a superior court only if he or she has had not less than seven years’ practice as a barrister or solicitor in Fiji or in another country prescribed by law. The term “practice” should be interpreted as discussed in paragraphs 66 and 67. A person should continue to be qualified for such an appointment if he or she holds, or has held, high judicial office in Fiji or in any other country prescribed by law.

RECOMMENDATION

435. The Constitution should provide that a person is not qualified to be appointed as a judge of the High Court unless that person:

- (a) holds, or has held, high judicial office in Fiji or in any other country that may be prescribed by law; or
- (b) has had not less than seven years’ practice as a barrister or solicitor in Fiji or in another country prescribed by law. The term “practice” should be interpreted as discussed in paragraphs 13.66 and 13.67.

THE APPOINTMENT OF JUDGES

13.70 The report of the *Beattie Commission* noted that, at least since independence in 1970, all appointments to the judiciary (except that of the Chief Justice) and to government legal services had been made by an independent commission, insulated from both executive and legislative control. The *Beattie Commission* contrasted the system with that in the United Kingdom, where judicial appointments are made on the advice of Ministers, and the United States, where the executive’s nominees are subject to scrutiny and confirmation by the legislature.

13.71 Like the *Beattie Commission*, this Commission considers the recommendation of high judicial appointments by an independent commission is a vital safeguard. However, we believe that the Constitution should recognise that the executive and the legislature also have a legitimate interest in judicial appointments to the superior courts. We steer a middle course between the arrangements in the United Kingdom and the United States.

A Judicial Service Commission

13.72 The *Beattie Commission* proposed the creation of a Judicial Commission which would deal exclusively with the appointment of judicial officers and other matters affecting the judiciary. The genesis of the proposal for a separate Commission seems to have been some disquiet within Government about the involvement in the appointment of government legal officers of practising members of the bar, in their capacity as members of the Judicial and Legal Services Commission. We emphasise the need to mark out more clearly that the judicial branch of government is separate from, and independent of, the executive branch. The same Commission should not be responsible for recommending the appointment of members of the two branches.

13.73 This Commission shares the view that the Constitution should provide for a service commission dealing exclusively with the judiciary. We consider that it should be called the Judicial Service Commission, rather than the Judicial Commission, to indicate that its functions are broadly comparable with those of the Public Service Commission and the proposed Disciplined Services Commission. The existing appointment powers of the Judicial and Legal Services Commission should be redistributed. In Chapter 12 we recommended that the Solicitor-General and the Director of Public Prosecutions should be appointed by the proposed Constitutional Offices Commission. In Chapter 14 we propose that other legal officers should be appointed by the Public Service Commission.

Composition of the Judicial Service Commission

13.74 The *Beattie Commission* recommended a Judicial Commission with the following membership:

- The Chief Justice as Chairman
- The Chairman of the Public Service Commission
- The Solicitor-General
- The Secretary for Justice (if a different person from the Solicitor-General)
- The President of the Fiji Law Society (or a representative of the Law Society)
- One other lay member to be appointed by the President of Fiji after consulting the Chief Justice. (Recommendation 107).

13.75 This Commission believes that the Chief Justice should be the Chairperson of the Judicial Service Commission, except when the office of Chief Justice is vacant, a matter we deal with below. The Chairman of the Public Service Commission should also be a member. The holder of that office, who is usually not a lawyer, can bring to the selection of judges experience in the making of senior appointments, a wide perspective and an ability to take account of the career interests and abilities of eligible members of the government legal service and the competing demands for their services.

13.76 The *Beattie Commission* recommended the inclusion in the Judicial Commission of the Solicitor-General and the Secretary for Justice (if a different person from the Solicitor-General) to take account of the need for the executive to have an input. We consider that it is inappropriate for persons in the service of the state to be members of service commissions, and that it is not desirable for the Solicitor-General, in particular, to be involved in the selection of the judges before whom he or she may appear.

13.77 We propose that the interest of the executive in judicial appointments should be met by requiring the Judicial Service Commission to make its recommendations in the first instance to the Minister responsible for the Justice portfolio. That will give the Minister the opportunity to either concur in the recommendation or ask the Judicial Service Commission to reconsider. There will no need for the executive to be represented in the Judicial Service Commission itself.

13.78 The *Beattie Commission* proposed also the inclusion of the President of the Fiji Law Society or a member nominated by the Law Society, to allow input from the legal profession, and a lay member, to represent the public interest. We received submissions on the inclusion both of persons representing the legal profession and of lay members.

13.79 Opinion was divided about the inclusion of members of the practising profession. As most of its members are in active practice before the courts, some saw its representation on the body which selects the members of the judiciary as undesirable. We share that view. We therefore propose that the third member of the Judicial Service Commission should be a person who is qualified to be a judge of the High Court but is not in active practice in Fiji. Persons in this category would include someone who has retired from practice or is teaching law or is qualified but not practising. That will ensure an input from a legal professional perspective, but would not allow the perception of the Judicial Service Commission's independence to be affected by what might be seen as a conflict of interest.

13.80 As the submissions indicated, there is a public interest in the appointment of members of the judiciary. The *Beattie Commission* noted that the inclusion of a lay member in the recommending commission would help ensure that the judicial system is responsive to the needs of the wider community and that appointments are made regardless of sex, ethnic origin or religion. We accept the validity of these objectives. However, we prefer to keep the number of members of the Judicial Service Commission at three, in line with the membership of the other service commissions, and to provide for the public interest in judicial appointments to be taken into account in another way.

13.81 That interest should be met by requiring the Minister responsible for Justice to place recommendations for appointments to the superior courts before the Select Committee of the Bose Lawa responsible for matters affecting the administration of justice. Only if the Committee approves the recommendation will the Minister be able to advise the President to make the formal appointment. If it does not approve the recommendation, the Judicial Service Commission will have to find another candidate.

13.82 We do not envisage the Select Committee conducting the searching inquiry into the personal philosophy and way of life of candidates for judicial office of the kind now common in the United States. Nor do we think that the Committee would often have reason to withhold its approval. But its scrutiny of proposed appointments to the superior courts is a valuable safeguard. The Committee would also keep its eye on the range and quality of appointments to the Magistrates' Courts.

13.83 During our visit to South Africa we were impressed by the open and contestable method of making appointments to that country's highest courts, including the Constitutional Court. One of its judges told us that he had found it strange to appear before the public hearing by the selection panel, and answer questions about what he thought he could bring to that court. On reflection, he had concluded that there was no reason why he should not have been required to answer that question publicly.

13.84 We do not propose a similar procedure here, but wish to show that the traditional system of making judicial appointments behind closed doors should not be regarded as sacrosanct. Moves to open up the process are desirable, and perhaps inevitable, as people understand better how much authority is placed in the hands of the judiciary, particularly through their responsibility for interpreting and applying the Bill of Rights.

13.85 We propose that the Chief Justice and the Chairperson of the Public Service Commission should be *ex officio* members of the Judicial Service Commission. The third member should be a person qualified to be a judge of a superior court but not in active practice in Fiji. That person should be appointed to the Commission by the President on the advice of the Minister responsible for Justice, after the Minister has obtained the approval of the Select Committee of the Bose Lawa responsible for matters affecting the administration of justice. The term of office should be three years.

13.86 The rules about disqualification for appointment proposed in respect of members of other service commissions in Chapter 14 should apply to the third member, as should the rules about disqualification from office in the service of the state, including judicial office, for 3 years after ceasing to be a member of the Judicial Service Commission. However, a member of the Judicial Service Commission should be free to accept nomination as a candidate for election to Parliament, with the consequent automatic loss of office.

A vacancy in the office of Chief Justice

13.87 In view of the importance of the office of Chief Justice, and the emphasis we place on enhancing judicial independence, we believe that the method of selecting the Chief Justice should be reconsidered. Under section 103(1) of the Constitution, the Chief Justice is appointed by the President acting on the advice of the Cabinet. The *Beattie Commission* favoured a requirement that the Leader of the Opposition as well as the Cabinet be consulted by the Prime Minister before he submits a name or names to the President for the exercise of the President's deliberate judgment. It commented that, whichever method of appointment is used, the Chief Justice's appointment must be free from political manoeuvrings.

13.88 We agree with that comment and consider that the appointment of a Chief Justice should be initiated by the Judicial Service Commission, the same independent body that selects candidates for other high judicial offices. Because the person appointed to act as Chief Justice while the office of Chief Justice is vacant may be a potential candidate, he or she should not act as the Chairperson of the Judicial Service Commission.

13.89 Instead, the Constitution should provide that a Justice of Appeal or a Justice of the Supreme Court who does not wish to be considered for the position of Chief Justice should be appointed to preside over the Judicial Service Commission for any period during which the office of Chief Justice is vacant.

The appointment should be made by the President on the advice of the Minister responsible for Justice. It is unnecessary to provide for the approval of the Select Committee as the choice must be made from among judges whose appointment it has already approved.

13.90 The Judicial Service Commission will then be able to recommend a person for appointment as Chief Justice in the same way that it recommends persons for appointment to other high judicial office. As in those cases, the Minister responsible for Justice and the Select Committee will need to concur in the recommendation before it goes to the President. The Opposition interest in the quality of the appointment would, we think, be met by the requirement of recommendation by the Judicial Service Commission and the concurrence of the appropriate Select Committee of the Bose Lawa.

The appointment of the judges of the superior courts

13.91 In discussing the composition of the Judicial Service Commission, we have explained its role in recommending persons for appointment to the offices of Chief Justice, Justice of the Supreme Court, the President of the Court of Appeal or other Justice of Appeal, and puisne Judges and Masters of the High Court. We have explained how that role should be complemented by the participation of the executive and the legislature. Appointments to the offices mentioned should be made by the President, on the recommendation of the Judicial Service Commission, with the concurrence of the Minister responsible for Justice and the approval of the Select Committee of the Bose Lawa responsible for matters affecting the administration of justice.

13.92 When the office of Chief Justice is vacant, an Acting Chief Justice should be appointed, to hold office until the new Chief Justice takes office. A similar appointment should be made if the Chief Justice is absent or is unable to fulfil the functions of the office. The provision for the appointment of acting judges of the High Court should also be retained. In each case the appointment should be made by the President on the recommendation of the Judicial Service Commission and with the concurrence of the Minister responsible for Justice. It is not necessary to involve the Select Committee.

The appointment of other judicial officers

13.93 The Constitution should give to the Judicial Service Commission the responsibility of appointing all judicial officers presently required to be appointed by the Judicial and Legal Services Commission. They include all magistrates and

the Central Agricultural Tribunal appointed under the Agricultural Landlord and Tenant Act. Before making the last-mentioned appointment, the Commission should be required to consult the Prime Minister. The former duty to consult the Leader of the Opposition as well should be restored.

13.94 The Constitution should require the Judicial Service Commission to appoint the holders of all other judicial offices for which provision is made by Parliament. An example is the person appointed to hold a Court of Review under the Income Tax Act (Cap. 201). Under that Act, the appointment is required to be made by the Judicial and Legal Services Commission.

13.95 Because the Judicial Service Commission should have responsibilities only for the judicial branch of government, Parliament should not be able to give the appointing power to the Judicial Service Commission unless the office is a judicial office. The question whether a particular office is a "judicial" office or not is ultimately one for the courts. If Parliament creates a tribunal whose functions are not exclusively judicial, the Public Service Commission, as the catch-all appointing body, will be required to make the necessary appointments.

13.96 Nevertheless, there may be cases in which the two Commissions consider that it is more appropriate for the Judicial Service Commission to be the appointing body. The mechanism under which the Public Service Commission can decline responsibility in an appropriate case, by regulation made with the concurrence of the Prime Minister, is discussed in Chapter 15. The Constitution should give the Judicial Service Commission a complementary power to assume responsibility for making the appointment, by regulation made with the concurrence of the Prime Minister.

Localisation

13.97 Section 124(1)(b) of the Constitution requires the Judicial and Legal Services Commission to act in accordance with the advice of the Prime Minister in appointing persons who are not Fiji citizens as judges of the subordinate courts. Section 124(3)(a), introduced in 1990, has the effect of extending that obligation to the appointment of a non-citizen as a judge of the High Court, the Fiji Court of Appeal or the Supreme Court.

13.98 We accept that the localisation of the judicial branch of government remains an important policy objective and discuss below the way in which it should be permissible to implement it by appointing judges under a contract for a term of years. However, we consider that the requirement to obtain the consent of the Prime Minister should not apply to non-citizens recommended for appointment as judges of the superior courts.

13.99 Such a requirement could become an instrument for influencing the Judicial Service Commission in making its recommendations. As we explain below, that Commission's overriding responsibility is to maintain the quality of judicial appointments. The need for its recommendations for the appointment of the judges of the superior courts to be concurred in both by the Minister responsible for Justice, as well as by the Select Committee of the Bose Lawa responsible for the matters affecting the administration of justice, will provide adequate safeguards against the unnecessary appointment of non-citizens. The Judicial Service Commission should continue to obtain the Prime Minister's consent before appointing non-citizens to other judicial offices.

Ethnic and gender balance

13.100 In Chapter 8 we described the way in which the 1990 Constitution introduced, in section 124(3)(b), (4) and (5), requirements concerning the distribution of judicial positions among ethnic groups. We saw these provisions as a focussed form of affirmative action inconsistent with the general principles that should be applied in making appointments to judicial office. We therefore propose their repeal, although as an objective we accept that the composition of the judiciary, as well as the departments and offices of the executive branch of government, should reflect the composition of the population as a whole.

13.101 In Chapter 14, we propose a statement of the general principles which should be applied in recruiting and promoting members of the state services belonging to the executive branch of government. We consider that the Constitution should contain a similar provision setting out the principles to be applied in selecting the members of the judiciary.

13.102 The over-riding principle should be the maintenance of the quality of judicial appointments, while seeking in the longer term to ensure that the composition of the judiciary reflects the ethnic and gender balance among citizens as a whole. The provision should be directed not only to the Judicial Service Commission but also to the executive and legislative branches of government in exercising their responsibilities for concurring in recommended judicial appointments.

13.103 Within that broad directive, the Judicial Service Commission should be expected to take other relevant factors into account, such as the need for a balance between the number of judges drawn from among government legal officers and from the practising profession. Judicial salaries need to be determined, bearing in

mind the importance of that objective. The *Beattie Report* discusses this question at length, recognising that an element of sacrifice is usually involved when well-qualified practitioners accept appointment to the bench. We have not gone into the question of judicial salaries, but it has constitutional as well as fiscal and economic implications.

RECOMMENDATIONS

- 436. The Constitution should make provision for a service commission dealing exclusively with the judiciary. It should be called the Judicial Service Commission.**
- 437. The Chief Justice and the Chairperson of the Public Service Commission should be ex officio members of the Judicial Service Commission. The third member should be a person qualified to be a judge of a superior court but not in active practice in the Fiji Islands. That person should be appointed to the Commission by the President on the advice of the Minister responsible for Justice, after the Minister has obtained the approval of the Select Committee of the Bose Lawa responsible for matters affecting the administration of justice. The term of office should be three years.**
- 438. The third member of the Judicial Service Commission should be subject to the rules applying to members of other service commissions, about**
- (a) disqualification for appointment, and**
 - (b) appointment to other office in the service of the state, including judicial office, after ceasing to be a member.**
- The third member should be free to accept nomination as a candidate for election to Parliament.**
- 439. To permit the appointment of a Chief Justice to be initiated by the Judicial Service Commission, the Constitution should provide that a Justice of Appeal or a Justice of the Supreme Court who does not wish to be considered for the office of Chief Justice should be appointed to preside over that Commission for any period during which the office of Chief Justice is vacant. The appointment should be made by the President on the advice of the Minister responsible for Justice.**

440. **The Constitution should provide that the President shall appoint the Chief Justice, Justices of the Supreme Court, the President of the Court of Appeal and other Justices of Appeal, and puisne Judges and Masters of the High Court, on the recommendation of the Judicial Service Commission, and with the concurrence of the Minister responsible for Justice and the approval of the Select Committee of the Bose Lawa responsible for matters affecting the administration of justice.**
441. **When the office of Chief Justice is vacant or the Chief Justice is absent or unable to fulfil the functions of the office, an Acting Chief Justice should be appointed by the President on the recommendation of the Judicial Service Commission, and with the concurrence of the Minister responsible for Justice. Corresponding provision should be made for the appointment of acting judges of the High Court.**
442. **The Constitution should give to the Judicial Service Commission the responsibility of appointing all magistrates and the Central Agricultural Tribunal appointed under the Agricultural Landlord and Tenant Act. Before making the last-mentioned appointment, the Commission should be required to consult the Prime Minister and the Leader of the Opposition.**
443. **The Constitution should require the Judicial Service Commission to appoint the holders of all other judicial offices for which provision is made by Parliament.**
444. **The Judicial Service Commission should be given power, by regulation made with the concurrence of the Prime Minister, to assume responsibility for appointing persons who are not strictly judicial officers in those cases where the Public Service Commission has excluded that responsibility under a corresponding mechanism.**
445. **The Constitution should not require the Judicial Service Commission to obtain the consent of the Prime Minister before recommending a non-citizen for appointment as a judge of a superior court. However, it should be required to obtain that consent before appointing a non-citizen to any other judicial office.**

446. **The Constitution should provide that, in appointing persons to judicial office, the over-riding principle should be the maintenance of the quality of judicial appointments, while seeking in the longer term to ensure that the composition of the judiciary reflects the ethnic and gender balance among citizens as a whole. Section 124(3)(b), (4) and (5) should be repealed.**

THE TENURE OF OFFICE OF JUDGES

13.104 The independence of the judiciary requires the holders of judicial office to have adequate security of tenure. This is provided in two ways. First a judge should be appointed for a fixed, and sufficiently long, term. Secondly, a judge should be protected against removal from office except for inability to carry out the functions of the office and what is traditionally called “misbehaviour”. We now examine the constitutional provisions for each of those purposes.

Term of office

13.105 Section 105(1) of the Constitution provides that a judge of the High Court other than the Chief Justice holds office until attaining the age of 65. This provision does not apply to a person appointed as an acting judge of the High Court. No retiring age is prescribed for the Chief Justice. Section 151(1) provides that persons may be appointed to certain offices including the office of any judge of the High Court for terms of not less than four years. It is not clear whether “a judge of the High Court” in that context includes the Chief Justice. A term appointment may not exceed the period within which the appointee will reach the prescribed retiring age. A Chief Justice who was not appointed for a term of years, assuming that is permitted, must be taken as having been appointed for life.

13.106 An acting judge of the High Court, appointed when the office of such a judge is vacant or a judge is absent or unable to perform the functions of the office, holds office until the holder of the office resumes his functions or until the appointment is revoked by the President acting in accordance with the advice of the Chief Justice.

13.107 The *Beattie Commission* recommended that the retiring age for Supreme Court and Court of Appeal judges should be 75; for High Court judges 70; and for magistrates 65 (Recommendation 116). The recommendation did not refer to the Chief Justice specifically. It is not clear whether, as President of the Supreme Court, the Chief Justice would retire at 75, or is to be treated as a judge of the High Court and retire at 70.

13.108 The *Beattie Commission* explained that the general practice has been for local judges to be given appointments until retiring age or for their lifetimes if no retiring age is prescribed, but for expatriate judges to be appointed for specified terms. It accepted as valid the use of term appointments to implement a policy of localisation and also to give an opportunity of making sure that expatriate judges are suited to conditions in Fiji. It noted, but without making a recommendation, that

longer non-renewable contract terms of five or seven years, coupled with more rigorous selection procedures, may strike the necessary balance between meeting the fears of those who have expressed concern about the quality of some judicial appointments and the obvious possibility of judicial integrity being compromised by a judge feeling pressurised to tailor judgments to ensure reappointment.

13.109 This Commission, too, accepts the need to make contract appointments as well as appointments until a specified retiring age and that it is undesirable to make an express distinction between the appointment of citizens and non-citizens. However, we consider that citizens should be appointed until retiring age. We believe that the retiring age proposed by the *Beattie Commission* is too high. Therefore the Constitution should provide as follows:

- The Chief Justice should hold office until the age of 70. It should not be possible to appoint a Chief Justice for a term of years. That should be taken into account in deciding at what age it is appropriate to appoint a person as Chief Justice.
- A Justice of the Supreme Court or a Justice of Appeal, including the President of the Court of Appeal, who is not appointed for one or more sessions of the Court or for a term of years, should hold office until the age of 70.
- A judge of the High Court, other than the Chief Justice, should hold office until the age of 65.
- A Chief Justice, Justice of the Supreme Court, Justice of Appeal, including the President of the Court of Appeal, or judge of the High Court, who has held office until reaching the retirement age, should, like expatriate judges or former judges, be eligible to be appointed as a Justice of the Supreme Court or a Justice of Appeal for one or more sessions of the Court or for a term not exceeding three years, if under the age of 75 years at the date of the appointment.

- A person should be eligible for appointment as an acting judge of the High Court if under the age of 70 years at the date of the appointment.
- A person appointed as Acting Chief Justice or as an acting judge of the High Court should vacate office when the holder of the office resumes the duties of the office, or, if the office was vacant, when the person appointed to fill the vacancy takes up office.

13.110 The Constitution should continue to allow a Judge of the High Court other than the Chief Justice to be appointed for a term of years. The term should be not less than four years and not more than seven years.

13.111 The retiring age or term of office of magistrates and other judicial officers should be as prescribed by the Constitution or other law.

RECOMMENDATIONS

447. The Constitution should provide as follows:

- (a) The Chief Justice should hold office until the age of 70. It should not be possible to appoint a Chief Justice for a term of years.**
- (b) A Justice of the Supreme Court or a Justice of Appeal, including the President of the Court of Appeal, who is not appointed for one or more sessions of the Court or for a term of years, should hold office until the age of 70.**
- (c) A judge of the High Court, other than the Chief Justice, should hold office until the age of 65.**
- (d) A Chief Justice, Justice of the Supreme Court, Justice of Appeal, including the President of the Court of Appeal, or judge of the High Court, who has held office until reaching the retirement age, like expatriate judges or former judges, should be eligible for appointment as a Justice of the Supreme Court or a Justice of Appeal for one or more sessions of the Court or for a term not exceeding three years, if under the age of 75 years at the date of the appointment.**

- (e) **A person should be eligible for appointment as an acting judge of the High Court if under the age of 70 years at the date of the appointment.**
 - (f) **A person appointed as Acting Chief Justice or as an acting judge of the High Court should vacate office when the holder of the office resumes the duties of the office, or, if the office was vacant, when the person appointed to fill the vacancy takes up office.**
448. **The Constitution should continue to allow a Judge of the High Court other than the Chief Justice to be appointed for a term of years. The term should be not less than four years and not more than seven years.**
449. **The retiring age or term of office of magistrates and other judicial officers should be as prescribed by the Constitution or other law.**

DISCIPLINARY CONTROL OR REMOVAL OF JUDICIAL OFFICERS

13.112 The constitutional protections giving members of the judiciary security of tenure have to be balanced by arrangements for dealing with complaints made against them by members of the public, and for removing them from office for wrong-doing. However, the provision made for these legitimate purposes has itself to be protected against its use by the executive to get rid of judges who give unwelcome decisions.

Judges of the subordinate courts

13.113 The provisions concerning judges of subordinate courts and other judicial officers appointed by the Judicial and Legal Services Commission are straightforward. The power to exercise disciplinary control over them and to remove them is vested exclusively in that Commission. A corresponding authority should be given to the Judicial Service Commission.

Judges of the superior courts

Complaints about the conduct of a judge

13.114 The Judicial and Legal Services Commission has no role in the removal of judges of the superior courts, and no formal powers to investigate misconduct

not sufficiently grave to justify removal. The *Beattie Commission* recognised that any procedure for inquiring into judicial conduct raises difficult and sensitive issues. It considered that the best way of subjecting the actions of judges to discipline was by keeping the courts open to the news media and the public. There should be no suggestion that the judiciary is under supervision.

13.115 However, it recognised that complaints may sometimes be made about the conduct of individual judges and recommended that they should be channeled through the Secretary of the Judicial Commission and from that officer to the Chief Justice. The Chief Justice might decide to deal with them himself, or consider them with two additional persons holding high judicial office. Without recommending the inclusion of a provision in the Constitution, we endorse this suggestion with the substitution of a reference to the Judicial Service Commission.

Removal of a judge

13.116 Under section 109 of the Constitution, judges may be removed only by the President, and then only on the recommendation of a specially constituted tribunal. The grounds for removal are inability to perform the functions of the office (whether due to infirmity or some other cause) or misbehaviour. If the President considers that the question of removing a judge from office on such a ground ought to be investigated, he is required to constitute a tribunal consisting of not less than three persons who hold or have held high judicial office in Fiji or some other country. The tribunal is required to inquire into the matter and report its findings to the President. If it recommends removal, the President must remove the judge from office.

13.117 The *Beattie Commission* recommended the continuation of this arrangement which it likened to the position in Western Samoa where a judge can be removed by the Head of State only on an address of the Legislative Assembly adopted by two-thirds of its members. In our view the position in Western Samoa is significantly different from that in Fiji. In Western Samoa the decision is in the hands of the legislature. In Fiji, the legislature is not involved. In deciding that the question of removing a judge ought to be investigated, and in appointing the members of a tribunal for that purpose, the President is required to act on the advice of the Cabinet or a Minister. Experience elsewhere has shown that such an arrangement is open to abuse.

13.118 We consider that it ought to be possible to remove a judge from office only with safeguards similar to those we have recommended for the removal from

office of the President or the Vice-President. If the tribunal recommends the removal of the judge, its report should be submitted to Parliament. The President should remove the judge only if each House adopts a resolution to that effect supported by three fourths of its members present and voting.

RECOMMENDATIONS

450. **The power to exercise disciplinary control over judges of subordinate courts and other judicial officers appointed by the Judicial Service Commission should be vested exclusively in that Commission.**
451. **Complaints about the conduct of individual judges of the superior courts should be channeled through the Secretary of the Judicial Service Commission and from that officer to the Chief Justice. There is no need to provide for this in the Constitution.**
452. **The Constitution should continue to provide that the only grounds for removing a judge of a superior court from office are inability to perform the functions of the office (whether due to infirmity or some other cause) or misbehaviour. If the President, acting on the advice of the Cabinet or a Minister, considers that the question of removing a judge from office on such a ground ought to be investigated, he should be required to constitute a tribunal consisting of not less than three persons who hold or have held high judicial office in Fiji or some other country. The tribunal should be required to inquire into the matter and report its findings to the President. If it recommends removal, its report should be submitted to Parliament. The President should remove the judge only if each House adopts a resolution to that effect supported by three fourths of its members present and voting.**

JUDICIAL TRAINING AND STUDY OPPORTUNITIES

13.119 The modern approach to the judicial role recognises that it is not enough to appoint able lawyers to the bench, and expect them to learn on the job all they need to know about being a judge. Members of the judiciary need opportunities for further training and study. They must keep up not only with developments in the law, but also with the increasing focus on the role of law in society.

13.120 Sentencing policy deserves close attention, to consider. The purposes of punishment are a perennial question. Arrangements for achieving reasonable uniformity of sentences need to be kept under review. Another question is the gender-bias in the law. Policy-makers, lawyers and judges are gradually becoming aware that the law reflects the place traditionally accorded to women in most societies. With heightened consciousness of the problem, its consequences can be addressed.

13.121 Yet another area in which the judges need to keep up to date is the developing law of human rights, discussed fully in Chapters 3 and 7. In the Fiji Islands, the way in which the law deals with sensitive issues affecting particular ethnic or religious communities also deserves special awareness and consideration.

13.122 We mention these matters because the *Beattie Commission* considered that the Judicial Service Commission should be given the responsibility for arranging study and refresher programmes for members of the judiciary. This is an area that tends to be neglected if no such responsibility is assigned. The Constitution should expressly give this responsibility to the Judicial Service Commission. Account should be taken of study and training requirements in appropriating funds for that Commission's operation.

RECOMMENDATION

- 453. The Constitution should expressly give the Judicial Service Commission the responsibility for arranging study and refresher programmes for members of the judiciary.**

THE ADMINISTRATION OF THE COURTS

13.123 International attention is now widely focussed on the fact that the independence of the judiciary depends in part on the way in which the courts are administered and resourced. Constitutional guarantees of judicial independence can be ineffective if the executive does not appropriate the funds to service the courts adequately, or fails to ensure that they are provided with sufficient well-qualified staff.

13.124 That is the background against which the judiciary recommended to the *Beattie Commission* the adoption of a recently introduced South Australian arrangement under which the judges assume direct responsibility for the administration of the courts. In its report, the *Beattie Commission* stated that its investigations in Adelaide had shown that the arrangement had not been in place

long enough for its operation in practice to be tested. Moreover, its introduction had been preceded by the setting up of a separate Courts Department. Over a period of 12 years, the Department had established a culture that the independence of the courts requires a special type of administration and relationship with the Government on issues of funding, staffing and facilities.

13.125 The *Beattie Commission* thought that the introduction of judicial responsibility for courts administration without this preliminary step held greater risks for the independence of the judiciary than the continuation of the present system. It therefore concluded that the proposal for a separate judiciary-controlled court administration system, as in South Australia, was premature. However, it recommended that preliminary steps should be taken against the time when Fiji could consider taking this step (Recommendation 134). Meantime, Fiji should establish by statute a Court Services Department with a chief executive called the Chief Courts Administrator. It should endeavour to provide a pool of appropriately qualified administrators (Recommendation 135).

13.126 In their submission to this Commission, the judiciary accepted that there should be a Courts Administrator, but they proposed that the Courts Administrator should be responsible to the Chief Justice and the Judicial and Legal Services Commission, instead of remaining in the departmental setting (when it would come under the auspices of the Public Service Commission). In this, and in their recommendations for the appropriation and spending of funds for the administration of the courts, there was no suggestion that there would continue to be ministerial responsibility for the functioning of the courts.

13.127 In our view, there is considerable merit in the idea of a separate Courts Department which would bring a much sharper focus to the administration of the courts. Such a step should help significantly reduce the unacceptable delays in bringing some cases before the courts and, if rights of appeal are exercised, allow them to proceed expeditiously through all stages until final decision.

13.128 We consider that such a department should remain part of the executive branch of government. The Public Service Commission should continue to have the power to appoint its officers, including court registrars and other staff. Persons appointed to those positions should have other career opportunities within the public service. We would expect major delegations of the appointing power to the Courts Administrator. That office should not be held in conjunction with any other office involving a major administrative or advisory responsibility, though its holder could appropriately be appointed as Secretary of the Judicial Service Commission.

13.129 To the extent that the Public Service Commission itself exercises the responsibility of appointing or promoting members of the Courts Department, court staff or the secretarial staff of judges and magistrates, those responsibilities should be exercised only after consultation with the Courts Administrator and the Chief Justice, the President of the Court of Appeal or the Chief Magistrate, as appropriate. A Minister should be assigned responsibility for the Courts Department. Through the Courts Administrator, the judiciary should have the opportunity to make an input into the preparation of the estimates and the approval of expenditure from the funds appropriated by Parliament for the administration of the courts.

13.130 Provision for these matters need not be included in the Constitution. Nevertheless, we include recommendations about them in this report because we consider that they are a vital factor in improving the administration of justice in the Fiji Islands.

RECOMMENDATIONS

- 454. The administration of the courts should be the responsibility of a separate Courts Department headed by a Courts Administrator. Such a department should remain part of the executive branch of government. The Public Service Commission should have the power to appoint its officers, including court registrars and other staff, but should consider delegating major aspects of that power to the Courts Administrator. The holder of that office could appropriately be appointed as Secretary of the Judicial Service Commission.**
- 455. To the extent that the Public Service Commission itself exercises the responsibility of appointing or promoting members of the Courts Department, court staff or the secretarial staff of judges and magistrates, those responsibilities should be exercised only after consultation with the Courts Administrator and the Chief Justice, President of the Court of Appeal or Chief Magistrate, as appropriate.**
- 456. A Minister should be assigned responsibility for the Courts Department.**
- 457. There is no need to make provision in the Constitution for any of these matters.**

THE PREROGATIVE OF MERCY

13.131 The exercise of the prerogative of mercy enables the executive to intervene in an essential and almost the only permissible way in the administration of the criminal law by the courts. For this reason it should always be exercised in a quasi-judicial manner, free from external influence and political motives. Through its exercise, justice can be done by giving due weight to factors not taken into account by the courts. This may have been because they were not relevant to the legal issues, were not the subject of admissible evidence, or came to light after the legal proceedings terminated. The exercise of the prerogative of mercy allows account to be taken of special circumstances in ways that may not be available to the courts in imposing the punishment laid down by statute.

13.132 Section 99(1) of the Constitution which codifies the content of the prerogative of mercy in a clear way should be retained. Section 99(3) constitutes a Commission to advise the President on the exercise of the prerogative of mercy. It is to consist of a Chairman and not less than two other members appointed by the President acting in his own deliberate judgment. The President is bound to act in accordance with the Commission's advice. Under section 38 of the Court of Appeal Act (Cap. 12), the President may refer the whole case to the Court of Appeal for consideration or obtain its opinion on a particular point. Advice to do so would need to come from the Prerogative of Mercy Commission.

13.133 The *Beattie Commission* found that, although members of the Commission had been appointed, it was not functioning, apparently because there was no institutional link with the executive. The Commission recommended that the Minister of Justice should be the Chairman of the Commission. We agree, and consider that the Constitution should give effect to this recommendation.

13.134 Traditionally, the Cabinet or a particular Minister has advised the Head of State on the exercise of the prerogative of mercy. Advisory Commissions to undertake this duty were set up in newly-independent states only to ensure that the prerogative was not exercised in a political way. On the other hand, there is no reason why account should not be taken of the Government's broad policies, such as the proportion of a sentence of imprisonment that a person should be required to serve. We believe that in the Fiji Islands the basis on which the prerogative of mercy should be exercised is well understood and accepted.

13.135 We propose that the Constitution should provide that the chairperson of the Prerogative of Mercy Commission should be the Minister responsible for Justice. The other two members should be persons appointed by the President, acting in his own deliberate judgment.

RECOMMENDATIONS

- 458. The substance of section 99(1) of the Constitution codifying the content of the prerogative of mercy should be retained.**

- 459. The Constitution should continue to make provision for a commission to advise the President on the exercise of the prerogative of mercy. The chairperson of the Prerogative of Mercy Commission should be the Minister responsible for Justice, ex officio. The other two members should be persons appointed by the President, acting in his own deliberate judgment. The President should be required to act in accordance with the Commission's advice.**