

NATIONAL IDENTITY AND SHARED GOALS

5.1 In this Chapter the Commission begins its review of the 1990 Constitution. We discuss a small group of provisions that focus on the national identity of the people of Fiji and the commitments they make to one another as citizens of this country. The relevant sections of the Constitution comprise the *Preamble*; *section 1* (the nature of the state); *section 66* (the official language of Parliament); and the *Oath or Affirmation of Allegiance to Fiji* in *Schedule 1*. The purpose of these provisions is to reflect the important values of the people and promote their shared goals.

5.2 To that end, we propose a number of changes to the existing provisions, and also the inclusion of new ones. The new provisions deal more fully with the name of the state and the right of all its citizens to describe themselves by a common name; they recognise the equal status of the three main languages, and give some directions about the way in which the Constitution should be interpreted. The preamble to the Constitution should remain, but in a shorter and simpler form. A new provision should set out shared understandings about the cooperation of all ethnic communities in the country's life and government. We describe it as a "Compact" among the people of Fiji.

5.3 We discuss these various matters not in the order in which they would appear in the Constitution, but in an order that shows how the various ideas are linked together.

THE NAME AND CHARACTERISTICS OF THE STATE

5.4 The first question is the name of the state. Section 1 of the 1990 Constitution provides as follows:

Fiji shall be a Sovereign Democratic Republic.

Perhaps because of the use of capital letters, people sometimes see this provision as meaning that the name of the state is "The Sovereign Democratic Republic of Fiji", but we do not believe section 1 was intended to be read in this way. Like section 1 of the 1970 Constitution, its purpose is to describe the characteristics of the state, not to specify its name. In the Oath of Allegiance, in Schedule 1, those taking the oath are required to swear allegiance simply to "the people and the Republic of Fiji".

5.5 However, the Constitution should indicate clearly the formal name of the state. In the case of Fiji, the name should be one which all its citizens can use when they want to describe themselves as belonging to Fiji. The submissions emphasized the need for a common name. Some suggested "Fijians". Others suggested "Fiji Islanders". Others, while supporting the idea of a common name, refrained from suggesting what it might be.

5.6 "Fijian" is used in English to describe the indigenous people of Viti (as distinct from Rotuma). A number of Fijians believe it should continue to be used in this restrictive sense. We consider that "Fiji Islander" is a more appropriate common name. There are other Pacific peoples who similarly describe themselves as belonging to their island group. "Solomon Islanders" and "Cook Islanders" are two examples.

5.7 To provide a firm basis for the use of the name "Fiji Islander", we propose that the name of the state should be "the Republic of the Fiji Islands". This proposal revives a geographic name, "the Fiji Islands", which was once common and has never been wholly discarded. The name "Fiji" will still be used when commonly referring to the whole group. But when, in this report, we are describing the state in a formal way, we shall use the name "the Republic of the Fiji Islands" or "the Republic".

5.8 There is no need for the Constitution to authorise or require the use of the common name "Fiji Islander", but people may describe themselves in that way if they want to. They should be encouraged to do so.

5.9 In describing the Fiji Islands as a "Republic", it is implicit that the country will continue to have a President as its Head of State. Most submissions supported a republican form of government. Only a few argued that Fiji should seek once more to become a monarchy owing allegiance to Her Majesty the Queen. A number expressed the hope that Fiji would re-establish links with the Sovereign. We understood that to mean readmission to the Commonwealth, of which the Queen is the Head.

5.10 The Oath of Allegiance is more a symbolic than a legal commitment. All citizens owe allegiance to the state (as do all aliens in its territory) whether or not they have taken the Oath of Allegiance. The form of oath should be amended to reflect the new name of the state. It should also be prescribed in a separate section of the Constitution, potentially one of general application, not in the sections requiring the oath to be taken by particular officers named in the Constitution.

Then, if there is good reason for the taking of the Oath of Allegiance by persons not referred to in the Constitution, that requirement can be imposed by Act with a cross-reference to that general section. No one should be required to take an Oath of Allegiance except by or under a law.

5.11 It is unusual that the Oath in its present form should require the swearing of allegiance to “the people” as well as the state. Perhaps the focus was on the need for persons wishing to be naturalised as citizens to take the Oath. Allegiance to the state is a well-understood legal concept, but it is not clear what a duty of allegiance to the people would require. A duty to *serve* the people is already included in the Oath of Office of the President and the judges of the superior courts. The Oath of Allegiance should provide only for the swearing of allegiance to “the Republic of the Fiji Islands”, not “the people”.

5.12 Section 1 of the 1990 Constitution describes the state as “sovereign” and “democratic”. In the context, “sovereign” means that Fiji is an independent state at international law, and, under its own constitutional law, is not subject to any outside law-making authority. More than 25 years after independence, a reference to the fact that the Republic of the Fiji Islands is “sovereign” is hardly needed, but it certainly does no harm and should remain.

5.13 The word “democratic” describes a country governed by the people through their elected representatives. It should mean that all citizens are represented on an equal basis and that the government is responsive to their wishes, subjecting itself to periodic, free elections. To describe the state as “democratic” also sets a standard by which to judge the content and the administration of the law.

5.14 That can be seen from the many provisions of Chapter II of the 1990 Constitution which forbid any limitation of a constitutionally-protected individual human right or fundamental freedom if the limitation is not “reasonably justifiable in a democratic society”. This means that neither the law nor the government may impose requirements that are authoritarian or arbitrary. In Chapter 7 we look in more detail at the nature of the standard and propose that it should be applied in all cases where there are broad grounds for limiting rights and freedoms.

5.15 The description of Fiji as democratic reflects a widely shared aspiration among the people of Fiji. On the assumption that the people wish to reaffirm their commitment to democratic institutions of government and to shape those institutions accordingly, the Constitution should continue to describe the Republic of the Fiji Islands as “democratic”.

RECOMMENDATIONS

11. **The name of the state should be “The Republic of the Fiji Islands”.**
12. **Readmission to the Commonwealth, of which the Queen is the Head, would reestablish links with Her Majesty.**
13. **The citizens of the state should have the right to use the common name of “Fiji Islanders” if they so wish, and should be encouraged to do so, but it is not necessary to make provision for this in the Constitution.**
14. **The Constitution should continue to describe the state as “sovereign”. In the expectation that the people wish to put in place a fully democratic system of government, the Constitution should also describe the state as “democratic”.**
15. **Section 1 of the 1990 Constitution should be redrafted to read as follows:**

“The Republic of the Fiji Islands is a sovereign, democratic state.”
16. **A separate section of the Constitution should prescribe the form of Oath of Allegiance. The form of Oath (or Affirmation) in Schedule 1 of the 1990 Constitution should be amended to provide for the swearing of allegiance to “the Republic of the Fiji Islands”, without mention of “the people”.**

THE LANGUAGES OF THE FIJI ISLANDS

5.16 The languages of the Fiji Islands include all languages spoken by any group in Fiji, however small. Schools set up by some communities teach the language spoken by members of that community, though not to the exclusion of other languages spoken in Fiji. The *United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities* provides that persons belonging to such minorities “have the right ... to use their own language, in private and in public, freely and without interference or any form of discrimination”. In Chapter 7, we recommend that “language” be added to the list of the grounds on which discrimination is prohibited.

5.17 The right of the members of all communities to use their own languages does not deal with the question of how members of different communities should be encouraged to learn a language or languages that will enable them to converse

with one another. Nor does it address the question of whether people should be able to use their own language when communicating with government. In Fiji these questions are mainly concerned with the place that should be given to Fijian, Hindi and English.

5.18 The colonial government's approach was that English should become the common language of Fiji. This approach seems to have been based partly on convenience and partly on a conviction that people would derive great benefits from learning the world's most widely spoken language. However, it was believed that in order to promote the learning of English, it was necessary, from a child's early years of education, to use English as the sole language of instruction. It was also thought desirable to discourage the teaching of Fijian and Hindi at the secondary school level. In fact, experience shows that, to learn another language, people need to have a good knowledge of their own, and that the more languages people learn, the easier they find them.

5.19 The assumption that communities need to learn a language foreign to both of them in order to communicate is misguided. While most members of non-English speaking communities in Fiji speak enough English to permit basic cross-community communication, comparatively few speak it fluently enough to have a relaxed, unselfconscious conversation. This lack of fluency in a common language hinders real communication among members of different communities.

5.20 In contrast, we found that, in country areas where there is a lot of contact between Fijians and members of other communities, people were often fluent in each other's languages. This fluency is greatly appreciated not only for its practical benefits but also as an indication of goodwill. Many Indo-Fijians acknowledged that they could have done more to learn Fijian, and in that way acquire greater understanding of Fijian culture. The Commission considers that the members of all communities should be encouraged to learn one another's languages. This should not detract from the importance of learning English. Knowledge of that language gives the people of Fiji the means of ready communication with the world at large, as well as access to literature, the sciences and technology.

5.21 The only provision on the use of the three main languages in the 1990 Constitution is section 66 which reads as follows:

The official language of Parliament shall be English, but any member of either House may address the Chair in the House of which he is a member in Fijian or Hindustani.

This provision gives English a status superior to Fijian or Hindi. It should be revised in the manner now proposed.

5.22 An early provision of the Constitution should state that Fijian, Hindi and English have equal status as the main languages spoken in the Fiji Islands. This would reflect the intrinsic value of each language and the way in which it expresses cultural values. So far as possible, people should learn one another's languages. In particular, all citizens should be encouraged to learn Fijian, but this should not be seen as detracting from the importance of learning English.

5.23 In keeping with this approach, people should be able to conduct their dealings with the state in Fijian, Hindi or English. As a matter of practicality, at least in the short term, it may not be possible to have fluent speakers of all three languages available at the public counters of every central and local government department or office throughout the country. Nor is there a need for this in areas where the population is largely made up of members of one community, or the service provided is mainly of interest to one community. The rights to communicate or receive services in Fijian, Hindi or English in divisional or district offices in Fiji should be qualified, not absolute. Service in a particular language should be provided if there is a significant demand for it in that language, or where, because of the nature of the service, it is reasonable to provide it in that language.

5.24 In addition, it should be provided that the services in the language of a person's choice may be made available through a competent interpreter. We also make specific recommendations in Chapter 7 about the availability of competent interpreters whenever a witness, a suspect or the defendant in a criminal trial may be unfairly prejudiced because of difficulties in speaking or understanding the language being used.

5.25 Section 66 itself should be amended to reflect the equal status of Fijian, Hindi and English. The records of parliamentary debates and committee proceedings should be kept in the language used by the member taking part, with a translation into English if the member spoke in Fijian or Hindi. Documents such as Bills, Acts, Resolutions and Reports should be in English unless the House or Committee resolves that they should also be in Fijian or Hindi or both, or in any other language spoken in Fiji.

5.26 The Constitution itself should be adopted in three versions, Fijian, Hindi and English. Following the standard international practice where treaties are adopted in a number of languages, the Constitution should provide that each version is equally authentic, but if there is any apparent discrepancy between one version of a provision and another version or versions, regard must be had to all the circumstances that tend to establish the true intent and meaning of that provision.

RECOMMENDATIONS

17. **The members of all communities should be encouraged to learn one another's languages, but this should not be seen as detracting from the importance of learning English.**
18. **An early provision of the Constitution should state that the Fijian, Hindi and English languages have equal status.**
19. **The Constitution should provide that members of the public dealing with government departments and other central or local government offices and statutory boards have the right, in the head office of the department, office or board, and in those divisional, district and local government offices where**
 - (a) **there is a significant demand for communications with or services from that department or body in any one or more of those languages, or**
 - (b) **because of the nature of the department or body, it is reasonable to provide for communications with or services from that department or body,****to conduct their transactions in Fijian, Hindi or English, either directly or through a competent interpreter.**
20. **Section 66 of the 1990 Constitution should be amended to provide that the official languages of Parliament are Fijian, Hindi and English. A speech made in any one of those languages should be simultaneously translated into each of the other two. The records of parliamentary debates and committee proceedings should be kept in the language used by the member concerned, with a translation into English if the member spoke in Fijian or Hindi. Documents such as Bills, Acts, Resolutions and Reports should be in English unless the relevant House or Committee resolves that they should, in addition, be in Fijian or Hindi or both, or in any other language spoken in Fiji.**
21. **The Constitution itself should be adopted in three versions, Fijian, Hindi and English. It should provide that each version is equally authentic, but if there is any apparent discrepancy between one version of a provision and another version or versions, regard must be had to all the circumstances that tend to establish the true intent and meaning of that provision.**

EXPRESSING IMPORTANT VALUES

5.27 In Chapter 3, we referred to many of the values that are important to the people of Fiji. Among them are the significant events in its history, its multi-ethnic character, its spiritual values, the human rights and fundamental freedoms of individuals and groups, the promotion of racial harmony, national unity and the economic and social advancement of all communities, and constitutional principles like adherence to the rule of law. We have stressed the need to respect the interests of all communities, to reconcile interests of all communities by negotiations in good faith, and to respect the paramountcy of Fijian interests as a means of ensuring that those interests are not subordinated to the interests of other communities.

5.28 In many Constitutions, values of this kind are referred to in a *preamble* to the Constitution. A preamble is explanatory and in itself does not create rights or duties. However, so far as it expresses the people's expectations about what the Constitution is intended to do, the courts often take account of it in determining the meaning and effect of other provisions.

5.29 Some Constitutions, notably those of Ireland, India and Papua New Guinea, contain not only a preamble, but also *directive principles*. These are directions to the government of the day to follow policies designed to bring about certain desired outcomes. They generally relate to such things as the availability of education, the role of women, and the protection of the environment. Directive principles usually make it clear that they do not create duties which can be directly enforced by the courts. In this respect they are like preambles. Again, directive principles are often taken into account by the courts in applying other provisions. However, the real sanction for their enforcement is through the political process. The submissions included suggestions that Fiji's Constitution should contain directive principles.

5.30 Directive principles are to be contrasted with *Bills of Rights* under which individuals claiming that their rights have been infringed can seek a remedy from the courts. However, a Bill of Rights should also guide the executive and Parliament in framing legislation and designing and implementing policies. For that reason, some countries now express economic and social goals in the form, not of directive principles, but of rights. If so, they usually expect that the courts, in enforcing such rights, will not get too deeply involved in the question of whether adequate budgetary provision has been made to give effect to the right. Suggestions were made in the submissions about including rights of this kind in the Constitution of Fiji.

5.31 A fourth type of provision, for which there is little in the way of a model, is to set out in the Constitution a *Compact* among the people of Fiji. A number of submissions expressed the view that, overall, the 1970 Constitution had had the quality of a compact or covenant among the ethnic communities and suggested that, in Fiji's multi-ethnic society, the Constitution should again perform this function.

5.32 After considering these different types of provision, the Commission adopted the following guidelines:

- There should be a short preamble dealing mainly with the history of Fiji's multi-ethnic society, and its shared beliefs and aspirations.
- The present Bill of Rights should be updated and clarified, but should refer only to rights which can appropriately be enforced by the courts.
- There should be no statement of directive principles as such. Broad policy directives can be inspirational, but they may not have much practical effect on the policies followed by different governments. The nature of these should be left to the political process, except in areas of special concern, such as the duty to put in place affirmative action and social justice programmes (dealt with in Chapter 8) and to protect the environment when authorising the exploitation of natural resources such as minerals (dealt with in Chapter 17). The Constitution should in those cases lay certain duties upon the Government. The provisions should not exclude the jurisdiction of the courts, but should be cast in terms which make it clear that the allocation of resources for the specified purposes will be monitored primarily through the political process.
- It is our belief that there should also be a new provision constituting a *Compact* among the people of Fiji. It should set out their shared understandings about the future participation of all ethnic communities and groups in the country's life and government. Effect would be given to these understandings through the operation of other provisions of the Constitution and also in the day to day functioning of the political process. Therefore its provisions should not be judicially enforceable. However, the courts should be free to take account of the *Compact* in interpreting and applying other constitutional provisions.

5.33 The Commission also considered that these various types of provision should not duplicate one another, though both the *Preamble* and the *Compact* would

foreshadow in general terms some of the Constitution's later and more detailed provisions.

THE PREAMBLE

5.34 For maximum impact, a preamble to the Constitution should be brief and clearly expressed. Like the whole of the Constitution, it should be broadly acceptable to all citizens. This is especially important in the case of a preamble whose significance is largely symbolic. It should give all citizens a sense that their contribution to Fiji is recognized, and that all communities form one nation.

5.35 The *Preamble* should begin by stating, in an adaptation of the well-known opening words of the American Constitution, that the people of the Fiji Islands give themselves their Constitution. The use of the word "people" in the singular will emphasise that all ethnic communities are broadly united in their support for the Constitution and the state itself.

5.36 Any new Constitution would need to be put in place by the processes laid down for the amendment of the 1990 Constitution. Those processes are an adaptation of the ordinary law-making processes of Parliament. Special procedures and majorities are required, depending on the nature of the amendment. It would be possible to reflect these processes by stating that the people of the Fiji Islands give themselves their Constitution "through their elected representatives". However, such a statement is not necessary and would detract from the simplicity of the resounding words: "We, the people of the Fiji Islands, ... , give ourselves this Constitution"

5.37 Most preambles to constitutions refer to those aspects of a people's history and the shared values that they see as particularly important. Among all the people of Fiji, there is a shared reverence for God. The members of all communities often concluded their submissions with the words "God bless Fiji". The *Preamble* should therefore begin by expressing the desire of the people for the blessing of God in terms which are acceptable to the members of all religious faiths.

5.38 In Chapter 3, we explained the importance of maintaining the separation of church and state, specially in a country made up of people of different faiths. Therefore the Constitution should not declare Fiji to be a Christian state, but the *Preamble* should continue to record the coming of Christianity and its significance in the life of the country. It should do so in terms that reflect the importance of Christianity not only to the indigenous people and other Christians but to the cultural and spiritual life of Fiji as a whole. That life is further enriched by the

other faiths adhered to in Fiji, and the variety of traditions, languages and cultures among its people.

5.39 The Commission considers that the *Preamble* should also refer to other events in the history of Fiji that have made its people what they are today. Those events include the settlement about 4,000 years ago by the first inhabitants, the ancestors of the indigenous Fijian and Rotuman people; the separate cessions of Fiji and Rotuma to Queen Victoria; and the arrival of the forebears of subsequent settlers including Europeans, Pacific Islanders, Indo-Fijians, the Chinese and many others. They also include the development of Fiji's economy and political institutions, and its accession to independence.

5.40 We do not think the *Preamble* needs to recite the constitutional history of Fiji. It should convey a sense of renewal and recommitment to the shared goals of harmony, unity, the economic and social advancement of all communities, respect for their rights and interests and the strengthening of the institutions of government. These are the goals referred to in the Commission's Terms of Reference unanimously approved by Parliament.

5.41 Finally, the *Preamble* should reaffirm the people's recognition of human rights and fundamental freedoms, adherence to the rule of law and respect for human dignity and the importance of the family. These concepts are self-explanatory, except, perhaps, "the rule of law". This is a constitutional concept which today signifies:

- a preference for law and order within the community, as distinct from anarchy and strife;
- the conduct of government in accordance with the law;
- the need for the law to conform to standards of fairness and justice, both in its substantive content and in the procedures for its application by the courts.

These important ideas should serve as a reminder of the goals which the people desire to achieve through their Constitution.

RECOMMENDATIONS

22. **The *Preamble* to the Constitution should be brief, clearly expressed and broadly acceptable to all citizens.**
23. **It should state that the people of the Fiji Islands give themselves their Constitution.**

22. **It should deal mainly with the history of Fiji's multi-ethnic society, and its shared beliefs and values.**
23. **The wording of the *Preamble* should be based on the following draft:**

WE, THE PEOPLE OF THE FIJI ISLANDS,

Seeking the blessing of God who has always watched over these islands, Recalling the events in our history that have made us what we are: especially the settlement of these islands by the ancestors of the indigenous Fijian and Rotuman people; the arrival of forebears of subsequent settlers, including Pacific Islanders, Europeans, Indo-Fijians, Chinese and many others; the adoption and enduring influence of Christianity and its contribution, along with that of other faiths, to the spiritual life of Fiji; and the separate cession of these islands by the High Chiefs of Fiji and Rotuma to Her Majesty Queen Victoria,

Recognising that the descendants of all those who chose to make their homes in these islands now form our multi-ethnic society,

Acknowledging the contribution of all ethnic communities to the well-being of that society, and the rich variety of their faiths, traditions, languages and cultures,

Taking pride in the development of our economy and political institutions, our accession to independence and our common citizenship,

Committing ourselves anew to living in harmony and unity, promoting the economic and social advancement of all communities, respecting their rights and interests, and strengthening our institutions of government,

Reaffirming our recognition of the human rights and fundamental freedoms of all individuals and groups, safeguarded by adherence to the rule of law, and our respect for human dignity and the importance of the family,

GIVE OURSELVES THIS CONSTITUTION.

A COMPACT AMONG THE PEOPLE OF THE FIJI ISLANDS

5.42 In Chapters 2 and 3 the Commission set out at length the reasons why, in its view, Fiji's past and present constitutional arrangements have not provided a sound basis for multi-ethnic government. A main reason has been the nature of the country's electoral arrangements. Our detailed recommendations about these are set out in Chapters 8 and 9. Their object is to enable the people of Fiji to break away from the communal system of representation and to encourage government by multi-ethnic parties or coalitions.

5.43 Our proposals take account of the need for all ethnic communities to have adequate assurances that their rights and interests will still be protected. To this end, we believe explicit provisions should be included in the Constitution. We have therefore prepared the following draft Compact:

Compact among the people of the Fiji Islands

The people of the Fiji Islands recognise that, within the framework of this Constitution and the other laws of the Republic, the conduct of government is based on the following principles:

- (1) The rights of all individuals, communities and groups must be fully respected.
- (2) These rights include those protecting the ownership of Fijian land according to Fijian custom, the ownership of freehold land, and the observation of the rights and obligations of landlords and tenants under leases of agricultural land. They also include the rights of all persons to practise their religion freely and to retain their language, culture and traditions.
- (3) The rights of the Fijian and Rotuman people include their right to governance through their separate administrative systems, as well as to take part in the government of the Republic along with all other citizens.
- (4) As citizens, the members of all communities enjoy equal rights, including the right to make their permanent homes in the Fiji Islands.
- (5) The rights of citizens include the right to form and join political parties, to take part in political campaigns, and to vote and be a candidate in free and fair elections of members of Parliament held by secret ballot and, ultimately, on the

basis of equal suffrage.

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- (6) The formation of a government that commands the support of a majority in the lower house of Parliament depends on the electoral support received by the various political parties or pre-election coalitions and if it is necessary or desirable to form a coalition government from among competing parties, depends on the compatibility of their policies and their willingness to come together to form or support a government.
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- (7) In forming a government, and in that government's conduct of the affairs of the nation through the promotion of legislation or the implementation of administrative policies, full account should be taken of the interests of all communities.
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- (8) To the extent that the interests of different communities are seen to conflict, all the interested parties should enter into negotiations in good faith in an endeavour to reach agreement.
- (9) In such negotiations, the paramountcy of Fijian interests as a protective principle should continue to apply, so as to ensure that the interests of the Fijian community are not subordinated to the interests of other communities.
- (10) Affirmative action and social justice programmes to secure effective equality of access to opportunities, amenities or services for the Fijian and Rotuman people, as well as for other communities, for women as well as men, and for all disadvantaged citizens or groups, should be based on an allocation of resources broadly acceptable to all ethnic communities.

Application of the Compact

- (1) The application of the principles or recognition of the rights referred to in the *Compact* shall not, by virtue only of this section, be called in question before any court or other authority.
- (2) The *Compact* may be taken into account in interpreting and applying any other provision of this Constitution or other law.

5.44 The operative provision at the beginning of the *Compact* records the recognition by the people of the Fiji Islands that the conduct of the country's government is based on the principles set out in the *Compact*. This recognition has moral, as distinct from legal, force. We hope that the principles will be recognised by all communities through their elected representatives and leaders. Such recognition will not prevent individuals within communities voicing their own views and casting their votes as they see fit.

5.45 The recognition of a broad consensus about the conduct of government is expressed as being "within the framework of this Constitution and the other laws of the Republic". The purpose of this phrase is to indicate that the principles and statements set out in the *Compact* do not in themselves give rise to legal rights or duties. In particular, the references to certain rights safeguarded in the Constitution are not a substitute for the rights themselves. They are mentioned only to reassure all communities that the need to take account of each other's interests will not affect the constitutional protection already given to their rights. See also the commentary below on the separate provision *Application of the Compact*.

5.46 Principle (1) states that the rights of all individuals and ethnic communities must be fully respected. If rights are not respected, they can be enforced through the courts, but rights also need to rest on the general willingness of the people to obey the Constitution and other laws of the land. That willingness needs to be reaffirmed.

5.47 Principles (2) to (5) refer to certain specific rights so people can see that rights they hold dear will remain constitutionally protected, no matter what kind of government takes office. The list is far from being comprehensive but the rights mentioned include

- the protection of all rights of individuals and communities to land, or in respect of land as well as other resources;
- the rights to freedom of religion and retention of language, culture and traditions;
- the rights of Fijians and Rotumans, as the indigenous people, to a system for their own governance;
- the equal citizenship rights held by the members of all communities.

The rights of citizens include the right to make their permanent homes in the Fiji Islands and to enjoy the full range of political rights, again on a basis of equality. The reference to an ultimate right to equal suffrage takes account of a possible

need for very minor departures from that principle in bringing about the transition from the present system of communal representation to a more open system.

5.48 Principle (6) of the draft Compact introduces for the first time in the Constitution the role of political parties in the formation of a government. In a Westminster written constitution, this role usually remains hidden behind the duty of the Head of State to appoint as Prime Minister the member of the Lower House who appears best able to command the support of the majority of the members of that House. It seems important to refer to political parties directly, because, in our view, the formation of a government must continue to depend on the party system.

5.49 The main thrust of this report is to encourage the emergence of multi-ethnic parties or coalitions. The electoral system can provide strong incentives, but no Constitution that claims to be democratic can predetermine the outcome of free and fair elections. While parties remain essentially ethnic, the responsibility will rest on them to find ways of cooperating with like-minded parties based in other communities.

5.50 A failure to make the necessary accommodations, or an unwillingness of voters to support candidates nominated by parties or coalitions on a multi-ethnic basis, could affect the opportunities for a particular community to share in government. Therefore we have set out several principles which could help to remedy such a situation, unless there is deliberate non-participation or withdrawal by a party representing a particular community.

5.51 Principle (7) states that, in forming a government and also in governing the country, full account should be taken of the interests of all communities. Only the first part of this principle is new.

5.52 The second part of the principle which refers to the need for a government once in office to take account of the interests of all sections of society, has always been an accepted part of democratic government. However, there is always a tension between a government's desire to respond to the interests of its supporters and its responsibility to govern in the interests of all. In Fiji, this tension is heightened by perceptions that a government formed mainly from members of one community might govern primarily in the interests of that community.

5.53 Principle (8) states that, if the interests of different communities are seen to conflict, either in forming a government or in governing the country, then all the interested parties should enter into negotiations in good faith in an endeavour

to reach agreement. In Chapter 3, we explained the origins of this important principle. Its force lies in the recognition that no controversial matter should be disposed of by one community acting alone, even if it has the political power to do so.

5.54 If agreement cannot be reached, the parties will remain in dispute. However, the obligation to enter into negotiations in good faith with the object of reaching agreement is not an empty one. The New Zealand courts have recognised that it applies to conflicts between the interests of Maori and those of the Crown, in such matters as, for example, access to the airwaves. The parties were required to negotiate an agreement that would allocate to Maori adequate frequencies and funding for the broadcasting of radio and television programmes in the Maori language.

5.55 Principle (9) states that, in negotiations involving a conflict of interests between or among communities, the principle that Fijian interests are paramount should continue to apply, so as to ensure that the interests of the Fijian community are not subordinated to the interests of other ethnic communities. Expressed in this way, the principle that Fijian interests are paramount resumes its original protective function and does not threaten the legitimate interests of other communities. Even so, it retains its full moral authority.

5.56 The Commission does not think it should try to spell out what recognition of the paramountcy of Fijian interests may require, nor the range of interests to which it may apply. However, it gives some indications below of how principles (7), (8) and (9) taken together might be relevant to the formation of a government. But the *Compact* itself should leave the content of the principle that Fijian interests are paramount to evolve. It will depend upon changing circumstances and on the good sense and goodwill of all community and political leaders.

5.57 The ability to govern rests on the ability of a party or parties, perhaps with the help of independent members of Parliament, to command the support of a majority in the Lower House. A majority party, or coalition of parties, will be able to form a Cabinet from among its own members. The elected members of the parties not in the government will then form the Opposition.

5.58 Against this background, principles (7)-(9) could affect the formation of a government in one of two ways. Under the first scenario, they will guide a multi-ethnic party or coalition with a majority in choosing a Prime Minister. They will also guide the Prime Minister in forming a Cabinet from the parliamentary

members of the party or coalition. The second scenario will arise if some communities are insufficiently represented within the party or parties that command a majority. Principles (7)-(9) will require the majority party or parties to consider whether the interests of an under-represented community need to be met by inviting what would otherwise be an Opposition party into the government.

5.59 This might not seem a very strong basis for the kind of cooperation on which coalition government depends. Nevertheless, government must, of necessity, be carried on through a coalition whenever no one party has an overall majority. It is not a large step to suggest that parties might also come together for reasons of political expediency rather than necessity. Such a development would certainly require the Government to obtain broadly-based support for its policy proposals. But the electoral arrangements we recommend will encourage parties to seek support among all communities. This should lead to a new political culture of greater cooperation.

5.60 For some time to come in Fiji, the ethnic composition of a governing party or coalition and of the Cabinet formed from among its members is likely to remain important. We hope that, through cooperation among mainstream parties, multi-ethnic governments will come about in the normal course of the electoral process. But if an election should result in a majority for a party or parties which are not seen as representing all communities, then principles (7)-(9) require the majority group to see if there is a basis upon which a government can be formed from among parties which, together, have broad, multi-ethnic support.

5.61 Principle (10) has already been mentioned more than once. It states that the allocation of resources among different affirmative action and social justice programmes should be one that is broadly acceptable to all ethnic communities. On this basis, no community will have good reason to oppose particular programmes that benefit only certain communities. As we have mentioned, the problems addressed by such programmes should be seen as national problems which all have an interest in solving.

5.62 In Chapter 8, we discuss further the reasons why it is necessary and justifiable to put in place programmes directed towards enlarging the participation in commerce of the Fijian and Rotuman people. We also propose safeguards to ensure that all affirmative action and social justice programmes are successful in achieving their desired objectives. Within such a framework, and through the application of principles (7)-(9), it should be possible to agree on an allocation of resources among all programmes, regardless of which community obtains the greatest benefit from any one of them.

5.63 The draft provision entitled *Application of the Compact* makes it clear that the courts are not empowered to enquire into the application of the principles or the recognition of the rights referred to, relying on the provisions of the *Compact* alone. All constitutionally-protected rights will be enforceable under other sections of the Constitution. Public opinion and the political process provide the sanctions for the application of the principles. The reference to any "other authority" makes it clear that no special tribunal can be set up to enquire into the application of the *Compact*. Nor will its application fall within the jurisdiction of an existing authority like the Ombudsman.

5.64 The purpose of the *Compact* is to act as a reassurance to all communities and to provide guidance to political leaders and parties. It will fail in those purposes if it is used as an every-day weapon in the rough and tumble of politics.

RECOMMENDATIONS

26. **The Constitution should contain a section described as a *Compact among the people of the Fiji Islands*. It should reassure all ethnic communities that their rights and interests will still be protected, even if changes are made to the electoral arrangements. It should also provide guidance to political leaders and parties.**
27. **The *Compact* should record the people's recognition of the principles on which the conduct of government is based. It should also refer to the rights of ethnic communities and individuals under other provisions of the Constitution in the areas likely to be of greatest concern to them.**
28. **The courts should have no jurisdiction to enquire into the application of the principles or the recognition of the rights referred to in the *Compact*, except so far as these principles and rights are recognised by other provisions of the Constitution or other law.**
29. **The *Compact* should be based on the following draft:**

Compact among the people of the Fiji Islands

The people of the Fiji Islands recognise that, within the framework of this Constitution and the other laws of the Republic, the conduct of government is based on the following principles:

- (1) The rights of all individuals, communities and groups must be fully respected.
- (2) These rights include those protecting the ownership of Fijian land according to Fijian custom, the ownership of freehold land, and the observation of the rights and obligations of landlords and tenants under leases of agricultural land. They also include the rights of all persons to practise their religion freely and to retain their language, culture and traditions.
- (3) The rights of the Fijian and Rotuman people include their right to governance through their separate administrative systems, as well as to take part in the government of the Republic along with all other citizens.
- (4) As citizens, the members of all communities enjoy equal rights, including the right to make their permanent homes in the Fiji Islands.
- (5) The rights of citizens include the right to form and join political parties, to take part in political campaigns, and to vote and be a candidate in free and fair elections of members of Parliament held by secret ballot and, ultimately, on the basis of equal suffrage.
- (6) The formation of a government that commands the support of a majority in the lower house of Parliament depends on the electoral support received by the various political parties or pre-election coalitions, and, if it is necessary or desirable to form a coalition government from among competing parties, depends on the compatibility of their policies and their willingness to come together to form or support a government.
- (7) In forming a government, and in that government's conduct of the affairs of the nation through the promotion of legislation or the implementation of administrative policies, full account should be taken of the interests of all communities.
- (8) To the extent that the interests of different communities are seen to conflict, all the interested parties should enter into negotiations in good faith in an endeavour to reach agreement.

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- (9) In such negotiations, the paramountcy of Fijian interests as a protective principle should continue to apply, so as to ensure that the interests of the Fijian community are not subordinated to the interests of other communities.
- (10) Affirmative action and social justice programmes to secure effective equality of access to opportunities, amenities or services for the Fijian and Rotuman people, as well as for other communities, for women as well as men, and for all disadvantaged citizens or groups, should be based on an allocation of resources broadly acceptable to all ethnic communities.

Application of the Compact

- (1) The application of the principles or recognition of the rights referred to in the Compact shall not, by virtue only of this section, be called in question before any court or other authority.
- (2) The Compact may be taken into account in interpreting and applying any other provision of this Constitution or other law.

INTERPRETING THE CONSTITUTION

5.65 Some constitutions set out the matters to be taken into account in interpreting their provisions. Others leave the question of interpretation to the courts. They can be expected to apply the widely recognised principle that constitutions need to be looked at more broadly than ordinary Acts of Parliament or other legal documents. For example, an opinion of the Privy Council in 1930 in relation to Canada described that country's constitutional legislation as "a living tree capable of growth and expansion within its natural limits". (*Edwards v Attorney-General for Canada* [1930] AC 124, 136)

5.66 In the leading Privy Council case of *Minister of Home Affairs v Fisher*, Lord Wilberforce, speaking of the Constitution of Bermuda, and particularly of Chapter I on Fundamental Rights and Freedoms, said that "it is drafted in a broad and ample style which lays down principles of width and generality". The antecedents of the chapter in the European Convention on Human Rights and the Universal Declaration of Human Rights, as well as its form,

call for a generous interpretation ... suitable to give individuals the full measure of the fundamental rights and freedoms referred to. ([1979] 3 All

ER 21)

That approach has been adopted and applied in a number of Pacific jurisdictions as well as in Britain itself.

5.67 Neither the 1970 nor 1990 Constitutions contained or incorporated by reference any general provision about the approach to be taken to its interpretation. In Chapter 7, we show that, in interpreting Fiji's constitutional provisions on fundamental rights and freedoms, the courts have sometimes placed too much stress on what appeared to be the literal meaning of the words used, without looking at the provision in its context and in the light of its purpose and in the spirit of the Constitution as a whole. We consider that it would be useful to include in the Constitution a reminder of the need to take account, not only of the words as written, but also of these wider factors.

5.68 Clearly, the Constitution must be applied to circumstances in Fiji as they arise. Another Canadian case explained this need in the following way:

A Constitution ... is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental power and, when joined by a Bill or Charter of rights, for the unremitting protection of individual rights and liberties. Once enacted, its provisions cannot be easily repealed or amended. It must therefore be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers. The judiciary is the guardian of the Constitution and must, in interpreting its provisions, bear these conditions in mind. (*Hunter et al v Southam Ltd* (1948) 11 DLR (4th) 641 (SCC) 649)

5.69 As a reminder of the approach needed in interpreting the Constitution, we propose the inclusion of a provision on the following lines:

Interpretation of this Constitution

- (1) This Constitution applies to circumstances as they arise from time to time in the Republic of the Fiji Islands.
- (2) Its meaning is to be ascertained from the text, read in its context and in the light of its purpose, taking into account the spirit of the Constitution as a whole.

5.70 These directions are based on the accepted principle of interpretation that the text is the starting point. In referring to the need to read the text in its context and in the light of its purpose, while taking into account the spirit of the Constitution as a whole, we do not draw clear-cut distinctions between context,

purpose and spirit. Each shades into the other. Together they provide a framework for the task of determining what the provisions of the Constitution require and permit at the time of their application.

5.71 The Constitution should reflect the international standards of individual and group rights. These standards are likely to influence the drafting of the Bill of Rights and a number of other matters. Reading the relevant international instruments will often throw light on context, purpose and spirit. These criteria will also be illuminated by the values expressed in the Constitution itself. We have recommended that certain values important to the people of Fiji should be set out in the *Preamble* and also in the *Compact*, but other provisions may also have a normative quality.

5.72 We do not think that a provision on the interpretation of the Constitution should single out specific values or list the sources to be looked to in ascertaining what values may be relevant in establishing the context or purpose of a provision or the spirit of the Constitution as a whole. The task of interpreting the necessarily general provisions of the Constitution and applying them to a particular set of circumstances will often be a balancing one. There is a point at which judges will find that they are confined by the words of the Constitution and must not trespass into the realm of constitutional amendment. But before that point is reached, there will often be a need for a careful, well-reasoned analysis of context, purpose and spirit, all of which may colour the meaning of the words as they are written. Our draft provision is simply a reminder about the need for this wider focus.

RECOMMENDATIONS

30. The Constitution should contain a provision about its interpretation, based on the following draft:

Interpretation of this Constitution

- (1) This Constitution applies to circumstances as they arise from time to time in the Republic of the Fiji Islands.
- (2) Its meaning is to be ascertained from the text, read in its context and in the light of its purpose, taking into account the spirit of the Constitution as a whole.

31. Those charged with the task of interpretation should bear in mind that, in ascertaining context, purpose and spirit, regard should be paid to all relevant matters including any international instruments on which particular provisions are based, and the values expressed in the Constitution itself.