THE CONSTITUTION OF FIJI

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CONTENTS

PART TWO A SURVEY OF THE HISTORY AND DEVELOPMENT OF THE CONSTITUTION

CHAPTER III VARIOUS STAGES OF HISTORICAL DEVELOPMENT

PART THREE THE CONSTITUTION

CHAPTER IV THE GENERAL CHARACTERISTICS AND STRUCTURE

ABSTRACT

The Constitution of Fiji though similar to many others adopted within the Commonwealth since the end of the Second World War departs in many respects from the Constitution of the United Kingdom and that of New Zealand. The Constitution of the United Kingdom is wholly unwritten and that of New Zealand is only partly written as contained in the Constitution Act of 1852. Fiji not only has a written Constitution; the Constitution also incorporates the rules or principles which are accepted as constitutional conventions in the United Kingdom and New Zealand. In this thesis attention has been given to the position of the Governor-General as the representative of the Queen and the powers conferred upon him. The fact that he is a local appointee makes his position even more delicate. The problem is accentuated in that the exercise of some of his powers are made nonjusticiable by the Constitution.

It is also suggested in this work that the fact that the Constitution of Fiji has an entirely different basis from that of the United Kingdom or New Zealand renders many of the principles adopted in those countries inapplicable. The notion of parliamentary sovereignty propounded by Dicey and others does not apply. The Constitution, not Parliament, is supreme. Judicial review of legislation is inevitable and the courts are intended as guardians of the Constitution. There are other important differences many of which are the result of the political decisions made on behalf of the three main races in Fiji before the Constitution was drafted. The separate Fijian administration and the powers of the Council of Chiefs are illustrations of these provisions. The fact the indigenous Fijians enjoy a privileged position through

the separate Fijian Administration and the Council of Chiefs is discussed.

The system of representation in the House of Representatives with a combination of the communal and multiracial electorates provides an unusual, perhaps questionable, experiment towards a solution of the tensions and problems associated with a heterogeneous society. Likewise the fundamental rights provisions have special significance in a multi-racial society like that of Fiji. As a background to the above matters a comprehensive survey of the constitutional history of the country is attempted.

The role of the judiciary has been given significant emphasis throughout the thesis as it is felt that the judiciary is the linchpin of the Constitution of Fiji.

Concluding observations have been offered on ways of making the spirit of the Constitution, as enshrined in the preamble to the Constitution, a reality; and to engender a national outlook amongst the people of all ethnic groups.

PREFACE

Fiji became an independent Dominion within the British Commonwealth on 10 October 1970. There has not been many study dealing with the Constitution of the Dominion. I present this thesis on the Constitution of Fiji in recognition of the importance of that demand and as a small service which I could render my country. It is hoped that students of government as well as of law will derive assistance from it.

My intention was to deal with the Constitution as a whole. The impracticability of providing detailed studies of all aspects of the Constitution in a work of this size manifested itself at the outset. Whilst conceding, for instance, that Chapter II of the Constitution dealing with fundamental rights and freedoms merits a thesis in itself, I have nonetheless been forced to adopt a more general approach, detailing only those facets which I felt to be essential to the framework and operation of the Constitution. At the same time I have found it necessary to delve into matters which may ex facie seem unrelated or unwarranted but on closer examination it will be seen that their understanding is a pre-requisite to a fuller appreciation of the constitutional provisions. The composition, history and tensions of Fiji's multiracial society, the land issue and the separate Fijian Administration are cases in point.

Independence was sought and granted on the basis of a compromise reached between the country's two main political parties. Hence it is important to remember that the transition to independence was by agreement and not complicated by the

communal factors which are endemic in any multiracial society. Nonetheless the problems associated with a heterogeneous society remain. The fundamental rights provisions of the Constitution provide inadequate protection in view of the fact that such provisions basically affect public bodies and governmental agencies and not the private actions of individuals. Communalism is further exacerbated by the system of parliamentary representation. In an attempt to obviate appeals to communal sentiments and to build a national outlook amongst the diverse ethnic groups, I have made several proposals including that of a new electoral equilibrium.

As the guardian of the Constitution, the judiciary has a vital role to play. If the new order established by the Fiji Constitution is to be given the maximum effect, the Courts will have to discharge their function with independence and integrity. Because the judiciary is the linchpin of the Constitution of Fiji, I have emphasised its role throughout this thesis. I have found the approach of the Supreme Courts of the United States and India of great assistance. This is particularly so in the area relating to the fundamental rights and freedoms and the interpretation of the Constitution. The Supreme Court of the United States, in particular, has proved its independence and strength. There is much to be gained from its decisions and from its experience of almost two centuries in the field of judicial review of legislation. This will be of particular relevance to Fiji as the Courts in Fiji have the unenviable, but vital, task of adjusting to the new order. It will have to reject the English traditions where judicial review of legislation is a foreign concept.

The final chapter is headed "Concluding Observations" rather than "General Conclusions". This has been done because the

sheer variety of subjects that have been discussed do not lend themselves to the latter and yet something approaching the former is clearly warranted. Nevertheless, wherever necessary, conclusions are given in particular sections of the study.

In this thesis I have attempted to deal with constitutional issues, eschewing politics as far as possible. At times the boundary may be blurred. I have endeavoured to approach the work with an objective and open mind. In places where my views may perhaps have been stated rather strongly, I hope and believe that it was done objectively with a view to making constructive criticism. Where the reference to personalities by name was unavoidable, I disclaim any desire or intention on my part to be other than purely informative.

After this dissertation was completed and it was about to go to the Bindery, the Privy Council delivered its very recent decision in Attorney-General v Antigua Times[1] (reported on 19 August 1975) dealing with issues upon which I had already made my observations and came to my own conclusions. Happily there seems to be little conflict, if any, between the views expressed in this thesis and those of the Privy Council. In view of its importance, I include a discussion of the decision as Appendix II.

I am indebted to the New Zealand University Grants Committee for the New Zealand Government Fellowship without which this work would not have been possible.

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1 [1975] 3 ALL E.R. 81.

But for the inspiration, guidance and encouragement of Professor J.F. Northey, Dean of the Faculty of Law, this work would not have been undertaken or completed. It is my privilege to acknowledge the debt I owe to my supervisors - Professor J. F. Northey, who sacrificed much of his few leisure hours to enable me to complete this thesis in the minimum time, and Dr F.M. Auburn, Senior Lecturer in Law for his much needed assistance.

To Miss Julia McMahon, Librarian of the Davis Law Library at Auckland and all her assistants, my special thanks for the assistance rendered during my research, particularly with regard to inter-loan applications. I am very grateful to Miss Gracie M. Fong and Miss Eily M. Lawton for undertaking the very boring and onerous task of proof-reading.

Special tributes are due to my wife, Zohra, for her unstinted support during the preparation of this work and to my father, A.H. Sahu Khan, who held fort for me in our legal practice during my absence from Fiji.

To all who have helped I record my sincere thanks. For any shortcomings or errors I alone am responsible. I have endeavoured to state the law as at 30 September, 1975. To facilitate easy reference I have included a copy of the Constitution in the pocket of the back cover.

Auckland
30 September 1975

M. S. Sahu Khan

TABLE OF CASES

PART ONE

GENERAL INTRODUCTION

CHAPTER I

THE COUNTRY AND ITS PEOPLE

A. The Country

The Dominion of Fiji is situated in the Southern Pacific Ocean between latitude 15° 42' and 20° 02' south, and between longitude 178° 12' west and 176° 53' east, the 180th meridian passing through Fiji.

The Fiji archipelago comprises about 320 islands[1] of varying sizes of which only about a hundred are inhabited. The larger islands are of volcanic origin and are mountainous. The two main islands are Viti Levu (4,010 square miles) and Vanua Levu (2,138 square miles) and together they comprise an area of 6148 square miles out of the total land area of 7,055 square miles.

B. The People

The society in Fiji is heterogeneous. The population includes Indians, Fijians, Europeans, part Europeans, Chinese and other Pacific Island races.[2] The prominent role, however, in the economic, political and constitutional fields has been played by the Indians, Fijians and the Europeans (including part Europeans).

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1 About 800 including all the islets.

2 Census of the population have been taken decenially (with one exception) since 1881, the last being in September 1966. The 1956 and 1966 Census revealed the following figures (with the official estimated figures for 1974 shown in brackets for comparison purposes): Fiji Current Economic Statistics, Jan, 1975.

	1956	1966	Estimated 1974
Fijians	148,134	202,176	(245,000)
Indians	169,403	240,960	(284,000)
Europeans	6,402	6,590	(3,000)
Part Europeans	7,810	9,687	(10,000)
Polynesians)	5,320	6,095)	(14,000)
Melanesians)		)	
Micronesians)		)	
Rotumans	4,422	5,797	(4,000)
Chinese	4,155	5,149	
Others	91	273	

(1) The Early Fijians

There are divergent views as to the historical and geographical origins of the Fijians.[3] There are no written records of the early days prior to the arrival of the Europeans although some information can be gleaned from the system of reciting genealogies which were passed on from one generation to the next.[4] These songs relate to the coming of the Fijian from a country in the far - west under the leadership of ancestral gods whose canoe, the "Kaunitoni" was driven ashore on the west coast of Viti Levu at or near the site of the Veiseisei village.[5] From this point the "travellers" are said to have dispersed - some explored the hinterland whilst others set out on further voyages of discovery and searched other islands within the Fiji group. In time there sprang up small villages with each village having little, if anything, to do with the others and gradually the south west, south east, and northern areas of Viti Levu became well settled.

These movements eventually led to the establishment of a number of powerful confederacies. The first two were those of Verata and Rewa in the south east of Viti Levu. The next was that of Bau, comprising those who had fled from their original homes in the hills as the result of wars. They initially settled on the mainland but later moved onto the island of Bau itself. To the east of Viti Levu a confederation comprising the whole of the Lau Group was formed. This latter grouping was to become considerably powerful through Tongan influence which was also instrumental in the formation of the important confederacies of Somosomo and Vuna on the island of Taveuni.[6] Other

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3 See Sir Alan Burns, Fiji (1963), 25; and J. W. Burton, The Fiji of Today (1910), 39.

4 J. J. McHugh, The Colony of Fiji (1929), 4 et seq.

5 About 7 miles north of Nadi.

6 Which is on the south east of Vanua Levu.

major confederacies were those of Nadroga[7] in the south-west of Viti Levu, Macuata,[8] Lakeba[9] and Naduri.[10] In addition there were several inter-tribal amalgamations amongst tribes living outside the spheres of influence of the larger confederacies. The many semi-independent communities in the interior areas also combined under a common leader during war.

By the nineteenth century, it was evident that the Fijians were consolidated into various distinct tribes. The Fijians led a communal way of life with the Chief as the head of the community. As in Africa and other countries, tribal wars and conflicts were common. It was due to these that the more powerful tribes were able to extend their boundaries and the size of their tribes. Casualties in these interminable tribal wars were not very heavy owing to the conventions, which regulated fighting and the relative ineffectiveness of the weapons which at this stage consisted of bows and arrows, slings, spears and clubs.

With the arrival of Europeans[11] and the introduction of fire-arms tribal warfare was intensified. Indeed it was with European help that Bau was able to conquer Verata and to subject virtually all the tribes of the eastern and northern coasts of Viti Levu and thus become the premier state. Somosomo conquered Vuna in 1840 and successfully allied with Bau against Natewa thus making itself a very powerful state in Vanua Levu. Rewa was initially a close ally of Bau but they fell out when Rewa destroyed the village of Suva which was

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7 Pronounced Nandronga.

8 Pronounced Mathuata.

9 Pronounced Lakemba.

10 Pronounced Nanduri.

11 See p.6 , post, for the coming of the Europeans.

under Bau's protection. The ensuring war lasted some eleven years. By 1852 Bau, with the help of King George of Tonga, had established itself as the most powerful state in Fiji and its ruler, Seru Cakobau,[12] came to be regarded by foreign consuls as the King of Fiji.

Tonga, a small group of islands lying just east of Fiji, played a disproportionately large influence on the Pacific area generally, as well as in Fiji itself. This was especially noticeable in the Lau confederacy with the advent of Maafu who was of royal Tongan blood. Maafu consolidated his power and was on the verge of a major confrontation with Bau in 1858 when the first British Consul arrived in the country. The Consul succeeded in preventing the attack but with his departure at the end of the year Maafu prepared fresh plans for the conquest of Bau. Cakobau had, however, made Fiji a British Protectorate in 1858 and so when the British Consul returned he warned Maafu that any attack on Bau would be regarded as an attack on Great Britain. Maafu subsequently signed a deed repudiating all claims to chiefly power in Fiji and Cakobau's position was thence unchallenged, and by 1871 he was generally recognised as the King of Fiji.

(2) The Early Europeans

As far as is known the first outsider to come to Fiji was Abel Tasman in 1643. Captain Cook was next in 1774 and he was followed by Captain Bligh in 1789. These visits were at best sporadic and accidental. By 1820 however, Fiji was being regularly visited as a provisioning port for whaling vessels and for its sandalwood which was then in great demand.

The first Europeans to settle in Fiji were merchants and missionaries. About 1830 a number of European traders settled at Levuka on the island of Ovalau and by 1835 had established a

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12 Pronounced Thakumbau.

trading settlement there. When Fiji became a British Colony, Levuka became its first capital. The first party of missionaries to arrive was a group of methodists led by Cross and Cargill and they settled at Lakeba in the Lau Group in 1835.

As has been said above, with the coming of the Europeans, modern weapons were introduced. The Europeans began to participate in tribal wars. Various chiefs tried to get the upper hand over others by "trading" with Europeans for guns and other goods. Many hundreds of acres were "given away" in these "trading" practices. British, American and French warships also began to visit Fiji. The Captains of these warships began to impress on the Fijians that savagery and fighting were not favourably looked upon by their respective governments.

Eventually, the European traders began to come in greater numbers. Hence Fiji became a trading centre for them particularly in respect of sandalwood, whales and later cotton.

(3) The Early Indians

The Indians came to Fiji principally as indentured labourers. The first group of Indians comprising four hundred and ninety eight indentured labourers arrived from Calcutta on 14 May 1879. Hitherto, the plantations of cotton and coconuts had been run with labour from nearby island groups but new regulations made it difficult to recruit that labour. The next choice was to employ Fijian labourers but this was thwarted by the first British Governor of Fiji, Sir Arthur Gordon, who refused to allow it. He showed concern for the adverse effects such recruitment would have on the Fijian way of life. He saw that such a course would disrupt the Fijian family and the structure of the traditional village economy and authority system, particularly because the recruits would have had to live in labour camps. The concern of

the Government for the Fijians arose from the pledge given at the time of the Deed of Cession to look after Fijian interests.

The Fiji Government took the initiative in looking for an alternative supply of labour. Eventually negotiations were completed with the Government of India. The agreement provided that Indian labourers were to be brought to Fiji for five years of compulsory work as the Fiji Government directed. After this period they were free to go back to India but at their own expense. However, if they stayed for another term of five years the Fiji Government would pay their return passages, and those of their children.

In 1880, a year after the arrival of the first Indians, the Colonial Sugar Refining Company of Sydney extended its sugar operations to Fiji. This turned out to be a profitable venture and accelerated further Indian migration. After 1916 when the indentured labour system was abolished, it was found that the majority of the Indians who came under this scheme preferred to settle in Fiji.[13]

(4) The Multiracial Society

Fiji became a British Crown Colony on 10 October 1874. By then Fiji already had significant numbers of Europeans besides the Fijians. With the arrival of the Indians after 1879 Fiji became a truly heterogeneous society from the very early days of colonial rule. Communalism subsequently played a prominent role in the constitutional and political development of the Colony. The economic developments also proceeded on communal basis.

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13 A total of 60,537 Indians arrived in Fiji under the indenture system; of these 24,655 were repatriated under the indenture contract. The rest settled in the Colony: K. L. Gillion, "The Source of Indian Emigration to Fiji," Population Studies, (1956) Vol. X, No. 2 , 139. For a fuller account of the early Indian migration and subsequent settlements in Fiji see Adrian C. Mayer, Peasants in the Pacific (2nd ed., 1973).

Immediately after Cession, the economy of the Colony was controlled by the Europeans. Practically all the industrial and commercial enterprises - particularly those involving sugar and coconut products - were the monopoly of the Europeans. With education and political participation the Indians began to compete with the Europeans. However, the Fijians were not able to compete as the Indians could. Today, the major industries are sugar, coconut products, banana, gold and tourism. The Europeans and the Indians play greater roles than the Fijians in most of these fields. The most important industries in economic terms are sugar and tourism. The Indians produce the bulk of the sugar cane. The tourist industry is basically in the hands of the Europeans and to a lesser extent the Indians. The Fijians play a relatively minor role in the control of the tourist industry. The great majority of those in the professions are Indians and Europeans. There are some Fijians in the professions but they are relatively few.[14] The commercial spheres are virtually controlled by the Europeans and the Indians.

This lagging on the part of the Fijians is a serious problem and all possible avenues are being explored to assist the Fijians in all aspects of the economic and educational field. For instance, the Fiji Development Bank has recently announced that the Fijians would be given loans on very easy terms to assist them in setting up any business or profession.[15] Even in the civil service the government is following the principle of parity between the Indians

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14 E.g. there are some eighty lawyers in Fiji and of them only seven are Fijians. Of these one is a judge of the Supreme Court, one a magistrate, one the Acting Crown Solicitor and four only are in private practice.

15 Fiji Times, 8 April 1975.

and the Fijians.

C. The Land Problem

Land is a very important, if not the vital, factor in Fiji today. The majority of the population[16] in Fiji is Indian and most of them rely on the land for their livelihood. Nevertheless, eighty three per cent of all the land is in the hands of the Fijians.[17] Hence the land problem has become both a political and communal one in Fiji particularly between the Indians and Fijians. It was for this reason that the land issue has played a very prominent role in the political and constitutional development of Fiji.[18] Accordingly it is important to consider, albeit briefly, the land tenure in Fiji and how so much land remains in Fijian hands.

(1) The Historical Setting

Before Fiji became a British Crown Colony in 1874, European settlers had acquired large areas of land from the Fijians. Land had been acquired by various means, some by bona fide "trading" and some by malpractices. The Deed of Cession recognised three classes of land, namely, freehold, crown land and native land. Paragraph 4 of the Deed reads as follows:-

> THAT the absolute proprietorship of all lands not shown to be now alienated so as to have become bona fide the property of Europeans or other foreigners or not now in the actual use or occupation of some chief or tribe or not actually required for the probable future support and maintenance of some chief or tribe shall be and is hereby declared to be vested in Her Majesty, her heirs and successors.

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16 See n. 2, p. 3 , ante.

17 Although some part of these lands are leased to the Indians.

18 See pp. 14 et seq., post.

Immediately after Cession a Lands Titles Commission was set up in 1875 for the claimants of land to substantiate their claims. The Commission took some seven years to finish its enquiries and presented its report to the Governor in Council in February 1882. It was found that 414,615 acres of land had been "properly" alienated to the Europeans.[19] Crown grants were issued in respect of such land. There were some 30,000 acres which were not claimed by the Fijians and this was held by the Crown. The whole of the balance of the land in Fiji, amounting to some 3,900,000 acres, remained the property of the Fijian land-holdings units.[20]

In 1875 all further dealings of native land between the Fijians and others were prohibited.[21] In 1880 the Native Lands Ordinance was enacted after its draft provisions had been discussed and examined by the Fijian Council of Chiefs.[22] Under this Ordinance the Native Lands Commission was established to make enquiries and to ascertain what lands in each province[23] were the rightful property of Fijian owners and in what manner and by which social units the lands were held. The Fijian land owning units actively participated in the enquiries. There were special procedures prescribed for the sittings of the Commission.[24]

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19 The total area of the Colony is 4,581,500 acres. There were many claims which were rejected. For a full report of the Lands Titles Commission see Fiji Royal Gazette (1883) 75.

20 It is questionable how 83 per cent of the land remained native land. Clause 4 of the Deed of Cession provides that these lands which were "in the actual use or occupation ... or actually required for the probable future support and maintenance of some chief or tribe" were to be native lands. As far as the writer is aware this Clause 4 had not been subject to any judicial decision or scrutiny by other authority.

21 The Native Lands Transfer Prohibition Ordinance 1875.

22 As to the Council of Chiefs see p.25 , post.

23 As to the Provinces see p. 23 , post.

24 The procedure was similar to that provided for by the current Native Lands Ordinance 1905, Chap. 114 of the Laws of Fiji.

The Commission sat over a very long period of time. It ascertained the social units owning land. The boundaries of their lands had been described and copies in English deposited with the Registrar of Titles. All the principal social units have been granted parcels of land which they claimed. A register of all Fijian lands has been drawn up and kept at each provincial head-quarters.

The 1880 Ordinance was repealed by the Native Lands Ordinance of 1905 which is the current statute empowering the Governor-General to appoint a Native Lands Commission should the need arise in case of disputes arising, inter alia, in respect of native lands.[25]

Sir Arthur Gordon, the first substantive Governor of Fiji, followed the principle of preserving the traditional social units of the Fijian people. However, in the early twentieth century a change of view appeared on the part of the Europeans and succeeding Governors. A move was made to encourage the principles of individualism. In 1905 legislation was passed which authorized sale or lease of native land to non-Fijians with the consent of the Governor in Council.[26] From 1905 to 1909 about 20, 184 acres of native land were purchased by the settlers, bringing the total land area held on freehold title up to 434, 799 acres.[27]

The relaxed policy of dealings with native land brought vigorous protests from Lord Stanmore (previously Sir Arthur Gordon) in 1908. He brought the matter up in the House of Lords. The argument for

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25 A Commission was also set up in the twenties. The Native Lands Commission also determines disputes as to headship of social units and also membership of social units and other matters incidental thereto; Native Lands Ordinance 1905, ss 16 - 21.

26 Native Lands Ordinance 1905, s. 4.

27 The Colony of Fiji 1874 — 1929, (Government Printer, Fiji, 1929), 55.

the relaxed policy was that the so called "waste lands" were available for lease or sale by the Crown. The Secretary of State for the Colonies made an examination of all the circumstances and ruled that the[28] "waste lands of Fiji must continue to be regarded as the property of the natives as much as the occupied lands". Consequently, subsequent to 1909 no further sales of native land were permitted[29] and the Native Lands Amendment Ordinance of 1912 prohibited alienation of native lands by native owners, whether by sale, exchange or grant, except to the Crown.[30]

Difficulty was frequently experienced in obtaining renewals of lease of native land. The native owners of the land frequently declined on trivial grounds to agree to any renewal. In order to provide a greater security of tenure, the Native Lands (Leases) Ordinance was enacted in 1916. This Ordinance provided that in the event of the native owners declining to surrender control of the land the subject of a lease about to expire, and no valid reason being advanced for such refusal, the Governor in Council could decide the value of the permanent and unexhausted improvements on the property and require the native owners of the land to pay the assessed amount within a stipulated period, or in the alternative, to agree to the surrender of control of the land to the government for approval of a renewal of the expired lease.[31]

Subsequent to 1912, although the question of leasing of native land had been subjected to legislation, at no time has the question of

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28 Parliamentary Paper, H. L. 205, 1908, 77.

29 The Colony of Fiji, op. cit., 55.

30 S. 3

31 Native Lands (Leases) Ordinance 1916, s. 4.

allowing the native land to be sold ever again been the subject of a legislation. Hence today although native land can be leased, no freehold title may be acquired in respect of such land.

(2) The Native Land Trust Board

The native lands are not held by the Fijians individually but communally.[32] Prior to 1940 the system of leasing Fijian land was by application made by the prospective lessee to the social unit[33] owning the land and all leases were subject to the approval of the government. This was found to be unsatisfactory. The whole question was examined by the Governor, Sir Arthur Richards, in the thirties. It was then referred to the Council of Chiefs. The Council of Chiefs made its recommendation for the creation of a statutory body to administer all native lands. A large majority of the Provincial Councils[34] supported this recommendation. Consequently, in 1940 the Native Land Trust Ordinance[35] was passed. Under it the Native Land Trust Board was established with the Governor as the President.[36] The control of all native land is vested in this Board and all such land is administered by the Board for the benefit of the Fijian owners.[37]

A major policy of the Native Land Trust Ordinance was to ascertain and demarcate the areas of Fijian-owned land which should

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32 See p. 21 , post.

33 As to these social units, see p. 21 , post.

34 As to Council of Chiefs and Provincial Councils, see pp. 23 et seq., post.

35 Chap. 115 of the Laws of Fiji.

36 The composition of the Board has been such that all along the Fijians had the ultimate control of the Board. As to the present composition of the Board see p. 636 , post.

37 Native Land Trust Ordinance, s. 4.

be set aside in perpetuity for the use and maintenance of the various proprietary units. Hence a Commission, headed by Ratu Sir Lala Sukuna, was appointed in 1940 to investigate and demarcate lands for such purposes. The Commission carried out such investigations and under its statutory powers given by the 1940 Ordinance, the Native Land Trust Board has made such demarcations and is continuing to do so. The demarcated areas are known as the "native reserves". The lands falling within the native reserves are not available for use in any manner whatsoever by non Fijians. They can only be leased or given on licence to a Fijian.[38] Even if such lands are lying idle (which is the case today) they cannot be given for use by non Fijians. If such land is leased to a Fijian, he cannot transfer or sublet the land to a non-Fijian. Similarly, such a land cannot be dealt with by a process of law which will have the effect of it being taken over by a non-Fijian.

As a result of the Native Land Trust Ordinance except in two cases,[39] no native land (whether falling within the native reserve or not) can be dealt with either by way of lease, sub-lease, mortgage, transfer, assignment or in any manner whatsoever without the consent of the Native Land Trust Board first had and obtained.[40] The granting or withholding of consent is in the absolute discretion of the Board.[41]

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38 Ibid., s. 16.

39 First, in respect of the land comprised in a lease granted for a term of 999 years (which are very few in any event) ibid., s. 36; and secondly a lessee of a residential or commercial lease granted before 29 September 1948 may mortgage the same; ibid., s. 12.

40 Ibid., s. 12.

41 Idem.

Any dealing taking place without such consent is unlawful and even a court of equity will not intervene to grant relief.[42]

Another prominent feature of the Native Land Trust Ordinance is section 9 which provides:

> No native land shall be dealt with by way of lease or licence under the provisions of this Ordinance, unless the Board is satisfied that the land proposed to be made the subject of such licence or lease is not being beneficially occupied by the Fijian owners, and is not likely during the currency of such lease or licence to be required by the Fijian owners for their use, maintenance or support.

The enactment of the Native Land Trust Ordinance created much uncertainty and anxiety amongst the Indians as they were the ones who felt the direct adverse effects. Many Indian sugar cane farmers were evicted from the land that had been cultivated by them for two or three generations. Rehabilitation committees were appointed but they were not able to settle the evictees or dispossessed Indian farmers as satisfactorily as the assurances that had been given by the colonial government at the time of the enactment of the 1940 Ordinance.[43] The result was that those farmers who tilled the land were almost

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42 Chalmers v Pardoe [1963] 3 ALL E.R. 552. See also Kuppan v Unni (1956) 4 F.L.R. 188, Ramlingham v Ram Krishna Mission (1962) 8 F.L.R. 12 and 9 F.L.R. 95. Jumman Sai v Harry Atchson (1960) 7 F.L.R. 71 and Harnam Singh v Bawa Singh (1957) 6 F.L.R. 31.

43 The Director of Lands said in 1940,

> When the [Native Land Trust] Board decides that renewal of a lease ... be refused ... and that the land should be returned to the native owners for their own use, I would recommend that, wherever possible, such lease should be extended for a short period ... in order that the lessee may ... seek another plot of land on which he may settle .... The average period of such extension might well be five years. Further, every endeavour should be made to assist such lessee in finding other land .... It goes without saying that a cultivator, if he is to be of any use to the community, must be kept on the land: Legislative Council Debates (1940) 99.

literally thrown on the streets. Great numbers of Indian farmers fell into this category. Relatively small numbers of these evictees were resettled in "new" lands with very little governmental aid. Some of them, on their own initiative, settled on other fresh lands and, with their own capital and resources, developed them. Some of these lands were fourth class lands fringing the hillsides of the country. Others, who had no means of becoming future farmers, became casual labourers. Some evictees had no alternative but to settle again on other native lands right in the interior. Such farmers opened up new lands and made them cultivable in spite of the fact that they faced further eviction on the expiry of the lease in respect of that land. In short, the plight of the evicted farmers was very desperate.

As time passed security of tenure became a serious question. This was not only in respect of native lands but also freehold lands. To solve part of the problem an important step was taken in 1966.

In 1966 the Agricultural (Landlord and Tenant) Ordinance[44] was passed. The fundamental purpose of this Ordinance was to[45]

> destroy a pernicious system that we have at the moment in Fiji. This system in relation to tenures of agricultural land is that, at the present moment, we have short tenancies, low rents and little, if any, security for the tenants. The result of this system means that there is little, if any, encouragement to develop agricultural land, because it is quite clear that the incentive in relation to the tenant is nothing but bad. He bleeds the land white in relation to his short term of tenancy, he can obtain little if any, compensation for his term, and with the exception of buildings on stilts, he cannot remove the buildings from the land. He cannot remove the buildings which form part of the agricultural tenancy in question.

On the question of security of tenure, the Ordinance[46] provides for

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44 Chap. 242 of the Laws of Fiji.

45 Legislative Council Debates (1966), 475, per the Attorney-General.

46 Ss. 4 - 13. Although the statute permits a minimum period of 10 years, invariably only 10 years' extensions are granted.

a statutory extension of an agricultural lease for two terms of ten years each if the tenant can show greater hardship than the landlord. There is a Tribunal established under the Ordinance which decides the relative hardships. If the relative hardship of a tenant is greater the Tribunal grants the first extension of ten years. If on the expiry of this first extension the relative hardship of the tenant is still greater then the second statutory extension of lease is granted for another period of ten years.

There are also provisions relating to increasing rents and forfeiture of lease which operate in favour of the landlord.[47]

The provisions of the 1966 Ordinance have been circumvented by the landlords, particularly the Native Land Trust Board. Previously the Native Land Trust Board usually granted lease for thirty years. After 1966 it granted leases for only ten years on the basis that the tenant may be allowed two statutory extensions of ten years each.

The Native Land Trust Board, which has at least eighty three per cent of all the lands in Fiji under its control, is obviously the largest landlord in Fiji. The great majority of the tenants who are affected by non-renewal of leases are Indian. [Also the Indians are the majority of the population in Fiji,[48] and most of them rely on land for their livelihood. Accordingly, the question of land inevitably became a racial, political and constitutional issue in Fiji. In the Constitution itself, along with Fijian custom and customary rights, the Fijian land has been given an entrenched position.[49]]

In the Fijian society the question of land is interwoven with the

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47 Ss. 23, & 26.

48 See n. 2, p. 3 , ante.

49 Constitution, ss. 67 and 68.

question of custom and customary rights. They cannot be seen in isolation. Traditionally the Fijians do not hold land individually but communally and this manner of land holding dates back to pre-Cession days. The British Government recognised that the Fijians had their own tribal and traditional ways of living and owning land; and it undertook to govern the Fijians "in accordance with native usages and customs".[50] In fulfilment of this promise, a separate Fijian Administration was set up from the very early days of the British Colonial rule. This separate Fijian Administration played (and continues to play) a prominent role in the constitutional and political development of the country.[51] So much so that the entrenched position of the Fijian land, custom and customary rights are the product of the significance of the separate Fijian Administration. Accordingly it is intended to deal with the subject of Fijian Administration in order to facilitate the understanding of the entrenchment of the special safeguards of Fijian land, custom and customary rights, and section 45 (1) a, 67 and 68 of the Constitution.

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50 Parliamentary Paper: H. L. 205, 1908, 84.

51 However, it has been revealed that the separate Fijian administration and the communal land holding have been significant factors in the retarding of the economic and general progress of the Fijians. E. g. see Report of the Commission of Enquiry into the Natural Resources and Population Trends of the Colony of Fiji (1959); Council Paper No. 1 of 1960 (Commonly known as the Burns Commission Report); and The Fijian People: The Economic Problems and Prospects, a report by Professor O. H. K. Spate: Council Paper No. 13 of 1959.

CHAPTER II

THE FIJIAN ADMINISTRATION

The Fijian Administration is a rural local government system having jurisdiction over all Fijians in the Dominion. However, the principles of the system were not an innovation of the British Colonial rule but were found in indigenous institutions. Such institutions were merely given statutory recognition after Cession. In order that the principles involved in the Fijian Administration may be understood it is desirable to explain briefly the constitution and evolution of Fijian society up to the stage which had been reached at the time of Cession.

A The Historical Background [1]

In its earliest form the Fijian society comprised independent family groups who were tillers of the soil. Each group had its own village and land for planting; and was ruled by the senior male members. Except in the case of Macuata (pronounced Mathuatha) succession was agnatic. This original village settlement was known as a Yavutu, and the original founder was termed the Kalouvu.

As the primitive settlement increased it gradually evolved into various separate units of population known as Matagali (pronounced Matanggali and meaning "community"). Each such unit was headed by a son of Kalouvu. Similarly, the first family of sons in each Matagali formed smaller subdivisions known variously as Itokatoka, Mbito, or Mbatinilovo according to the locality. The various Matagalis grouped together to form the Yavusa (or "federation") under one chief who was the nearest lineal descendant of the common ancestor, or Kalouvu. The senior male in each Matagali represented his community in the Yavusa. The Yavusa was in effect a political entity with sovereign rights over a defined area.

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1 See Report of the Public Service Reorganization Committee: Council Paper No. 2 of 1937 from which significant assistance has been derived.

When the country came to be more closely populated, inter-tribal fighting became common. Hence confederations of several Yavusa were formed for mutual protection under a selected chief. Such a confederation was known as Vanua (or "Confederation"). Further confederations of several Vanua united under a powerful chief to form a Matanitu[2] (or "state"). However many Vanua remained separate and independent. Matanitu was the largest social unit known in the Fijian polity.

Succession to the headship of a family or tribe customarily passed to surviving brothers in order of seniority, and on the death of the last brother reverted to the senior male in the succeeding generation; that is, to the eldest son of the eldest brother if there was one. In a Yavusa, a Vanua, or a Matanitu succession to the headship, while preferring the recognized order of seniority, was frequently decided by a system of election to ensure the selection of the best man for so important a position.

This was basically the position of the Fijian society at the time of Cession. In short, the British colonial rule found the Fijian society was strictly communal. The formation and aggregation of these social units gave rise to the system of Chiefs amongst the Fijians and which has since become deeply embedded in Fijian society and its way of life. As Mr G.K. Roth so aptly put it:[3]

> Throughout Fijian society customary rights and obligations existed and their practice as between chiefs and people in the

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2 Cases in point being MBau, Rewa, Namosi, MBua, Cakaudrove (pronounced Thakaundrove), Naitasiri, Serua, Lau Nadroga (pronounced Nandroga) and Kadavu (pronounced Kandavu).

3 G.K. Roth, Fijian Way of Life (1953), 67. Substantial assistance has been derived from this work.

> various social units, great and small, was well understood. Members of these units acknowledged, as being in the best interests of the State to which they belonged, the obligation to render tribute and service to their chiefs for the general weal. Rights they did not press, being sufficiently protected through the social system under which they lived. Commands to produce tribute such as bark-cloth or sail mats, and services such as the planting of food crops, were a natural feature of the every-day life of chiefs and people.... In return for the loyalty of his people and as a result of the services that he could command, the chief afforded his people protection against attack; and he was expected to help them in times of distress, to settle land disputes and domestic affairs if major interests were involved, and generally to administer his people in accordance with accepted custom.

B. The Colonial Policy

Traditions and customs were so strong amongst the Fijians that at the time of the cession of the Colony to Great Britain, the British Government gave the undertaking that the Fijians would be governed "in accordance with native usages and customs". It was to implement such a policy that the first provisional Governor of Fiji, Sir Hercules Robinson, adopted a policy of administering the Colony on principles found in indigenous institutions. In a despatch dated 16 October, 1874, Sir Hercules stated in a report on the establishment of the Native Department:[4]

> By this machinery it is believed that arrangements can be made for the efficient government of the Natives without departing in any important particular from their own official customs, traditions and boundaries.

In pursuance of this policy he grouped the islands of the Colony into Provinces, based on the boundaries of the old "States". Within each Province a number of Divisions was created. Each Division comprised a group of villages. A native Fijian was placed in charge

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4 Cited in Legislative Council Debates (1944), 32.

of each of these units - Provinces, Divisions and Villages.

There was also a chain of responsibility from the lowest to the highest level. At the head of every Province was a chief known as a Roko who was the deputy of the Governor in his own Province. There were also formed Provincial and Divisional courts with Fijian magistrates having jurisdiction over matters where only Fijian parties were affected. These structures were the foundations for a Fijian local government system.

The first substantive Governor of Fiji, Sir Arthur Gordon (who later became Lord Stanmore) perpetuated the basic policies of Sir Hercules Robinson. In 1876 the Native Affairs Regulations Ordinance[5] was passed and under it the Native Regulation Board was created. The fundamental duty of the Board was to -

> consider such questions relating to the good government and well-being of the Native populations as shall from time to time be submitted to them by the Governor and to give honest and well-advised counsel thereupon and to submit to the Governor such recommendations and proposals as they may deem to be for the benefit of the Native population....[6]

The Board also had powers to make regulations with regard to native marriages, divorces and succession to property and generally for the "good government and well-being of the native population".[7] There were also native courts created with native magistrates having jurisdiction over matters involving only the Native population. This Ordinance and the regulations made thereunder constituted the first written code of Fijian custom.

> The regulations secured the continuance of certain moral and customary sanctions found in the traditional Fijian social

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5 39 and 40 Vict. No. 35.

6 Ibid., s. 7.

7 Ibid., ss. 8 and 9.

> system and provided a simple code of criminal and civil law adaptable to situations arising in the Fijian way of life.[8]

The first set of regulations covered practically all aspects necessary for the administration of the native Fijians. They covered such fields as the appointment of Fijian officials and their general responsibilities in the administration of their own affairs in the various Provinces, administration of justice in Fijian courts, raising and collecting of rates for administrative expenses, discipline, registration of births and deaths, schooling, and other social and economic matters generally.

Prior to Cession there was in existence a system of government by Councils of Chiefs and elders. They used to meet and deliberate on matters relating to "custom, alliances, discipline, and the many feuds that attended on their natural form of government in those days."[9] Statutory recognition was given to that system. There were three types of councils which were recognised - the Divisional Councils, the Provincial Councils and the Council of Chiefs. Each Divisional Council was presided over by the head of the Division called Mbuli. This Council dealt with local matters of welfare and good order and was responsible to the Roko Tui who was the head of the Province. The Provincial Councils which had corresponding but wider duties dealt with matters relating to the Province as a whole and was responsible to the Governor. Both these Councils had legislative authority. The third was the Council of Chiefs which was comprised as its name suggested, basically of Chiefs. This body was merely an advisory one. Its membership has always included representatives from all Provinces. Although it was merely an advisory body, the Council of Chiefs' recommendations and views

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8 Roth, op. cit., 136.

9 Ibid., 137.

have always been regarded as representative of Fijian feeling generally. As will be seen, even today it is the "voice" of the Fijians. This Council has always been consulted by the Governors in all measures affecting the Fijians. One instance was the passing of the Native Lands Ordinance in 1880, when Sir Arthur Gordon was Governor.

C. The Continuation of a Separate Fijian Administration

The desirability of continuing a separate Native Department drew the attention of the Colonial Government in 1913. By a despatch dated 24 September, 1913 the Secretary of State issued the following instructions to the Governor of Fiji:[10]

> I shall be glad if you will consider, with the advice of the Executive Council, whether the continued separate existence of the Native Department is necessary or desirable. It has occurred to me that it may be possible to distribute the work which is now attended to by the Native Department amongst the first grade Stipendiary Magistrates and the Stipendiary Magistrates and Commissioners (who already are, or should be,in close touch with native affairs in their own districts) affording them such extra assistance as they may require from the savings which would be effected by the abolition or reduction of the Native Department.

As a result a Committee was appointed to investigate the matter and on 5 January 1914 it reported, inter alia, that:[11]

> The Committee concur in the suggestion of the Secretary of State that fuller powers should be delegated to Stipendiary Magistrates and that native administration in the provinces should be placed in the hands of those officers, who will in future be styled District Commissioners. But, it is, in

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10 Journal of the Legislative Council (1915); Council Paper No. 101, 7.

11 Ibid., 9.

> the opinion of the Committee, essential that the desired end should be attained gradually.

However, the Committee did recommend that:[12]

> The Committee consider that it is quite impossible to do away with the Native Department at the present time. Such a sudden change would inevitably lead to misunderstanding and confusion.

This suggestion of decentralization was opposed by the Fijians. They felt that this separate administration, particularly through the separate and distinct Department, was in their best interests. On 2 February 1915 the Roko Tuis of Tailevu, Cakaudrove and Mbua addressed a letter of protest to the Governor stating:[13]

> We wish to bring to Your Excellency's notice that it is our desire and that of the chiefs and people of Fiji that neither the Department nor the Commissioner should cease to exist.
>
> We Fijians are the most numerous class in the country and own the greater part of the land. We support all Government measures and are loyal subjects of His Majesty. We do not think it at all reasonable that we should be considered as of no account or that our department should be belittled ....
>
> We feel sure that were the Department to be abolished we should not receive the same consideration as we now do .... We beg that our Department be maintained.

However, the process of decentralization did commence in 1915, albeit, gradually. In 1915 the Legislative Council passed a motion[14] which had the object in principle of abolishing the Native Department

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12 Idem.

13 Ibid., 14.

14 Legislative Council Debates (1915), 205.

and replacing it with certain officers who were to be attached to the Colonial Secretary's Department. The head of the Native Department (previously the Native Commissioner) became the Secretary for Native Affairs and the Assistant Commissioner became the Assistant Secretary for Native Affairs. Control of the Native Administration was placed in the hands of District Commissioners and Officers later called District Officers, who were in fact assistants to the District Commissioners.

Up to 1916 there was a Native Department. In 1917 that separate Department was abolished. The Secretariat for Native Affairs then became part of the Colonial Secretary's Department. In 1923 there was another change, when the Secretariat for Native Affairs became known as the Native Section of the Secretariat and the head of that Section was known as the Under-Secretary for Native Affairs. In 1925 the post of Secretary for Native Affairs was restored but it was still attached to the Colonial Secretary's Department. By 1937 decentralization of the Native Administration had taken place in all but one of the Provinces.[15]

The Fijians did not approve of the decentralization. As the late Ratu Sir Lala Sukuna pointed out,[16] there were

> doubts and misgivings on the part of the Fijians who regretfully looked back to the time when they did govern themselves through the natural agency of Chiefs and elders.

Their greatest complaint was that,[17]

> The policy of the period was, on the passing of the old school of Chiefs, to govern through European officers

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15 Legislative Council Debates (1944), 35.

16 Idem.

17 Idem.

rather than through young Chiefs who had not been trained in the art of leadership.

In 1936 a Committee called the Public Service Reorganization Committee was appointed by the Governor to review, inter alia, the existing organization of the Public Service in Fiji. In 1937 the Committee presented its Report to the effect that the [18]

> Natives are now showing a desire not only to disregard their natural and chiefly organization, but also to disregard the authority of the administrative officers and to seek an outlet in a Department whose centre is far from their tribal homes. The effect can only be harmful to the Natives, disruptive to their life, and disruptive also to proper administration of their affairs.

The Committee recommended the abolition of the Department[19] and title of Secretary for Native Affairs and favoured the creation of a post of Adviser on Native Affairs who was to be an ex-officio member of the Executive Council and a nominated member of the Legislative Council. The Committee was careful in saying that this newly defined post should not involve any departure from the unitary system.[20] Basically the Adviser was to be the Governor's adviser on matters

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18 Journal of the Legislative Council (1937): Council Paper No. 2, at 7.

19 The term "Department" was a misnomer. At the time of the report there was no separate entity known as the "Native Affairs Department". There were two subsections in the Colonial Secretary's Department, one was called the "Native Section" and the other the "Indian Section". It was only loosely that the former was called the "Native Affairs Department". Hence the effect of the recommendation of the Committee was that the "Native Section of the Secretariat should be more closely associated with the general work of that office and that any separatist tendencies should be severely checked.": The Governor's Address, Legislative Council Debates, (1938), 4.

20 Journal of the Legislative Council (1937): Council Paper No. 2, at 7. As to the details of the duties and functions of this Adviser see idem.

connected with Native policy and administration. He was to be the chief link between the Government and the Fijians. The ultimate aim of the recommendations was that the separate section of the Colonial Secretary's Office dealing with Native Affairs would be completely absorbed in the larger organization.[21] The changes as recommended by the Committee did eventuate and in 1938 the Adviser on Native Affairs was appointed.[22]

However, the Fijian leaders[23] were not at all happy with the scheme for reorganization. There was a feeling of unrest and anxiety. The Fijians felt that previously the Fijian Chiefs had taken responsible positions as the rulers of their own people. All of them were working under the Officer known as the Native Commissioner. Fijian Chiefs, as Rokos, were treated as senior Officers of the Government. As the late Ratu Sukuna (later Sir Lala Sukuna) said:[24]

> [The Fijian Chiefs] were consulted by the Secretary for Fijian Affairs at every turn. That system of personal rule by the Governor through the Native Commissioner produced in the years steadfast faith, sincere attachment and abiding loyalty.

However, under the reorganization scheme the same Rokos became junior officers of the Government. They were controlled by District Commissioners and District Officers. The District Officers were invariably young and inexperienced with little knowledge of local customs and conditions. Furthermore, the Rokos no longer had direct contact with the Adviser on Native Affairs. The feeling of dissatisfaction culminated in a resolution of the Council of Chiefs

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21 Idem.

22 Mr H.C. Monckton.

23 E.g., Ratu Sukuna (later Sir Lala Sukuna), Legislative Council Debates (1940), 402.

24 Idem.

passed in 1940 which stated:[25]

> This Council considers that Rokos should be placed directly under the Adviser on Native Affairs in their work and not under the District Commissioner or District Officer as at present.

To this the Governor replied:[26]

> It is not possible to alter the structure of government, which would be the result of placing Rokos directly under the Adviser on Native Affairs.

The Fijians continued with their protests against the decentralization policy.[27]

In 1943 the government began to draw plans for adjustments in the Native Administration in order to charge the Fijian members of the Legislative Council more directly with responsibilities in Fijian affairs and generally to consolidate native affairs under one legislation. In 1944 the Fijian Affairs Ordinance was passed. Its aim was to re-establish indirect rule; that is instead of the District Commissioners and District Officers controlling native affairs, the Fijians themselves would control their affairs through their own representatives. This ordinance charged the Fijian members of the Legislative Council more directly with responsibilities to the Council and to the Governor in matters of Fijian concern. At the same time it readjusted financial arrangements so that all expenditure on Fijian local government services might be carried on a Fijian local government budget and administered by a body composed mainly of the Fijian members of the Legislative Council. However, the administration of the budget was to be subject to the final control of the Legislative Council and the Governor.

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25 Ibid., 401.

26 Idem.

27 E.g., see ibid., 400 - 403 and 435 - 437.

The Fijian Affairs (Amendment) Ordinance of 1966 is the current statutory authority for the system which was designed to continue the policy of building indigenous institutions. It gave statutory recognition to the existence of the Council of Chiefs. This Council was to consist of the Secretary for Fijian Affairs as President, the Rokos of the Provinces, one representative from each Province selected by the Provincial Council, one Fijian Magistrate, and one Fijian Medical practitioner to be nominated by the Secretary for Fijian Affairs and a maximum of six Chiefs appointed by the Governor.[28] The primary duty of the Council was similar to that of the Native Regulation Board created under the Native Affairs Regulation Ordinance of 1876.[29]

By the 1944 Ordinance was also established the Fijian Affairs Board comprising the Secretary for Fijian Affairs who was to be Chairman, the Fijian members of the Legislative Council, and a Legal Adviser appointed by the Governor. The Board had functions and duties analogous to the Native Regulation Board. However, the Fijian Affairs Board was given specific powers to make regulations, in relation to the Fijian people, for:[30]

(a) the peace, order, welfare and good government of Fijians and for all matters connected therewith;

(b) the observance of Fijian customary rights, ceremonies, obligations and conduct, including communal services;

(c) the provision of public services;

(d) the imposition of rates by Provincial Councils;

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28 Fijian Affairs Ordinance 1944, s. 3.

29 See p. 24 , ante.

30 Fijian Affairs Ordinance 1944, s. 7.

(e) the jurisdiction, power and procedure of Fijian courts and magistrates;

(f) the making of by-laws and orders by Provincial Councils and District Councils;

(g) sanitation and health;

(h) fishing.

Further when any Bill was to be introduced into the Legislative Council which appeared to the Governor to affect, in any important respect, the rights and interests of Fijians then as a rule the Bill had to be first referred to the Board for consideration.[31] There were also provisions for the appointment and powers of Rokos, Fijian magistrates, District and Provincial Courts, Provincial and District Councils.[32] The Provincial and District Councils were given legislative powers pertaining to all aspects of the running of the provinces and districts, including matters of housing, bridges, sanitation, rates, pollution, gambling and the planting of food.[33]

The 1944 Ordinance underwent several changes. However, the existing system, now called the Fijian Administration, remained substantially unaltered. The changes which were made involved the inter-relationship of the various bodies and authorities to each other and to the Central Government. In other words the changes were in the scope rather than the nature of the functions. For instance in 1949 a completely revised regulation came into force. Two important changes were brought about by the new regulations. First, an elective system in choosing unofficial members of the Divisional Councils, the

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31 Ibid., s. 11.

32 Ibid., ss. 12 - 20.

33 Ibid., ss. 21 and 22.

Provincial Councils and the Council of Chiefs was adopted. Secondly, there was a provision for the majority of the members not being salaried staff of the Fijian Affairs Board.[34]

In 1959 the Burns Commission Report[35] made recommendations relating to Fijian Administration. The Commission strongly felt that the Fijian Administration should not continue for longer than was absolutely necessary. It thought that the system was not operating for the benefit of the Fijians for these reasons:-[36]

(a) It is no longer (if ever it was) a local government organization, and it has developed and is becoming more and more entrenched as a completely exclusive, autonomous administration (with its own financial and legal advisers) divorced from the Central Government.

(b) It is tending to isolate the Fijians from all other communities.

(c) It is continuing to foster an out-dated communal system against the wishes of a large number of people who desire a much greater degree of freedom.

(d) The present "dual" system is wasteful of time and money.

(e) For its success it is almost wholly dependent upon "personalities" instead of "pin-pointed" responsibility.

However, the Commission felt that immediate abolition of the system was not justified and recommended a transition, on the following lines.[37]

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34 Regulation No. 5, reg. 2, 8 and 14.

35 Report of the Commission of Enquiry into the Natural Resources and Population Trends of the Colony of Fiji: Legislative Council Paper No. 1 of 1960.

36 Ibid., 32.

37 Idem.

(a) The Fijian Affairs Department should be moved into the Secretariat and made an integral part of the Central Government.

(b) The title of Secretary for Fijian Affairs should be changed to "Secretary for Local Government" to whom Commissioners of Divisions would be directly and solely responsible. District Officers would continue to be responsible to the Commissioners of Divisions.[38]

(c) The Central Fijian Treasurer should be transferred to the Accountant-General's Department.

(d) Roko Tui and Buli should be paid through the District Officer's office, but Roko should be directly and solely responsible to Commissioners.

(e) The installation of a new Roko Tui should be carried out by the Commissioner and not, as was done, by the Governor.

(f) The Roko Tui should be chairmen of Provincial Councils which would continue to have power to make by-laws and levy their own rates.

(g) Programmes of work[39] and communal duties (as distinct from social customs) should be abolished.

(h) Provincial Budgets should be approved by the Commissioner.

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38 Fiji has been divided into four administrative divisions of the central government - the Central, Eastern, Western, and Northern. Each division has at its head the Commissioner. In each division there are one or more district officers, depending on the size and needs of the division. The Commissioners are responsible for co-ordinating the activities of all departments of government within their divisions and generally to supervise the activities of government. The district officers assist them in their tasks.

39 As to programmes of work, see Roth, op. cit., 140 et seq.

As a result of the Burns Commission Report, some changes were brought about in the Fijian Administration in 1966. The Fijian Affairs Ordinance was substantially amended.[40] However, once again the changes were more in the scope rather than in the nature of the functions. The new amending Ordinance continued the existence of the Great Council of Chiefs, the Fijian Affairs Board and the Provincial Councils. The District Councils were no longer recognised. Instead there was provision for creating such other Council for any area in any Province as the Fijian Affairs Board defined. An important change was that the Ordinance did not provide for the composition of the Councils or the Board. All these were left to be prescribed by Regulations. For instance Section 4(1) of the Ordinance states,

> There shall be in respect of the Fijian people a Council called the Great Council of Chiefs which shall consist of such number of appointed, elected and nominated persons as the Governor-General may by regulation prescribe.

The provisions of the Fijian Affairs Ordinance (as amended in 1966) govern the Fijian Administration today.

Accordingly, the Fijian Administration is comprised of the Great Council of Chiefs, the Fijian Affairs Board, and the Provincial Councils. At the apex is the Great Council of Chiefs presided over by the Minister for Fijian Affairs and Rural Development. The Council consists of the Minister of Fijian Affairs and Rural Development, the Fijian members of the House of Representatives, not more than seven chiefs to be appointed by the said Minister, not more than eight other persons to be appointed by the said Minister, three persons (of whom at least two shall be members of Provincial Councils) to be elected by each Provincial Council with twenty or more members; and two

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40 The Fijian Affairs (Amendment) Ordinance, No. 10 of 1966.

persons (of whom at least one shall be a member of the Provincial Council) to be elected by each Provincial Council with less than twenty members.[41] This Council considers legislation and proposals affecting the rights and welfare of the Fijian people which is referred to it by the said Minister and makes recommendations thereon. It also advises the Governor-General on matters affecting the rights, welfare, good government and development of the Fijian people.[42] This Council acts purely in an advisory capacity. However, it is regarded as the voice of the Fijian people generally. It is a very influential body and has from the outset been the backbone of the Fijian polity. Its current strength and influence in Fiji can be gauged from the provisions of sections 45 (1)(a), 67 (5) and 68 of the Constitution.[43] Legislation affecting Fijian land, customs and customary rights and amendments to sections 45(1)(a), 67 (5) and 68 of the Constitution cannot be passed by the Fiji Parliament unless, inter alia, six of the eight senators appointed on the advice of the Great Council of Chiefs agree.[44]

The next in the ladder of importance is the Fijian Affairs Board which is also presided over by the Minister for Fijian Affairs and Rural Development. The Board consists of the Minister, eight Fijian members of the House of Representatives elected by the Fijian members of that House and two members of the Great Council of Chiefs, not being members of the House of Representatives, elected by those members of the Great Council of Chiefs who are not members of the House of Representatives.[45] This Board is empowered to make regulations to be observed by all Fijians and to exercise vigilance over

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41 Fijian Affairs (Great Council of Chiefs) Regulations, reg. 2 (1).

42 Fijian Affairs Ordinance, s. 4 (2).

43 See p. 208, post.

44 Constitution, ss. 67(5) and 68.

45 Fijian Affairs (Fijian Affairs Board) Regulations, reg. 2 (1).

the affairs of the fourteen Provincial Councils which are subject to the general directions of the Board.[46] The Board maintains a central secretariat at its headquarters and a Treasury which co-ordinates and assists the financial work of the Provincial Councils. It also trains and provides the senior administrative and accountancy staff of the Provincial Councils.

The third stratum is the group of Provincial Councils. For the purposes of the Fijian Administration, the Dominion is divided into fourteen provinces, each with its own Council. Each Council comprises partly elected and partly appointed members - the number of members vary from province to province.[47] Council elections amongst residents and land-owners of each Province were conducted for the first time in 1967 on a full adult Fijian franchise. In addition to those elected, the Minister for Fijian Affairs and Rural Development appoints a number of chiefs to each Council. There is however, an elected majority on each Council. The Chairman of each Council is elected annually. Besides the Chairman, there is a chief executive officer of each Council who is known as the Roko Tui. The Roko Tui is appointed by the Minister for Fijian Affairs and Rural Development on the recommendation of the Provincial Council concerned. The Councils have wide powers to make by-laws subject to confirmation by the Fijian Affairs Board. Their budgets are also subject to the approval of the Minister. The Councils are empowered to levy rates for revenue. They also have wide powers to make by-laws relating to "the health, welfare and good government" of their respective provinces.[48] Although the Fijian Affairs Board has regulation-making powers, such powers are now seldom used. Instead the Provincial Councils are now encouraged to make their own by-laws

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46 Fijian Affairs Ordinance, s. 7 and the regulations made thereunder.

47 Fijian Affairs (Provincial Councils) Regulations, reg. 3 (1).

48 Fijian Affairs Ordinance, s. 8 (2).

to suit local circumstances. Any regulation or by-law made by the Fijian Affairs Board or the Provincial Council has to be subject to the laws of the central government so that if there is any conflict then the former shall be void to the extent to which it is incompatible with such other law.[49]

Each Province was divided into divisions called Tikina. Until 1966 there used to be Tikina Councils which were supervised by the Provincial Councils. Since then there are no longer Tikina Councils as such, although the traditional divisions of each province (tikina) still subsist.

A tikina comprises groups of villages. At the head of each Tikina there used to be a Mbuli[50] who was a salaried official of the Fijian Administration and he, like the Roko Tui, was not necessarily a person of hereditary rank. However, since 1967 the statutory recognition of a Mbuli has been discontinued.[51] Instead the Board has been given powers to appoint such officers and servants as may be necessary for the efficient discharge of its duties and responsibilities and for the proper conduct and administration of Fijian affairs.[52]

On the lowest rung of the ladder come the villages. Traditionally every village had a headman who was known as the Turaga ni Koro. The Turaga ni Koro used to be appointed on the recommendations of the inhabitants of the village. In the early days the position was held by chiefs but later this was not necessarily so. Although there appears to be no statutory recognition of this position, one still finds Turaga ni Koro at the head of each village. His duties are to see to the carrying out of social services and he has the general and overall responsibility for the village.[53]

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49 Ibid., s. 26.

50 As to the duties of Buli see Roth, op. cit., 145.

51 Fijian Affairs (Amendment) Ordinance, No. 29 of 1967, s. 4.

52 Ibid., s. 4.

53 As to the duties of Turaga ni Koro, see Roth, op. cit., 141.

At present attempts are being made to bring matters previously handled by the Fijian Administration under the jurisdiction of the central government. The Fijian courts which heard cases arising out of Fijian Affairs Board regulations and Provincial Councils by-laws have been gradually withdrawn from all provinces as from 31 December, 1968. The ordinary judicial process now deals with infringements of all such regulations and by-laws. Similarly legislation relating to native divorces and registrations of birth, deaths and marriages is no longer separate. With the enactment of the Matrimonial Causes Ordinance[54] and the Births Deaths and Marriages Registration Ordinance,[55] there are now a uniform code of matrimonial law and a uniform system of registration for persons of all races living in Fiji.

D. Conclusion

It is apparent that over the years the Fijian Administration has acquired an assured place in the general administration of the Dominion. The majority of the Fijians have all along felt that the separate Fijian Administration has been to their great advantage. Two official reports[56] have advocated changes - in fact the Burns Commission recommended the abolition of the separate Fijian Administration. The two reports demonstrated how the separate Fijian Administration has retarded the economic progress of the Fijians. Despite this, very few changes have been made. On the contrary under the present Constitution the separate Fijian Administration has secured an entrenched position

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54 No. 22 of 1968.

55 No. 10 of 1968.

56 The Burns Commission report and The Fijian People: Economic Problems and Prospects, a report by Professor O.H.K. Spate: Council Paper No. 13 of 1959.

and any amendment to the Fijian Affairs Ordinance, must secure the special majority required by the Constitution.[57]

This means that no matter how strongly one feels about this separate administration any changes desired will have to emanate from the Fijian people themselves. In view of the resistance offered by the Fijians in the past to alteration of the separate administration it is difficult to predict radical changes in the foreseeable future. The Fijians feel somewhat secure under the present system and would rather continue with it despite its drawbacks and shortcomings. Professor Spate summed up the position well when he stated:[58]

> Together with weaknesses, some of which seem inherent, in the machine itself, this adds up to a lack of clear leadership and consequent frustration among leaders and people alike. The best men in Fijian Affairs, on and off the Fijian Affairs Board, are aware, often consciously, of this, but commitment to the system, and the lack of any clear alternative, make it difficult indeed to take successful counter-action or to launch out on a new approach.

When the seeds of the separate Fijian Administration were first sown in 1876, the whole machinery was built on the existing socio-political organisation of the Fijians. Sir Arthur Gordon relied on existing chiefly and tenurial relations for the internal government of the Fijians.

Hence the tradition was an important foundation of the system; while today, ironically enough, it is the system which perpetuates those traditions. Any changes to the machinery and system as a whole will necessarily involve changes in the attitudes of the Fijian people themselves. That is, the changes will have to be by evolution and not something which can be imposed.

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57 Constitution, ss. 67 and 68.

58 Council Paper No. 13 of 1959, 33.

PART TWO

A SURVEY OF THE HISTORY AND DEVELOPMENT OF THE CONSTITUTION

CHAPTER III

VARIOUS STAGES OF HISTORICAL DEVELOPMENT

A. Introduction

No analysis of a Constitution can be complete without an understanding of the society for which it was designed and without a knowledge of the constitutional evolution which it represents. It has been seen that from the outset of colonial rule in Fiji the society was composed of various races and it was with this multi-racial background that Fiji became an independent Dominion within the British Commonwealth of Nations on 10 October 1970. Mindful of the problems that have arisen in other countries with similar ethnic variety, the framers of the Fiji Constitution were obliged to seek a basis for an amicable solution to the problems of a multi-racial society. However, whether the 1970 Constitution in fact achieves that aim and satisfies the aspirations of the various communities is difficult to assess in the present work. We will be concerned with constitutional rather than political issues although at times it may be difficult to draw the boundaries.

To appreciate the present constitutional framework, it is imperative that a general historical background leading up to the adoption of the 1970 Constitution be given. It is particularly important to understand that Fiji is not a homogeneous but a heterogeneous society.

B. Pre-Cession Constitutional History

The evolution of constitutional government in Fiji dates back to the period prior to the cession of the Fiji Islands in 1874. Fiji was first offered to the British Crown on 12 October 1858. This arose out of the necessity of settling a huge debt alleged to have

been owed by Cakobau, the "King of Fiji", to the American Government.[1] An offer was made to cede 200,000 acres of land to the British Government in consideration of the latter paying the American claims. This offer was declined. King Cakobau then offered Fiji to the United States of America. The Americans being engaged in a civil war, no reply was received.

By this time there was a significant number of Europeans resident in the islands who pressed King Cakobau to establish a regular form of government. Several attempts were made but these failed mainly because of the mutual suspicions and hostility of the leading chiefs.

In 1865 an attempt was made to form a Confederation. On 8 May 1865, there was an assembly of the various independent Chiefs of Fiji at Levuka. They deliberated on matters connected with the welfare of Fiji and their mutual interests. An agreement was reached that there ought to be a firm and united form of government and that there ought to be a code of laws applying to all. Accordingly, the seven paramount Chiefs of Fiji[2] agreed on a form of

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1 The circumstances surrounding this debt to the Americans should be stated. The American Consulate was stationed on the small island of Nukulau off the mainland near Suva. On 4 July 1849, the Consul was celebrating independence day by the firing off of cannons and letting off of squibs. The house of the Consul was gutted by fire. Also various complaints were lodged against Cakobau and numerous losses ascribed to him. Claims for damages in respect of the alleged losses were made by the American settlers through their Consul. All the responsibility for these losses was put on Cakobau although he had not been the cause of these losses. The United States Government sent a representative (Commander Boutwell) to make inquiries and consequently Cakobau was asked to pay £9,000 as damages.

2 That is of Bau, Lakeba (pronounced "Lakemba"), Macuata (pronounced "Mathuata"), Rewa, Cakaudrove (pronounced "Thakaundrove"), Naduri (pronounced "Nanduri") and Bua.

Confederation.[3] They agreed to have one of them elected as President whose tenure of office was for one year and there was to be a General Assembly. This attempt to establish a form of government failed because of hostility amongst the Chiefs.

In 1867 there was another attempt to form a Confederation amongst the Chiefs of Fiji ruling Cakaudrove, Bua and Lau. A form of a constitution[4] was agreed upon on 13 February 1867 under the title of the "Tovata Ko Natokalau Kei Viti". This too vested all legislative powers in a General Assembly of the Chiefs who were parties to the Constitution. The executive powers were vested in a Supreme Chief elected by the General Assembly. This constitution was also doomed to failure for the same reason as the earlier attempt.

In the meantime King Cakobau was being pressed by the American Government for payment of his debt. He was unable to fulfil his obligation. In an attempt to secure funds, on 23 July 1868 he signed a Charter[5] granting to the Polynesian Land Company 200,000 acres of land in return, inter alia, for the payment of £9,000 damages due to the American Government but the deal fell through.

On 15 February 1869 another attempt was made to form a government by the Chiefs of Lau and in 1871 they adopted a Constitution of the Chiefdom of Lau.[6] This too collapsed.

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3 As to the terms of the Constitution of the Confederation see G. Henderson, Evolution of Government in Fiji (1935), 17 - 18.

4 As to the terms of this Constitution see Henderson, op.cit., 19 - 21.

5 As to the terms of this Charter see Henderson, op.cit., 22 - 25.

6 As to the terms of this Constitution see Henderson, op. cit., 28 - 42.

King Cakobau with the assistance of several European settlers, formed a government for the whole country. Representatives of both races were invited to meet with a view to framing a constitution. Eventually in August 1869 the delegates met in a convention and agreed to a Constitution for the whole of the "Kingdom". The "Constitution Act" of the Kingdom of Fiji was "enacted". The preamble to this "Act" recited:

> Whereas, it is expedient for the good Government of the White and Native Population of the Fiji Group of Islands to Establish a Constitution and Legislative House of Representatives therein: and whereas, Delegates from amongst the White Residents have been Called together for that purpose : Be it, therefore, Enacted by the King and Delegates in Council now Assembled, as follows....

Then followed the details of the "enactment".[7] The Constitution Act provided for a legislature, executive and judiciary.[8] There was to be a constitutional Monarchy.[9] The executive was to consist of the King and the Ministry and the legislature comprising a Privy Council and House of Representatives. The Kingdom of Fiji was subdivided into Provinces which were to be ruled by Native Governors who were to be members of the King's Privy Council. The Privy Council consisted of the Governors and one Chief from each Distrct, and members of the Cabinet, who were ex-officio members of the Privy Council. The Privy Council was to receive all Bills passed by the Legislative Assembly and had

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7 As to the terms of this Constitution see Henderson, op. cit., 43 - 55.

8 Article XXI provided that the Supreme Power of the Kingdom, in its exercise is divided into the Executive, Legislative and Judicial; these shall always be preserved distinct....

9 Article XXII provided that, The Government of the Kingdom of Fiji is that of a Constitutional Monarchy under his Majesty Cakobau, his Heirs and Successors.

power to suggest amendments and return the measure to the Legislative Assembly for reconsideration but it had no power of veto. The Legislative Assembly was formed of members returned by the electoral districts proclaimed throughout the islands. Membership of the Assembly was to be not less than twenty nor more than forty. The suffrage was given to male subjects of the Kingdom and the qualifications of an elector were the due payment of taxes and six months residence. There were provisions for the setting up of a judiciary with the Supreme Court consisting of the Chief Justice and two Associate Judges.

At this time, the native Fijians were obviously not familiar with this form of government which was in any case absolutely unsuitable to the conditions then prevailing. This system of government benefitted the white settlers inasmuch as it placed all political power in their hands while leaving the native people with hardly any influence.

Not only was the system of government unsuitable but the calibre of the white settlers also left much to be desired. The American Civil War caused a boom in cotton prices, and exports rose rapidly. New settlers arrived and, to augment local labour supplies, men were imported from the New Hebrides and the Solomon Islands. The influx of new settlers presently developed into a "rush" and the newcomers included far too many fugitives from justice and other undesirables. The calibre of the white settlers is clearly borne out in a Confidential Despatch by Sir Hercules Robinson, Governor of New South Wales in which he stated:[10]

3. Mr Thurston The Chief Secretary of Fiji gives a

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10 Confidential Despatch from Sir Hercules Robinson, Governor Of New South Wales to the Earl of Kimberley, 27 January, 1873, quoted in Henderson, op. cit., 58 - 64.

> deplorable description of the character and design of the majority of the white settlers in Fiji, and assuming that his statements are correct, which I have no reason to doubt, it appears to me that they serve to prove how unsuitable the present constitution of Fiji is to the conditions existing in these islands, and how hopeless it is to expect that any government established on such principles could ever be able to protect from oppression and spoilation the native population of the country ....

Most of the white settlers were insolvent planters. They exerted themselves to the utmost to destroy the government as the best way to escape from their liabilities and from the "consequences of their acts of tyranny and murder".[11] Sir Hercules pointed out:[12]

> The White Settlers are striving to subvert the King's Government, so as to reduce the Fijians to serfdom and A feud has been begun by Her Majesty's subjects whose principal object is to kill off the Fijians and acquire by murder, treachery and fraud their lands.

As mentioned earlier, the native people had very little, if any share in the government of the country. The powers were placed exclusively in the hands of the white settlers, who were[13]

> incapable of exercising the privileges of self-government with justice or with any regard for the welfare of the great bulk of the population.

The constitution was based on European models quite unsuited to the conditions prevailing in Fiji. Traditionally, Fijians were governed through their Chiefs and Headmen. The new system was completely alien to their traditions. Matters came to a head when the King refused to accept the resignation of Ministers who had been "constitutionally" defeated by a large majority in the Assembly; the Assembly was dissolved in the middle of 1873.[14]

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11 Ibid., 59.

12 Idem.

13 Ibid., 60.

14 The Colony of Fiji 1874 - 1924 (1925, J.J. McHugh, Acting Government Printer, Suva, Fiji), 13.

The government then drew up a new Constitution which conferred a larger share of power upon the natives. It also provided for a Legislative Assembly, consisting partly of nominated and partly of elected members. This Constitution which was never put in force was strongly opposed by Commodore Goodenough and Consul Layard, who had arrived in Fiji at the close of 1873, with instructions to inquire into the local conditions. This was in response to a new proposal by the Fijian Government to re-open the question of annexation to the British Government. This new proposal was made because of the chaos in Fiji. Trade was almost at a standstill; the Treasury was empty and the country was on the verge of bankruptcy; and some of the highest chiefs were considering secession.[15] Hence the chiefs appealed to Great Britain to bring order out of chaos. The two British Commissioners who had arrived in the country made their report to the British Government.[16] Eventually on 10 October 1874, Fiji was ceded to Great Britain,[17] and Fiji became a British Crown Colony.

C. Constitutional Development from a British Crown Colony to Representative Government

(1) 1874 - 1929

The Fiji Islands became a separate British Colony by virtue of a Charter passed under the Great Seal of the United Kingdom on 2 January 1875. Under this Charter the Government of the Colony was to be administered by a Governor appointed by the British

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15 In two and a half years the government spent £124,000 or three times as much as it received in revenue: Fiji Annual Report 1971, 151.

16 The Colony of Fiji, 1874-1924, op. cit., 14.

17 See The Colony of Fiji 1874 - 1924, op. cit., 14 for the events leading up to the actual cession.

Crown.

There was also established a Legislative Council consisting of the Governor and of such other public officers and persons, being not less than two in number, as were nominated by him.[18]

There was also set up an Executive Council[19] comprising such members as the Governor, in pursuance of Royal Instructions received through the Secretary of State for the Colonies, might from time to time appoint. Subsequently, government was conducted in accordance with various Letters Patent[20] until 1963 when the first Constitutional Order in Council was made.

The membership of the Legislative Council was later enlarged by various Letters Patent. The first major step was the inclusion of elected members in terms of the Letters Patent of 1904. Prior to 1904 the Legislative Council consisted of six official members who were public officers and four unofficial members who were nominated by the Governor with the approval of the Secretary of State for the Colonies.[21]

In 1903 the European residents of the Colony sent a petition addressed to His Majesty the King, praying that the right might be granted to them to elect unofficial members of the Legislative Council, instead of their being appointed by the Crown on the nomination of the Governor. The petition prayed that the franchise be conferred upon male adults who were British and, who were not

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18 Article III of the Charter.

19 Article V of the Charter.

20 There were Letters Patent of 1880, 1904, 1914, 1916, 1929 and 1937.

21 The Colony of Fiji, 1874 - 1924, op. cit., 17.

Indians, Fijians or aboriginal Polynesians.[22] The then Governor of Fiji, H.M. Jackson, favoured the petition in principle, but he opposed the view that Fijians should be excluded from representation in the Legislative Council.[23] However, the Governor concerned did agree that:[24]

> I do not think it necessary to provide representation for the Indian and Polynesian element, which has shown itself very open to corruption at the municipal elections....

Accordingly under the Letters Patent dated 21 March 1904 the Legislative Council consisted of the Governor, as President, ten official members, six elected members and two Fijian members.[25] The franchise was extended only to persons of European descent.[26] Hence only Europeans could be elected. This Constitution directed that the elected members should be elected as follows:

(a) Three members by electors not engaged in the cultivation of land and residents of the municipalities of Suva or Levuka; two of whom were to represent Suva and one to represent Levuka.

(b) Two members by electors engaged in the cultivation of land, other than for the production of sugar.

(c) One member by electors being directors or managers of companies engaged within the Colony in the production or manufacture of sugar.[27]

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22 (1905) Fiji Royal Gazette 105.

23 Ibid., 106.

24 Idem.

25 Cl. 8.

26 Cl. 13.

27 There were only two companies so involved - the Colonial Sugar Refining Co. Ltd and the Vancouver Sugar Company Ltd.

The two Fijian members were to be appointed by the Governor from a list of six names submitted to him by the Council of Chiefs.

A few amendments were made to these Letters Patent. In 1910 the position of the half-caste community of European descent was discussed in the Legislative Council upon a motion introduced by the European elected members. It was recommended that half-castes should be eligible for admission to the European roll subject to the condition that one parent be of European descent. This recommendation resulted in the Letters Patent being amended in 1910 to include among the electoral qualifications male persons being the sons of parents of European descent, or, being the sons or lineal descendants of a European father and who could read, write and speak the English language.[28] The Letters Patent of 1914 and 1916 consolidated the instruments. They provided for an Executive Council,[29] consisting of the Governor, Colonial Secretary, Attorney-General and such other persons as the Governor, in pursuance of the Royal Instructions received through the Secretary of State for the Colonies, from time to time appointed. The Executive Council included two unofficial members of the Legislative Council who vacated their seats upon the dissolution, triennially, of the Legislative Council. These new Letters Patent further provided for a Legislative Council[30] consisting of the Governor as President, twelve nominated members, seven elected members and two Fijian members. Of the twelve nominated members, eleven had to be public officers and one could be a British subject not holding any such office. This was the first time that a person of

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28 Letters Patent 1904, Cl. 13 as amended by Letters Patent of 1910.

29 The Colony of Fiji 1814 - 1924, op. cit., 17.

30 Cl. 6, 7, 8, 9, 10, of 1914 Letters Patent, as amended by 1915 Letters Patent.

Indian descent was eligible for nomination to this one seat. An Indian held this twelfth nominated seat between 1916 and 1923.[31]

Since 1917 the Secretary of State for the Colonies had been negotiating with the Government of India with a view to extending the franchise to the Indians.

On 25 August 1920 the Governor appointed a Commission (The Indian Franchise Commission) to report and make recommendations on the question of providing for the representation, on an elective basis, of the Indian population of the Colony by two members in the Legislative Council. The Commission held meetings in Suva and Lautoka and submitted its recommendations in April 1921.[32] Broadly, the Commission recommended the representation of Indians by two members elected by an Indian constituency of the whole Colony, both electors and candidates to have certain qualifications.[33] On 13 July 1923 the Colonial Secretary moved the following motion in the Legislative Council:[34]

> That the Secretary of State for the Colonies be respectfully invited to secure at an early date the passage of Letters Patent providing for representation on an elective basis of the Indian population by two members of the Legislative Council of the Colony in accordance with the report and recommendations submitted to the Council in Council Paper No. 1 of 1921.

In support of the motion the Colonial Secretary said:[35]

> Prior to 1917, the interests of Indians in the Council were

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31 He was Mr Badri Maharaj; see Fiji Royal Gazette (1916) 637.

32 See Council Paper No. 1 of 1921: Journal of Legislative Council (1921), 1.

33 See idem.as to details of the recommendations.

34 Council Debates (1923), 17.

35 Ibid., 18.

> represented by the Agent-General of Immigration, and in 1917 one nominated Indian member, in no way chosen by the Indians themselves, was appointed to the Council .... The Indian population in Fiji is the second largest, and the interests of Indians are very considerable. That some measure of elective representation should be given to that community appears to be right and proper.

The motion was carried unanimously.

This recommendation of the Legislative Council was transmitted to London. A Joint Committee of the Colonial Office and the Government of India sat in London and considered the recommendations of the Council with regard to Indian representation. This culminated in the Letters Patent of 1929. The membership of the Legislative Council was expanded by Letters Patent of 1929. These Letters Patent were historic for the Indian community in Fiji inasmuch as they granted that community representation as of right in the Legislative Council. Under these Letters Patent,[36] the composition of the Legislative Council was to be the Governor as President, thirteen nominated members, six European elected members, three Fijian appointees or nominees and three Indian elected members. The nominated members had to be persons holding public office.[37] The Fijian members were again nominated by the Governor from a panel of four to six names submitted by the Council of Chiefs.[38]

(2) 1929 - 1937

In spite of the expansion of membership by the Letters Patent of 1929 the Indians and the Fijians obviously occupied a subservent position in the legislature of the Colony. Hence, as soon as the

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36 Cl. 7.

37 Cl. 8.

38 Cl. 10.

Indians were represented in the Council they commenced their battle for equality by a vociferous expression of their demands. The first three Indian elected members[39] took their seats in the Legislative Council on 25 October 1929. In the same session of the Legislative Council an Indian member[40] proposed the motion:

> That the Council recommends to His Excellency the Acting Governor that he be pleased to convey by telegraphic message to His Majesty's Government the view of this Council:-
>
> (a) That political rights and status granted to Indian settlers in this Colony on racial lines are not acceptable to them; and
>
> (b) That Indians in Fiji should be granted Common Franchise along with other British subjects resident in the Colony.

This motion was seconded by another Indian elected member.[41] The motion was naturally very vehemently (and insultingly) opposed by the European members, particularly the elected members.[42] The Fijian members merely joined in the opposition without much comment. The Europeans opposed the suggestion of a common roll, of course, because they would be outnumbered by Indian voters. They deprecated the aspiration of the Indians for equality. As the senior elected member said in opposing the motion:[43]

> Gentlemen, can you expect the European Elected Members

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39 Messrs, Vishnu Deo, Parmanand Singh and James Row Ram Chander.

40 Mr Vishnu Deo: Fiji Legislative Council Debates (1929), 178 col. 2.

41 Mr Parmanand Singh.

42 Fiji Legislative Council Debates (1929), 178, col. 2 and 187, col. 2.

43 Ibid., 182 col. 2.

> to support this motion when we know absolutely that in ten years, or at the furthest, twenty years, we will be utterly and entirely swamped, not ourselves perhaps but our descendants and our successors in the Colony.

This motion was defeated with only the three Indian members voting for it. Immediately after losing the motion, the three Indian members withdrew from the Council and tendered their resignations in protest against an electoral system on racial lines. As will be seen later, the Indian leaders continued to adhere to the principle of a common electoral roll and the European and the Fijian leaders continued to oppose the aspirations of the Indian community.

On the resignation of the three Indian members, no candidates offered themselves to fill the vacancies for three years. Subsequently representations were made to the Government by the Indian leaders for a common franchise. It was argued that under a communal franchise there was necessarily unfair discrimination between races and equality of citizenship was impossible.[44]

Two of the three vacant Indians seats were filled in 1932. Again in the very first session of the Legislative Council one Indian member proposed another motion for a common roll which was seconded by the other Indian member. The European members maintained their position takenon the 1929 motion and strongly opposed the motion. However, the mover withdrew the motion on the express undertaking given by the Governor that he would put the motion fully to the Secretary of State as an expression of the mover's views, with the Hansard report of the debate.[45]

In the meantime religious differences developed among the

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44 Address by His Excellency the Governor, 13 May 1930: Fiji Journal of the Legislative Council (1930), 5.

45 Council Debates (1932), 390.

Indian community. Religious preachers began to arrive from India and there was strong religious antagonism particularly between the Hindus and Muslims. The religious tension was at its highest point in the thirties. There was discord throughout the Colony. Religious leaders baited one another and their adherents were drawn into opposing factions, so much so that there began a "sangattan" (boycott) movement under which the followers of the religion of Islam were boycotted by those of the Hindu faith. This led to a demand by the Muslims for separate Muslim representation.[46]

It is pertinent to point out the exact nature of the Indian grievance at this stage. This was aptly stated in 1935 by the Governor of Fiji, Sir Murchison Fletcher, thus:[47]

> In my reply to Lord Passfield I pointed out that the discussions had hitherto proceeded upon the assumption that the Indian population had a genuine desire for democratic institutions. A close study of the situation had convinced me that this was not in fact the case. I proceeded to examine the matter at length. I expressed my conviction that the Indians as a whole had no quarrel with the Crown Colony system. What they objected to was the assigning to the white settler of powers or control in matters where their interests were involved, while they themselves were given no voice. Steps had been taken in various directions to set this matter right. Representative Indians had informed me that they were satisfied with the present constitution of the Legislative Council - subject to the claim by the Muslims for a separate seat....

The Indian community as a whole desired equal representation and the introduction of a common roll but there were differing views as to how best to attain these objects. One view favoured a boycott

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46 See A.R. Sahu Khan, Muslim Appeal for Separate Political Rights in Fiji (1958).

47 Council Debates (1935), 258.

of the Legislative Council and non co-operation with the Government, another advocated the election of representatives to fight the common roll battle within the Council.

The latter plan seems to have gained significant support and the Indians continued their battle for better representation with a common roll as the ultimate goal. Early in 1933 the reply of the Secretary of State for the Colonies rejecting the proposals of a common electoral roll was received. As a result, on 22 February 1933 the two Indian elected members of the Legislative Council left the Council and intimated that they would both resign but as it turned out only one did.[48] He was however, re-elected in June. Since 1929 one of the three Indian seats continued to remain vacant. This was so because the polls in that particular constituency were controlled by the advocates of non co-operation. It was generally recognized that since 1929 Indian politics had been dominated by a relatively small but very active party who had been able to control the polls. Some sections of the Indian community had wished to return representatives who had been willing to take part in the Legislative Council under the existing constitution but they had been deterred by their conviction that their nominees would be defeated by the advocates of non co-operation. There was also a very large section of the Indian community which regarded nomination as the only effective safeguard by which the sectional interests of the Indian community could be adequately represented. The Muslims, of course, clamoured for separate representation, failing which they favoured representation by nomination as the second alternative.[49]

The Europeans, on the other hand, steadfastly opposed any

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48 Mr K B. Singh.

49 Council Debates (1934), 46.

Europeans opposed.

representation of the Indian community from the beginning. As early as 1904 the European community in their petition for greater representation of themselves in the Legislative Council expressly demanded that Indians (and Fijians) be excluded from any representation. This view of the European settlers extended not only to the Legislative Council but also the municipal institutions. Hence a brief reference to the municipal institutions is imperative.

(a) Municipal Institutions

Until 1935 (after the Municipal Institutions Amendment Ordinance was passed) the Municipal Council had been successful in keeping the Indians out of the Council. The attitude is exemplified by the remarks of a European elected member in the Legislative Council:[50]

> The Municipal Council, Sir, is a Council, which should be respected. I, for one, do not want to sit there - I fill a high and honoured position there - unless I have men equal to myself sitting alongside me when dealing with business matters connected with the Council. If you do not give us this power, and amend this Ordinance, Sir, the chances are that some of these days we will have a Ratu Tomi (No., not a Ratu: I would not mind a Ratu - a Fijian - at all; they are very intelligent) : but we will have some uneducated Indian elected to the Council.

Under the Municipal Institutions Ordinance 1909[51] any occupier, lessee or owner of any rateable property within any town or ward was entitled to be registered as a voter. The proposed amendment introduced a literary test in English. This amendment was passed by the Legislative Council but it did not receive the Royal Assent. However, in 1915, the European members again managed to have the amendment passed. This time the Royal Assent was given and the amendment became law.[52]

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50 Council Debates (1912), 96 col. 1.

51 S. 20.

52 Municipal Institutions Amendment Ordinance 1915.

The Indians became dissatisfied and continued their agitation to have their grievances redressed. The main grievance of the Indian Community was the insertion of the literacy test by the amendment of 1915, whereby the qualification of an elector was that he "can read, write and speak the English language." This, in effect, barred any Indian representatives from the municipal institutions, especially the Suva and Levuka town councils, despite the fact that the Indian population of Suva was more than double the European population. Representations were made by the Government of India to the Colonial office, (in regard to both national and municipal enfranchisement) which in turn referred the matter to the Fiji Government. The Fiji Government,[53] realising the import of this pronouncement, appointed an unofficial committee on 29 December 1927 to investigate the issue.[54] The majority reported that no amendment of the law was necessary. The minority[55] recommended that the language qualification should be widened to include the Hindustani, Tamil and Fijian languages as suggested by the Government of India. The report was considered in the first instance by a Commission led by Sir A. K. Young whose report was made in 1929. The Committee's report and that of the Commissioner were both sent to the Colonial Office which transmitted them to the Government of India.[56] The Government of India was unable to agree to the proposal that thelaw should be left unchanged. In their opinion there was no reason why the qualification

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53 See the Council Paper No. 15 of 1927. This Council Paper contains a proclamation by the Government of India published in the Indian Parliamentary Paper of 12 January 1927, relating to the position of the Indian Community in Fiji.

54 The committee comprised 5 Europeans, 3 Indians and 1 Fijian: Council Paper No. 38 of 1929.

55 The three Indian members.

56 See Council Papers Nos 38 and 39 of 1929 for the reports of the Committee and the Commissioner respectively.

of literacy should not be extended for Indians, so as to include the capacity to read and write Tamil and Hindustani. They felt, however, that a knowledge of English might be desirable in the case of members of municipal bodies but they could not see how such a qualification was desirable for electors. The Colonial Office then referred the matter to the Fiji Government desiring the inclusion of the Indian languages. In the meantime the Governor had changed and nothing much was done to amend the legislation. However, in 1935, as the result of pressures exerted by the Government of India, the Secretary of State instructed the Governor of Fiji to bring about alterations in the composition of municipal institutions and eventually, the municipal institutions came under the control of the central government. That is all the members were to be nominated whereas in the past most were elected.[57]

The history of the 1935 Ordinance is of great interest. There was very strong opposition by certain sections of the European community. The Governor was able to secure the passage of the legislation very tactfully and with usual British diplomacy by presenting two alternatives namely:

(a) the introduction of a bill to establish a common municipal roll; or

(b) the acceptance of central government control.

Obviously, the lesser of the two evils, the second, from the European point of view, was accepted. They could not tolerate an Indian majority in the municipal councils.

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57 The New Ordinance (The Municipal Institutions Amendment Ordinance No. 15 of 1935) provided for the appointment of seven official members and six unofficial members - two Indians, two Fijians and two Europeans - nominated by the Governor. The Chairman also was to be appointed by the Governor from the official members.

(b) The Legislature

In the Legislative Council the Europeans continued to oppose a common roll. However, by 1935 the Europeans faced another threat. Certain influential Europeans expressed their serious concern that the representation of their interests should have passed so largely to electors who were not strictly members of their own community. They referred to half castes. They feared that before long the so-called European roll would become in effect a half caste roll.[58]

The Europeans also claimed that because the major industries of the colony were established by European capital and European management they should have a greater say. The right of racial representation, having been conceded to the Fijians and Indians, the Europeans asked that their former rights be restored to them by means of nomination of members by the Governor.[59]

They supported the nominative system for another reason. If the electoral system was maintained, the rapidly increasing preponderance of the Indians would inevitably result in the merging of the then communal rolls in one common roll. Accordingly, it was urged that nomination was the only permanent safeguard of the important stake which European interests possessed in the Colony. They regarded the nomination system as the only means by which an even balance could be maintained between the communities.[60]

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58 In 1910 when the proposal was first made to include half-castes in the European roll, there were very few half-castes who had the necessary qualifications. By 1935 there were 1036 European electors and 459 half-caste electors and the half-caste population was only about 1,000 less than the European population: Governors' Address Council Debates (1935), 160.

59 Ibid., 160.

60 Idem.

The Fijian stand was not as involved as those of the Europeans and the Indians. The Fijians claimed that when Fiji was ceded to Great Britain in 1874, it was done in the belief that they would be governed in accordance with British traditions and that their interests would accordingly be safeguarded. They were content to accept the leadership and guidance of the British but by 1935 they began to fear that the rapidly increasing Indian population and the demand for a common roll might bring about Indian domination in the political field. They too, accordingly, saw the nomination system as safeguarding their interests.[61]

The Indians continued their battle for equality of status. As has been said earlier, the Indians sought a common roll not for its own sake but as a means of securing equality of status. As an Indian elected member said in 1934:[62]

> For many years past the European community has enjoyed the privilege of electing its members to this honourable Council, and my community was not granted this privilege until the year 1929, and in spite of its numerical superiority it was given only three representatives against their brethren given to the European community. My community desires equality, and it is because it regards a common roll as the best means to obtain full equality that we Indians now fight for the common electoral roll.

On March 23 1934, the Indian members again introduced a motion for common roll. Not surprisingly, the motion was overwhelmingly defeated. Because the demand for a common roll was understandably - from the European and Fijian point of view - consistently opposed by these two communities, certain sections of the Indian community compromised by agreeing to a system of

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61 Ibid., 161.

62 Council Debates (1935), 80.

nomination under which the same number of seats would be assigned to each racial group. In support of this demand about four hundred Indians submitted a written petition to the Governor in April or May 1934. A second petition signed by three hundred and ninety-eight persons was submitted to the Legislative Council on 5 May 1935. The Muslim community also supported the nomination system, but another section of the Indian community, represented by the Indian Association, was not in favour of the suggested compromise.

On 16 May 1935, an Indian member introduced a motion in the Legislative Council:[63]

> That in the opinion of this Council it would be in the best interests of the Colony and the various races resident therein if the European and Indian members as well as the Fijian members were nominated and not elected - an equal number of seats to be reserved for each of the three communities.

This motion was surprisingly seconded by a European elected member[64] who admitted that he was doing so with "mixed feelings".[65] The seconder made it clear that he and his followers supported the motion because they felt this was the best protection against Indian domination which would otherwise result from a common roll. The European community believed that the Secretary of State might give way to pressures from the Government of India and the India Office and agree to introduce a common roll. It was therefore better for them to accept the system of nomination with equality of seats for each of the three major races.

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63 Council Debates (1935), 78.

64 Sir Maynard Hedstrom.

65 Council Debates (1935), 82.

This motion was nonetheless opposed by some European members and petitions were presented in opposition to it. The motion was passed, with the Government and Fijian members abstaining from voting or speaking on the issue. The reason for the Fijians' abstention was an earlier resolution adopted by the Great Council of Chiefs (of which the Fijian members of the Legislative Council were members). In November 1933, after a debate on the opposing principles of election and nomination the Great Council of Chiefs had resolved:[66]

> That this Council records its strong and unanimous opinion that Fiji, having been ceded to Her Majesty the Queen of Great Britain and Ireland, her Heirs and Successors, the immigrant Indian population should neither directly nor indirectly have any part in the control or direction of matters affecting the interests of the Fijian race.

The Fijian members were in a difficult position, as was later admitted by them in a letter to the Acting Colonial Secretary, dated 5 November 1935.[67] They had no time to discuss the current motion with the Council of Chiefs. They felt that to move an amendment in the terms of the resolution of the Council of Chiefs would have been an unwarranted rebuff to Indian efforts for political peace and goodwill but to support the motion would have been an act of disloyalty to those who had put trust in the members. Hence the easy way out was to refrain from voting or participating in the debate.

After the motion was passed, the Governor forwarded to the Secretary of State copies of the debates and of the petitions. Because of their importance the Secretary of State wished the proposals comprised in the motion, to be fully ventilated throughout the colony

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66 Ibid., 174.

67 Idem.

and that adequate time be given for discussion and deliberation. To enable this to be done, the term of the then current Legislative Council was extended for another year.

As a result of the request of the Colonial Secretary for an expression of opinion from the various communities on the constitutional issue, the Fijian members of the Legislative Council held discussions with the senior Chiefs. An emphatic statement by the Fijian Chiefs ensued:[68]

> [W]e choose, with the full support of native conservative and liberal opinion, the system of nomination, believing that along this road, and along it alone, the principle of trusteeship for the Fijian race can be preserved and the paramountcy of native interests secured.

Discussions and meetings were held throughout the Colony regarding the principles and implications of the nomination system. Eventually on 12 November 1935, a European elected member introduced a motion similar to the one passed earlier. This new motion read:[69]

> That in view of the changed and changing conditions of the Colony opinion of the unofficial members of this Council is that a system of nominated unofficial representatives will be better suited to the present and future interests of the Colony than the existing system of elected representatives.

This motion was duly passed by the Council. This motion was introduced and agreed to by the European members not from any sense of equality as such, but because it was felt that:[70]

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68 Council Paper No. 47, Journal of the Legislative Council (1935).

69 Council Debates (1935), 269.

70 Ibid., 297.

> The only way that we can seek to ward off the common roll menace is by the reversion to the nomination principle.

This motion was opposed by two European elected members.[71]

The opposing views were forwarded to the Secretary of State for the Colonies. In 1936 the Secretary of State informed the Governor that in view of the sharply divided views as regards nomination and elective systems amongst the European and the Indian communities, a compromise would be imposed. As a result some of the European and Indian members would be elected and others nominated. As for the Fijian members, since they were unanimous in their views to continue with the current system, no change in the system of their nomination was contemplated.

Consequently, on the 2 April 1937, new Letters Patent were passed which revoked the earlier ones. Under the new "Constitution" the Legislative Council consisted of the Governor, as President, three ex officio members - namely the Colonial Secretary, Attorney-General, and Treasurer of the Colony, thirteen other official members, five European members of whom three were elected and two nominated, five Fijian members (all of whom were nominated from a panel of seven to ten members presented by the Council of Chiefs) and five Indian members, of whom three were elected and two nominated.

The new Constitution, it is submitted, was designed to end the long and embarrassing agitation on the part of the Indian community for equality with the other communities in the government of the Colony. The new Constitution seems to have been reasonably well accepted by the Indian communities at the time. This is borne out by the absence of political friction in the years that followed the adoption of the new Constitution.

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71 Mr J.P. Bayly and Mr T.W.A. Barker.

(3) 1937 - 1950

During the period from 1929 to 1937, the Indian community was concerned with constitutional reforms, particularly with the acceptance of their equality with other races. Once this was achieved, the Indian community was relatively content and was prepared to co-operate in the Legislative Council. Thus an Indian elected member, Mr Vishnu Deo, who was one of the three who had walked out of the Council in 1929 and remained out until after the new Constitution was presented in 1937 frankly admitted:[72]

> It is true, Sir, that in 1929 I did advocate common electoral roll, but from 1937, Sir, I myself have co-operated in this Council under the system of communal electoral roll under which, Sir, equal racial representation was recognized.

However, as will be seen, the post-1937 era seems to centre on European agitation for a greater share in government and the movement of self government. But this agitation, at least on the surface, was not for greater European say but for greater popular participation.

Thus on 26 August 1943 a European elected member introduced a motion in the Legislative Council the effect of which was that the unofficial Europeans and Indian members would be elected, instead of partly elected and partly nominated, and that the Fijian members would be elected by the Council of Chiefs. Secondly the numbers of European, Indian and Fijian unofficial members would be increased to six of each. Thirdly the number of official members would be reduced to provide for an unofficial majority in the Council, with the Governor having a right of veto.[73]

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72 Council Debates (1946), 189.

73 Council Debates (1943), 57.

This motion was debated and in principle it was accepted by all the Indian and European unofficial members. The Fijian members opposed the proposed changes. However, no vote was taken on the motion. The mover agreed with the Governor that the motion be withdrawn and the matter was referred to a select committee. The committee made a report which was tabled, but not read in Council, on 22 December 1943. Nothing further was heard of the report.[74]

On 31 August 1945 the same European elected member (Mr A.A. Ragg) called for the abolition of the Legislative Council with the official majority. He said,[75] "the humbug of this representation should be done away with".

On 17 December 1945, Mr A.A. Ragg again attacked the Legislative Council with an official majority. He stated:[76]

> I can say that (unofficial members) have no actual responsibility, in other words they are used here to give adherence to a Bill, which practically speaking, they have no power to control and I think it will be admitted, at least in any civilized country in which even a modicum of democratic government exists, that he who pays the piper should call the tune. We do not do it in this Council nor do we do it in the community .... We cannot go on much longer under this pseudo constitution which purports to give us political liberty but which on analysis has the opposite effect.

The agitation by the Europeans seems to have been precipitated by the colonial policy declared by the Secretary of State for the Colonies who, on 12 November 1945, issued a circular

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74 The writer has not been able to have access to a copy of this report.

75 Council Debates (1945), 141.

76 Ibid., 263.

emphasizing that political development must be "the concern of the ordinary people of the country" and not regarded "as an activity of 'Government' ".[77] The circular also emphasized that it intended to encourage and give "as much self-government as possible as soon as possible for Colonial territories".[78] As a result on 21 December 1945, a European elected member introduced the following motion:[79]

> That this Council is of the opinion that in view of the constantly reiterated principle of policy of the Colonial Office 'as much self-government as possible as soon as possible for colonial territories' and in view of the present and proposed increases in taxation, our Constitution be revised and amended to increase the number of elected representation of the people so that a significant measure of control may be exercised over the raising and the spending of these comparatively huge sums of money which the people of this Colony will be called upon to provide.

This motion was not however agreed to by the majority of the unofficial members.

Then in 1947 the Colonial policy was enunciated by the Secretary of State for the Colonies. This policy was of course meant to be the guiding principle of all the colonies and not only for Fiji. The Colonial Secretary stated:[80]

> I can say without hesitation that it is our policy to develop the colonies and all the resources in such a way as to enable their people speedily and substantially to improve their economic and social conditions and as soon as may be practicable to obtain responsible self-government.

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77 Ibid., 425.

78 Ibid., 424.

79 Idem.

80 As was reported in the local daily newspaper, Fiji Times and Herald (15 July, 1946).

He made it clear that:[81]

> The colonies are to us a great trust and their progress towards self-government is a goal towards which His Majesty's Government will assist them with all the means in its power. They shall go as fast as they show themselves capable of going. I would that this policy was better known and better understood.

On political development, he stated:

> Every endeavour is being made to accelerate progress towards self-government."[82]

Thus, in 1946 a memorial was presented to the Secretary of State for the Colonies by the European Electors Association which in substance demanded a greater measure of political control over their own affairs by the people of Fiji. The prayer of the memorial was refused and the only concession made was that civil servants were enfranchised. The Secretary of State's reply to the memorial was to the effect that he was not satisfied that there was a sufficient body of people in favour of a revision of the constitution. To this reply a further letter dated 5 February 1947, was sent informing him that the Association did not agree with that contention and requesting that a plebiscite be taken to decide the matter.[83] However, the request for a plebiscite was not accepted. The request for constitutional change was also turned down.

Consequently in 1948 a European elected member, who was also the President of the European Electors Association of Fiji, proposed the following motion in the Legislative Council:[84]

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81 Idem.

82 Idem.

83 For a full context of this letter and the reply thereto see Council Debates (1948), 168 - 170.

84 Council Debates (1948), 167.

> That this Council considers that, in view of the increasing population of the Colony and the advances made in the social, educational and economic spheres by its peoples, a greater measure of political control of our own affairs is necessary and desirable, and advises that our Constitution be amended to provide representation on the following lines ....

Then followed the details of the composition of the Legislative and Executive Councils. In substance, it was that the Legislative Council should consist of the Governor, as the President, four ex officio members, six members nominated by the Governor, and six representatives of each of the three major races elected by the people. The Executive Council was to consist of the Governor, as the President, the four ex-officio members of the Legislative Council, one nominated member and three elected members chosen from a panel of six names submitted by the elected members of the Legislative Council.

This motion was amended to read that a committee be appointed to consider and report on the desirability of granting to the peoples of Fiji a greater measure of political control over their own affairs and to recommend amendments to the Constitution. As a result, a Constitution Committee was appointed by the Governor, comprising two members of each major race - Indian, Fijian and European. The committee heard representations from various sections of the community. Essentially, the committee recommended that the proposed Constitution should be based on the following principles:

(a) Equal representation of the three main races.

(b) Election of all the unofficial representatives.

(c) No combination of the representatives of two races should be able to act detrimentally to the interests of the third race.

(d) The Government should have the balance of power, with special safeguards for Fijian interests when these were in question.

(e) The Imperial Government should have control over all but local affairs.

The Committee presented its report[85] in July 1949 but no active steps were taken to carry out these recommendations.

(4) 1950 - 1965

In the fifties no effective and significant constitutional "agitation" took place. The only matter of some significance was a motion introduced in the Legislative Council by an Indian elected member and seconded by a European elected member on 9 April 1959.[86] The motion called for abolition of the nomination system and an increase in the number of unofficial members to eighteen, comprising six Indians, six Europeans and six Fijians, all of whom were to be elected on three racial rolls. This motion was defeated. However, towards the end of the fifties and in the early sixties, very important occurences took place which collectively resulted in constitutional changes.

At the end of 1959, there was an industrial strike involving the oil workers which culminating in a riot in Suva developed into an anti-European "incident". There were also sympathy

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85 For a full report of the Committee see Council paper No. 15 of 1949: Journal of the Legislative Council (1949).

86 Council Debates (1959), 95.

strikes by other unions. The Government was obliged to invoke emergency powers and a night curfew was imposed in Suva, Lautoka and Nadi. In January 1960 a one man commission of enquiry was set up to investigate the disturbances.

Also in 1959 the Burns Commission was set up as a "Commission of Enquiry into the Natural Resources and Population Trends of the Colony of Fiji". Though the Governor made statements on proposed reforms, little could be done until the presentation of the report by the Burns Commission.[87] The report was presented in January 1960.[88] In the body of its report the Commission included references to political considerations. It acknowledged that, although its terms of reference did not require the Commission to comment on constitutional or administrative matters, consideration of such matters was warranted in view of the representations made to it. The Commission was strongly opposed to the continuation of the separate Fijian Administration which was felt to be retarding the progress of the Fijians.[89]

The Burns Commission also felt that the Council of Chiefs did not fully represent Fijian public opinion and that an opportunity should be given to the ordinary citizens to choose at least

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87 E.g., See the Governor's address in Nov., 1959: Council Debates (1959), 343 and 346.

88 The full report appears in Council Paper No. 1 of 1960: Journal of the Legislative Council of Fiji (1959). Cf. Council Debates (1960), 405.

89 As to Fijian Administration see Ch. II, ante.

some of their representatives. But the Commission did not favour the Chiefs being entirely deprived of their traditional right to select representatives. As a compromise the Commission recommended, inter alia, that the Council of Chiefs should elect two Fijian members of the Legislative Council, the three others being elected by adult Fijian males of the respective constituencies. The Government accepted this recommendation in the "Statement of Government Policy on the Recommendations of the Burns Commission".[90] This recommendation was also accepted by the Council of Chiefs who felt that direct elections were inevitable and that it was better to make the change at that stage than have it possibly forced by circumstances at a later date.[91]

Then there was the "pressure" from the United Nations Special Committee on Colonialism. With the admission of Afro-Asian nations, the United Nations became an active opponent of colonialism. As had been appropriately observed:[92]

> However else they might differ in race, religion and nationality, Ghanians, Egyptians, Lebanese, Indians and others shared one bond bred in their recent history against colonialism.

The Special Committee advocated independence not only for trust territories, but also for the colonial possessions of Western Powers
Also the granting of Indep to Colonial Countries & peoples - Started Dec 1960

90 Council Paper No. 31 of 1960.

91 Council Paper No. 33 of 1960, 7.

92 W. J. Hudson, Australia and the Colonial Question at the United Nation (Sydney, 1970), 33.

powers. Fiji was in this latter category. Of vital importance was the General Assembly's declaration on the granting of independence to Colonial countries and peoples. This was contained in the Resolution of 14 December, 1960.[93]

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93 General Assembly's Resolution 1514 (XV) stated:

> Mindful of the determination proclaimed by the peoples of the world in the Charter of the United Nations to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small and to promote social progress and better standards of life in larger freedom ...
>
> Recognising the passionate yearnings for freedom in all dependent peoples and the decisive role of such peoples in the attainment of their independence ...
>
> Convinced that all peoples have an inalienable right to complete freedom ...
>
> Solemnly proclaims the necessity of bringing to a speedy and unconditional end to colonialism in all its forms and manifestations;
>
> And to this end
> Declares that:
>
> 1. ....
> 2. All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
> 3. Inadequacy of political, economic, social or educational preparedness should never serve as a pretext for delaying independence ....
> 4. Immediate steps shall be taken, in trust and non self governing territories or all other territories which have not yet attained independence to transfer all powers to the peoples of those territories, without any conditions or reservations ... to enable them to enjoy complete independence and freedom....

The United Kingdom, as a permanent member of the Security Council, could not ignore the General Assembly's declaration. It was not only the declaration itself but also other factors - principally the 1959 riots and the Burns Commission report - that caused the United Kingdom Government to take progressive strides in relation to independence for Fiji. Fiji, however, presented a peculiar problem to Great Britain inasmuch as independence was not sought by all the racial groups.

In his opening address to the Legislative Council in 1960 the Governor spoke of constitutional changes.[94] He voiced the belief that the time had come to consider some modifications of the current constitution and he hoped that there would be changes before the following general elections (in 1962) which would give more responsibility to unofficial members without making any radical alteration in the composition of the Council.

In the meantime the Indian community in Fiji had also been pressing for constitutional change. For instance, the Indians formed an organisation called the Fiji National Congress, a political organisation headed by an experienced politician, Mr Ajodhya Prasad. In 1960 this Congress published a memorandum entitled "Internal Self-Government for Fiji" which outlined not only the various grievances of the Indian community but also how colonial rule had failed to secure prosperity for the Fijians as promised in the Deed of Cession. A copy of this memorandum was sent to the United Kingdom, the United Nations and the Council of Chiefs.

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94 Council Debates (1960, 405.

The Council of Chiefs had recommended that provision should be made for the direct election of three Fijian members as proposed by the Burns Commission. It was desired that amendments to the Letters Patent be made in sufficient time to allow the general elections of 1962 to be held in accordance with the Burns Commission proposals.

The British Government accepted that constitutional changes were needed. Though the existing constitution was suited to the early stages of colonial development, it had the disadvantage of having an adverse effect on training people for greater responsibilities. It was acknowledged that an official majority, if retained for too long, could have an inhibiting effect on healthy growth. More important:[95]

> It [was] the declared policy of Her Majesty's Government to guide dependent territories to take increasing responsibility for their own affairs and that there[were] many people of all races in Fiji who [were] as capable of accepting responsibility as those in territories which then had much more advanced forms of constitution.

The British Government was cautious and reluctant to abolish the official majority without making any change in the executive body. It believed that if there was to be an unofficial majority, unofficial members must be prepared to help form a government and share responsibility for the government's policy and decisions. The British Government desired to adopt the "member"

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95 Opening Address by the Governor of Fiji in the Legislative Council on 19 April 1961: Council Debates (1961), 3.

system as the first step to responsible government. This would give both political leaders and government officers an opportunity of learning new techniques and adjusting themselves to new relationships. This was to be a transitional stage leading to ministerial responsibility. To enable the British Government to learn of the views of the peoples of Fiji, the proposed constitutional changes were embodied in a Council Paper [96] so that they could be discussed. The proposals contemplated two stages. The first stage was the "member" system. Under this, it was proposed that, at a time to be agreed, the Governor would invite unofficial members of the Executive Council to undertake supervisory functions over groups of government departments; if they declined, other members of the Legislative Council would be invited to serve. Such persons would be called "Members". They would have no executive authority, but it was proposed that all policy matters relating to their departments would be referred to them and they would have a large say in policy-making. The Members were expected to introduce in the Legislative Council bills relating to their departments and there was to be collective responsibility of the Executive Council. If the system were accepted, the Legislative Council was to consist of eight officials, four unofficial members of Government and eleven other unofficial members.

The second stage was to be the ministerial system, with executive responsibility. Under this proposal there were to be three ex-officio members of the Executive Council with four to

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96 "Government Proposals for Constitutional Reforms", Council Paper No. 8 of 1961.

six unofficial members, all of whom would be Ministers. Members of the Executive Council would be appointed by the Governor from the elected members of the Legislative Council.

Accordingly, the Government of Fiji through the Acting Colonial Secretary, introduced the following motion in the Legislative Council:[97]

> That this Council welcomes the constitutional proposals as set out in Council Paper No. 8 of 1961.

The mover made it very clear from the outset that:[98]

> Government is not seeking approval or any decision on the proposals set out in the Council Paper. The purpose of this debate is to obtain the views of the Members of this House on the broad constitutional front.

The motion was opposed by nearly all of the Fijian (and European) members. The reason for their opposition was their belief "that the direction was towards complete independence of Fiji".[99] It was made clear by the Fijians that:[1]

> Any proposal for constitutional changes that ignores and does not take into consideration the Deed of Cession is ill-conceived .... Furthermore, the development of any constitution in this Colony that ignores the Deed of Cession will not be on stable ground.

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97 Council Debates (1961), 129.

98 Idem.

99 Ratu K.K.T. Mara (as he then was); ibid., 133.

1 Idem.

The Indian members unanimously supported the motion. The European members supported some changes but they strongly opposed major constitutional change.

Since the intention of the motion was to take the views of the various communities regarding constitutional change, the Government felt that no vote was necessary. Accordingly, it was unanimously agreed that the best way to handle the situation was to withdraw the motion. This was accordingly done with the general concurrence of the leaders of the three groups.

After the motion was withdrawn, there were discussions between the Governor and the members of the Legislative Council. The unofficial members continued to be divided on the composition of the Legislative Council. There was a wide measure of agreement, however, that separate communal rolls should be retained. Nonetheless some Indian members suggested that a common roll constituency should be introduced on an experimental basis. There was also a suggestion that five members of each race should be elected on separate communal rolls and three others (one from each race) elected on a common roll. The Fijians and European members, however, absolutely opposed the introduction of common roll in any shape or form. The Governor recommended against any change of this kind.

On the representation of the three main racial groups, the Fijians considered that there should be four elected Fijian members and two elected by the Council of Chiefs and that the Indians and Europeans should, each have four elected and one nominated member. The extra Fijian member was seen by the Fijians as recognition by Her Majesty's Government of the special position

of the Fijian people under the Deed of Cession and in subsequent promises. They demanded that the constitution should formally record this. They also felt that the Europeans and Indians should be equally represented and that the official majority should be retained.[2] The European members supported the Fijian proposal.

The great majority of the Indian members were opposed to the suggestion of an additional Fijian member but were divided as to the composition of the Legislative Council. One member proposed a common roll constituency with an unofficial majority. Another rejected a continuation of nominated members. Another spoke of a separate Muslim representation.[3]

Later in 1961 the Governor sent a despatch regarding his views to the Secretary of State for the Colonies. A Council Paper, containing copies of the Governor's despatch and of the Secretary of State's reply was issued in November 1961.[4] That paper proposed that there should be four elected members for each of the main racial groups. In the case of the Fijians there was to be, in addition, two members elected by the Council of Chiefs, while the Indians and Europeans would continue to have two nominated members. The franchise was to be extended to women.

The Secretary of State for the Colonies accepted the above

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2 "Proposed Changes in the Composition of the Legislative Council", Council Paper No. 40 of 1961, 3.

3 Idem.

4 Ibid., 1 - 5.

recommendations and agreed that there ought to be an increase in the number of seats but with preservation of parity between races and the official majority.

The Fijians displayed their strong opposition to drastic constitutional changes. However, the British Government was of the equally strong opinion that changes were inevitable.

> But it should be recognized now that it is the long-standing policy of Her Majesty's Government to help dependent territories to attain self-government as soon as they are ready for it. [5]

The British Government did appreciate the apprehensions of the Fijians that any major change in the status quo would be detrimental to their interests. Accordingly it repeated the assurance that: [6]

> Her Majesty's Government will only decide on any major changes after full consultation with the representatives of the various communities in the Colony.

Subject to this, the British Government felt that it was unrealistic to suppose that the status quo could be maintained indefinitely.

Then in November 1962, it was announced that the Under Secretary of State, Mr Nigel Fisher, hoped to visit Fiji in early 1963 and expected to learn of the views of all sections of the community on the future of the Colony. The Governor expressed

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5 Address of the Governor of Fiji in the Legislative Council: Council Debates (1962), 500.

6 Idem.

7 Idem.

the wish that all sections of the community should give consideration to the issues and make their views known to the Under Secretary of State.[8] His proposed visit led to speculation on the intentions of the British Government towards constitutional changes. In spite of the various assurances given, both outside and inside the Legislative Council, the Fijians were still unsure of their position in relation to imminent constitutional changes. In fact the latest assurance had been given as recently as 23 November 1962 - that is in the opening address of the Governor in the Legislative Council.[9] In December 1962, the following motion was moved and seconded by Fijian members:[10]

> That in view of the expressed and representative desire of the Fijian people and having due regard to His Excellency the Governor's address at the opening of the present session, this Council takes cognisance of the wish of the Fijian people that there should be no change in the present Constitution of the Colony until the Fijian people express their desire for further Constitutional changes.

This motion was introduced as was expressly acknowledged, to get a "reaffirmation" of the position of the Fijians. According to the Fijians there were grave doubts as to their future.

> There have been doubts expressed in recent years, doubts which have been created in the minds of the Fijian people because of recent developments in other territories, because they see a sort of broad conflict between assurances given to us from time to time and what we think is pressure brought about by high-power politics as to our future in this country.[11]

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8 Idem.

9 Idem.

10 Council Debates (1962), 625.

11 Ibid., 626. per Mr. Ravuama Vunivalu.

The substance of the motion seems to have been unanimously accepted in that almost all agreed that no major constitutional changes ought to come about against the wishes of the people as a whole. However, there was objection from the Indian members to the racial connotations and form of the motion. This motion, as it stood, was agreed to with the Indian members voting against it.

In the meantime in March 1963 an important constitutional change was made by the Fiji (Constitution) Order in Council 1963 which came into effect on 1 March 1963. By the Order, the Legislative Council was to consist of six unofficial members of each of the three principal racial groups, the Fijians, Indians and Europeans. Four members of each of the races were to be directly elected by the people, two Indians and two Europeans were to be nominated by the Governor, and two Fijians elected by the Council of Chiefs. This Order in Council was the first major constitutional change since 1937. For the first time the Fijian people were able to elect their representatives directly and for the first time the franchise was extended to women and to all literate adults regardless of property qualifications.[12] Though there was an increase in the number of elected members to eighteen, the official majority of nineteen members was retained.

On the international scene there was strong criticism of the English colonial policies including their effect on Fiji. There was a debate about Fiji in the United Nations Special Committee

PTO Pg 86

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12 Fiji (Constitution) Order in Council, 1963 : ss. 25,30 & 32.

on Colonialism. In 1963 and 1964 there were resolutions, calling on Britain to take immediate steps to hand over power unconditionally to the people of Fiji.[13]

In January 1963, the Under Secretary of State, Mr Nigel Fisher, visited Fiji and he held discussions about the constitutional future of Fiji. During his visit, the members of the Fijian Affairs Board addressed a letter, dated 17 January 1963, to the Under Secretary further outlining the Fijian objections to constitutional changes without the necessary safeguards. Fijian members represented that the terms of the Colony's special relationship with Britain, which was felt to have its closest parallel in the constitutional links between Britain and the Channel Islands or the Isle of Man, should be clarified and contained in legislation. Their view was that, if these issues could be satisfactorily resolved, they would be prepared to go along with further moves towards self government. However, the British Government felt that the time for change was coming. In a despatch dated 15 August 1963 to the Governor of Fiji, the Secretary of State for the Colonies made the position of the British Government quite clear when he stated:[14]

> The British Government accept that the time is approaching when the future relationship between Fiji and Britain should be clarified and codified, and will be glad, in consultation with representatives of the people of Fiji, to work out a constitutional framework which will preserve a continuing link with Britain and within which further progress can be made in the direction of internal self-government.

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13 Pacific Islands Monthly, August 1965, 64.

14 (1963) Fiji Royal Gazette 309.

It was clearly indicated by the British Government that in 1964 or early 1965, a constitutional conference was to be held in London with a view to reaching agreement between the British Government and the leaders of the representative opinion in Fiji.

In the meantime the British Government desired that some advance be made to increase internal self-government. Fiji was seen to have leaders well qualified to bear added responsibilities. Accordingly, the British Government wished to introduce the "Member System" in accordance with its previous proposals of 1961.[15] This, of course, did not necessitate amendment of the existing constitutional instruments. The above mentioned despatch of the Secretary of State was the subject of much discussion and deliberation in Fiji.

In 1963 the Great Council of Chiefs resolved to accept this despatch from the Secretary of State as a basis for negotiation on the subject of constitutional changes. However, the Council of Chiefs sought an assurance from the British Government that the points raised in paragraph five of the letter of the Fijian Affairs Board to Mr Nigel Fisher would be safeguarded.[16]

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15 Council Paper No. 8 of 1961; see p.79 , ante.

16 Paragraph 5 of the letter read:

> The provision in the Fijian Affairs Ordinance that all legislation affecting Fijian rights and interests should be referred to the Fijian Affairs Board or, on the recommendation of the Board, to the Council of Chiefs, should be retained and likewise theGovernor's directions through the Public Service Commission to work towards the balance of the races in the Civil Service.

For a full text of the letter see Council Debates (1965), 752 - 753.

Further, the Council of Chiefs desired that there be consultations amongst the representatives of all racial groups prior to the Conference in Britain. Accordingly in January 1964, a Fijian elected member Ratu K. K. T. Mara (as he then was) moved:[17]

> That this Council takes note of the Secretary of State's despatch No. 388 of the 15th August, 1963, the text of which is as follows: .... [The text omitted] and agrees that in the light of the assurances given by Her Majesty's Government in the United Kingdom in the said despatch a 'Member System' within the framework of the 1963 Constitution should be introduced as soon as is practicable.

In so moving, he was very careful to say that:

> The motion of course, does not spell out any constitutional change.

The motion was seconded by an Indian member. This motion was unanimously adopted. Consequently one Member was appointed from each of the three races. They were:-

(a) Ratu K. K. T. Mara (as he then was): Member for Natural Resources, (a Fijian).

(b) Mr A. D. Patel: Member for Social Services, (an Indian).

(c) Mr J. N. Falvey: Member for Communication and Works, (a European).

In the meantime an organized political party called the Federation Party (later the National Federation Party) was formed in 1964.

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17 Council Debates (1964), 5.

The nucleus of the party was established after the 1960 sugar cane strike. It was headed by Mr A.D. Patel and among the initial strong supporters were Messrs S.M. Koya, James Madhavan, and C.A. Shah, This party was predominantly, if not entirely, Indian in membership at the time of its formation. Its objective was to press for the immediate adoption by the legislature of a common roll.

(5) 1965 - 1970

In February 1965, the British Government invited all unofficial members of the Legislative Council to a Constitutional Conference. The following month the Under Secretary in Charge of the Pacific and Indian Ocean Department of the British Colonial Office, Mr Trafford Smith, visited the Colony for talks with assocations and individuals about the future constitution.

His visit was followed by that of the British Parliamentary Under Secretary of State for the Colonies, Mrs Eirene White in April. The main purpose of her visit was to hear the views of those groups who would not have been directly represented at the proposed conference.

(a) The Pre-Conference Political Scene

The intention of the British Government was to have the three major races agree in broad terms on the issues to be discussed. The Governor held discussions with Legislative Council members to ascertain if agreement would be forthcoming. The Indian representatives were reluctant to give any definite undertakings. The Fijians refused to give undertakings until the Indians did so. Nonetheless there seemed to have been broad

agreement as to continuing the link with the Crown and continued United Kingdom responsibility for external affairs. Difficulties arose in relation to land and the introduction of a common roll. Eventually it was agreed that the question of Fijian lands should not be placed on the agenda for the forthcoming constitutional conference.

Voting System

On the method of elections and the common roll issue there was sharp disagreement. The Federation Party, headed by Mr A.D. Patel and supported by three other Indian Members of the Legislative Council, pressed for common roll which would give one man one vote. A meeting convened by the Governor, in March, of the leaders of each community broke up early when Mr A.D. Patel made it clear that he would not contribute anything to the discussions and whatever views he had would be expressed in London. The Fijians reacted by refusing to continue the discussions unless the Indians would. This was followed by a statement issued after the Federation Party's annual meeting at Lautoka when it was announced that the four unofficial Indian members of the Legislative Council who were in the Federation group would not hold any discussions on constitutional matters with other members of the Legislative Council. They would present their views in London. It was resolved by the Party that it was "inconceivable" that any good purpose would be served by holding any further discussions in Fiji.

Subsequent to this, Mr A.D. Patel and his colleagues attended a meeting of the unofficial members of the Legislative Council and read a statement advocating the introduction of common roll. The four members then confirmed their directive from the Party not to hold any further discussions in Fiji. However,

the other remaining members - six Fijians, six Europeans and two Indians - decided to hold meetings amongst themselves and agreed to attempt to prepare a considered policy for London.

It must be pointed out that not all of the Indians supported Mr Patel and his views. There were many who were opposed to Mr Patel. The Kisan Maha Sang and the Kisan Sangh (which were farmers' associations), the Indian Association and the National Congress were uncompromisingly opposed to Mr Patel and his Party. This was demonstrated clearly at a meeting held on the 25 June between members of the National Congress of Fiji, and Fijian and European members of the Legislative Council. The Indians at the meeting condemned the actions of Mr Patel and his group in refusing to co-operate with other Council members in an effort to work out a pre-conference solution.

On the Fijian political stage, there was strong opposition to Mr Patel and his Party's attitude. It was so strong that the Fijian Democratic Party - headed by a trade unionist, Mr Apisai Tora - declared[18] "Fiji for the Fijians". It also condemned the common roll. Mr Tora went to the extent of saying that Indians must leave Fiji. The Great Council of Chiefs also met in Suva. The temper of the Fijians can be judged by a motion which was placed before the Council of Chiefs calling for the exclusion of the Indians from the constitutional talks in London. This motion was defeated by a narrow majority. Further, some individuals began to call for exclusion of both the Europeans and Indians from the constitutional talks, the basis being that when

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18 Pacific Islands Monthly, July 1965, 13.

Fiji was ceded to the British Sovereign in 1874 the only parties were the Fijians and the British Government.[19]

The Europeans on the other hand, also wanted to secure their own positions. This could best be achieved by supporting the Fijians. They maintained that employment and income for Fiji's growing population was more important than political change for the sake of change or because of outside pressure. In April they released a memorandum containing these and other points. The memorandum, drawn up after wide-ranging discussions among the European electorate, put the European point of view on constitutional changes for Fiji. Drastic changes were opposed and very gradual changes were advocated. It strongly supported communal representation.[20]

With such an unsatisfactory atmosphere in Fiji there were grave apprehensions about the success of the London talks. Nevertheless, the Constitutional Conference was held from 26 July to 8 August. Before the Conference opened, general agreement had been reached in Fiji that independence was not an issue to be discussed. It was also agreed that all minority groups not then enfranchised should be included in the electoral rolls and that Muslims and other groups would not be separately represented.[21]

All sessions were held in private. Hence there are no

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19 Pacific Islands Monthly, June 1965, 11.

20 Ibid., May 1965, 12.

21 Cmnd. 2783 (1965), 6.

official records of what transpired at the Conference,[22] apart from a white paper containing the report of the Conference, which was published in October.[23]

The Conference agreed that there should be a majority of elected members in the Legislative Council. The nomination of unofficial members was to be discontinued. Members of all minority groups, who hitherto had no vote, would be enfranchised and be eligible to stand for election. There was to be universal adult suffrage. Agreement was also reached on the introduction of ministerial responsibility and the inclusion of a Bill of Rights in the Constitution.

There was no agreement on the method of election to the Legislative Council. The majority of the Indian members continued to press for a common roll with appropriate safeguards. The Fijians and the Europeans strongly opposed this and advocated the retention of communal representation. They were prepared to accept a common roll as a long term objective. These diametrically opposed views as to the timing of the introduction of common roll could not be reconciled at the Conference.

Another matter on which divergent views were held was the proposal that there should be two more Fijian members of the legislature than Indian members. The European and Fijian groups maintained that the special position of the Fijians in Fiji justified

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22 However, there is an unofficial account of what transpired: See Pacific Islands Monthly September, 1965, 147.

23 Cmnd. 2783, (1965).

two extra seats. The United Kingdom delegation also argued that since the Rotumans and other Pacific Island communities would be included in the Fijian electorate, additional seats were justified. The entire Indian delegation rejected this proposal and recorded their strong objection to it.

Ultimately the Conference reached its conclusions with various reservations noted. It decided that the Legislative Council would comprise thirty six elected and, at most, four official members. It was recommended that the elected members be chosen thus:

(a) Nine Fijians, nine Indians and seven Europeans would be elected on a communal roll.[24]

(b) Two Fijian members would be elected by the Council of Chiefs.

(c) Three members on each of the Fijian, Indian and European rolls would be elected by persons of all communities. This would give each elector a chance to elect a member of another community. This of course necessitated different constituency boundaries for the purposes of the election of these nine members and the country was divided into three different constituencies. This manner of voting was called "cross-voting".

Other recommendations referred to a Bill of Rights, the judicial system and the appointment of various commissions. These were not contentious matters.

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24 The Rotumans and other Pacific Islanders would be included in the Fijian roll and Chinese and all other communities on the same roll as the Europeans: Cmnd. 2783 (1965), 11.

(b) Post-Conference Era

After the Conference, there was strong disapproval by the Federation Group and other Indians of some of the proposals and recommendations. Mr Patel's group sent a letter to the British Secretary of State, Mr Greenwood, immediately after the Conference, warning that implementation of the London proposals "would create a grave racial disharmony leading to undesirable results".[25] The letter continued:[26]

> In this process an irreparable harm would be done to the country as a whole and we fear that the goodwill, harmony and understanding which has existed among all races in Fiji over the last ninety years would disappear forever.
>
> The responsibility for any course of events arising out of the implementation of these proposals and leading to this result should rest, in our view, on Her Majesty's Government.

Mr Greenwood, in reply, asked the authors of the letter to co-operate and warned that outright opposition was "far more likely to increase the suspicions of the other communities".[27]

In December 1965, a European member moved and a Fijian member seconded the following motion in the Legislative Council:[28]

> That in the opinion of this Council, the views of delegates to the Fiji Constitutional Conference as adopted by Her

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25 Cited in Pacific Islands Monthly, November 1965, 9.

26 Idem.

27 Idem.

28 Council Debates (1965), 627.

Majesty's Government in a White Paper published in October, 1965 form a satisfactory basis for future political progress in Fiji along constitutional lines.

This motion was supported by a great majority of European and Fijian members and one Indian member and was objected to by the other five Indian members. Here again, the centre of controversy was the question of the common roll and the extra two seats for the Fijians. Five of the six Indian members held the view that the common roll should be introduced immediately but for obvious reasons the Fijian and European members objected to this course. After very lengthy discussions the Legislative Council formally adopted, as was expected, the recommendations made in the White Paper.

Both before and after the Constitutional Conference and the debates in the Legislative Council in 1965, the people of the Colony began to display a political awareness which was unthinkable a few years previously. There may perhaps be several reasons for this.

One reason is that hitherto the majority of the people relied on the Crown to govern the best way it thought fit. However, with the move towards self-government, people began to realise that very soon they would have to shoulder that burden. As well education was expanding and people, educated overseas, began to introduce ideas of "modern" democratic institutions. Further, people of all races recognised that for the protection of their respective rights and freedom, they would have to participate actively and organize themselves in groups. Needless to say, some also felt that the best way to become future leaders of the

country was to organise political parties hoping eventually to have their ideas adopted by the electorate.

(c) The Fijian Political Parties

The Fijians' first political party, the Fijian Association, was formed in 1956. In its initial stages it was not a very active political association. However, from the early 1960's it began to gain momentum. It became more influential when more Chiefs began to support it.

The next political party, the Fijian Democratic Party, was created in 1961 and has already been mentioned. The leader of this party was a trade unionist, Mr Apisai Tora. In the beginning this party gave the impression that it opposed the chiefly traditions. In the 1963 elections it received a very severe blow and lost much of its support. It was this party which in 1965 began to advocate "Fiji for the Fijians" and declared that the "Indians must go". (Ironically, the then leader of the party, Mr Apisai Tora, is now a member of the predominantly Indian party, The National Federation Party.) It was eventually dissolved.

There also emerged during 1964 the Fijian Advancement Party. One of its few achievements was the protest march against Sunday trading on 9 December 1966, but as a political party it simply faded away.

Later there was a fourth party - the National Independent Party. This party too did not enjoy much success and had very little support. It was doomed to failure from the beginning as

was evident from the report that at its meeting on 22 January 1966, only about thirty Fijians and three Indians turned up.[29]

(d) The Indian Political Parties

The first political party among the Indians was the Indian Association of Fiji. It was formed in the early thirties. It is still in existence, but it plays little part in politics.

As has been seen[30] the nucleus of the present National Federation Party was formed after the historic sugar cane strike in 1960. Initially, this party was predominantly an Indian party but it later gained the confidence of some Fijians and others. It claims, justifiably, to be a multi-racial party, membership being open to persons of all races.[31] From its inception it has been a very active political party playing a major role in constitutional developments in Fiji, including the establishment of the 1970 Independence Constitution. It is now the Opposition Party in the House of Representatives in Fiji.

Next there emerged the National Congress of Fiji. This party was formed to counteract the influence of Mr A.D. Patel and the Federation Party. The Congress was headed by Mr Ajodhya Prasad but it had very little success politically.

The Fiji Muslim League began as a political association

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29 Pacific Islands Monthly, March 1966, 29.

30 See p.89 , ante.

31 It commands the support of fourteen Indians (including the Leader of the Opposition), three Fijians and one Chinese in the House of Representatives of the Fiji Parliament.

in the late twenties. The League is no longer a political party and survives only as a religious body. Later there was the Muslim Association which was formed in the early forties. It was headed by a prominent Muslim figure, Mr A.R. Sahu Khan.[32] This Association put up a very strong case for separate Muslim representation but without success. One of the major reasons for its failure was the opposition it met from the Fiji Muslim League leaders. The Association too has become a religious body. As well there were two very insignificant political parties - the Fiji Minority Party and the All Fiji Muslim Front. Both of these had very little support from the bulk of the Muslim community.

(e) The European Political Parties

In Fiji the Europeans enjoyed a great advantage over the Indians and the Fijians in terms of political experience. They participated in the constitutional development of Fiji from the beginning of colonial rule and secured their first elective representation in 1904. Hence by the time the Indians and the Fijians secured elective representation in the legislature, Europeans had been able to consolidate their position in the political field. There was not much political rivalry amongst the Europeans in Fiji. They were able to present a common front to a greater degree than the other two major races particularly the Indians. The European Electors Association of Fiji was formed well before the 1950's and had a very strong and united backing from the persons on the European electoral roll.

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32 A nominated member of the Legislative Council from 1944 - 1947.

When the half-castes appeared as a significantly numerous community, they formed the Part-European Association. Though included in the "European" roll, half-castes outnumbered the Europeans. When the 1966 Constitution required all communities, other than those which were included in the "Indian" or "Fijian" roll, to be included in the "General" roll that roll included the Europeans, the Chinese, the half-castes and other non-Fijians and non-Indian groups. This led to the formation of the political party called the General Electors Association early in 1966.

(f) The Alliance

By January 1966 there was a move to set up a multi-racial political alliance of organizations and individuals. A steering committee representing members of Fiji's Fijian, Indian, European and Chinese communities had been formed. This was the nucleus of what later became the Alliance Party. The Alliance Party was formed not as a political party of individuals but more as an alliance of organizations. It was a "Party" which recognized racial distinctions. Thus to be a member of the Alliance Party one has to be a member of one of the organizations which is affiliated to the Alliance Party. Today the General Electors Association, the Fijian Association and the Indian Alliance are the three major organizations which constitute the Alliance Party.

The Europeans and the Fijians gave whole-hearted support to the Alliance Party but relatively little support for the Alliance came from the Indians. In fact, the writer is aware that in the early stages of the formation of the Alliance, some Indian members and supporters of the Alliance were embarrassed to declare openly their support for the party. Amongst the Indians, rightly

or wrongly, the common attitude was that the Indian supporters of the Alliance were puppets and stooges of the Europeans and Fijians.[33]

By way of summary it may be said that of all the various political parties that had emerged by the 1966 Constitution or soon thereafter the two major parties were the Alliance and the Federation (which became the National Federation Party). This is evident from the results of the first election under the 1966 Constitution in September 1966. Of the thirty-four candidates elected directly by the people twenty-four seats were secured by the Alliance, nine by the Federation and one went to an independent candidate[34] (who declared openly that although he was an independent candidate he supported the Alliance policy).

(g) The 1966 Constitution

The 1966 Constitution established an unofficial majority in the Legislative Council. After the elections, as has been seen, there were two major political parties represented in the Legislative Council - the Alliance and the Federation. The Alliance commanded the substantial majority and hence it formed the "Government". A new post was created called the "Leader of Government Business" which was equivalent to the prime ministership and appointed on the same principle as the appointment of a prime minister in England. The Leader of Government

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33 Hence in the first general elections in September, 1966 under the 1966 Constitution the Alliance candidates got only 15.7 per cent of Indian votes: Pacific Islands Monthly, November 1966, 11.

34 Mr Charles Stinson. He is now the Minister of Finance.

Business also headed the Executive Council or "Cabinet" which continued to be appointed by the Governor.

On 1 September 1967, the full ministerial system was introduced for the first time in Fiji. Under this the Leader of Government Business became the Chief Minister (Premier) and the "Members" became Ministers with the Governor retaining the right of veto. The Executive Council was replaced by the Council of Ministers (equivalent to a Cabinet) with the Governor as its President.

There was also created the position of the Leader of the Opposition.

(h) The 1967 Walk Out

The Federation Party continued its pressure for the immediate introduction of common roll, a move which the Alliance Party, with a substantial majority in the Legislative Council, strongly opposed. In spite of the new Constitution the United Nations Special Committee on Colonialism did not modify its attitude towards Fiji and in 1967 the United Nations Organization announced that a fact-finding mission would be sent to Fiji. This aroused strong opposition from the Fijians generally and the Alliance Government in particular. Thus in the Legislative Council Ratu K. K. T. Mara (as he then was) who was then the Leader of Government Business emphatically stated in the Legislative Council that as far as the Government was concerned the visit was not welcome.[35] MP for Fed Party walked out in Protest.

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35 Council Debates (1967), 176.

On 1 September 1967, the Leader of the Opposition, Mr A. D. Patel, introduced a motion in the Legislative Council condemning the Constitution as "Undemocratic, iniquitous and unjust" and calling for a "Constitutional Conference immediately to ensure that a new Constitution is worked out based on true democratic principles...." .[36] As might have been expected, this motion was very strongly opposed by the Alliance members. The opening speaker for the Alliance Group was Mr Vijay R. Singh, an Indian. The latter recalled the non-co-operative attitude of Mr A. D. Patel and his colleagues during the pre-conference talks. He also adverted to the issue of the non-enlistment of Fiji Indians in the 1939 - 45 war.[37] This prompted very strong protests from

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36 Ibid., 612. The full text of the motion was:

> Undemocratic, iniquitous and unjust provisions characterize the existing Constitution and electoral laws of Fiji and their operation have caused alarm in the minds of right thinking people and have hampered the political advancement of Fiji along democratic lines and this House therefore is of the opinion that Her Majesty's Government of the United Kingdom should call a Constitutional Conference immediately to ensure that a new Constitution is worked out based on true democratic principles without any bias or distinction on the grounds of colour, race, religion or place of origin or vested interest either political, economic, social or other so that Fiji may attain self-government and become a nation with honour, dignity and responsibility as soon as possible.

37 However, the true reason why the Indians in Fiji did not enlist during the Second World War was their protest against discriminatory pay between the Europeans and the other races. Mr A. R. Sahu Khan, who was an ex-sergeant in the Indian Platoon, has given a comprehensive account of the whole history on this subject: see Fiji Times, 18 March 1964. This account was cited with approval in the Legislative Council by Mr S. M. Koya: Council Debates (1965), 725 - 727.

the Opposition. Mr Vijay R. Singh then moved as an amendment to the original motion, that the 1966 Constitution:[38]

> correctly expresses the views of the great majority of the electors of all races in this country ... and ... the transition to a ministerial system of government less than ten months after the introduction of the 1966 constitution is plain evidence of the ability of the Alliance Government to govern the nation with honour, dignity and responsibility and on democratic principles.

As soon as this motion for amendment was accepted by the Speaker and the mover began to speak to it all the nine members of the Opposition walked out of the Chamber amidst shouts of "Cowards, cowards!" and "Shame on you". The members of the Opposition remained absent and eventually relinquished their seats; the country was ready for a by-election.

In the meantime there was much discussion in the country with the Opposition seeking to justify their walkout to their electorates and the government members, needless to say, attempting to condemn the walk out. The Chief Minister went to the extent of declaring:[39]

> I have no fear whatsoever in running this country without the Opposition.

The Federation Party issued a statement saying that the members had walked out in protest at the existing Constitution and the introduction of the ministerial system under it. The

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38 Council Debates (1967), 624.

39 Council Debates (1967), 690.

statement claimed that they proposed to resort to non-co-operation. Public meetings were held all over the country. The Alliance also had several meetings. The Government published a detailed statement of the communications between the two parties over the previous ten months in order to discredit the Opposition.

In the meantime, the Chief Minister went on a world tour to acquaint himself with the way the ministerial system operated in countries where a similar system had recently been adopted. It was also reported[40] that the Chief Minister went to "sell Fiji's point of view" to the Committee of Twenty Four of the United Nations which wanted to send a mission to the Colony to see why it was not getting independence. He met with little success in this respect.

The stage was set for a by-election for all nine seats of the Opposition members. Before the by-election, one Opposition member, Mr M. T. Khan defected and filed his nomination as an Alliance candidate. The Federation Party opened its campaign with plans for independence. Its main policy was:[41]

> to work for immediate independence and to set up a democratic republic with a parliamentary government within the British Commonwealth.

Further, it was stated:[42]

> In order to maintain a link with the past, a person who is

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40 Pacific Islands Monthly, October 1967, 23.

41 Pacific Islands Monthly, August 1968, 20.

42 Idem.

ethnically a Fijian will be elected as the Head of State.

There was strong opposition to these policies.

The Alliance itself said that full self-government was inevitable but it favoured such a move by an "ordered and systematic handover of power", and not with "chaos and anarchy in the streets".[43] At a Party Convention, the Chief Minister acknowledged that the Alliance itself was redrafting the Constitution to meet the needs of a self-governing Fiji. A resolution calling for more constitutional talks with Britain before the general elections in 1971 was also adopted by the Party.

The by-elections were held in September 1968 and the Federation Party was returned with greater majorities in practically all of the nine constituencies. This gave the Federation the strength to say that it represented at least the majority Indian voice inasmuch as these by-elections were in respect of Indian communal seats. Of the 59,786 Indians who voted, 46,960 voted for the Federation candidates.

This landslide victory of the Federation created much uncertainty in the minds of the Fijians. Mass meetings were held throughout the Colony where a disturbing emotionalism was exhibited, particularly in relation to the Federation Party's contention that it had a clear mandate to push for immediate independence and the adoption of a common roll. The Fijians' concern was accentuated by the fact that they felt that in matters of national importance, the Indians would be united. Hitherto, it had been thought that there was major disunity among the Indians.

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43 Pacific Islands Monthly, September 1968, 21.

The Fijian Association held Colony-wide meetings. At its first meeting in Suva which was chaired by the present Governor-General, there were calls for the deportation of Indians and the return of land to Fijian hands. Topics with racial connotations were the major subjects at these meetings. There were also reports of disturbances in a few parts of the country. The Federation party blamed the Government and the Alliance supporters for all the resulting disturbances which it said were a face saving device for their "shock" defeat in the by-elections. Nevertheless, the Federation continued undaunted with its policy for the adoption of a common roll.

(i) 1970 Constitutional Conference

Relative calm followed the return of the Federation members to the Council. The next significant step in Fiji's constitutional development was the announcement, made by the Chief Minister in June 1969, that both the Alliance and the Federation would meet for discussions on a new constitution for Fiji. The date for a London Constitutional Conference was said to depend upon the measure of agreement reached at meetings in Fiji. However, most of these meetings had to be postponed in view of the sugar cane contract arbitration hearings. The death on 1 October 1969 of the Leader of the Opposition, Mr A.D Patel, caused the constitutional talks to be further delayed.

Mr S.M. Koya, who remains the present Leader of the Opposition, was elected as the new Leader of the Federation Party. On his election, Mr Koya stated that he favoured close consultations with the governing Alliance Party on pre-constitutional conference talks in Fiji. Surprisingly, by November 1969, within one month of the election of the new leader of the Opposition

Party, it was announced that both of Fiji's leading political parties had agreed to seek full self-government with Dominion status within the Commonwealth as the "most logical step" towards independence. The Alliance favoured full self-government with Dominion status, and the Opposition favoured independence as a republic. Nevertheless the Opposition was "happy" to accept the Alliance proposal. By late November most of the matters were generally agreed upon. All the meetings leading up to these announcements were of course held behind "closed" doors. There was much criticism of the secrecy but it fell on deaf ears.

1970 opened with another series of meetings between the two parties and in January official announcements were made that basic agreement had been reached. The most important agreement was the safeguarding of Fijian interests. It was agreed that this would be best achieved by the establishment of a Second Chamber. There was as yet no agreement on the electoral system or the manner of constituting the Upper House. At the end of January 1970, Lord Shepherd, the British Minister of State for Foreign Affairs arrived for discussions with the Government and Opposition on the formulation of a new status for Fiji. He met representatives of both political parties in complete privacy and secrecy. Again there was much criticism of the secrecy but no heed was taken. A report of Lord Shepherd's visit was presented to the Legislative Council on 25 February 1970. The Council, on the motion of the Chief Minister, seconded by the Leader of the Opposition, accepted the report. All members, except one,[44] formally endorsed the agreement that had been

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44 Dr L. Verrier.

reached. The date for the next Constitutional Conference in London was set for 20 April, 1970.

The Conference took place from 20 April to 5 May. Again, all the business was conducted in private, despite popular disapproval of these secret talks on matters so vital to the country. There was no official information concerning what took place. It had been pointed out that it was wrong for Legislative Council members alone to represent the people at such a vital Conference. This was particularly so in view of the fact that the proposed constitutional arrangements had not been an issue at the previous election. It was argued that the Fiji delegates should have been elected by a convention in Fiji, called specially to deal with the constitutional issues.

Be that as it may, the Conference succeeded in agreeing on the terms of a Constitution for an independent Fiji. Finally on 10 October 1970, when the Constitution came into force, Fiji became an independent Dominion within the British Commonwealth.

PART THREE

THE CONSTITUTION

CHAPTER IV

THE GENERAL CHARACTERISTICS AND STRUCTURE

A. Introduction

A constitution is a set of laws and rules setting up the machinery of the government of a state. It invariably defines and determines the relations between the different institutions of government, namely the executive, the legislature and the judiciary. Most Commonwealth countries and indeed all those former colonies which achieved independence in the Commonwealth era have written constitutions. Fiji is no exception.

Whilst the 1970 Constitution of Fiji is the result of political negotiations and compromise, its provisions are not completely original. The framers of the Fiji Constitution drew directly on the constitutions of such African countries as Nigeria and Mauritius and any comparison will show striking similarities. Nonetheless there are, because of local factors, significant differences in the composition of the legislature and the methods of election.

Although the framers of the Fiji Constitution drew directly on the constitutional experience of the African countries in particular, the spirit and practice of the Westminster model have been influential. Both directly and derivatively, the constitution of Great Britain has influenced the Fiji Constitution. However, the basis of achieving the Westminster model has been different. For instance, as will be seen, some of the characteristic features of the Fiji Constitution are the supremacy of the Constitution (as opposed to the sovereignty of parliament),[1] constitutional guarantees of fundamental rights,[2] judicial review of the constitutionality

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1 See pp. 210 et seq., post.

2 See pp. 427 et seq., post.

of legislation,[3] the transfer of the responsibility for terminating a judge's tenure of office from a legislative to a judicial forum,[4] and the vesting of full control over the public service and the conduct of elections in the hands of independent commissions.[5] Although the English constitution has no specific provisions relating to the matters just mentioned, most of these provisions follow the spirit and practice of British institutions.[6] The framework of the executive and the legislature in Fiji follow the Westminster model very closely. At Westminster

> the head of state is not the effective head of government; in which the effective head of government is a Prime Minister presiding over a Cabinet composed of Ministers over whose appointment and removal he has at least a substantial measure of control; in which the effective executive branch of government is parliamentary inasmuch as Ministers must be members of the legislature; and in which Ministers are collectively and individually responsible to a freely elected and representative legislature.[7]

The Fiji Constitution has very similar framework. However, before examining the various important aspects of the Fiji Constitution, it is desirable to have a general view of its characteristic features and structure.

B. Legislature

The legislative function in Fiji is vested in the Parliament

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3 See pp. 183 et seq., post.

4 See pp. 134 et seq., post.

5 See pp. 140 et seq., post.

6 S. A. de Smith, The New Commonwealth and Its Constitutions (1964), 77.

7 Idem.

consisting of Her Majesty, a House of Representatives and a Senate.[8]

(1) The House of Representatives

The House of Representatives, like the House of Commons, predominates in the legislative field. The House consists of fifty two members elected to represent constituencies. But, unlike the United Kingdom or New Zealand, there are four electoral rolls. Voters are registered on one of three separate rolls, that is to say:[9]

(a) a roll of voters who are Fijians;[10]

(b) a roll of voters who are Indians; and

(c) a roll of voters who are neither Fijians nor Indians,

and all voters so registered are also registered on one additional roll called the "National roll".

The House comprises twenty two Fijians, twenty two Indians

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8 Constitution, ss. 30 and 52.

9 Ibid., s. 32.

10 'Fijian" for the purposes of the Constitution is defined in s. 134 (a) as:

> A person shall be regarded as a Fijian if, and shall not be so regarded unless, his father or any of his earlier male progenitors in the male line is or was the child of parents both of whom are or were indigenous inhabitants of Fiji or any island in Melanesia, Micronesia or Polynesia.

and eight others who are neither Indians nor Fijians. The election of the respective members of the various races is partly communal [11] and partly national. [12] The fifty two members of the House are elected as follows: [13]

(1) Twenty two members of the House are elected from among persons who are registered on the roll of voters who are Fijians, and of those members -

(a) twelve are elected by voters registered on that roll; and

(b) ten are elected by voters registered on the national roll.

(2) Twenty two members of the House are elected from among persons who are registered on the roll of voters who are Indians and of those members -

(a) twelve are elected by voters registered on that roll; and

(b) ten are elected by voters registered on the national roll.

(3) Eight members of the House are elected from among persons who are registered on the roll of voters who are neither Indians nor Fijians, and of those members -

(a) three are elected by voters registered on that roll; and

(b) five are elected by voters registered on the national roll.

Thus it will be seen that the representation in the House of Representatives is very unusual, possibly unique. The present

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11 Only the members of a certain community elect members of that community; e. g. the Fijians elect the Fijian members and the Indians the Indian members.

12 That is where voters elect members irrespective of race or community e. g. an Indian voter can vote for a Fijian candidate. This will be similar to voting in the House of Representatives in Australia or House of Commons in the United Kingdom.

13 Constitution, s. 32.

form of representation although the result of hard political bargaining, nonetheless recognises the principle of adult suffrage of citizens.

At the first meeting following a general election the House of Representatives elects a Speaker and a Deputy Speaker from among its members.[14] Neither the Speaker nor the Deputy Speaker can be simultaneously a Minister or an Assistant Minister. The functions of the Speaker are very similar to those of the Speaker of the English House of Commons.

Unlike the English position, the determination of the question of membership of the House of Representatives is vested in the Supreme Court and not in the House itself.[15]

(2) The Senate

The Senate,[16] consists of twenty two members, of whom

(a) eight are appointed by the Governor-General acting in accordance with the advice of the Great Council of Chiefs;[17]

(b) seven are appointed by the Governor-General acting in accordance with the advice of the Prime Minister;

(c) six are appointed by the Governor-General acting in accordance with the advice of the Leader of the Opposition; and

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14 Ibid., s. 36.

15 Ibid., s. 37.

16 Ibid., s. 45.

17 As to the history and composition of the Great Council of Chiefs see Ch. II, ante.

(d) one is appointed by the Governor-General acting in accordance with the advice of the Council of Rotuma.

A member of the House of Representatives is disqualified from membership of the Senate.[18] In addition to the other usual disqualifications, a person is disqualified from membership who had at any time during the immediately preceding three years held or acted in one of the offices specified.[19] The term of office of a member of the Senate is six years and his tenure is not affected by a dissolution of Parliament.[20] Parliament is dissolved at the expiration of five years. The basic qualifications for all Senators are similar to those for membership of the House of Representatives - that is citizenship, non allegiance to foreign nations, not disqualified by bankruptcy, unsound mind and so forth.

The Senate, at its first meeting elects, a President and a

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18 Constitution, s. 46 (2) (a).

19 The offices are the Constituency Boundaries Commission, the Electoral Commission, the Judicial and Legal Services Commission, the Public Service Commission or the Police Service Commission or the office of Supervisor of Elections or Ombudsman; Constitution s. 46 (2) (h).

20 Ibid., s. 47. However, the first members of the Senate were not all appointed for six years. The following were only appointed for three years:

(a) four appointed under advice of Great Council of Chiefs,

(b) three appointed under advice of the Prime Minister,

(c) three appointed under advice of the Leader of the Opposition, and

(d) The member appointed under advice of Council of Rotuma.

Vice President, neither of whom can be a Minister or Assistant Minister. They discharge duties corresponding to those of the Speaker and Deputy Speaker of the House of Representatives.

(3) Her Majesty

The Queen is an integral part of Parliament in Fiji and her functions are exercised by the Governor-General. When a bill has been passed by the House of Representatives it is sent to the Senate. After the bill has been passed by the Senate and agreement has been reached between the two Houses on any amendments made to it by the Senate, it is then presented to the Governor-General for assent.[21] However, if the bill falls within sections 62, 63, 64 or 65 of the Constitution it may be presented to the Governor-General for assent irrespective of the views of the Senate.[22] When a bill is presented to the Governor-General for assent, he signifies that he assents or that he withholds assent.[23] When the Governor-General assents to such a bill, it becomes law and the Governor-General causes it to be published in the Gazette. No law comes into operation until it has been published in the Gazette.[24]

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21 Constitution, s. 53 (3). As to the appointment of the Governor-General and the exercise of functions by the Governor-General generally see Ch. XVI, post.

22 Idem. As to the limitations of the powers of the Senate under ss. 62, 63, 64 and 65, see p. 123 , post.

23 Constitution, s. 54 (4).

24 Ibid., s. 53 (5) and (6).

C. The Exercise of Legislative Functions

(1) Sessions, Prorogation and Dissolution of Parliament

The commencement of each session of Parliament is determined by the Governor-General. However, the time appointed for the commencement of any session of Parliament must be such that a period exceeding six months does not intervene between the end of one session and the first sitting of Parliament in the following session. The Governor-General may summon a session if he receives a request in writing for the summoning of a session of Parliament from not less than one quarter of the members of the House of Representatives and he considers, in his own deliberative judgement, that the Government no longer commands the confidence of a majority of the members of that House or that it is necessary for the two Houses of Parliament to consider without delay a matter of public importance. Otherwise, the sitting of each House of Parliament takes place at such time and place as that House may, by its rules of procedure or otherwise, determine.[25]

As to prorogation and dissolution of Parliament, the Governor-General, acting in accordance with the advice of the Prime Minister, may at any time prorogue or dissolve Parliament.[26] However, if the House of Representatives passes a resolution of no confidence in the Government, and the Prime Minister does not either resign from his office within three days or advise the Governor-General to dissolve Parliament within seven days, or at such later time as the Governor-General,

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25 Ibid., s. 69.

26 Ibid., s. 70 (1).

acting in his own deliberate judgement, may consider reasonable, the Governor-General acting in his own deliberate judgement, may dissolve Parliament. Also, if the office of Prime Minister is vacant and the Governor-General considers that there is no prospect of his being able within reasonable time to appoint to that office a person who can command the support of a majority of the members of the House of Representatives, the Governor-General, acting in his own deliberate judgement, may dissolve Parliament.[27]

Under normal circumstances, the life of Parliament is five years; but if at any time Fiji were to be at war Parliament has the power from time to time to extend the period of five years by not more than twelve months at a time, provided that the total period of extensions does not exceed five years.[28] Also, if the Governor-General has declared by proclamation that a state of public emergency exists, Parliament may extend its life by not more than six months at a time provided that the total period of extensions does not exceed twelve months.[29] Furthermore, if after dissolution and before the holding of the next following general election, the Prime Minister advises the Governor-General that, owing to the existence of a state of war or of a state of emergency in Fiji, it is necessary to recall Parliament, the Governor-General shall summon the Parliament that has been dissolved.[30] This of course would not stop the

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27 Idem.

28 Ibid., s. 70 (3).

29 Ibid., s. 70 (4).

30 Ibid., s. 70 (5).

scheduled elections. The Parliament so summoned, unless dissolved sooner, shall stand dissolved on the day before the day prescribed for polling at that election.[31]

(2) Parliamentary Powers

Parliament has the general power, subject to the provisions of the Constitution, to make laws for the peace, order and good government of Fiji.[32] It is in this field of parliamentary powers that the Fiji Constitution differs drastically from the constitutional arrangements in the United Kingdom.[33] As will be seen later, sovereignty of Parliament as Dicey understood the term has relatively little application to Fiji. In Fiji there is supremacy of the Constitution as opposed to supremacy of Parliament.[34] There are various fetters to the powers of Parliament in Fiji.[35]

The law as to parliamentary privilege is also very different in Fiji from the position in the United Kingdom. Parliament in

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31 Ibid., s. 70 (6).

32 Ibid., s. 52.

33 This matter relating to the difference between the two constitutional set ups is dealt with in greater detail in part IV; see pp. 210 et seq., post.

34 S. 2 expressly declares the supremacy of the Constitution. This matter is dealt with in greater detail in Part IV, see pp. 210 et seq., post.

35 See pp. 206 et seq., post.

Fiji has very few, if any, of the common law privileges of Parliament. Most of the privileges attached to the English Parliament have a statutory basis in Fiji.[36] At present, the Parliament in Fiji has no power to commit anyone for contempt. All such contempt matters are subject to ordinary criminal prosecution in a court of law.[37] However, the Constitution does provide that each House of Parliament may regulate its own procedure and may make rules for that purpose, including in particular the orderly conduct of its own proceedings.[38]

(3) Parliamentary Procedure

Each House is empowered to regulate its own procedure. However, there are some constitutional requirements which must be complied with. The power of Parliament to make laws is exercised by bills passed by both Houses of Parliament except, as will be presently seen, in respect of appropriation and other money bills, and certain urgent bills. A bill may originate only in the House of Representatives.[39] When a bill has been passed by the House of Representatives, it is sent to the Senate. When it has been passed by the Senate and agreement has been reached between the two Houses on any amendment made to it by the Senate, the bill is presented to the Governor-General for assent.[40]

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36 They are contained in The Parliamentary Powers and Privileges Ordinancy 1965: Ordinance No. 26 of 1965.

37 On this subject, see pp. 289 et seq., post.

38 Constitution, s. 54.

39 Ibid., s. 53 (2).

40 Ibid., 53 (3).

(a) Financial Measures

Except upon the recommendation of the Cabinet signified by a Minister, neither the House of Representatives nor the Senate can deal with any motion or bill (including any amendment to a bill) that makes provision for:[41]

(a) the imposition or alteration (otherwise than by reduction) of taxation;

(b) the imposition or alteration (otherwise than by reduction) of any charge upon the Consolidated Fund or any other public fund of Fiji;

(c) the payment, issue or withdrawal from the Consolidated Fund or any other public fund of Fiji of any moneys not charged thereon or any increase in the amount of such payment, issue or withdrawal; or

(d) the composition or remission of any debt to the Government.

Whether the bill or motion deals with any of the above matters is decided by the person presiding.[42]

If an appropriation bill has been passed by the House of Representatives and is not passed by the Senate without amendment by the end of the second day of its receipt, the bill shall, unless it is otherwise resolved by the House of Representatives, be presented to the Government-General for assent.[43] Whether it is an appropriation bill shall be determined by the Certificate of

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41 Ibid., s. 61.

42 Idem.

43 Ibid., s. 62.

the Speaker.[44]

Also, if the Senate does not pass without amendment a non-appropriation bill which has been passed by the House of Representatives and certified by the Speaker as a money bill[45] within 21 days of its receipt, the bill shall, unless the House of Representatives resolves otherwise, be presented to the Governor-General for assent.[46]

(b) Urgent and Other Bills

If the Governor-General, acting in accordance with the advice of the Prime Minister, certifies in writing to the President of the Senate that the enactment of a bill that has been passed by the House of Representatives is a matter of urgency and the bill has been sent to the Senate at least seven days before the end of the session, and if within seven days of its receipt the Senate has either not passed it or has passed it with an amendment to which the House of Representatives does not agree, the bill, unless the House of Representatives otherwise resolves, shall be presented to the Governor-General for assent. This however, does not apply to any bill falling under sections 67 and 68 of the Constitution.[47]

If any bill (other than those falling under sections 62,[48] 63,[49]

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44 Idem.

45 As defined by s. 63 (3).

46 Ibid., s. 63 (1).

47 S. 64.

48 See n. 41 p. 122, ante.

49 See nn. 45 and 46, ante.

64,[50] 67[51] and 68[52]) has been passed by the House of Representatives in two successive sessions and in each case has been sent to the Senate at least one month before the end of the session, has been rejected by the Senate in each of those sessions, that bill shall, on its rejection by the Senate for the second time, unless the House of Representatives otherwise agrees, be presented to the Governor-General for assent. However, in such a case at least six months must have elapsed between the date on which the bill is passed by the House of Representatives, in the first session and the date on which it is passed by that House in the second session.[53]

It is apparent that the Senate has very limited powers in

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50 See n. 47 ante.

51 This section concerns amendments to the following provisions of the Constitution:

(a) Chs. I, II, III, VII, VIII and IX (including schedules 2 and 3),
(b) Ss. 27, 28, 30, 31, 42 - 45, 52, 53, 67 - 70, 72, 78, 85, 124 and 126,
(c) Ch XI to the extent it relates to any of the provisions specified above.

52 This section covers bills altering any of the following laws:

(a) The Fijian Affairs Ordinance,
(b) The Fijian Development Fund Ordinance 1965,
(c) The Native Lands Ordinance,
(d) The Native Land Trust Ordinance,
(e) The Rotuma Ordinance,
(f) The Rotuma Lands Ordinance,
(g) The Agricultural Landlord and Tenant Ordinance,
(h) The Banaban Lands Ordinance and
(i) The Banaban Settlement Ordinance.

53 Constitution, s. 65.

relation to the bulk of the legislation in Fiji. It is only in relation to the amendment of most of the provisions of the Constitution and certain specified enactments,[54] that the Senate has any effective power or role to play.[55]

(4) The Royal Assent

When a bill has been passed (dealt with) by the House of Representatives and the Senate under the provisions of the Constitution, it is then presented to the Governor-General for assent.[56] When a bill is so presented to the Governor-General for assent, he signifies that he assents or that he withholds assent.[57] When the Governor-General assents to such a bill, it becomes law and the Governor-General causes it to be published in the Gazette. However, no law comes into operation until it has been published in the Gazette.[58]

D. The Executive

The executive authority of Fiji is vested in Her Majesty

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54 See nn. 51 and 52, p. 124, ante.

55 Matters pertaining to the Senate are dealt with in greater detail in Ch. XVII, post.

56 Constitution, s. 53 (3).

57 Ibid., s. 54 (4); as to this section and the exercise of functions by the Governor-General generally, see Ch XVI, post.

58 Constitution, s. 53 (5) and (6).

whose powers are exercised by the Governor-General either directly or through officers subordinate to him.[59]

The functions of the executive are carried on under the ministerial system. The Constitution provides for a Prime Minister, an Attorney-General and such other Ministers of the Government as the Governor-General, acting in accordance with the advice of the Prime Minister, may establish. The Governor-General, acting in his own deliberative judgement, appoints as Prime Minister the member of the House of Representatives who appears to him best able to command the support of the majority of the members of that House.[60] Other Ministers are appointed by the Governor-General acting in accordance with the advice of the Prime Minister.

(1) The Cabinet

(a) General

The Cabinet is patterned on the United Kingdom Cabinet system. In theory the function of the Cabinet is to advise the Governor-General as to the government of Fiji. However, in practice the real power within the nation resides in the Cabinet.

The Cabinet in Fiji consists of the Prime Minister and such of the other Ministers as the Prime Minister may from time to time designate.[61] The Cabinet is collectively respon-

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59 Ibid., s. 72. As to the exercise of functions by the Governor-General generally see Ch. XVI, post.

60 As to the tenure of office of the Prime Minister and other Ministers, see pp. 128 et seq., post.

61 At present in addition to the Prime Minister the Attorney-General and Deputy Prime Minister there are 11 Ministers and 7 Assistant Ministers.

sible to Parliament for any advice given to the Governor-General by or under the general authority of the Cabinet and for all things done by or under the authority of any Minister in the execution of his office.[62] This means that the Cabinet must speak with one voice on all questions of policy and if a member disagrees with his colleagues he must resign. The Cabinet is not responsible for the following:[63]

(a) the appointment and removal from office of Ministers and Assistant Ministers, the assigning of responsibility to any Minister under the powers conferred on the Governor-General under Section 76 of the Constitution or the authorization of another Minister to perform the functions of the Prime Minister during illness or absence;

(b) the dissolution of Parliament; and

(c) the exercise of the prorogative of mercy.

It is the responsibility of the Prime Minister to keep the Governor-General fully informed concerning the general conduct of the Government of Fiji and he must furnish the Governor-General with such information as the latter may request with respect to any particular matter relating to the Government of Fiji.[64]

There is no requirement in the Constitution as to a Minister being a member of the House of Representatives (an elected body) or a member of the Senate (a nominated body). A Minister

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62 Constitution, s. 75 (2).

63 Ibid., s. 75 (3).

64 Ibid., s. 79.

can be appointed from either House of Parliament.[65]

(b) Appointment of The Cabinet

The Governor-General, as has been seen, appoints the Prime Minister. The Prime Minister then selects all other members of the Cabinet from among the members of either House. In practice a great majority of the members of the Cabinet are selected from members of the House of Representatives. The Prime Minister then advises the Governor-General who makes the ministerial appointments. It is possible for all members of the Cabinet to be appointed while Parliament is dissolved but they must come from either of the last Houses of Parliament and their continuance in office is contingent upon their being members of either House of the new Parliament, and in the case of the Prime Minister, the House of Representatives.[66] The Prime Minister can retain in his Cabinet a member of the House of Representatives who fails to secure re-election by appointing him to the Senate should there be a vacancy.

(c) Termination of Cabinet Appointments

The services of a Cabinet as a whole can be terminated (besides of course the voluntary resignation of the Prime Minister and the other Ministers) in two ways. First, if a resolution of no confidence in the Government is passed by the House of Representatives and the Prime Minister does not within three days

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65 In fact the present Deputy Prime Minister, Ratu Sir Penaia K. Ganilau, was in 1971 appointed as the Minister of Defence and later the Minister for Home Affairs, Lands and Mineral Resources when he was a member of the Senate. Also the present Attorney-General, Mr J. N. Falvey, is a member of the Senate.

66 Constitution, s. 73 (2).

resign from his office, the Governor-General shall remove the Prime Minister from office unless, in pursuance of section 70 (1) of the Constitution, Parliament has been or is to be dissolved in consequence of such a resolution.[67] If the Prime Minister resigns from office after the passage by the House of such a resolution of no confidence in the Government or is removed from office as aforesaid, the offices of all other ministers become vacant.[68] Secondly, if at any time between the holding of a general election and the first sitting of the House of Representatives thereafter the Governor-General, acting on his own deliberative judgement, considers that, in consequence of changes in the membership of the House resulting from that general election, the Prime Minister will not be able to command the support of a majority of the members of the House, the Governor-General may remove the Prime Minister from office.[69] When the Prime Minister is so removed, the offices of all other Ministers automatically become vacant.[70]

Thus, the removal of the Prime Minister can only be effected by the bringing down of the Government although he, (like all other Ministers and Assistant Ministers) may resign his office. On the other hand, the other Ministers and Assistant Ministers hold their appointments formally at the pleasure of the Governor-General who of course acts on the advice of the Prime Minister.[71]

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67 Ibid., s. 74 (1).

68 Ibid., s. 74 (5) (d).

69 Ibid., s. 74 (2).

70 Ibid., s. 74 (5) (d).

71 Ibid., s. 74 (5) (c).

Hence the tenure of office of the other ministers is at the pleasure of the Prime Minister.

(2) The Prime Minister

The Prime Minister of Fiji occupies a very important position not only in the legislative and executive field but in a number of other important areas specified in the Constitution. The Constitution creates the office of Commissioner of Police who is in command of the Police Force. The Prime Minister may give to the Commissioner of Police such general directions of policy with respect to the maintenance of public safety and public order as he may consider necessary and the Commissioner is bound to comply with such orders.[72]

Appointment to certain other offices is in the hands of the Governor-General, e.g. the Chief Justice, Ambassadors, High Commissioners and other principal representatives of Fiji in any other country, and the Ombudsman. However, the Governor-General can only make such appointments after consultation, inter alia, with the Prime Minster.[73]

Appointment to other public offices are vested in the various Commissions, e.g. the Judicial and Legal Services Commission. However, an appointment to certain other public offices[74] cannot be made without consultation with the Prime Minister (and the

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72 Ibid., s. 84.

73 Ibid., ss. 90, 103 and 112.

74 E.g., The Central Agricultural Tribunal.

Leader of the Opposition).[75] Persons who are not citizens of Fiji (and who are not already public officers) cannot be appointed to certain public offices, unless the Prime Minister agrees.[76] Thus the Prime Minister wields very strong and effective influence over practically all governmental agencies.

E. The Leader of The Opposition

The Constitution expressly recognizes the office of the Leader of the Opposition,[77] who is appointed by the Governor-General. The person to be appointed the Leader of the Opposition is the leader of the opposition party whose numerical strength in the House of Representatives is greater than the strength of any other opposition party. If there is no such party, the Governor-General shall appoint the member of the House whose appointment would, in the judgement of the Governor-General, be most acceptable to the leaders of the opposition parties. However, if no such

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75 Constitution, s. 102 (1).

76 I.e., Central Agricultural Tribunal,
Chief Registrar of the Supreme Court,
Deputy Registrar of the Supreme Court,
Assistant Registrar of the Supreme Court,
Solicitor General,
Crown Solicitor,
Chief Legal Draftsman,
Principal Legal Draftsman,
Senior Legal Draftsman,
Senior Magistrate,
First Class, Second Class and Third Class Magistrates,
Principal Legal Officer and
Legal Officer.

77 Constitution, s. 86.

person is found to be so acceptable, the Governor-General, acting on his own deliberate judgement, need not appoint a Leader of the Opposition.

The Leader of the Opposition also commands influence not only in the legislature but also in relation to certain appointments. Thus, the Governor-General or the relevant Commission has to consult the Leader of the Opposition in appointing the Chief Justice, the Ombudsman and certain other officers.[78]

F. The Judiciary

(1) General

The Constitution of independent Fiji made no significant changes in the judicial structure. The Constitution provides for a Supreme Court of Fiji with unlimited original jurisdiction to hear and determine any civil or criminal proceedings.[79] There is one Chief Justice of the Supreme Court and such other puisne judges as may be prescribed by Parliament.[80]

The Court of Appeal of Fiji[81] sits as an appellate court from decisions of the Supreme Court. The judges of the Court of Appeal are the Chief Justice, who is the President of the Court

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78 Ibid., ss. 90, 104 (8), 105 (4), 106 (8), 109 (9), and 112.

79 Ibid., s. 89.

80 At present the prescription is for seven judges as prescribed by the Prescription of Judges (Amendment) Act 1972.

81 Constitution, s. 93.

of Appeal, such Justices of Appeal as may be appointed and the puisne judges of the Supreme Court.[82] However, the Chief Justice and the puisne judges very rarely sit as appellate judges in local matters. They occasionally sit on appeals from the Solomon Islands or the Gilbert and Ellice Islands because the Fiji Court of Appeal is also the appellate court for those countries.

(2) The Appointment and Tenure of Office of Judges

(a) Supreme Court

The Chief Justice is appointed by the Governor-General, acting after consultation with the Prime Minister and the Leader of the Opposition.[83] The puisne judges are appointed by the Governor-General, acting after consultation with the Judicial and Legal Services Commission.[84] Temporary puisne judges may also be appointed in the same way as a puisne judge.

Judges of the Supreme Court are appointed until they attain retiring age. Under the Constitution, the retiring age is sixty two years but Parliament may prescribe a higher retiring age.[85] A Judge of the Supreme Court may be removed from office by the Governor-General for only two reasons:[86]

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82 Ibid., s. 94.

83 Ibid., s. 90.

84 As to this Commission, see p. 137, post.

85 Constitution, s. 91 (7). At present the retiring age is 68 years, fixed by the Judges (Retiring Age) Act, s. 2: Act No. 60 of 1971.

86 Ibid., s. 91 (2).

(1) for inability to perform the functions of his office; or

(2) for misbehaviour.

The inability may arise from infirmity of body or mind or "any other cause". However, even in these two events, the removal by the Governor-General can only be made in accordance with the special procedure.[87]

Proceedings for the removal of a Judge are initiated by the Chief Justice or the Governor-General as the case may be. If the Chief Justice or, in relation to the removal of the Chief Justice, the Governor-General, considers that the question of removing a Judge of the Supreme Court for one of the two permissible grounds ought to be investigated, he appoints a tribunal which shall consist of a Chairman and not less than two other members, selected by the Governor-General from among persons who hold or have held high judicial office in some part of the Commonwealth or any other country that may be prescribed by Parliament.

The tribunal, after enquiring into the matter, shall report on the facts thereof to the Governor-General and advise the Governor-General whether he should request that the question of the removal of that Judge from office should be referred by Her Majesty to the Judicial Committee of the Privy Council under section four of the Judicial Committee Act 1933 or under any other such enactment in force enabling such a reference. If the tribunal so advises, the Governor-General shall request that the question be referred accordingly.

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87 Ibid., s. 91 (3), (4) and (5).

If the question of removing a judge from office has been referred to a tribunal, the Governor-General may suspend the judge from performing the functions of his office pending the result of the proceedings. Such suspension may be revoked by the Governor-General at any time; but it will cease in any event under two circumstances. First, if the tribunal advises the Governor-General that he should not request that the question of the removal of the judge from office should be referred by Her Majesty to the Judicial Committee. Secondly, if the Judicial Committee advises Her Majesty that the judge ought not to be removed from office.[88]

If the Judicial Committee advises for the removal of the judge concerned, the Governor-General shall remove the judge from office.[89]

(b) Court of Appeal

The Justices of Appeal are appointed by the Governor-General, acting after consultation with the Judicial and Legal Services Commission.[90]

A Justice of Appeal vacates his office upon the expiration of the period of his appointment to the office. Except in the case of the Justice of Appeal who, at the time of his appointment also holds office as a Judge of a Court in some other part of the Commonwealth or in any other country outside the Commonwealth, the period for

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88 Ibid., s. 91 (5).

89 Ibid., s. 91 (3).

90 Ibid., s. 94 (2).

which the Justice of Appeal is appointed shall be not less than three years.[91]

A Justice of Appeal can be removed from office only for the two reasons and in accordance with the procedure applicable to a Judge of the Supreme Court.[92] The proceedings for removal of a Justice of Appeal, however, are initiated by the President of the Court of Appeal.

(3) Jurisdiction of The Courts

The Supreme Court has unlimited original jurisdiction to hear and determine any civil or criminal proceedings under any law (including of course the Constitution). Parliament has the power to create courts inferior to the Supreme Court; and such courts do exist, e.g. the Magistrates' Courts.[93] The Supreme Court exercises control over subordinate courts through appellate, revisionary and general supervisory jurisdiction.[94]

The Court of Appeal has exclusive jurisdiction to determine appeals from the Supreme Court. In some cases the appeal lies as of right and in other cases with leave.[95]

From decisions of the Court of Appeal, an appeal lies to

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91 Ibid., s. 95 (2).

92 Ibid., s. 95 (3), (4), (5) and (6).

93 Created by the Magistrates' Courts Ordinance, Chap. 10 of the Laws of Fiji.

94 Supreme Court Ordinance, Chap. 9 of the Laws of Fiji.

95 Constitution, s. 99.

Her Majesty in Council. Here too in some cases the appeal lies as of right and in other cases with leave.[96]

G. Service Commissions and the Public Service

The Constitution creates a number of agencies with important functions of government. Some of them would fall within a familiar categorization of administrative agencies, others would not. The functions they perform may be adjudicative or executive or some combination of both.

(1) Judicial and Legal Services Commission

The Constitution provides for a Judicial and Legal Services Commission consisting of the Chief Justice as the Chairman, the Chairman of the Public Service Commission and one other member appointed by the Governor-General, acting in accordance with the advice of the Chief Justice.[97] The appointed member must be qualified to be appointed a Judge but he must not be in active practice as a barrister and solicitor in Fiji.[98]

The Commission appoints and has the power to remove and to exercise disciplinary control over persons holding office as or

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96 Ibid., s. 100.

97 Ibid., s. 101.

98 However the present appointed member, Mr S. B. Patel, is an active practitioner but there was specific exemption in his case: s. 13 of the Fiji Independence Order 1970. There are other disqualifications of an appointed member: Constitution, s. 101 (4).

acting as legal officers.[99] Before making any appointment to hold or act in the office of a Central Agricultural Tribunal, the Commission must consult the Prime Minister and the Leader of the Opposition. Further, the Commission cannot appoint to an office under its jurisdiction a person who is not a citizen of Fiji and is not a public officer, unless the Prime Minister consents to the appointment.[1]

(2) Public Service Commission

The Constitution[2] provides for a Public Service Commission consisting of a Chairman and not less than three nor more than five other members appointed by the Governor-General in accordance with the advice of the Prime Minister tendered after the latter has consulted the Leader of the Opposition.[3] A person is not qualified for appointment if he is, or has at any time during the three years immediately preceding his appointment been:[4]

(a) a member of either House of Parliament or an elected member of any local authority;

(b) nominated with his consent as a candidate for election as a member of the House of Representatives or of any local authority or as a candidate for selection by the Great Council of Chiefs or the Council of Rotuma for appointment by the Governor-General as a member of the Senate;

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99 Ibid., s. 102. That is the officers specified in schedule 3 of the Constitution, see n. 76 p.131, ante.

1 Ibid., 102 (2).

2 Ibid., s. 104.

3 Ibid., s. 104 (8).

4 Ibid., s. 104 (2).

(c) a public officer or a local government officer; or

(d) the holder of an office in any political organization that sponsors or otherwise supports or has during the said period of three years sponsored or otherwise supported a candidate for election to the House of Representatives.

Further, a person is also disqualified for membership if he is a member (except the Chairman) of the Police Service Commission.

This Commission is responsible for making appointments of public officers and for removing and exercising disciplinary control over persons holding or acting in such offices. However, the Commission has no jurisdiction over the offices falling under the jurisdiction of other Commissions and other specified offices.[5] Also the Commission cannot make any appointment to the office of Secretary to the Cabinet or of a Permanent Secretary or of any other supervising offices within section 82 of the Constitution unless the Prime Minister concurs in the appointment.[6] There are other similar restrictions on appointment to the staffs of other officers, e.g. of the Governor-General and the Ombudsman.

(3) Police Service Commission.

The Constitution[7] provides for a Police Service Commission which consists of a Chairman and two other members appointed

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5 E.g., a Judge, Ombudsman etc.; Ibid., s. 105 (3).

6 Ibid., s. 105 (5).

7 Ibid., s. 106.

by the Governor-General. The disqualifications from membership are similar to those relating to the Public Service Commission.[8] The functions of this Commission are to appoint, to remove and to exercise disciplinary control over members of the Police Force above the rank of Senior Inspector. However, for appointments of the Commissioner and Deputy Commissioner of Police, the Commission must consult the Prime Minister. Jurisdiction over police officers below the rank of the Senior Inspector is vested in the Commissioner of Police, but the Commission must concur in the removal or demotion of an officer.[9]

(4) The Electoral Commission and the Constituency Boundaries Commission

The Constitution[10] provides for an Electoral Commission consisting of a Chairman appointed by the Governor-General, acting in accordance with the advice of the Judicial and Legal Services Commission, and not less than two nor more than four members appointed by the Governor-General, acting in accordance with the advice of the Prime Minister tendered after the Prime Minister has consulted the Leader of the Opposition. The disqualifications from membership of this Commission are similar to those relating to the Public Service Commission.[11]

The Electoral Commission has the general responsibility for, and supervises the registration of voters for the election of members of the House of Representatives and the conduct of elections

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8 Ibid., s. 106 (2).

9 Ibid., s. 107.

10 Ibid., s. 42.

11 Ibid., s. 42 (2).

of such members.

There is also provision for a Constituency Boundaries Commission consisting of a Chairman and two other members appointed by the Governor-General, acting in accordance with the advice of the Prime Minister tendered after the Prime Minister has consulted the Leader of the Opposition.[12] The disqualifications from membership of this Commission are similar to those relating to the Electoral Commission. The general function of this Commission, as its title suggests, is to prescribe the boundaries of constituencies for the purpose of the election of members of the House of Representatives. It is also entrusted with the duty of reviewing the boundaries of the constituencies not later than every ten years.

(5) The Commission on the Prerogative of Mercy

The Constitution vests the prerogative of mercy in Her Majesty exercisable in Fiji by the Governor-General. However, the Governor-General exercises such powers in accordance with the advice of the Commission on the Prerogative of Mercy created by the Constitution.[13] This Commission consists of a Chairman and not less than two other members appointed by the Governor-General.

H. The Director of Public Prosecutions

The Constitution[14] provides for the public office of Director

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12 Ibid., s. 38.

13 Ibid., s. 88.

14 Ibid., s. 85.

of Public Prosecutions. The Director is appointed by the Judicial and Legal Services Commission; but the Commission cannot appoint a person who is not a citizen of Fiji and is not a public officer unless the Prime Minister so agrees.[15]

The Director of Public Prosecutions has the general responsibility for all criminal proceedings in Fiji. In the exercise of his powers he is not subject to the direction or control of any other person or authority.[16]

The Director of Public Prosecutions holds office until he attains the age of sixty years unless he resigns earlier. He may be removed from office only for inability to discharge the functions of his office (whether arising from infirmity of body or mind or any other cause) or for misbehaviour.[17] In any event he can only be removed by the special procedure prescribed by the Constitution. This entails the appointment by the Judicial and Legal Services Commission of a tribunal which shall enquire into the matter, report on the facts to the Commission and advise the Commission whether he ought to be removed. Only if the tribunal so advises can the Commission remove the Director of Public Prosecutions.[18]

I. The Auditor General

The Constitution[19] provides for an Auditor-General appointed by the Public Service Commission. He has the general function

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15 Ibid., s. 102 (1) (b).

16 Ibid., s. 85.

17 Ibid., s. 109 (2).

18 Ibid., s. 109 (4).

19 Ibid., s. 126.

of auditing and reporting on the public accounts of Fiji and those of all courts of law and all authorities and officers of the government. The Auditor-General submits his reports to the Minister responsible for finance who causes them to be laid before each House of Parliament. In the exercise of his functions the Auditor-General is not subject to the direction or control of any other person or authority.[20]

The Auditor-General has the same tenure as the Director of Public Prosecutions and he may not be removed from office except for the same grounds and in the same manner as the Director.[21]

J. Citizenship

(1) Acquisition of Citizenship

The law is relatively simple. Fiji citizenship may be acquired as of right in two ways - by operation of law and by registration.

(a) By operation of law

There are five ways of acquiring citizenship by operation of law. First, every Fiji-born person who was on 9 October 1970 a citizen of the United Kingdom and Colonies automatically became a citizen of Fiji on 10 October 1970.[22]

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20 Ibid., s. 126 (4).

21 Ibid., s. 109 (4). Except it is the Public Service Commission who removes him and appoints the tribunal and not the Judicial and Legal Services Commission).

22 Ibid., s. 19 (1).

Secondly, every person who on 9 October 1970 was a citizen of the United Kingdom and Colonies and who:[23]

(a) became such a citizen under the British Nationality Act 1948 by virtue of his having been naturalized by the Governor of the former Colony of Fiji as a British subject before that Act came into force;

(b) became such a citizen by virtue of his having been naturalized by the Governor of the former Colony of Fiji under that Act; or

(c) became such a citizen by virtue of his having been registered by the Governor of the former Colony of Fiji under that Act before 6 May 1970,

became a citizen of Fiji by law on 10 October 1970.

Thirdly, every person who, having been born outside Fiji, was on 9 October a citizen of the United Kingdom and Colonies became a citizen of Fiji on 10 October 1970 if his father became or would but for his death have become a citizen of Fiji by virtue of the abovementioned provisions.[24]

Fourthly, every person born in Fiji after 9 October 1970, becomes a citizen of Fiji at the date of his birth except for

(a) those whose father possessed such immunity from suit and legal process as is accorded to an envoy of a foreign sovereign power accredited to Fiji and neither of his parents is a citizen of Fiji; or

(b) those whose father is an enemy alien and the birth occurs in a place then under occupation by the enemy.[25]

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23 Ibid., s. 19 (2).

24 Ibid., s. 19 (3).

25 Ibid., s. 21.

Fifthly, a person born outside Fiji after 9 October 1970, becomes a citizen of Fiji at the date of his birth if at that date his father was a citizen of Fiji otherwise than by virtue of the provisions of section 19 (3) of the Constitution.[26]

(b) By Registration

There are three circumstances in which persons are entitled to be registered as citizens of Fiji. First, any woman who, on 10 October 1970 was or had been married to a person -

(i) who became a citizen by operation of law a mentioned above; or

(ii) who, having died before 10 October 1970 would, but for his death, have become a citizen of Fiji by operation of law as mentioned above,

is entitled, upon making application and, if she is a British protected person or an alien, upon taking the oath of allegiance, to be registered as a citizen of Fiji.[27] It is significant to note that this privilege under the current provision extends only to a woman and not to a man.

Secondly,[28] any person, being a Commonwealth citizen (otherwise than by virtue of being a citizen of Fiji), who immediately before 10 October 1970 was a person deemed to "belong" to Fiji within the meaning of section 16 (3) of the 1966 Constitution,[29]

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26 Ibid., s. 22. As to s. 19 (3) see n. 24 p.144ante.

27 Ibid., s. 20 (1).

28 Ibid., s. 20 (2).

29 S. 16 (3) provides:

> For the purposes of this Chapter, a person shall be deemed to belong to Fiji if that person is a British subject or a British protected person and -

cont...

could have registered himself as a Fiji citizen

(i) providing he made such application before October 1972 and

(ii) providing he, being a citizen of any other Commonwealth country renounced his citizenship of that other country or if that was not allowed by that other country, he made the

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29 cont.

(a) was born in Fiji;

(b) has resided in Fiji for a period extending over not less than seven years, during which he has not been absent from Fiji for a period or periods amounting in all to more than eighteen months:

Provided that no period in respect of which a student's permit issued under section 10 of the Immigration Ordinance, 1962, or any enactment repealing or in substitution for the same, is in force, shall be counted as residence for the purposes of this paragraph;

(c) has obtained the status of a British subject by reason of the grant in Fiji of a certificate of naturalisation under the British Nationality and Status of Aliens Act 1914 or the British Nationality Act 1948;

(d) is the child, step-child or child adopted in a manner recognized by law under the age of eighteen years of a person to whom any of the foregoing paragraphs apply; or

(e) who, on the 1st September, 1962, was resident in Fiji and who -

(i) immediately prior to the said date was entitled under the provisions of sub-paragraph (ii) of paragraph (a) of section 3 of the Immigration Ordinance (now repealed) to exemptions from the provisions of that Ordinance; or

(ii) has been granted by the Principal Immigration Officer or by a court exemption from the provisions of the Immigration Ordinance (now repealed) on account of being domiciled in Fiji.

prescribed declaration.

Thirdly, any woman who after 9 October 1970 married a person who was or became a citizen of Fiji shall be entitled to be registered as a citizen of Fiji if she, being a British protected person or an alien, takes the oath of allegiance.[30] It is again significant to note that this privilege extends only to a woman and not to a man.

(2) Termination of Citizenship

The Constitution empowers Parliament to make provisions for the termination of citizenship but such powers are very restricted. Parliament cannot deprive those persons who became citizens by operation of law or who were registered as citizens by virtue of "belonging"[31] of their citizenship[32] except in the case of a person who, having attained the age of twenty-one years and who being a citizen of some other country, has not within the prescribed period renounced his citizenship of that other country or if that other country does not permit such renunciation, has failed to make the prescribed declaration.[33] In all other cases, Parliament may pass legislation depriving them of their citizenship.[34]

It is difficult to find a justification for the distinction between the two types of citizenship as far as the deprivation of citizenship

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30 Constitution, s. 23.

31 See n. 29 ante as to those who "belong".

32 Constitution, s. 25 (b).

33 Ibid., s. 25 (b) and (e).

34 Ibid., s. 25 (b).

is concerned. In any event, even if there was a reason for distinguishing between a citizen who had become a citizen by virtue of operation of law and those who had become citizens by registration, it is hard to understand why there should be distinctions among the various groups within the latter class. It is submitted that once a person becomes a citizen he should be under no greater a disability than any other citizen.

It is interesting to note that there was agreement at the 1970 Constitutional Conference that dual citizenship should be prohibited. It was for this reason that section 25 (e) was included.[35] In 1971 the Fiji Parliament enacted the Fiji Citizenship Act.[36] In the debates in the House of Representatives both the Opposition and the Government supported the move for disallowing dual citizenship.[37]

For instance, Mr S.M. Koya, the Leader of the Opposition stated:[38]

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35 S. 25 (e) provides:

> Parliament may make provision - ...
> for depriving of his citizenship of Fiji any citizen of Fiji who has attained the age of 21 years and who, being a citizen of some other country, has not, within such period as may be prescribed, renounced his citizenship of that other country or, if the law of that other country does not permit him to renounce his citizenship of that other country, made such declaration as may be prescribed.

36 No. 27 of 1971.

37 Fiji Parliamentary Debates (1971) (Part 1), 654 - 707.

38 Ibid., 657 - 658, (emphasis added).

> [A]fter our return from London we have been criticised in some quarters rather seriously on our agreement that there should be a complete prohibition on people holding double passports or people holding dual citizenship. Throughout the Constitution, in relation to this matter, Mr Speaker, you would see that this proposal has been given effect to and indeed, the present bill also gives effect to that intention.

Similarly other members, speaking on the Bill assumed that the proposed measure would prohibit dual citizenship. Mrs L. Livingston, a government member, in supporting the Bill, condemned dual citizenship and said, "dual citizenship will never build a nation."[39]

Surprisingly, in spite of the expressed condemnation of dual citizenship, the enactment had very limited effect on dual citizenship. Section 16 provides:

> Any person, being a citizen of Fiji and also a national or citizen of some other country, who has attained the age of twenty one years on or after the commencement of this Act, shall within twelve months of such commencement or his attaining that age, whichever shall be the later date, renounce the nationality or citizenship of that other country failing which he shall cease to be a citizen of Fiji.
>
> Provided that the Minister may, when he is satisfied that any such person was absent from Fiji during the said period of twelve months or for other good cause, extend the time within which such person shall renounce the nationality or citizenship of that other country.

It is submitted that this provision seems to affect only those persons who held dual citizenship during the transitional period after independence. Those affected can be divided into two classes - those persons who were minors at the time of the coming into force of the enactment and those persons who were adults at the

39 Ibid., 676. See also Mr U. Koroi: Ibid., 675.

time. Thus, any citizen of Fiji who was over twenty one years of age on 28 May 1971 (when the Fiji Citizenship Act 1971 came into force), if he had been a national or citizen of some other country at that time, had to renounce the citizenship or nationality of that other country within twelve months of the commencement of the 1971 Act - that is by 28 May 1972 - if he wanted to retain his Fiji citizenship. If he failed to do so, he would have automatically ceased to be a Fiji citizen.

Secondly, any citizen of Fiji who was under twenty one years of age on 28 May 1971, if he had been a national or citizen of some other country at that time, had to renounce the citizenship or nationality of that other country if he wanted to retain his Fiji citizenship. However, in his case he had to do so by 28 May 1972 if he attained twenty one years before that date, otherwise he had to do so when he attained twenty one years of age.

It is submitted, that section 16 does not seem to cover those persons who acquired citizenship or nationality of another country after the expiry of the period specified in the section.[40] Moreover, it may not cover those persons who had renounced their citizenship or nationality within the specified period, but who subsequently re-acquired the same citizenship or nationality

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40 E.g., B., who was born in Fiji, was over 21 years of age in 1971 and was not a citizen or national of any other country (but Fiji) in 1971, had no nationality or citizenship to renounce within 12 months as specified in s. 16 of the 1971 Act. However, if in 1974 he acquired Australian citizenship, it is submitted, he is not forbidden by s. 16 to hold dual citizenship.

outside the specified period.

Accordingly, it is submitted, the 1971 Act has only a very limited application in its prohibition of dual citizenship or nationality. If the intention was only to "catch" those persons who were dual citizens or nationals in 1971, of course the enactment meets its purpose. However, if the intention was to prohibit absolutely dual citizenship, the enactment does not achieve its purpose. It seems, it is submitted, that the latter must have been intended. Otherwise there is no legitimate or cogent reason for the enactment operating against some persons and not against others.

K. Fundamental Rights

The Fiji Constitution provides for the protection of fundamental rights and freedoms of the individual.[41] Five basic concepts are provided for in the Constitution.

(i) Liberty of the person.

This concept has of course many facets. Liberty of the person embraces freedom from arbitrary arrest, prohibition of slavery and forced labour, freedom from retrospective criminal laws, freedom from repeated trials for the same offence, freedom of citizens from banishment and restrictions on movement, protection for the privacy of his home and other property, protection of the law, protection from inhuman treatment and the right of fair trial.

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41 This subject of "fundamental rights" is dealt with in greater detail at pp. 427 et seq., post.

(ii) Freedom of religion.

(iii) Freedom of speech, assembly and association.

(iv) Freedom from discrimination.

(v) Protection of property from acquisition without adequate compensation.

However, all these basic concepts are not granted (or protected) in absolute terms. Most of them may be largely or entirely abrogated by ordinary legislation if the reason for such legislation falls into one of the specified classes; in other words there are specified exceptions for derogation from the fundamental rights.[42] The only "rights" which are granted in absolute terms are:

(i) prohibition against slavery and forced labour;[43]

(ii) protection from torture and inhuman or degrading punishment or other treatment;[44]

(iii) freedom from retrospective criminal laws;[45] and

(iv) freedom from repeated trials for the same offence.[46]

Otherwise, the rights and freedoms are granted subject to exceptions and qualifications allowing for derogations in specified circumstances.[47]

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42 This matter is dealt with more adequately at pp.427 et seq., post.

43 Constitution, s. 6.

44 Ibid., s. 7.

45 Ibid., s. 10 (4).

46 Ibid., s. 10 (5).

47 See n. 42, ante.

PART FOUR

THE PARLIAMENT AND THE COURTS IN FIJI

CHAPTER V

THE EXISTENCE OF JUDICIAL REVIEW

A. Introduction

The majority of the countries which gained independence from Britain in the Commonwealth era,[1] as opposed to the Empire era, rejected the doctrine, fundamental to United Kingdom constitutional law, of the legal omnipotence of statutes enacted by a simple majority of each House. Whilst patterning its government institutions on the "Westminster Model", Fiji has followed this modern trend and, like its contemporaries in independence, has adopted a different principle.

Fiji's departure from her United Kingdom prototype is illustrated by the rejection of traditional English constitutional ideas and by the incorporation in the Constitution of formal limitations, such as the Bill of Rights[2], on governmental authority, both executive and Legislative. Unlike the United Kingdom, Fiji has a written constitution which is the sole source of constitutional authority. To a considerable extent what is only unwritten law (including custom and convention) in the United Kingdom has been converted into formal rules embodied in the Fiji Constitution itself. For instance, the Constitution prescribes[3] the structure of government and the relationship inter se of the various agencies of government. It in effect provides an elaborate blueprint for a people not yet experienced in the practice of representative democratic government.[4]

The Constitution of Fiji, as has been said, is the sole source

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1 E.g., India, Pakistan, Ireland, Nigeria, Kenya and Mauritius.

2 Constitution, ss. 3 - 18.

3 Ibid., ss. 70, 72, 79, 82, and 86.

4 Only in 1966 did Fiji secure a truly representative legislature; see p.95 , ante.

of constitutional authority in Fiji. It is the fundamental and supreme law of the land. Section 2 of the Constitution expressly provides:

> This Constitution is the supreme law of Fiji and if any other law is inconsistent with this Constitution, that other law shall, to the extent of the inconsistency, be void.

This provision has several important effects. No act of the government whether executive, legislative, or judicial, which is contrary to the Constitution can be valid. It is under this fundamental law that all other laws are made and executed and under which all authorities - legislative, executive and judicial - shall act. It is with reference to this fundamental law that the validity of the functioning of the different organs of government is judged. Thus in Fiji the Constitution conditions the whole governmental process in the country.

However, in terms of the functional organization of government, the Fiji Constitution continues the fundamentals of English constitutional organization, namely, the institution of representative government as expressed through a parliamentary executive (the Cabinet) formally responsible to and controlled by the legislature. The basic and fundamental qualification that needs be made relates to the institution of judicial review.

B. Meaning of "Judicial Review"

The meaning of the term "review" has been given as:[5] "the act of looking over something (again) with a view to correction or improvement". Thus the primary legal meaning of the term "judicial review" would be, it is submitted, the revision of the

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5 The Shorter Oxford English Dictionary (3rd ed., revised, 1964).

decision, decree, order, act or omission of a court, person or agency by a court or higher court of competent jurisdiction. This form of judicial review is part of the judicial administration, in some form or another, of every country, irrespective of the nature of its constitutional arrangements. After all, the judiciary of every country plays the very important, in fact vital, role of interpreting and applying the law and adjudicating upon issues and controversies between citizen and citizen or between a citizen and the state or one of its agencies.

However, "judicial review" has a more technical signifcance in the public law of a country with a written constitution, such as the United States of America or Fiji, which has adopted the principle of the supremacy of the constitution. This appears from the theory of two classes of law - ordinary and organic. Thus as soon as it is established that there is a paramount law which constitutes the foundation and source of all other legislative authority in the body politic, it follows that any act of the ordinary law-making body which infringes the provisions of the paramount law must be void. It also follows that there must be some agency or organ in existence which has the power or authority to pronounce upon the validity of such legislative acts. In the United States of America, this task was assumed by the judiciary. This is the primary sense of a judicial review of legislative acts.

However, in public law, judicial review is not confined to a review of legislative acts. Once the constitution of a country is regarded as the supreme or paramount law of the land and it is accepted that the powers of all other organs of the government emanate from it, it naturally follows that not only the powers of the law-making agency, that is the legislature but also those of the executive and all other administrative agencies are limited by

the constitution and their acts must be kept within the limits of its provisions. Thus any act which contravenes the provisions of the constitution must likewise be void and the courts must so pronounce. But judicial review of executive and administrative acts is not peculiar to countries with a written constitution. In countries like the United Kingdom, where there cannot be any judicial review of legislation in the strict sense, owing to the omnipotence of the legislature, there is judicial review of administrative and other acts in a way not substantially different from a country like the United States with a written constitution. There can be a judicial review of administrative acts not only on the ground of breach of the supreme law, the constitution, but also on the basis that they are not authorised by the ordinary law. The ordinary or statutory law is normally the source of authority for administrative actions and the doctrine of ultra vires has a broad application in this sphere of ordinary law.[6]

Judicial review may thus be briefly stated as representing the power of the courts to hold invalid and hence unenforceable any law, any official action based upon it, and any illegal action by a public officer which is deemed to be in conflict with a basic law, such as the Constitution of Fiji and the United States of America.[7] In other words, by invoking the power of judicial review, a court applies the "superior"of two laws.[8] It is the judicial review of legislative acts that concerns us for present purposes.

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6 See generally S.A. de Smith, Judicial Review of Administrative Action (3rd ed., 1973).

7 Henry J. Abraham, The Judiciary (2nd ed., 1968), 97.

8 Ibid., 98.

C. The Traditional English View

The traditional English view is that judicial review of the validity of statutes is impossible.[9] In the United Kingdom, Parliament is supreme in the sense that any law which has been enacted by it and which has received the Royal Assent is valid and binding and is the law of the land. No court can declare a statute invalid as being contrary to any other superior law. Thus in 1871 Willes, J. stated:[10]

> We sit here as servants of the Queen and the legislature. Are we to act as regents over what is done by parliament with the consent of the Queen, lords, and commons? I deny that any such authority exists. If an Act of Parliament ... exists as law, the Courts are bound to obey it.

Support for this traditional view can be found both in other cases and writings.[11] The view taken by the courts in the United

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9 However, the question whether a purported legislation is the authentic expression of the will of the legislature - that is whether a measure is an "Act of Parliament" - is a separate issue and is dealt with elsewhere; see pp.233, et seq., post.

10 Lee v Bude and Torrington Junction Railway Co. (1871) L.R. 6 C.P. 577, 582. See also Edinburgh and Dalkeith Railway v Wauchope (1842) 1 Bell's App. Cas. 252, 279, per Lord Campbell, and Middleton v Anderson (1842) 4 D. 957 1010 per Lord Mackenzie.

11 See Mortensen v Peters (1906) 14 S.L.T. 227, 334, per Lord Dunedin; Hoani Te Heuheu Tukina v Aotea District Maori Land Board [1941] A.C. 308, 322, per Lord Simon: Labrador Co. v The Queen [1893] A.C. 104, 103; and A.V. Dicey, The Law of the Constitution (10th ed., 1960), 39, where the learned author states:

> Parliament ... has under the English constitution, the right to make or unmake any law whatever; and, further, that no person or body is recognized by the law of England as having a right to override or set aside the legislation of Parliament.

Further at page 40, the learned author continues:

> Any Act of Parliament, or any part of an Act of Parliament, which makes a new law, or repeals or modifies an existing law, will be obeyed by the courts.

Kingdom is related to the historical development and evolution of the concept of the modern parliament as a legislature and as a court. Basically, it is submitted, there are two main factors which have influenced the traditional view that courts cannot question Acts of the United Kingdom Parliament.[12]

Firstly, Parliament in the United Kingdom is omnicompetent. In this regard its area of legislative competence is unlimited. Hence no court can question the content, extent or policy of Acts of Parliament.[13] The English Parliament gradually asserted and secured unlimited legislative powers and was not responsible to any other superior or controlling power. Secondly, there is the old concept of the High Court of Parliament, according to which Parliament partook of the character of a court.[14]

A brief reference to the historical development of parliament-

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12 Cf. B. Beinart, 'The Parliament and the Courts,' (1954) S.A. L.R. 135 138, where the learned writer contends that there are three main factors which have contributed to English Courts not questioning Acts of Parliament:

> Firstly, owing to Parliament's omnicompetence, the area of legislative power is so wide that the contents, extent and policy of an Act can never be questioned. That indeed is the main purport of the dictum in Lee's case. Secondly, each House of Parliament enjoys an unduly wide (but not unlimited) freedom regarding the manner of legislation. Thirdly, there is the old concept of the High Court of Parliament, according to which Parliament as a whole partook of the character of a Court.

It is submitted with respect that the second factor mentioned by the learned writer is really a result of the traditional view and not a contributing factor to it. In any event it may be said to be included in the first factor so mentioned.

13 Ibid., 138.

14 Idem.

ary power in England would assist in appreciating the traditional stand taken by the English Courts.[15] In fact, it is submitted, the traditional English view cannot be divorced from its historical background.

The English Parliament did not take its modern form by virtue of being merely a legislative body as such. In the middle ages, and much later, the English Parliament was not primarily a legislature or law making body, as it is today, but principally a court. In the course of time and by gradual development, Parliament came to acquire its modern characteristics.

The English Parliament of the thirteenth and fourteenth centuries were, like the Spanish Cortes or the French Estates General, assemblies in which the King met the various Estate of his Realm.[16]

> In the thirteenth century the King's Council was the 'core and essence' of Parliament; and the term 'Parliament' [meant] rather a colloquy than a defined body of persons. 17

The King's Council at the Parliament dealt with state matters, including matters of taxation and legislation.[18] However, there were two other matters of significance for present discussion.

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15 This is treated in greater detail by W.S. Holdsworth, A History of English Law (7th ed., 1956), vol. I and vol II (3rd ed., 1923); Holdsworth, "Central Courts of Law and Representative Assemblies in the Sixteenth Century" (1912) 12 Col. L. Rev. 1; Anson, Law and Custom of the Constitution (5th ed., 1922), vol. I 25 - 45 and 254 - 266; H.S.C. Feilden, A Short Constitutional History of England (3rd ed., 1908), Chs II, III and IV.

16 Holdsworth, loc., cit., 12.

17 Ibid., 13; Holdsworth, op. cit., vol. I, 352.

18 Ibid., 354.

First, it heard important cases.[19] It did not merely sit as a court of appeal but exercised original jurisdiction. Secondly, it answered petitions.[20] The petitions were of different kinds.[21]

In the course of the fourteenth century this "colloquy" developed into a body possessed of particular powers and privileges which helped to consolidate its position in the State.[22] From the King's Council in Parliament there emerged the House of Lords, and from the knights and burgesses who were summoned to meet the King's Council in Parliament, there developed the House of Commons. Thus the modern Parliament took shape.[23]

As the fourteenth century advanced, the initiation of legislation gradually passed from the Crown to the Commons and sometimes to the Lords. The effectual means by which this position was confirmed was by a change in the mode of enacting statutes which became general in Henry VI's reign. Legislation by way of petition was replaced by legislation by way of Bill. This change in the form of the enactment emphasised the position which both Lords and Commons had secured as partners in the field of legislation.[24]

It is of significance that from an early period lawyers have been distinguished members of the House of Commons. Judges

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19 Idem.

20 Ibid., 355.

21 E.g., some of them claimed for relief which could be secured by ordinary action; some asked favours of the King; some asked for new legislation: ibid., 355.

22 Holdsworth, loc. cit., 13 et seq.

23 Idem.

24 Holdsworth, op. cit., vol. II, 438 et seq.

and law officers were from the earliest period members of the Council, which was at first the "core and essence" [25] of the Parliament. Even when the judges and law officers ceased to be members of the House of Lords, they continued to be summoned to the House of Lords by Writs of Attendance. [26] Holdsworth remarks: [27]

> This is a fact of the greatest importance in the history of the English Parliament because it meant that the best legal talent of the day was ready to assist in the development of its powers .... the men who spent their lives in working and developing them were the men who were best fitted to create a workable set of rules for the guidance of a representative assembly.

The English Parliament from the beginning was regarded as the highest court known to the law [28] - a court

> in which relief could be given which could not be given elsewhere; in which powers could be exercised which neither the King nor any other body in the state could exercise, in which the errors of their own courts could be redressed. [29]

The lawyers never took a narrow or technical view of its powers and privileges. The judges in the fifteenth century declined to give an opinion as to their extent. [30] Thus, as its powers expanded, it

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25 Holdsworth, loc. cit., 13.

26 Ibid., 15.

27 Idem.

28 Holdsworth, op. cit., vol. II, 434. Thus the learned author states at 433:

> It was said in 1593 (D' Ewes, Journal 514) that, 'This court for its dignity and highness hath privilege, as all other courts have; and as it is above all other courts, so it hath privilege above all other courts; and as it hath privilege and jurisdiction too so hath it also coercion and compulsion'."

29 Holdsworth, loc. cit., 14.

30 Holdsworth, op. cit., vol. II., 434, 445 and 561.

was able to develop independently and without outside influence or control.

Such development of the powers of Parliament had two major effects. First, there developed the division of the power of the Parliament into judicial and legislative branches. In this regard the existence of Parliament as a petitioning, taxing and legislative body helped to introduce and develop these distinct characteristics of a legislative and a judicial body.[31]

The second major effect was the origin of the peculiarly English combination of the doctrine of the rule of law and the doctrine of the legislative supremacy of Parliament. In England, the theory that the law was supreme was a major premise which was used to justify logically the control over taxation and legislation which Parliament had acquired.[32] Elsewhere in Europe, at this time, the current doctrine recognised the supremacy of a fundamental law which no power in the State could change. However, in England towards the end of the Middle Ages it was coming to mean the supremacy of the law which could be modified and changed by Parliament. By the end of the fifteenth century the legislative supremacy of Parliament was fully recognised.[33]

As mentioned earlier, it was of great significance that lawyers were distinguished members of the House of Commons. The increase in the powers of Justices of the Peace also aided the development of the two distinct powers of Parliament. As many of the members of Parliament were Justices of the Peace, they had helped to make some of the laws which they administered.[34] Hence they were in a better position to understand them and apply them intelligently.[35]

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31 Ibid., 441 - 442.

32 Idem.

33 Holdsworth loc. cit., 21.

34 Idem.

35 Ibid., 22.

Furthermore, till towards the end of Elizabeth's reign, judges served on some committees of the House of Lords, not as advisers but as members.

As to its judicial functions, Parliament in the sixteenth century was regarded as "the highest and most authentic court of England." Its judicial functions and attributes were well marked.[36]

Parliament's non-judicial functions were also being rapidly developed. Hence by the end of the sixteenth century Parliament had developed functions which were equally consistent with it being a council or a court. Professor Holdsworth points this out.[37]

> It had indeed become very different from any other court, for in it were represented the king and the three estates of the realm - 'The great corporation or body politic of the kinddom'. It was this fact which gave to it its 'high, absolute, and authentical power;' and it was these powers which were destined to so expand in the following century that the sovereignty of Parliament has become the central and characteristic feature of English constitutional law.[38]

Thus the English Parliament developed its parallel powers - as a judicial body and as a legislative body - simultaneously. Ultimately it became a truly legislative assembly without losing all of its characteristics as a judicial body. In fact, a petition to Parliament for a private act still retains the judicial features which earlier characterised all legislation. The passage of the ordinary private

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36 Ibid., 24.

37 For the various kinds of jurisdiction exercised by the House of Lords see Holdsworth, op. cit., vol. I, 365 - 394.

38 Holdsworth, loc. cit., 26.

Bill resembled a civil action and the enactment of an Act of Attainder a criminal trial.[39] Eventually, it came to be realized that Acts of Parliament, whether public or private, were legislative in character and the courts of law were obliged to accept that these Acts, however morally unjust, had to be obeyed.[40] When an Act of Parliament acquired such authority and status, the supremacy of the law came to mean supremacy of Parliament. That is, Parliament could pass any legislation on any subject whatsoever, and its content, extent and policy could not be questioned by courts of law. This historical background coupled with the judicial view of Parliament's supremacy as law-maker as well

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39 Ibid., 27. The learned author says:

> Thus it was the practice to hear counsel at the Bar of the House on such bills, see D'Ewes, Journal 50, 68, 86, 317; at p. 124 (1566) there is the following entry: 'This morning the Dean of Westminster was present at the Bar with his counsel; viz., Mr Edmund Plowden of the Middle Temple, and Mr Ford a civilian. The Dean himself made an oration in defence of the Sanctuary, and alleged divers grants by King Lucius and other Christian Kings, and Mr Plowden alleged the grant of Sanctuary there by King Edward five hundred years ago: viz., Dat. in an 1066 with great reason in law and chronicle; and Mr Ford alleged divers stories and laws for the same; and thereupon the bill was committed to the Master of the Rolls, and others(not named) to peruse the grants, and to certify the force of the law now for Sanctuaries.

40 Idem. The learned author cites "Co. Fourth Instit, 37, 38,

> I had it of Sir Thomas Gawdye Knight, a grave and reverend judge of the King's Bench, who lived at that time, that King H. 8 commanded him to attend the chief justices and to know whether a man that was forthcoming might be attainted of High Treason by Parliament, and never called to his answer. The Judges answered that it was a dangerous question, and that the High Court of Parliament ought to give examples to inferior Courts for proceeding according to Justice. But being by the express commandment of the King, and pressed by the said Earl[Cromwell] to give a direct answer: they said that if he be attainted by Parliament it could not come in question afterwards, whether he was called or not to answer Facta tenent multa, quae fieri prohibentur; the Act of Attainder being passed by Parliament - did bind as they resolved.

as the "Highest Court" of the realm accounts for pronouncements such as those of Lord Mackenzie, Lord Campbell and Willes, J.[41] Commonwealth Courts have also recognized the fact that the notion of omnipotence of the English Parliament is related to the history of the High Court of Parliament. Thus Dixon J. (as he then was) said:[42]

> The incapacity of the British Legislature to limit its own power ... has been accounted for by the history of the High Court of Parliament, and has been explained as a necessary consequence of a true conception of sovereignty .... Because of the supremacy of the Imperial Parliament over the law, the Courts merely apply its legislative enactments and do not examine their validity ....

This traditional English view was recently re-affirmed and emphasized by the House of Lords in British Railways Board v Pickin.[43] In this case the plaintiff alleged, inter alia, that the passage of a private Act of Parliament, had been fraudulently obtained by the Board and the rights secured under the Act by the Board were therefore ineffective to deprive the plaintiff of his land or proprietary rights. The House of Lords held that the courts had no power to disregard an Act of Parliament whether public or private, nor had the courts power to examine proceedings in Parliament in order to determine whether the passage of an Act had been obtained by means of an irregularity or fraud. Lord Reid stated:[44]

> The idea that a court is entitled to disregard a provision of an Act of Parliament on any ground must seem strange

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41 See n. 10, p. 159, ante.

42 Attorney-General for New South Wales v Trethowan (1931) 44 C.L.R. 394, 425.

43 [1974] A.C. 765.

44 Ibid., 782.

> and startling to anyone with any knowledge of the history and law of our constitution ....

His Lordship continued:[45]

> The function of the court is to construe and apply the enactments of Parliament. The court has no concern with the manner in which Parliament or its officers carrying out its Standing Orders perform these functions.

Lord Morris of Borth-Y-Gest endorsed the principle:[46]

> It is the function of the courts to administer the laws which Parliament has enacted. In the processes of Parliament there will be much consideration whether a Bill should or should not in one form or another become an enactment. When an enactment is passed there is finality unless and until it is amended or repealed by Parliament. In the courts there may be argument as to the correct interpretation of the enactment: there must be none as to whether it should be on the Statute Book at all.

It can accordingly be asserted with reasonable certainty that in the English Courts there can be no question of judicial review of legislation. Thus the English people, in their fight for freedom against autocracy, stopped with the establishment of the supremacy of the law and with Parliament as the sole source of the law.[47] In contrast, other countries like the United States of America and Fiji for that matter, went further and asserted that there was to be a law superior to the legislature itself. This paramount law has been embodied in a written constitution. In most countries with a written constitution, the judiciary performs the vital role of being the guardian of the constitution. It is the task of the courts,

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45 Ibid., 787.

46 Ibid., 789.

47 Magna Carta, 1214, Petition of Rights 1628, and Bill of Rights, 1689. The current discussion must be seen subject to the obligations of the U.K. under the European Convention on Human Rights and the E.E.C. See comments in n. 2 p. 233, post.

through the instrumentality of judicial review, to ensure that the limitations imposed by the paramount law are not transgressed by the legislature. However, it must not be supposed that the power of the courts to pronounce upon the validity of laws enacted by the legislature depends solely upon the fact that a country has a written constitution. Some written constitutions do not vest this power in the judiciary.[48] Thus the foundations of judicial review vary from constitution to constitution.

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48 Although there are other methods of review. Contrast the position in France and Switzerland. Though the Constitution of France is written, it seeks to impose no legally enforceable limitations on the omnipotence of Parliament. There is no judicial review of legislation and no court can declare any law of the French Parliament to be unconstitutional. Instead after a law is enacted, the French constitution provides for its scrutiny, before promulgation, by an extra-judicial body called the Constitutional Council, composed of the nominees of the President and the two Houses of Parliament and of the former President of the Republic who shall be ex-officio members. Article 61 provides that every 'organic law' must be submitted to this Council before its promulgation, while in the case of other bills, it is optional for the President of the Republic to make such reference. The declaration of the Council is final and once a bill is declared unconstitutional by this Council, it cannot be promulgated by the President.

The Swiss Constitution on the other hand empowers the Federal Supreme Court to declare an Act of the Cantonal Legislature to be invalid, if repugnant to the provisions of the Federal Constitution, but the court is given no such powers as regards laws passed by the Federal Legislature. In the Swiss Constitution, the power to determine the validity of Federal laws is given to the people themselves. If 30,000 voters or 8 cantons so demand, a Federal law must be submitted to the people who have the final power to determine whether it shall go into effect or not (Article 89). Subject to this, the guardianship of the Constitution is vested in the Federal Executive (Article 102 (2)). Thus the Swiss Supreme Court has no power of judicial review on the ground of unconstitutionality of acts of the Federal Executive or Legislature.

D. Foundations of Judicial Review of Legislation

(1) United States of America

In the United States the power of judicial review is wielded by the Courts. But it is remarkable that the Constitution drafted by the American Founding Fathers did not expressly confer such an important and, as subsequent history has shown, vital power on the judiciary. The records of the Philadelphia Constitutional Convention of 1787 indicated that though the principle of judicial review was a matter of vital concern to the framers,[49] it was not debated in the convention. Hamilton, however, very shortly afterwards, came forward with the plea that judicial review was an indispensable condition of a limited government.[50] His argument basically was that the limitations imposed by the written constitution upon the organs of government (particularly the legislature) could not be maintained unless there was some authority to determine whether those limitations had been transgressed. Despite the absence of express provision in the constitution, the United States judiciary assigned to itself this onerous task. Accordingly, Chief Justice John Marshall formally propounded the doctrine of judicial review in the United States in the seminal Marbury v Madison.[51] The learned Chief Justice declared:[52]

> The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written .... The Constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the

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49 Henry J. Abraham, Freedom and the Court (2nd ed., 1972), 6.

50 Essay No. 78. The relevant text is reproduced in Gunther and Dowling, Cases and Materials on Individual Rights in Constitutional Law (8th ed., 1970), 18.

51 1 Cranch 137; 2 L Ed 60, (1803).

52 Ibid., 176; 73.

legislature shall please to alter it.

> If the former part of the alternative be true, then a legislative act contrary to the constitution is not law: if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable.
>
> Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and, consequently, the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void.
>
> This theory is essentially attached to a written constitution, and, is consequently, to be considered by this court, as one of the fundamental principles of our society....
>
> It is emphatically the province and duty of the judicial department to say what the law is .... If two laws conflict with each other, the courts must decide on the operation of each.
>
> So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, ... the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.
>
> If, then, the courts are to regard the constitution, and the constitution is superior to any ordinary act of the legislature, the constitution and not such ordinary act, must govern the case to which they both apply ....
>
> The judicial power of the United States is extended to all cases arising under the constitution.

This was a clear enunciation of two principles which were of vital importance to the young nation. First, the courts have the power, even the duty, of judicial review of legislative acts. Secondly, the constitution of the United States is the supreme and paramount law of the land. If there is a conflict between the fundamental law and the ordinary law, the court is bound to give effect to the paramount law. It is submitted that this power of judicial review of legislation has been deduced by the Supreme Court from its power to determine "all cases arising under the constitution"[53] read

53 Art. III, s. 2 (1).

with Article VI section 2 which says "This Constitution ... shall be the supreme law of the land".

It is beyond question that judicial review is crucial to the governmental process in the United States with its federal character and its principle of the separation of powers. This is well borne out by subsequent judicial history.[54] James Madison, the Father of the American Constitution, wrote that the[55]

> judiciary is truly the only defensive armour of the Federal Government, or rather of the Constitution and laws of the United States. Strip it of that armour and the door is wide open for nullification, anarchy, and convulsion.

The principle of judicial review is now strongly entrenched in the United States. While the power to pronounce upon the unconstitutionality of a statute was originally asserted as incidental to the judicial power, since the case of Marbury v Madison[56] it has come to be considered as a duty of every judge in the United States to treat as void any enactment which violates the constitution.[57]

Thus we see that in the United States the doctrine of judicial review is a gloss put upon the constitution by the judges themselves. This doctrine of judicial review has had great beneficial effects on the governmental process in the United States. It has been a necessary and proper check on possible excesses by the legislatures. Mr Justice Cardozo advanced as his key contention that it is the

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54 Gunther and Dowling, op. cit., 1 et seq.

55 As quoted in Charles Warren, The Supreme Court in United States History (1937), vol. I, 740.

56 Supra.

57 Carter v Carter Coal Co. 298 U.S. 238 (1936). See also Dred Scott v Sanford, 19 Howard 393 (1857); Brown v Board of Education 347 U.S. 483 (1954).

restraining influence of the doctrine's presence, rather than the frequency of its application that renders judicial review so vital to the governmental process in the United States.[58]

Beneficial though it has been, the authenticity and the legitimacy of the power of judicial review has been questioned. It has been contended that from the premises, the power of judicial review was not the only possible conclusion. There is no specific provision in the constitution declaring that any law repugnant to it shall be "void".[59] Secondly, even though it is accepted that a written constitution per se begets the concept of a paramount law, it does not necessarily follow that the power to determine whether that paramount law has been infringed must vest in the judiciary.[60] Finally, as later pronouncements of the American Supreme Court itself have shown, though the constitution is the fundamental law of the land, not all of its provisions are justiciable. Hence the courts are powerless to interfere with the legislature if it violates those provisions of the constitution which are not justiciable.[61]

There are many other questions raised as to the legitimacy of judicial review in the United States.[62] One vital question raised

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58 B.N. Cardozo, The Nature of the Judicial Process (1921), 93.

59 Cf. the constitutions of India, Japan, Nigeria and Fiji.

60 Cf. n. 48 p.169 ante. The Constitution of the Fourth as well as well as the Fifth French Republic which placed the power in the hands of a non-judicial "Constitutional Council". The Swiss Constitution adopted another solution.

61 D.D. Basu, Commentary on the Constitution of India (5th ed., 1970), vol. 1, 159.

62 See Gunther and Dowling op. cit., 15 et seq. and D.P. Currie, Federal Courts: Cases and Materials (1968), 26 et seq.

is: was the authority of judicial review asserted in Marbury v Madison a usurpation? This question has long sparked controversy.[63]

It is submitted, however, that there is no longer any doubt that judicial review is very strongly concreted into the structure and workings of government in the United States of America notwithstanding the repeated attacks from both the public and private sectors. The position of the Supreme Court in relation to judicial review is so strong that it has led to the establishment of the doctrine of judicial supremacy. Thus Senator George W. Morris of Nebraska said in the United States Senate:[64]

> We have a legislative body, called the House of Representatives of over 400 men. We have another legislative body, called the Senate, of less than 100 men. We have in reality, another legislative body, called the Supreme Court, of 9 men; and they are more powerful than all the others put together.

The pre-eminent position of the Supreme Court under the American Constitution is due to the powers of judicial review which it assigned itself. The Supreme Court, however, does not wield this power lightly. It does so only after a very careful analysis of the alternatives. Whenever the Court can conceivably find its way clear to do so, it will avoid the drastic consequences of invoking its powers of review.[65] The Court always exercises judicial self-

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63 There is an extensive attack on judicial review in L. B. Boudin, Government by Judiciary (1932); cf. Justice Holmes in Bloodgett v Holden 275 U.S. 142, 147 (1927). For an elaborate defence of legitimacy see R. Berger, Congress v The Supreme Court (1969).

64 Congressional Record, 71 Cong, 2nd Sess. vol. 72, Part 4, 3566 (Feb. 13, 1930) cited in H. J. Abraham, The Judicial Process (1962), 281; see generally Abraham, op. cit., 281 - 289.

65 Cole v Young 351 U.S. 536 (1956); Schneidor v Smith 390 U.S. 17 (1968), Yates et al v United States 354 U.S. 298 (1957).

restraint.[66]

Whatever may be the attitudes of the Judges and the Court towards the techniques to be adopted in reviewing legislation, the fact of the power of judicial review under the American Constitution is unquestionable.

Australia

In Australia, as in the United States, the constitution does not expressly confer the power of judicial review. Nonetheless, it was certain from the beginning that the Australian Courts would have the power of judicial review. There are several provisions in the constitution of Australia which would be unintelligible unless such a power of judicial review was intended. Thus section 5 of the Constitution of the Australian Commonwealth provides for the operation of the constitution and laws and makes reference to the courts, Judges and people of every State as being bound by the Constitution. Section 74 makes provision for appeals on any question as to the limits inter se of the constitutional powers. Section 76 provides for the High Court having jurisdiction in matters concerning the Constitution or its interpretation as well as in issues arising under other laws of the Federal Parliament or State Legislatures. It is submitted that the very nature of the form of the Constitution reveals that the powers of the Federal Parliament and the State legislatures are such that there must be a higher legal norm controlling those powers,[67] and that being so there must be an agency to

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66 United States v Butler, 297 U.S. 1 (1936); see also the judgement of Frankfurter J. in Trop v Dulles, 356 U.S. 86 (1958).

67 The powers of the Federal Parliament and the State legislatures are enumerated in ss. 51, 52 and 106 and 109 of the Commonwealth of Australia Constitution Act 1900.

adjudicate thereon. Rich J. observed:[68]

> The legislative powers of the Parliament are not plenary, but are restricted to those conferred upon it by the Constitution and are subject to any limitations or conditions imposed by the Constitution. It cannot free itself from such limitations or conditions; only the process provided for by sec. 128 of the Constitution (or, in theory, the Imperial Legislature) can do that; nor can it decide for itself whether a purported exercise of a power is valid; and if an exercise of a power involves any legal consequences prescribed by the Constitution it cannot exempt itself from any of those consequences. The questions whether an Act of the Federal Parliament is valid, and if so whether it involves any and what legal consequences, can be determined only by an exercise of the judicial power, ... But no body but a court can be invested with such jurisdiction.

From the inception of the Constitution the courts in Australia have exercised their rights of judicial review. As Fullagar J. observed:[69]

> But in our system the principle of Marbury v Madison is accepted as axiomatic, modified in varying degree in various cases (but never excluded) ....

Apart from sections 73 and 74 of the Constitution, the position of the judiciary has been further consolidated by the provisions of Commonwealth legislation, namely the Judicial Act 1903 - 1968 and the Privy Council (Limitations of Appeals) Act, 1968. The result of the legislation is that the High Court alone can determine finally questions of interpretation of the Constitution, subject to the possible contingency of appeal to the Privy Council on the certificate of the High Court itself where there is a jurisdictional conflict between the Federal body and a state or among states inter se.[70]

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68 Australian Apple and Pear Marketing Board v Tonking (1941) 66 C.L.R. 77, 104. See also Australian Communist Party v The Commonwealth (1950 - 1951) 83 C.L.R. 1, 262.

69 Idem.

70 For a detailed treatment of these matters see W.A. Wynes. Legislative, Executive and Judicial Powers in Australia (4th ed., 1970), Ch. X and XI.

Under section 30 of the Judiciary Act, 1903 - 1968, the High Court has, in addition, original jurisdiction in "all matters arising under the Constitution or involving its interpretation"; and section 40 and 40A of that Act provide for the removal of constitutional cases from the State Supreme Courts to the High Court.

However, the Courts in Australia have stated that they are not entrusted with any power to veto the acts of the legislature. Latham C.J. has observed that:[71]

> Common expressions, such as: 'The courts have declared a statute invalid,' sometimes lead to misunderstanding. A pretended law made in excess of power is not and never has been a law at all. Anybody in the country is entitled to disregard it. Naturally he will feel safer if he has a decision of a court in his favour - but such a decision is not an element which produces invalidity in any law. The law is not valid until a court pronounces against it - and thereafter invalid. If it is beyond power it is invalid ab initio.

The courts have also emphasized that constitutional questions are basically legal and not political.[72] Questions involving matters of policy are beyond the reach of judicial review.[73] The Courts will not entertain questions of constitutionality unless it is necessary for the ascertainment of the position of the parties before it,[74] nor will the Courts hear applications for advisory opinions.[75]

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71 South Australia v The Commonwealth (1942) 65 C.L.R. 373, 408.

72 Idem.; The Communist Party case, (1950-1951) 83 C.L.R. 1, 148 - 149; Australian National Airways Ltd v The Commonwealth. (1945) 71 C.L.R. 29, 70; Wynes, op. cit., 28 - 34.

73 Broken Hill South Ltd v Commissioner of Taxation (1936-1937) 56 C.L.R. 337, 375; Elliott v The Commonwealth (1935-1936) 54 C.L.R. 657, 665.

74 Bruce v Commonwealth Trade Marks (1904) 4 C.L.R. 1569.

75 Re Judiciary and Navigation Acts (1921) 29 C.L.R. 257; cf. the position in Canada where advisory opinions are frequently given.

Professor G. Sawer, with respect, rightly points out that in Australia, the impact of judicial review has been made much less severe than it might have been by the practice of "reading down" and "blue-pencilling". These are ways of severing the invalid from the valid portions of challenged legislation, leaving the latter parts to operate alone.[77] "Reading down" occurs when two meanings are possible, that construction will be accepted which will give validity to the enactment.[78] "Blue pencilling" occurs when some parts of an enactment are valid and others invalid, the invalid part is excised without affecting the rest.

The general rule is that the legislature intends its enactments to be effective in their entirety. There is a common law presumption against severability of an enactment.[79] However, in Australia, as in the United States, the legislature has used severability or saving clauses expressly to negative this presumption. The effect of such a clause is that if only part of a statute is invalid it does not necessarily follow that the whole statute will be invalid. The valid portion will still be given effect if it can be severed from the invalid portion.[80] There has been widespread use of severability clauses.[81]

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76 G. Sawer, Australian Federalism in the Courts (1967), 113.

77 Idem.

78 Irving v Nichimura (1907) S.C.L.R. 233.

79 Kalibia Owners v Wilson (1910) 11 C.L.R. 689. For a treatment of this subject, see pp. 340 et seq., post.

80 Cf. Kalibia Owners v Wilson, supra, and New Castle and Hunter River Steamship Co. Ltd v Attorney-General of the Commonwealth (1921) 29 C.L.R. 357. In both these cases Commonwealth legislation sought to regulate employment and other conditions in the maritime "coasting trade". The court held that the Commonwealth could deal only with the part of the coasting trade which was inter-state. In the former case there was no severability clause and the whole Act was held invalid; whereas in the second case the Act was held invalid in relation to the inter-state coasting trade as a result of severability clause.

81 As to limitations to severability clauses, see Sawer, op. cit., 114-116 and Wynes, op. cit., 48 - 53.

The Australian Constitution is another instance of a written constitution having no Bill of Rights. There are, however certain provisions in the Constitution, which operate to protect individual rights by imposing limitations upon legislative power.[82]

Canada

Canada, like the United States and Australia, has a federal system of government. The British North America Act 1867 provides for a division of legislative power between the Dominion Parliament on the one hand and the provincial legislatures on the other.

Basically the Canadian system of judicial review is similar to that of the United States and Australia. The validity of any law may be questioned by the courts. In Canada too the courts have assumed the power to determine the validity of enactments by reference to the provisions of the British North America Act, even though there is no express provision to this effect in the Constitution Act. Thus either federal or provincial legislation may be declared ultra vires the legislature concerned if it invades a field of legislation reserved by the Constitution Act to the other level of government.[83]

However, the scope of judicial review is narrower in Canada

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82 E.g., s. 116 (freedom of religion); s. 51 (xxxi) right to compensation for acquisition of property by the State; s. 92 (freedom of trade and commerce). Cf. Commonwealth v Bank of New South Wales [1950] A.C. 235.

83 Attorney-General of Canada v Attorney-General of Ontario [1937] A.C. 355; Attorney-General of Canada v Attorney-General of Ontario [1937] A.C. 326; Hammerstein v British Columbia Coast Vegetable Marketing Board et al (1962) 37 D.L.R. (2d) 153.

than in the United States inasmuch as the Constitution Act contains no list of individual guarantees. Canada has no constitutional Bill of Rights similar to that in the United States but there are nonetheless limited constitutional guarantees; for instance, those requiring separate schools and the use of French and English languages in the courts and legislatures of the Dominion and of Quebec.[84] Accordingly, the task of the courts has been confined to the scrutiny of the legislative competence of the legislatures.[85] In 1960 the Federal Parliament did enact a Bill of Rights[86] but the purely statutory status of these guarantees means that they are not binding upon the legislature.[87] As a consequence civil liberties in Canada are at the mercy of legislative contradiction. Even the provisions of the Bill of Rights Act can be overcome by properly drafted legislation. The provisions of the Canadian Act may none-

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84 British North America Act 1867, ss. 93 and 133.

85 Attorney-General for Ontario v Attorney-General for Canada [1912] A.C. 571.

86 S.C. 1960, c. 44. Saskatchewan also adopted a Bill of Rights in 1947 (1947, c. 35, now R.S.S. 1953, c. 345).

87 The Federal Act provides that,

> Every law of Canada shall, unless it is expressly declared by an Act of Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights, be so construed and applied as not to abrogate, abridge or infringe ... any of the rights or freedoms herein recognised and declared.

For an excellent discourse on the Canadian Bill of Rights, see W.S. Tarnopolsky, The Canadian Bill of Rights (1966). See also Bora Laskin, "Canadian Bill of Rights: A Dilemma for the Courts?" (1962) 11 Int. & Comp. L.Q. 519, V.K. Bhardway, "Canada and Entrenched Bill of Rights: A Visitor's View-point", (1972) 14 Journal of Ind. L. Inst. 187; P. Brett, "Reflection on the Canadian Bill of Rights." (1969) 7 Alberta L. Rev. 294; Louis Philippe Pigeon, "Bill of Rights and the British North America Act" (1959) 37 Can.B. Rev. 66; K.W. Cheung, "The Abortion Decision - A Qualified Constitutional Right in the United States: Whither Canada?". (1973) Can. B. Rev. 643; R.N. McLaughlin, "Canadian Bill of Rights - R v Smythe - 'Equality Before the Law' - The Meaning of 'Discrimination' ", (1973) Can. B. Rev. 517; A.A. Borovoy, "Civil Liberties In the Imminent Hereafter," (1973) Can. B. Rev. 93.

theless serve in future as a basis for developing a system of judicial review to protect individual rights at the Federal level [88] and their invasion even by statutes. [89] Whereas in the United States certain kinds of governmental actions, whether federal or state, may be struck down as unconstitutional because they offend against the Bill of Rights; in Canada the legal question is, which level of government (federal or provincial) has the constitutional power to deal with matters involving civil liberty. [90]

It may also be mentioned that since the abolition of appeals to the Privy Council by the Supreme Court Act, 1949, the Supreme Court of Canada has become the final court of appeal in all cases, including those involving constitutional questions.

New Zealand

The battle over the power of judicial review has been fought in other countries such as South Africa, [91] Ceylon, [92] and to a

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88 As it has been held that this Dominion Act does not apply to the provincial governments: Re Williams and Williams [1961] O.R. 657, 600, 29 D.L.R. (2d) 107, 110 (C.A.).

89 See R v Drybones (1967) 64 D.L.R. (2d) 260 and R v Morgentaler (No. 1) (1974) 42 D.L.R. (3d) 424.

90 For a brief survey of the comparative position of the two federal constitutions of United States and Canada, see Bora Laskin, "The Constitutional Systems of Canada and the United States; Some Comparisons", (1966 - 1967) 16 Buffalo L. Rev. 591.

91 Harris v Donges [1952] 1 T.L.R. 1245, discussed at pp.196 et seq, post.

92 Bribery Commissioner v Ranasighe [1964] A.C. 172, discussed at pp.201, et seq., post. This case must be read in the light of the new constitution of the Republic of Sri Lanka (previously Ceylon).

limited extent in New Zealand.[93] As far as New Zealand is concerned, it is submitted that there is no power of judicial review of legislation in respect of any legislation enacted since 1947 at the very latest. In 1968 the New Zealand Supreme Court held that the legislative powers possessed by the New Zealand Parliament[94] were not as wide as those possessed by Parliament of the United Kingdom, and laws passed by it could, in proper cases, be challenged as being ultra vires.[95] In view of the doubts so expressed on the strength and scope of the legislative powers of the New Zealand legislature, the Constitution Act was amended in 1973[96] so as to remove any remaining restrictions on the legislative competence of the New Zealand Parliament. It can now be asserted with confidence that the Parliament of New Zealand is subject to no constitutional limitations whatsoever either as to substance or form of legislation. There is no Bill of Rights or similar protection for fundamental rights. The New Zealand Parliament has, it is submitted, the same legislative capacity as the Parliament of the United Kingdom. It can legislate on any subject matter, however unjust or discriminatory. No court is capable of reviewing New Zealand legislation passed since 1947 inasmuch as the 1973 amendment to the Constitution Act has a retrospective effect from 1947.[97]

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93 R v Fineberg [1968] N.Z.L.R. 119, discussed at pp. 219 et seq., post.

94 Under s. 53 of the New Zealand Constitution Act 1852.

95 R v Fineberg, supra.

96 The Constitution Amendment Act 1973.

97 Ibid., s. 2.

Fiji

As has been seen [98] the Constitution of Fiji defines and establishes the principal organs of government. The Constitution is the source of their authority. It prescribes the manner in which and the limits within which their functions are to be exercised. It further determines their inter-relationship. Not only are there provisions protecting fundamental rights [99] and freedoms of the individual but there are also provisions which are so entrenched that they may be altered and/or repealed only by special legislative procedure. [1]

There are provisions in the Constitution which impose restrictions on the legislative authority of the Fiji Parliament. [2] More important, the Fiji Constitution is hierarchically superior to rules of law enacted by Parliament unless the legislation is passed in accordance with the provisions of the Constitution. This principle is explicitly stated in section 2 of the Constitution. [3] Thus in the present constitutional scheme of things it is imperative that some institution should exist to protect the very fabric of the Constitution and to ensure that the legislature and the executive will not connive to break the equilibrum.

Judicial review stands on a firmer ground in Fiji than in the United States. It has a more solid basis because it is founded not on any judicial pronouncement but on the Constitution itself. As has been seen the United States judiciary claimed that the principle of judicial review was an essential attribute of a "limited government". In Fiji, however, the framers of the Constitution not only

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98 Pp. 111 et seq., ante.

99 Ch. II of the Constitution.

1 Ss. 67 and 68.

2 E.g. ss. 5, 6, 8, 15, 52, 61, 67 and 68.

3 See p. 120, ante.

believed that "limited government" was essential to democracy, but also enshrined in the Constitution itself the principle which Chief Justice John Marshall had to assume, namely, that the limitations imposed by the constitution upon the powers of the legislature must be respected and if the legislature violates these limitations, its acts must be void.[4]

Besides the express provisions of section 2 declaring the Constitution to be the supreme law of Fiji and making laws inconsistent with the Constitution pro tanto void, there are other sections in the Constitution which expressly confer on the Supreme Court original jurisdiction to hear applications alleging breaches of the constitutional provision.

Section 17 expressly confers jurisdiction on the Supreme Court to entertain applications for redress for breaches of the provisions of the Constitution

> and make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions

relating to fundamental rights and freedoms of the individual.

By section 97 original jurisdiction is expressly conferred upon the Supreme Court to hear applications and grant relief

> if any person alleges that any provision of this Constitution (other than chapter II) has been contravened and that his interests are being or are likely to be affected by such contravention ....

Under s. 98 (2) the Supreme Court has jurisdiction to hear applications for the interpretation of the Constitution.

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4 Marbury v Madison 1 Cranch 137;

Thus we see that the power of the Courts to declare Acts of Parliament unconstitutional, while implied under other constitutions, has been set out in clear terms in the Fiji Constitution. The provisions of the Fiji Constitution, to use the words of Marshal C. J.[5]

> confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and the courts, as well as other departments are bound by that instrument.

There is no doubt whatsoever, it is submitted, that the Supreme Court of Fiji has competence, even the duty, to review legislation on the ground of constitutionality and to strike down as invalid any infringement of the Constitution. Thus judicial review in Fiji will basically consist of reconsiderations of the constitutional propriety of an Act of Parliament. The question whether the right of the Courts to review legislation derogates from the sovereignty of the Fiji Parliament accordingly becomes significant.

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5 Ibid., 180.

CHAPTER VI

SOVEREIGNTY OF PARLIAMENT AND THE SUPREMACY OF THE CONSTITUTION

A. Introduction

The notion of "sovereignty" is really ambivalent in a legal context.

> Sovereignty is exercised in two directions. Internally it relates to the power of making and enforcing laws, externally, to freedom from outside control.[1]

In one sense it indicates sovereignty in the international sphere. In this sense it is descriptive of a state's position in international law and when one speaks of the sovereignty of a state in such a context, all one means is that there is an absence of subjection to outside control or authority. In other words, no other state may legally interfere in the internal affairs of that particular state. It was to this aspect of sovereignty that Centlivres C. J. referred when he stated:[2]

> [T]he only Legislature which is competent to pass laws binding in the Union is the Union Legislature. There is no other Legislature in the world that can pass laws which are enforceable by Courts of law in the Union .... [T]he Union is an autonomous State in no way subordinate to any other country in the world.

However, the criteria of sovereignty for international law may well be different from the concept of parliamentary sovereignty in the internal sphere. In international law the emphasis is on independence in the sense of absence of control or subjection to any outside authority, while parliamentary sovereignty in the internal order perhaps has more exacting requirements.[3]

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1 R v Christian (1924) A.D. 101, 106, per Innes C. J.

2 Harris v Donges [1952] T. L. R. 1245, 1261; see also Ibralebbe v R. [1964] A. C. 900, 922.

3 C. F. Amerasinghe, "The Legal Sovereignty of the Ceylon Parliament" [1966] Pub. L. 65, 68; D. V. Cowen, "Legislature and Judiciary" (1952) 15 M. L. R. 282, 292.

The doctrine of parliamentary sovereignty has become a commonplace of English constitutional law. In a classic passage Dicey formulated the doctrine of parliamentary sovereignty thus:[4]

> The principle of Parliamentary sovereignty means neither more nor less than this, namely, that Parliament ... has, under the English constitution, the right to make or unmake any law whatever; and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament.

Dicey's view is still widely accepted in writings on the British Constitution today.[5] In English jurisprudence the doctrine of sovereignty of Parliament is generally understood to mean the absence of any legal restraint upon the legislative powers of Parliament. This absence of legal restraint can be approached from two sides; and both these aspects were clearly asserted by Dicey.[6] In his exposition of the doctrine of parliamentary sovereignty in England, Dicey postulated two basic characteristics. The first is that Parliament has unlimited legislative competence. In other words, the United Kingdom Parliament is free to pass any

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4 Dicey, op. cit., 39.

5 E.C.S. Wade, in the Introduction to Dicey, op. cit., xxxv, states that:

> Despite recent criticism, it is still true today as a proposition of the law of the United Kingdom to say that Parliament has the right to make or unmake any law whatever. Nor can any court within the United Kingdom set aside the provisions of an Act of Parliament.

See also H.W.R. Wade, "The Basis of Legal Sovereignty" (1955) Camb. L.J. 172. Cf. H.R. Gray, "The Sovereignty of Parliament Today" (1953) 10 U. Toronto L.J. 54.

6 Dicey, op. cit., Ch. 1. It is not intended to attempt to review or re-examine Dicey's theory.

legislation on any topic or subject-matter whatsoever. It cannot be legally limited or confined by any factor,[7] be it morality or natural law[8] or international law.[9] "Parliament could do anything ... being omnipotent".[10] The power of the United Kingdom Parliament to legislate is unrestrained and unrestricted from a legal point of view. However, from a political point of view, it may be assumed that Parliament will not ordinarily do anything contrary to the wishes of a strong and influential group.[11]

Dicey's second assertion is that there is no other authority or body (including the courts) which can question the validity of Parliament's legislation or override it or set it aside. Thus, as has been seen, in the United Kingom the courts have no jurisdiction to declare an Act of Parliament void as being ultra vires or "unconstitutional".[12] In the exercise of its power, Parliament may

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7 However, there are conventional (as opposed to legal) rules which in practice do impose limitations. For instance, the doctrine of mandate; it is accepted that convention requires that a government consult interests likely to be affected by general legislation. As to this subject see J.D.B. Mitchell, Constitutional Law (2nd ed., 1966), 66.

8 Liversidge v Anderson [1942] A.C. 206, 261.

9 Mortensen v Peters (1906) 14 S.L.T. 227. However see n. 2, p 233, post.

10 Hammersmith Borough Council v Boundary Commission The Times, 15 December 1954, per Harman J. See also Lee v Bude and Torrington Railway (1871) L.R. 6 C.P. 576, 582; Institute of Patent Agents v Lockwood [1894] A.C. 347, 359; National Union of General and Municipal Workers v Gillian [1946] 1 K.B. 81, 85. Cf. Lord Cooper's strictures in MacCormick v Lord Advocate, [1953] S.C. 396, 413.

11 See Professor Wade in the introduction to Dicey, op. cit., xviii and Professor Sir Ivor Jennings, The Law and The Constitution (5th ed., 1959), 147.

12 See pp.159 et seq., ante. Cf. Gray, loc. cit., 54. The current discussion, however, must be seen subject to the obligations of the U.K. under the European Convention on Human Rights and the E.E.C. See comments in n. 2, p. 233, post.

make a law which is unreasonable, impolitic or contrary to moral principles,[13] without fear of judicial review. Similarly the courts are precluded from enquiring into the motives, or the influences that led to the passage of the Act in question.

Amongst jurists there are two areas of disagreement in relation to the doctrine of the sovereignty of Parliament: first, as to what is the juridical basis of parliamentary sovereignty and secondly, to what extent, if at all, can one Parliament bind succeeding Parliaments.

(1) Juridical Basis of Parliamentary Sovereignty

The English doctrine of parliamentary sovereignty is the theoretical response to the demand for some explanation of where the ultimate power in a national community lies. It can be thought of as posing the question, "what is the juridical basis of parliamentary sovereignty". This is the first area where theorists differ.

The first school[15] maintains that parliamentary sovereignty depends upon judicial determination in exactly the same way as any other question of law. Thus Professor Sir Ivor Jennings propounded that the law requires the courts to obey any rule enacted by the legislature, including a rule which alters the law itself.[16] Thus

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13 Dicey, op. cit., 62; Jennings, op. cit., Ch. 4. The same power of course, belonged to a non sovereign legislature; R v Burah (1878) 3 A.C. 889; R v Hodge (1884) 9 A.C. 117.

14 Lee v Bude and Torrington Railway, supra; British Railway Board v Pickin. [1974] A.C. 765. See also The King v Barger (1906) 6 C.L.R. 41; Osborne v The Commonwealth (1911) 12 C.L.R. 321, at 346; Hoani Te Heuheu Tukino v Aotea District Maori Land Board [1946] A.C. 308.

15 Which includes Professor Sir Ivor Jennings and Professor Hamish R. Gray.

16 Jennings, op. cit., 149.

referring to the supremacy of Parliament,[17] the learned author stated:[18]

> It is a legal concept, a form of expression which lawyers use to express the relations between Parliament and the courts. It means that the courts will always recognise as law the rules which Parliament makes by legislation; that is, rules made in the customary manner and expressed in the customary form.

This view was supported by Professor H. R. Gray when he stated that:[19]

> Parliamentary sovereignty (which is, after all, legislative sovereignty) depends on judicial determination in exactly the same way as any other question of law.

The learned author further stated:[20]

> [T]he true reason for parliamentary sovereignty is to be found in the fact that the courts recognise its existence as a legal doctrine. This recognition has arisen as the result of a self-denying ordinance on the part of the courts, who as a matter of constitutional practice accept and apply new laws when presented to them in a particular form, that is to say, an Act of Parliament.

The opposing view that the true basis of the sovereignty of Parliament,

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17 Professor Sir Ivor Jennings prefers the term "supremacy" rather than "sovereignty" of Parliament. "Sovereignty" he states, "is a word of quasi-theological origin which may easily lead us into difficulties"; Jennings, op. cit., 147.

18 Ibid., 149. See generally ibid., 144 et seq.

19 Gray, loc. cit., 54. For a similar view see W. Friedmann, "Trethowan's Case, Parliamentary Sovereignty, and the Limits of Legal Change" (1950) 24 Aust. L. J. 103, 104; Keir and Lawson, Cases in Constitutional Law (4th ed., 1954)7.

20 Gray, loc. cit., 58.

as understood in British constitutional law, is that it is a political fact which can only be changed by revolution. Thus Professor H. W. R. Wade stated:[21]

> What Salmond calls the 'ultimate legal principle' is therefore a rule which is unique in being unchangeable by Parliament - it is changed by revolution, not by legislation; it lies in the keeping of the courts, and no Act of Parliament can take it from them. This is only another way of saying that it is always for the courts, in the last resort, to say what is a valid Act of Parliament; and that the decision of this question is not determined by any rule of law which can be laid down or altered by any authority outside the courts. It is simply a political fact. If this is accepted, there is a fallacy in Jennings' argument that the law requires the courts to obey any rule enacted by the legislature, including a rule which alters this law itself. For this itself is ultimate and unalterable by any legal authority.

These are basically the two views.[22]

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21 "The Basis of Legal Sovereignty", (1955) Camb. L. J. 172, 189. As to the question of sovereignty of Parliament see further B. Beinart, "Parliament and the Courts" (1954) S. A. L. R. 135; K. W. B. Middleton, "Sovereignty in Theory and Practice" (1952) 64 Jurid, Rev. 135; G. Marshall, Parliamentary Sovereignty and the Commonwealth (1957); R. F. V. Heuston, Essays in Constitutional Law (2nd ed., 1964), Ch. 1; J. D. B. Mitchell, "Sovereignty of Parliament - Yet Again" (1963) 79 L. O. R. 196; M. A. Fazal, "Entrenched Rights and Parliamentary Sovereignty" (1974) Pub. Law. 295.

22 As will be discovered later, in the constitutional set up of Fiji, there is very little room for the varying views on the sovereignty or supremacy of the Parliament as they are known in English jurisprudence. As will be seen (see pp. 210 et seq., post), in Fiji there is constitutional supremacy. Hence an analysis of the divergent views regarding the English Parliament or other legislatures (e. g. New Zealand) would be an academic exercise with little relevance to Fiji. See also n. 33 p. 195, post.

(2) To What Extent Can Parliament Bind Its Successors

Here again there are two conflicting views. Professor H. R. Gray maintained that the United Kingdom Parliament is capable of binding its successors by two types of legislation viz., legislation affecting the existence, constitution or composition of Parliament itself and legislation dealing with the procedure of law-making.[23] This view is supported by Professor Sir Ivor Jennings.[24] According to the argument of Professor Jennings if there is a requirement that a statute to be enacted must be approved by say, a referendum or some outside body or a two-thirds majority in the legislature, that would constitute, not a procedural requirement, but a change in the composition of Parliament. Thus it would be binding on the legislature.

Similarly, Professor D. V. Cowen has argued that a requirement such as a special majority in either or both Houses of Parliament would constitute redefinition of "Parliament" for this purpose; so that in the case proposed above, "Parliament" would mean the Queen, the Lords, and the Commons approving by the stated majority. Professor Cowen draws a distinction between the "static" and "dynamic" concepts which correspond to structure and function.[25] The static concept has reference to the structure of Parliament, that is, to the elements which constitute it. The dynamic concept refers to the constituent

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23 Gray, loc. cit., 60 et seq.

24 Jennings, op. cit., 152 et seq.

25 D. V. Cowen, Parliamentary Sovereignty and the Entrenched Sections of the South Africa Act (1951), 5. For a further comprehensive treatment of this subject by the same author see "Legislature and Judiciary" (1952) 15 M. L. R. 282 and (1953) 16 M. L. R. 273.

elements of Parliament functioning as a law-making body. He points out:[26]

> [I]t is a fundamental legal principle that in all cases where legislative power is vested not in one person, but in a number of persons, that number must combine for action in accordance with certain rules prescribing the manner in which their will is to be ascertained. And this principle applies even to sovereign law-making bodies.

The learned author's conclusion is that the constituent elements of Parliament are bound to observe the rules which for the time being govern the method of law-making. He asserts that this conclusion is not incompatible with parliamentary sovereignty inasmuch as there are binding rules of law imposed or enacted by itself governing the structure and mode of functioning of Parliament.[27]

On the other hand, Dicey describes the problem as an "alleged legal limitation" and summarily dismisses the idea that one Parliament may be bound by the acts of its predecessors.[28] H.W.R. Wade supports Dicey and regards the proposition that one Parliament cannot bind its successors in any form whatsoever as an "obvious" legal proposition.[29] He maintains that no Act of the sovereign legislature (composed of the Queen, Lords and Commons) could be invalid in the eyes of the courts. That is, it is always open to the legislature, so constituted, to repeal any previous legislation and it is an invariable rule that in case of

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26 Op. cit., 6. See also J.C. Gray, The Nature and Sources of Law (2nd ed. 1931), 76.

27 Cowen, (1953) 16 M.L.R. 273, 290.

28 Dicey, op. cit., 64.

29 H.W.R. Wade, loc. cit., 5.

conflict between Acts of Parliament, the latter repeals the earlier, and that the legislature has only one process for enacting sovereign legislation. He maintains that the only limitation to Parliament's legal power is that it cannot detract from its own continuing sovereignty; and that Parliament's power is unalienable in the United Kingdom.[30]

Hood Phillips is of the same opinion as H. W. R. Wade.[31] Thus the learned author states:[32]

> As a matter of logic and law, a legislature cannot bind itself - whether as to subject-matter or the manner and form of legislation - unless it is directed or empowered to do so by some 'higher law', that is, some (logically and historically) prior law not laid down by itself.[33]

B. The Position in the Commonwealth as Regards "Manner and Form"

The question arises as to what influence, if any, did British juridical theory of the sovereignty or supremacy of Parliament have within the Commonwealth. At the outset, it is submitted, the Commonwealth experience shows that the Parliaments of the Commonwealth countries are not as powerful or as absolute as

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30 Idem.

31 Hood Phillips, Constitutional Law (5th ed., 1973), 66 - 76.

32 Ibid., 75.

33 It is not intended to enter into an examination and analysis of the divergent views hitherto stated for the reasons stated in n. 22 p.192, ante. In Fiji there is a written constitution which defines the manner in which the legislative bodies are to operate. Hence to enact legislation, or even to amend such procedures as defined by the Constitution, as will be seen (see pp. 206 et seq., post) the Fiji Parliament is bound to follow the procedures specified by the Constitution. Hence these opposing views will not be analysed further.

the Parliament of which Dicey wrote. A state may be sovereign and yet have a legislature which is not unlimited and its legislation may be subject to judicial review. Thus the case Harris v Donges [34] represents an important stage in the process of delimitation of the legal doctrine of parliamentary sovereignty; it was a recognition by a Commonwealth Court (as it then was) of the principle that the powers of a sovereign legislature may be legally limited by the requirements of "manner and form".

In this case a South African Court was asked to adjudicate upon the validity of an Act passed by the South African legislature. The South Africa Act, 1909, provided that certain sections of that Act could be changed only by a statute passed with a specially prescribed majority. These were known as the "entrenched sections". The two which directly concerned the case at hand were sections 35 and 152. [35] In 1951 the Separate Representation of Voters Act was passed by the House of Assembly and the Senate sitting separately. It also received the Governor-General's assent and was therefore officially enrolled. When the validity of this Act of 1951 was questioned the court had to decide two issues. The first concerned the structure, mode of legislation and powers of the Union Parliament. Secondly, it had to decide the relationship between the Court and the Parliament.

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34 [1952] T. L. R. 1245.

35 S. 35 required the passage of such an Act by a joint sitting of the two Houses and on the third reading to secure a majority of at least two-thirds of the members at such joint sitting.

S. 152 was the amendment section, and it too required that a bill amending the provisions, inter alia, of section 35 to be passed in the same way - that is to be at a joint sitting and to secure the support of at least two-thirds of the members present.

It was contended for the Minister, in support of the Act, that the answer to the questions raised was determined by the doctrine of parliamentary sovereignty in the United Kingdom. It was argued that the Union Parliament had been created as an exact replica of the United Kingdom Parliament except that prior to the passing of the Statute of Westminster there existed certain fetters upon the legislative powers of the Union Parliament, including the fetters of the entrenched provisions. After 1931 all the fetters on the legislative powers were removed and the courts in South Africa were in exactly the same position as English courts in relation to parliamentary legislation. In other words, they could not question the validity of an Act of the Union Parliament, in this case the 1951 Act.

The Court, in rejecting the argument, said [36] that the contention

> seems to me to be based on the fallacy that a Dominion Parliament must necessarily be a replica of the British Parliament, despite the fact that all Dominion Parliaments have Constitutions which define the manner in which they must function as legislative bodies. There is nothing in the Statute of Westminster which in any way suggests that a Dominion Parliament should be regarded as if it were in the same position as the British Parliament.

Thus the Court accepted, contrary to the argument of the Minister, that the Union Parliament was different from the British Parliament. The Court seems to have laid stress on the fact that the Union Parliament was created by a specific document, namely the South Africa Act which was a statute of the United Kingdom Parliament.

Having observed that[37] "all Dominion Parliaments have

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36 [1952] 1 T.L.R. 1245, 1258, per Centlivres, C.J.

37 Idem.

Constitutions which define the manner in which they must function as legislative bodies", the learned judge stated:[38]

> It is that Act [the South Africa Act] and not the Statute of Westminster which prescribes the manner in which the constituent elements of Parliament must function for the purpose of passing legislation. While the Statute of Westminster confers further powers on the Parliament of the Union, it in no way prescribes how that Parliament must function in exercising those powers.

The Court made it clear that it was by reference to the exact terms of that document, namely the South Africa Act 1909 (i.e. the Constitution) that the question in issue had to be resolved. The Court further stated that[39] "it is clear that Parliament means Parliament functioning in accordance with the South Africa Act".

The Court thus held that the South African Parliament differed from the Imperial Parliament in regard to both its powers and the mode of legislation. It was the latter difference that was really the decisive issue in this case. The Court recognised that, having regard to the position of the Union Parliament at the time of its inception, the provisions of the entrenched sections were part of the definition of the Union Parliament and not a limitation upon the powers of an exclusively bicameral Parliament, which could be assumed to function in the same way as the United Kingdom Parliament. The learned Chief Justice said:[40]

> In my opinion one is doing no violence to language when one regards the word 'Parliament' as meaning Parliament sitting either bicamerally or unicamerally

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38 Ibid., 1259. (Emphasis added).
39 Idem.
40 Ibid., 1258.

> in accordance with the requirements of the South Africa Act .... There is, in my opinion no justification for reading the words 'Parliament of a Dominion' in the statute as meaning, in relation to the Union, Parliament functioning only bicamerally.

The Court then went on to inquire whether the Statute of Westminster had in any way altered the Union Parliament's method of enacting valid legislation. It was held that the Statute of Westminster did not change the definition and mode of legislation of the Union Parliament as set out in the South Africa Act. Having arrived at the conclusion that the entrenched sections had been left intact by the Statute of Westminster, the Court was of the opinion that it had the necessary powers and accordingly held the whole of the 1951 Act to be invalid as not having been passed in the manner and form provided for by the entrenched provisions of the South Africa Act 1909.

This decision, it is submitted, is in conformity with the principles propounded by the Privy Council in McCawley v The King.[41] In that case Lord Birkenhead L. C. in delivering the judgement of the Privy Council stated:[42]

> The first point which requires consideration depends upon the distinction between constitutions the terms of which may be modified or repealed with no other formality than is necessary in the case of other legislation, and constitutions which can only be altered with some special formality, and in some cases by a specially convened assembly.

His Lordship called the former types of constitution "uncontrolled" and the latter "controlled". However, his Lordship did observe:[43]

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41 [1920] A.C. 691.

42 Ibid., 703. (Emphasis added).

43 Ibid., 704.

> Nor is a constitution debarred from being reckoned as an uncontrolled constitution because it is not, like the British constitution, constituted by historic development, but finds its genesis in an originating document which may contain some conditions which cannot be altered except by the power which gave it birth. It is of the greatest importance to notice that where the constitution is uncontrolled the consequences of its freedom admit of no qualification whatever. The doctrine is carried to every proper consequence with logical and inexorable precision.

This was a case where a Queensland statute, passed by the ordinary process, conflicted with the Constitution Act 1867. It was held that the Constitution placed no restriction on the manner in which or the extent to which the law-making power could be exercised. It was recognised, however, that a Constitution may impose limitations as to the powers of the legislature in enacting laws. It is submitted that the Privy Council accepted that had there been conditions attached to the law-making powers of the Legislature of Queensland, the Legislature would not have been able to ignore them and the decision would have been different.

This was the position in the case of Attorney-General for New South Wales v Trethowan.[44] The Constitution Act 1902, enacted by the legislature of New South Wales, was amended in 1929, by adding section 7A, which provided that no Bill for abolishing the Legislative Council should be presented to the Governor for assent until it had been approved by a majority of the electors voting upon a submission to them made in accordance with the section. The same provision was to apply to a Bill to repeal the section. In 1930 both Houses of the Legislature passed two bills, one to repeal section 7A and the other to abolish the Legislative Council. It was intended to present the Bills for

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44 [1932] A.C. 526.

assent.

By section 5 of the Colonial Laws Validity Act 1865, the legislature of the State had full power to make laws regarding the constitution, powers and procedure of the Legislature, provided the laws were passed in such "manner and form" as might from time to time be prescribed by any Act of Parliament, Letters Patent, Order in Council, or Colonial law in force in the Colony. It was held by the Judicial Committee that the whole of section 7A of the Constitution Act 1902 was within the competence of the legislature of the State under section 5 of the Colonial Laws Validity Act 1865, and that the provision that Bills of that nature must be approved by the electors before being presented was a provision as to "manner and form" within the meaning of the proviso of the said section 5. Accordingly, it was held that the Bills could not lawfully be presented unless and until they had been approved by a majority of the electors.

It is submitted that although the question in that case related to a subordinate legislature, the principle is of general application in respect of "controlled" legislatures where there are specific constitutional provisions or conditions governing the manner and form of legislation.

This question relating to the manner and form of legislation came squarely before the Judicial Committee in a direct way in 1964 in respect of the "sovereign" legislature of Ceylon (as it then was). This was the case of Bribery Commissioner v Ranasinghe.[45] This decision is of utmost importance to the Dominion of Fiji, not only because it concerns a "controlled" legislature analagous to Fiji's but also because the Judicial Committee which decided it is the ultimate judicial authority

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45 [1965] A.C. 172.

as far as Fiji is concerned. Accordingly it warrants a close examination.

The Constitution of Ceylon (as it stood in 1964)[46] could only be amended in accordance with section 29(4) thereof, the substance of which was that an amendment required an endorsement of a certificate by the Speaker that the number of votes cast in favour of the amendment in the House of Representatives amounted to not less than two-thirds of its members. The certificate was to be conclusive evidence thereof and could not be questioned in any court of law.

The Bribery Act 1954 established a system of tribunals for the trial of public servants on charges of corruption and since this was thought to be an amendment to the Constitution in that the members of the tribunals were not appointed by the Judicial Service Commission (the constitutional body charged by section 55 of the Constitution with the duty of appointing judicial officers) this Act was passed by the special procedure prescribed by section 29(4). The Bribery Act also specified that

> (1) Every provision of this Act which may be in conflict or inconsistent with anything in the Ceylon (Constitution) Order in Council, 1946 shall for all purposes and in all respects be as valid and effectual as though that provision were in an Act for the amendment of that Order....
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> (2) Where the provisions of this Act are in conflict or are inconsistent with any other written law, this Act shall prevail.

In 1958 the Bribery Amendment Act was passed. It provided for the setting up of special Bribery Tribunals the members of

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46 The provision has no application since Ceylon became a Republic in 1970.

which were appointed by the Governor-General instead of the Judicial Service Commission as was provided for by the Constitution. Henceforth all bribery prosecutions were to be heard by these tribunals instead of by the ordinary courts. This Act of 1958 was not passed by the special procedure prescribed by section 29 (4) of the Constitution but by the ordinary process. The question for determination was whether the members of the tribunal appointed under the 1958 Act by the Governor-General and not the Judicial Service Commission as required by the Constitution, were lawfully appointed.

The Supreme Court of Ceylon held that the members of the Tribunal were judicial officers and that they were not lawfully appointed. The Privy Council affirmed the decision of the Supreme Court and held that the 1958 Amendment Act was in conflict with the provisions of the Constitution relating to the appointment of judicial officers and since it was not passed by the special procedure prescribed under the section 29 (4) it was void to the extent of such conflict. This was so despite the fact that the 1958 Act was expressly said to be an amendment of the 1954 Act which was itself passed by the special procedure prescribed by section 29 (4). In this case the Judicial Committee posed the pertinent question: [47]

> When a sovereign Parliament has purported to enact a Bill and it has received the Royal Assent, is it a valid Act in the course of whose passing there was a procedural defect, or is it an invalid Act which Parliament had no power to pass in the manner?

The Bribery Commissioner argued that if an Act had been passed by both Houses of Parliament and received the Royal

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47 [1965] A.C. 172, 196.

Assent, it was a valid enactment and had the full force of law. It was said that a defect in procedure did not make the Act invalid in view of the fact that the Ceylon Parliament was a sovereign legislature. It was contended that section 29 (4) - which required the special procedure of enactment - was clearly only a procedural requirement in relation to the exercise of the legislative power and was not a requirement which affected legislative competence. The argument concluded with the assertion that once a Bill had received the Royal Assent, it was no longer competent for the courts (except in cases of express provisions like sections 29 (2) and 29 (3))to go behind the question of the assent so given.

Their Lordships' answer, after referring to McCawley v The King,[48] was that:[49]

> [A] legislature has no power to ignore the conditions of law-making that are imposed by the instrument which itself regulates its powers to make law. This restriction exists independently of the question whether the legislature is sovereign ... or whether the Constitution is 'uncontrolled'....

Further, their Lordships stated:[50]

> Such a Constitution can, indeed, be altered or amended by the legislature, if the regulating instrument so provides and if the terms of those provisions are complied with: and the alteration or amendment may include the change or abolition of those very provisions. But the proposition which is not acceptable is that a legislature, once established, has some inherent power derived from the mere fact of its establishment to make a valid law by the resolution of a bare majority which its own constituent instrument has said shall not

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48 Supra.

49 [1965] A.C. 172, 197.

50 Ibid., 198.

> be a valid law unless made by a different type of majority or by a different legislative process.

Their Lordships distinguished McCawley's case thus:[51]

> There the legislature, having full power to make laws by a majority, except upon one subject that was not in question, passed a law which conflicted with one of the existing terms of its Constitution Act. It was held that this was valid legislation, since it must be treated as pro tanto an alteration of the Constitution, which was neither fundamental in the sense of being beyond change nor so constructed as to require any special legislative process to pass upon the topic dealt with. In the present case, on the other hand, the legislature has purported to pass a law which, being in conflict with section 55 of the Order in Council, must be treated, if it is to be valid, as an implied alteration of the Constitutional provisions about the appointment of judicial officers. Since such alterations, even if express, can only be made by laws which comply with the special legislative procedure laid down in section 29 (4), the Ceylon legislature, has not got the general power to legislate so as to amend its Constitution by ordinary majority resolutions, such as the Queensland legislature was found to have under section 2 of its Constitution Act, but is rather in the position, for effecting such amendments, that that legislature was held to be in by virtue of its section 9, namely compelled to operate a special procedure in order to achieve the desired result.

The Commonwealth experience therefore shows that a Parliament can be bound by the manner and form of the legislative process, depending on whether it is a "controlled" or "uncontrolled" legislature. Hence a legislature has no power to ignore the conditions of law-making that are imposed by the instrument which itself regulates that body's power to make laws. As has been seen, a legislature does not have inherent power, from the mere fact of its establishment, to legislate by ordinary process

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51 Ibid., 198.

in relation to a matter on which its own constituent instrument requires that to be valid the law must be adopted by a different type of majority or by a different legislative process.

With this background, it may be useful to examine the position in Fiji as regards the manner and form of legislation.

The Position in Fiji as Regards "Manner and Form"

The Fiji Constitution is "controlled". The major provisions thereof may be modified, repealed or altered only after compliance with the special formality prescribed by sections 67 and 68 of the Constitution. Whether the United Kingdom Parliament could or could not fetter itself by providing for new rules regarding the process of law-making, is irrelevant to Fiji where we are concerned with a different state of affairs. We are not concerned with rules made by the Fiji Parliament prescribing the process of law-making. On the contrary, we are concerned with the case of a Parliament which was validly fettered in the process of law-making by the prescription[52] of another body[53] which was superior to the Fiji legislature at the time of its "enactment". It was this very "enactment" which gave birth to the Fiji Parliament and which prescribes the rules regarding the manner and form of legislation.

As has been said[54] a Parliament can be measured against

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52 Fiji became an independent Dominion by the Fiji Independence Act 1970 (U.K.). The Constitution is scheduled to the Fiji Independence Order, being an Order made by The Queen's Most Excellent Majesty in Council.

53 The United Kingdom Parliament and the Queen in Council.

54 Pp. 193 et seq., ante.

two concepts - the "static" and the "dynamic".[55] Section 30 of the Constitution of Fiji describes the Fiji Parliament as ordinarily constituted - that is Her Majesty, a House of Representatives and a Senate. This is classed as a "static" concept, section 30 having defined the structure of Parliament. However, there is a functional distribution of powers of legislation when one sees the Fiji Parliament as a "dynamic" concept, that is as a law-making body. There are provisions in the Constitution, as will be presently seen, which prescribe the rules regarding the manner of legislation. The rules so made are part of the "dynamic" concept of the Fiji Parliament as it was created by the Constitution. This is the functional aspect of Parliament. Thus ordinarily, a bill passed by both Houses of Parliament and assented to by the Governor-General on behalf of Her Majesty, becomes law.[56] In such cases an ordinary majority is required in each House.[57]

When, however, the subject-matter of legislation falls within the entrenched sections,[58] one of four different procedures have to be adopted by both Houses of Parliament, depending on which part of the entrenched sections are to be amended.

(1) Any legislation affecting the first type of entrenched matter must be passed by both Houses of Parliament and be supported at the third reading in each House by not less than three-quarters of all the members of each House.[59]

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55 Professor Cowen's terms discussed at p.193, ante, are adopted here.

56 Constitution, s. 53.

57 Ibid., s. 59; but certain measures falling within s. 61 to 65 preclude the Senate from refusing to pass the measures referred therein, see p.122, ante.

58 Ibid., ss. 67 and 68.

59 Ibid., ss. 67 (2) and 68 (1).

(2) Any legislation affecting the second type of entrenched matter must be passed by both Houses of Parliament and be supported at the third reading in each House by not less than two-thirds of all the members of each House.[60]

(3) Any legislation affecting the third type of entrenched matter must not be passed until three months after there has been laid before each House of Parliament a copy of a report of a Royal Commission appointed after the first general election of members of the House of Representatives held after 10 October 1970[61] for the purpose of making recommendations as to the most appropriate method of electing members of the House of Representatives. In addition to this requirement, if a bill comes before the Houses touching the subject-matter so entrenched, then in each House the bill must be supported at the third reading by three-quarters of all the members of the House.[62]

(4) Any legislation affecting the fourth type of entrenched matter must be supported at the third reading by not less than three-quarters of all the members of each House. In addition to this requirement, at least six of the eight members of the Senate who are nominated by the Governor-General, acting on the advice of the Great Council of Chiefs,[63] must at the third reading also

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60 Ibid., s. 67 (3).

61 The date when the Constitution came into force.

62 Constitution, s 67 (4).

63 The Senate consists of twenty-two members appointed under s. 45 (1) of the Constitution, being:
(a) Eight appointed by the Governor-General acting in accordance with the advice of the Great Council of Chiefs;
(b) Seven appointed by the Governor-General acting in accordance with the advice of the Prime Minister;
(c) Six appointed by the Governor-General acting in accordance with the advice of the Leader of the Opposition; and
(d) One appointed by the Governor-General acting in accordance with the advice of the Council of Rotuma.

support the proposed legislation.[64]

To legislate validly on these subjects the Fiji Parliament is legally bound to follow one of the procedures prescribed in the entrenched sections.[65]

This may best be illustrated by an example. Under section 68 (2) of the Constitution, a bill to amend the Native Land Trust Board Ordinance affecting native land falls within the subjects entrenched by that section. Under section 12 of the Native Land Trust Board Ordinance a lessee of native land cannot mortgage his land without the consent of the Native Land Trust Board. Suppose a Bill were presented to Parliament exempting from section 12 all mortgages where the consideration does not exceed $100.00. Such a Bill must secure at the third reading the support of not less than three-quarters of all the members of the House of Representatives. In the Senate the Bill must secure at the third reading the support of both (a) three-quarters of all members, and (b) at least six of the eight Senators who were nominated by the Governor-General on the advice of the Great Council of Chiefs.[66] Thus, if all the fifty two members of the House of Representatives[67] support the Bill and nineteen of the twenty-two members of the Senate support it, but the three remaining members of the Senate opposing the Bill happen to be Senators nominated on the advice of the Great Council of Chiefs the Bill cannot be adopted because the manner

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64 Constitution, s. 67 (5) and 68 (2).

65 Bribery Commissioner v Ranasinghe [1965] A.C. 172; Harris v Donges [1952] T.L.R. 1245; Attorney-General for New South Wales v Trethowan [1932] A.C. 526; McCawley v The King [1920] A.C. 691.

66 See n. 63, p.208, ante.

67 There are 52 members in the House of Representatives (Constitution s. 32) and 22 members in the Senate (Constitution s. 45).

and form provisions of sections 67 and 68 would not have been complied with.

Accordingly, it is submitted that since a legislature has no power to ignore the conditions of law-making imposed by the instrument which itself regulates the legislature's power to make laws, the Fiji Parliament is bound to follow the "manner and form" of legislation provided for by the Constitution.[68] Also, it has already been seen that the validity of the legislation can be questioned by the courts and declared void. This obviously cuts across at least one of the basic characteristics postulated by Dicey regarding parliamentary sovereignty in the United Kingdom. Hence one is left with the problem of defining sovereignty and identifying the sovereign in Fiji.

D. The Question of Sovereignty in Fiji

(1) General

In discussing the "supremacy" or "sovereignty" of Parliament in relation to Fiji, a distinction must be drawn between legislative supremacy and constitutional supremacy.

In the United Kingdom legislative sovereignty resides in Parliament. This location of sovereignty, it is submitted, is not a universal characteristic of the constitutions of the world. It is a peculiar accident of English history. The doctrine of legislative supremacy developed in England without any written constitution or any comparable fundamental law under which the validity of a statute could be judged. As has been seen,[69] Parliament established

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68 See pp. 206 et seq., ante.

69 Pp. 161 et seq., ante, and pp. 277 et seq., post.

itself as the sole legislative authority in England by the end of the Tudor period after a long struggle with the Crown. During the Stuart period the Commons provided the impetus for the popular movement against absolute monarchy. The Commons contested the royal claim to sovereignty, and the contest was decided in favour of Parliament by the ensuing Civil War and the Revolution.[70] It has already been seen that Parliament in England is supreme in that statutes affecting constitutional rights stand on no higher footing than other enactments. Parliament may enact, amend or repeal any statute dealing with any subject-matter whatsoever, in the same manner as ordinary legislation. In other words, there is no legal limitation upon the legislative powers of the English Parliament.

Constitutional supremacy, on the other hand, is a doctrine applied to written constitutions which create the various organs of government and mark out the limits of their respective powers, including those of the legislature. It also determines the inter-relationship of the various principal organs of government. All such organs, including the legislature, are bound to observe the provisions of the Constitution. All their actions and exercises of powers are tested against the provisions of the Constitution. In this sense it is a body of fundamental laws. Also it is hierarchically superior to rules of law enacted by the legislature except in so far as those rules have been made in conformity with the provisions of the Constitution, as regards both the content and the manner and form of legislation.

It is in this context that the question whether the Fiji Parliament is as powerful and as absolute as the Parliament described by Dicey must be answered. At the outset, it must be realised that the Fiji Parliament is a creature of the Constitution and accordingly enjoys only such powers as the Constitution has bestowed upon it.

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70 Anson, op. cit., Chs. 2, 6 - 9 and pp.153 - 198; Fielden, op. cit., Chs, 2 - 5.

One of the basic attributes of sovereignty or supremacy of Parliament, as understood in English jurisprudence, is the power to enact legislation on any subject-matter whatsoever.[71] Cases such as Harris v Donges[72] have accepted limitations as to the manner and form of legislation being created by a Constitution, but they have not established that Parliament was limited in its legislative powers as regards the content of legislation. It is submitted that it is on this latter point that the Fiji Parliament diverges from its United Kingdom counterpart.

Historically, there were certain legal limitations on the powers of Fiji's colonial legislature. These included its legislative incapacity under the doctrine of repugnancy as contained in the Colonial Laws Validity Act 1865 and the uncertain scope of the doctrine invalidating legislation having extra-territorial effect.[73] These limitations, however, were removed by the Fiji Independence Act 1970.[74]

Since 10 October 1970, the legislative power of Fiji's Parliament is derived from the Constitution creating it. Accordingly, the Fiji Parliament can do nothing beyond the limits, if any, set by the Constitution. Legislative power is conferred by section 52 of the Constitution which provides:

> Subject to the provisions of the Constitution, Parliament may make laws for the peace, order and good government of Fiji.

Thus, in the exercise of its ordinary power to legislate, the Fiji Parliament is subject to two limitations:

(i) The legislation must not infringe the provisions of the

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71 Pp.188 et seq., ante.

72 [1952] T.L.R. 1245.

73 See Appendix I, p. 717 , post.

74 Ss. 1, 2, 3 and 4 of First Schedule to the Act.

Constitution.

(ii) The apparent limitation that legislation must be for "the peace, order and good government of Fiji" and no other purpose.

(2) Legislation must not infringe the provisions of the Constitution

The first chapter of the Constitution makes provision for the supremacy of the Constitution over all other laws. Section 2 expressly provides for the Constitution being the supreme law of the land and if any other law is inconsistent with the Constitution, that other law shall, to the extent of the inconsistency, be void.

Chapter III of the Constitution contains provisions for the protection of fundamental rights and freedoms of the individual.[75] Accordingly Parliament in Fiji cannot make a law in contravention of the fundamental rights and freedoms provided for in the Constitution. Section 15 expressly prohibits the enactment of any law that is discriminatory either of itself or in its effects. Any legislation which so contravenes this provision shall to the extent of its inconsistency with this provision be void.[76]

Sovereignty necessarily implies a power to confer and take away citizenship. On this matter the Parliament of Fiji has been given very wide powers in section 25 of the Constitution. Wide though the powers may be, they are not as unfettered as the powers of the British Parliament. One obvious check on the power is imposed by section 25 (b) of the Constitution.[77] For instance, Parliament may not deprive a person of his Fiji citizenship if that

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75 They are equivalent to a comprehensive Bill of Rights.

76 Cf. Akar v Attorney-General for Sierra Leone [1970] A.C. 853.

77 S. 25 (b) provides:
Parliament may make provision ...
(b) for depriving of his citizenship of Fiji any person who is a citizen of Fiji otherwise than by virtue of section 19, 20 (2), 21 or 22 of the Constitution;

person was born in Fiji and was a citizen of the United Kingdom and Colonies before 9 October 1970.[78] In addition, Parliament in Fiji cannot make a law with respect to the termination of citizenship which would make an invidious discrimination between one citizen and another in like circumstances.[79] These show that the power with respect to termination of citizenship, though apparently very wide, is not without limitation. These are merely illustrations of the limitations on the power of the Fiji Parliament in relation to the content of legislation. There are other limitations.[80]

Even within its own legal sphere of activity the Parliament of Fiji is not free from outside control. The Supreme Court of Fiji can question the reasonableness or desirability of laws in certain spheres. For instance, it is submitted, the reasonableness of a legislation affecting fundamental rights can undoubtedly be examined by the Supreme Court.[81] Thus under section 15 of the Constitution there is a prohibition against the enactment of discriminatory law. However, there is an exception which provides that a discriminatory law is permissible where the nature of the discrimination and the special circumstances surrounding it are such that it is "reasonably justifiable in a democratic society".[82] It is submitted that whether legislation is reasonably justifiable in a democratic society will ultimately be a question for judicial determination and assessment. In other words, whether the legislation which falls under section 15 (3) (e) strikes a proper balance as being reasonably justifiable or not

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78 Constitution, ss. 19 and 25 (b). But cf. s. 25 (e).

79 Ibid., s. 15.

80 E.g., Ibid., ss. 37, 70, 91, 120 and 129 dealing respectively with membership in the House of Representatives, prorogation and dissolution of Parliament, tenure of office of judges; withdrawals from Consolidation Funds or other public funds and appointment to certain offices.

81 The subject of fundamental rights is treated in greater detail elsewhere; see pp. 427 et seq., post.

82 S. 15 (3) (e). For a further treatment of this phrase see pp. ? et seq., post.

in a democratic society is for the Court to determine. If it shall appear to the Court that the law fails to strike a proper balance, it can declare the law to be void.[83]

It can therefore be said that under the Fiji Constitution legislative sovereignty is limited at least with respect to the fundamental rights of a citizen. First, the provisions curtail the legislative choice as to the law's ends and means. Secondly, they subject the decision of the legislature to judicial review.

(3) "Peace, Order and Good Government of Fiji"

This phrase "peace, order and good government" has been a conspicuous feature in Imperial statutes conferring legislative powers on colonial legislatures and later on a few Dominion legislatures.[84] Although this phrase has been judicially considered in various cases by both the Privy Council and Colonial and Commonwealth courts, its component parts have never been fully analysed to determine their full implications and meaning. Nonetheless it has been held that the words "peace, order and good government" connote, in British constitutional language, the widest law-making powers appropriate to a sovereign legislature.[85]

It is submitted, however, that the Fiji Constitution requires as a criterion of validity that legislation must not only be for peace, order and good government but it must in addition be so in relation to Fiji. The enactment must be pointed to or aimed at being not only for the "peace, order and good government" but also "of Fiji". In other

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83 As in Akar v Attorney-General for Sierra Leone [1970] A.C. 853.

84 E.g., New Zealand.

85 Ibralebbe v The Queen [1914] A.C. 900, 923.

words it is against the background of Fiji that one must assess whether legislation is for peace order and good government. It is only when legislation comes within the ambit of this phrase that the Parliament of Fiji has plenary powers and ultimate discretion of enactment.[86]

If the legislation is within the general scope of the affirmative words which bestow the legislative powers, and provided it does not violate other provisions of the Constitution, the courts must inquire no further. In R. v Burah[87] the Privy Council declared:

> The established Courts of Justice, when a question arises whether the prescribed limits have been exceeded, must of necessity determine that question; and the only way in which they can properly do so, is by looking to the term of the instrument by which, affirmatively, the legislative powers were created, and by which, negatively, they are restricted.

This is not to say, however, that the courts can investigate the intentions or policy of legislation to enquire whether it would secure peace, order or good government. It is submitted with respect, that Halsbury, L. C. was correct when he made the following observation:[88]

> [I]t appears to be suggested ... that if a Court of law should come to the conclusion that a particular enactment was not calculated as matter of fact and policy to secure peace, order and good government, that they would be entitled to regard any statute directed to those objects, but which a Court should think likely to fail of that effect, as ultra vires and beyond the competency of the Dominion Parliament to enact.
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> Their Lordships are of opinion that there is not the least colour for such a contention.

This does not alter the submission that to be valid legislation in Fiji must have as its aim "the peace, order and good government of Fiji".

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86 R v Burah (1878) 3 A.C. 889; Riel v The Queen (1884) 10 A.C. 675.

87 R v Burah (1878) 3 A.C. 889, 904.

88 Riel v The Queen (1884) 10 A.C. 675, 678.

Such a question was directly raised by Evatt, J. in Trustees, Executors and Agency Coy v Federal Commissioner of Taxation.[89] His Honour specifically posed the question and answered it in relation to the New Zealand Parliament. However, it is just as relevant to the position of the Fiji Parliament inasmuch as section 53 of the New Zealand Constitution Act 1852 (as it stood until November 1973) was mutatis mutandis the same as section 52 of the Fiji Constitution. It dealt with "peace, order and good government of New Zealand". His Honour said:[90]

> Could the Dominion of New Zealand, apart from section 3 of the Statute of Westminster, make punishable within its borders an assault committed upon French soil by a Frenchman upon a Frenchman?
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> ... [I]t would, in my opinion, be beyond power. But this is not because non-Dominion matters are dealt with by the law. The true reason for concluding that such a law is ultra vires the Dominion, is to be found in answering the relevant question: Can it be regarded as a law for the peace, order, and good government of New Zealand? In truth the conduct aimed at would bear no relation to New Zealand, and the law could forward its welfare in no conceivable way. In a proper case, which must necessarily be a very rare case, the Courts of the Dominion would be bound to pronounce a law invalid upon this ground, which is firmly founded upon the very words used in the New Zealand Constitution.

Although his Honour said "apart from section 3 of the Statute of Westminster", it will be seen that this phrase has no bearing on the generality of what was said.

His Honour proceeded to deal with the position of a Dominion Parliament, like that of the Commonwealth of Australia, where the authority to legislate for peace, order and good government related

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89 (1933) 49 C. L. R. 220.

90 Ibid., 235.

to the subject matters enumerated therein, but added:[91]

> In the case of the New Zealand Parliament, however, this additional complication does not arise, because, so long as the peace, order and good government of New Zealand are in some way bound up with the law possessing non-New Zealand elements, the precise ground of concern need not be described, classified, or even stated. For such Parliament has a general jurisdiction over peace, order and good government, and there is no other competing Legislature within that Dominion.

Later his Honour stated:[92]

> (1) The mere exhibition of non-territorial elements in any challenged legislation does not invalidate the law. (2) The presence of such non-territorial elements may however call attention to the necessity for enquiring whether the challenged law is truly a law with respect to the 'peace, order and good government' of the Dominion - the words employed in the constitutional statute to define and limit the legislative power. (3) It is the duty of the Courts of the Dominion to make this enquiry in a proper case. (4) The test is not quite, as Sir John Salmond suggested, whether the law is a 'bona fide exercise of the subordinate legislative power' (Law Quarterly Review, Vol. 33, 122) because the bona fides of the exercise of legislative power cannot be impugned in the Dominion's own Courts. (5) The test is whether the law in question does not, in some aspects and relation, bear upon the peace, order and good government of the Dominion, either generally or in respect to specific subjects. (6) If it does not bear any relation whatever to the Dominion, the Courts must say so and declare the law void. If it bears any real or substantial relation, then it is a law for the peace, order and good government of the Dominion.

It is to be noted that before setting out those propositions, Evatt, J. was discussing[93] "those Dominions where section 3 of the Statute of Westminster has not been applied 'as part of the law' ". But it is submitted that what was said by his Honour was of general application

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91 Ibid., 237.

92 Ibid., 240.

93 Idem. The question of extra-territorial legislation and its relation to s. 3 of the Statute of Westminster is relevant here. However, such a question has been more conveniently dealt with in Appendix I. see p.717, post.

and that section 3 of the Statute of Westminster [94] in no way affects the position in view of the fact that even before the enactment of the Statute of Westminster every Dominion legislature had power [95] to make laws having extra-territorial operation. [96] The "qualifying" remarks of Evatt, J. may be ignored; they in no way diminish the correctness of his observations as to the power of the Dominion Court to pronounce legislation ultra vires as not being for peace, order and good government. [97]

This question whether a New Zealand statute can be declared ultra vires as falling outside the ambit of the legislative competence of the New Zealand Parliament was squarely before the Supreme Court of New Zealand in R. v Fineberg. [98] In that case Fineberg was indicted before the Supreme Court of New Zealand with an offence under section 8 of the Crimes Act 1961. The substance of the charge was that on or about 19 June 1967, on board a Commonwealth ship on high seas, Fineberg attempted to murder another person. It was contended for the accused that section 8 of the Crimes Act was ultra vires the New Zealand Parliament because all laws made by the New Zealand Parliament must be directed to promoting

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94 S. 3 of the Statute of Westminster 1931 provides:
It is hereby declared and enacted that the Parliament of a Dominion has full power to make laws having extra-territorial operation.

Cf. s. 3 of schedule 1 of the Fiji Independence Act 1970 (U.K.) which provides:
The legislature of Fiji shall have full power to make laws having extra-territorial operation.

95 As to whether they were limited or not see Appendix I, post, where the question of extra-territorial legislation and its relation to s. 3 of the Statute of Westminster is discussed.

96 Croft v Dunphy [1933] A.C. 156.

97 See Appendix I, post.

98 [1968] N.Z.L.R. 119.

"the peace, order and good government of New Zealand".[99] Section 8 of the Crimes Act 1961 was concerned with acts and omissions beyond New Zealand on board ships or aircraft. It provided that where any such act or omission would, if occurring in New Zealand, be a crime under New Zealand law, the person involved would be treated as if the act or omission had occurred in New Zealand and would be liable to the penalties laid down by New Zealand law. It was urged on behalf of the accused that this section did not promote the peace, order and good government of New Zealand and was therefore ultra vires.

The Crown's submission, inter alia, was that once the New Zealand Parliament had adopted section 3 of the Statute of Westminster, it became unnecessary that its laws (at least, those having extra-territorial operation) should meet the requirement of being for the peace, order and good government of New Zealand. Thus, it was submitted, that since section 8 of the Crimes Act 1961 operated extra-territorially it came within section 3 of the Statute of Westminster.[1]

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99 The source of the legislative power of the New Zealand Parliament in 1961 and 1967 was s. 53 of the New Zealand Constitution Act 1852 which provided:

> It shall be competent to the said General Assembly (except and subject as hereafter mentioned) to make laws for the peace, order and good government of New Zealand, ...

However, because of the doubts thrown on the strength and scope of this section the New Zealand Parliament by the New Zealand Constitution Amendment Act 1973, repealed s. 53 and replaced it by a new provision reading:

> 53 (1) The General Assembly shall have full power to make laws having effect in, or in respect of, New Zealand or any part thereof and laws having effect outside New Zealand.
>
> (2) Without limiting the validity of any Act of the General Assembly passed before the 25th day of November 1947 (being the date of the passing of the Statute of Westminster Adoption Act 1947), every Act of the General Assembly duly passed on or after that date, and every provision of every such Act, are hereby declared to be and always to have been valid and within the powers of the General Assembly.

1 See n. 94 p. 219 , ante.

The Court rejected the contention and held, relying on The British Columbia Electric Railway Company Limited v The King[2] that the effect of section 3 of the Statute of Westminster on section 53 of the New Zealand Constitution Act 1852 was to make the latter section read:[3]

> It shall be competent to the said General Assembly ... to make laws for the peace, order and good government of New Zealand, even though such laws have an extra-territorial operation.

A second contention on behalf of the Crown was that in any event section 8 of the Crimes Act 1961 was a law for the peace, order and good government of New Zealand. It was argued that this would be so if any purpose it achieved came within that description. This was opposed by the defence with the argument that if the court could point to one possible application of that section which did not involve the peace, order and good government of New Zealand, there arose a duty to hold the section ultra vires. The court, in rejecting the argument of the defence, held that although section 8 contained elements of extra-territorial operation, it nevertheless came 'within the general scope' of, and in some aspects and relations had bearing upon, the peace, order and good government of New Zealand. Hence it was held that the section was not ultra vires.

The legislative powers of the Fiji Parliament are essentially the same as those of the New Zealand General Assembly prior to 1973. Section 52 of the Fiji Constitution states that Parliament "may make laws for the peace, order and good government of Fiji". In addition, there is a specific provision[4] which states: "The legislature of Fiji shall have full power to make laws having extra-territorial operation". This, as will be noticed, is basically the same provision

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2 [1946] A.C. 527.

3 [1968] N.Z.L.R. 119, 123.

4 S. 3 of schedule 1 of the Fiji Independence Act 1970.

as section 3 of the Statute of Westminster.

The provisions of the Statute of Westminster were designed, it is submitted, to remove the generally accepted limitation and to resolve doubts as to the scope of the competence of Dominion legislatures to legislate extra-territorially. After the passage of the Statute of Westminster, any such legislative incompetence was extinguished. Henceforth, the Dominions were at liberty, without any fear of invalidity, to enact laws having extra-territorial operation.[5] Thus in British Columbia Electric Railway Co. Ltd. v The King[6] Viscount Simon, in delivering the judgement of the Privy Council, quoted with approval what was said by Rand, J. and Kellock, J. in the Supreme Court of Canada, namely:

> The specific investment of extra-territorial power by s. 3 of the statute of 1931 was designed no doubt to remove the generally accepted limitation of colonial legislative jurisdiction, ... and any such jurisdictional inadequacy no longer hampers the legislative freedom of the Dominion.

The Judicial Committee held that the effect of section 3 of the Statute of Westminster was to add to the legislative powers of the Canadian legislatures the words "even though such laws have an extra-territorial operation". This was also the view adopted in R v Fineberg.[7] The position is the same in Fiji. Section 3 of schedule 1 to the Fiji Independence Act 1970 is parallel to section 3 of the Statute of Westminster. Accordingly, there are no legal limitations whatsoever on the Fiji Parliament to enact legislation having extra-territorial operation, provided of course it falls within section 52 of the Constitution. Whatever may have been the position

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5 See Appendix I, p.717, post.

6 [1946]A.C. 527, 542.

7 [1968]N.Z.L.R. 119.

earlier, any limitations have been done away with by the enactment of the Fiji Independence Act. It is submitted that the effect of section 3 of schedule 1 is to make section 52 of the Constitution read:[8]

> Subject to the provisions of the Constitution, Parliament may make laws for the peace, order and good government of Fiji, even though such laws have an extra-territorial operation.

Thus the Independence Act removed any supposed incapacity of the Parliament of Fiji to pass legislation having extra-territorial effect, but, it is submitted, it did not overcome the limitation inherent in the phrase "peace, order and good government of Fiji".

It has been submitted that the power of the Fiji Parliament to make laws is confined to "peace, order and good government of Fiji". It is true that the courts have paid little attention to the actual words of the phrase. Instead the courts have concerned themselves with the general doctrine of legislative competence. Nevertheless, as has been seen, New Zealand and Australian courts have expressly accepted that limitations are imposed by this hallowed phrase.[9] The Privy Council has interpreted the phrase as authorising[10]

> the utmost discretion of enactment for the attainment of the objects pointed to.

The Judicial Committee emphasised how wide the powers are in Croft v Dunphy.[11]

> Once it is found that a particular topic of legislation is

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8 Adopting the decision in British Columbia Electric Railway Co. v The King, supra, and R v Fineberg, supra.

9 R v Fineberg, supra, and Trustees Executors case, supra.

10 Riel v The Queen (1884) 10 A.C. 675, 678 (Emphasis added). See also Chenard and Co. v Joachim Arissol [1949] A.C. 127, 132.

11 [1933] A.C. 156, 163.

> among those upon which the Dominion Parliament may competently legislate as being for the peace, order and good government of Canada ... their Lordships see no reason to restrict the permitted scope and such legislation by any other consideration than is applicable to the legislation of a fully Sovereign State.

It is a prerequisite that the legislation must have some relation to "peace, order and good government" of the country concerned.

Two possible opposing views may be taken in determining the validity of legislation of the Fiji Parliament. One view is that if the legislation in some way or other comes within the ambit of "peace order and good government of Fiji", it will be valid. The diametrically opposite view is that if even one possible application of it which did not involve the peace, order and good government of Fiji could be shown, there would arise a duty on the courts to hold the legislation concerned ultra vires. It has been seen that in no case would a court enter into the inquiry whether as a matter of fact or policy the legislations would secure peace, order and good government of Fiji.[12] Accordingly, it is submitted that in determining what the subject-matter or purpose or object of the legislation is, the sole question to be considered is the legal effect of the law. This it is submitted, would solve the major question.

This leads us to the further inquiry as to whether a law can be questioned on the ground of whether its legal effect attains the constitutional requirement. If the inquiry reveals that the legal effect would not have bearing in any conceivable way on Fiji or on the advancement of its peace, order and good government, the legislation ought to be held ultra vires. If, on the other hand, the law is found to involve Fiji's peace, order and good government, then despite the provisions containing non-Fiji elements, that law should be held to be intra vires.[13]

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12 P.216, ante.

13 Trustees Executors case, supra, and R v Fineberg, supra.

The legislatures of Fiji and New Zealand are in the same position in this respect. The phrase "peace, order and good government" by itself is very broad. It would be proper to concede that the phrase confers on the legislature concerned the widest law-making powers appropriate to any "sovereign legislature".[14] However, it is submitted, the addition of the words "of Fiji", or "of New Zealand" qualifies the earlier part of the phrase. As Dr A.M. Finlay, the Minister of Justice in New Zealand, referring to the New Zealand provision, said,"the sting is in the fourt part, the words 'of New Zealand'".[15]

Professor J.F. Northey has expressed doubts in regard to the New Zealand provision and its full implications in relation to the legislative competence of the New Zealand General Assembly.[16] The learned Professorobserved:[17]

> Most New Zealand lawyers would be prepared to acknowledge without much, if any, hesitation that the 1947 legislation removed all remaining limitations on the legislative competence of the General Assembly. But it is not altogether free from doubt. Section 53 enables the General Assembly to legislate for the 'peace, order and good government of New Zealand' ... but must all legislation relate to New Zealand's peace, order and good government to be valid? .... If the legislation had no connection with peace, order and good government, s. 3 of the Statute of Westminster would not necessarily save it from invalidity .... Though ... the New Zealand Constitution Act (is) to have that construction most beneficial to the 'widest amplitude of power' it is implicit in such statements that the powers in question may be too narrow to support some legislation.

These doubts were expressed by the learned author in 1965 and they foreshadowed the decision in R v Fineberg.[18]

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14 Ibralebbe v The Queen [1914] A.C. 900, 923.

15 New Zealand Parliamentary Debates (Hansard) 1973, at 5235.

16 The powers and competence of which were similar to the present position in Fiji; see n. 99 p.220, ante.

17 J.F. Northey, "The New Zealand Constitution" in A.G. Davis Essays in Law (1965), 149, 159. (Emphasis added).

18 Supra.

Those doubts, reinforced by that decision, led to the enactment of the New Zealand Constitution Amendment Act 1973. It is interesting to note what Dr. Finlay, the Minister of Justice, had to say in relation to the Bill. He stated:[19]

> (T)his Bill is concerned with such fundamental matters as the legislative powers of Parliament and the right of the courts to declare an Act of Parliament void and inoperative .... It is important legally in that it removes a fetter on our powers to make laws .... We are thus our own masters. In the meantime, however, until we do alter the New Zealand Constitution Act the powers of the New Zealand Parliament are defined and limited by section 53 of the New Zealand Constitution Act, which provides that Parliament may make laws 'for the peace, order and good government of New Zealand'....
>
> No court has ever suggested that it might strike down an Act of the New Zealand Parliament on the ground that the Act did not promote peace, order or good government. Those are three of the four constituent parts. The sting is in the fourth part, the words 'of New Zealand'. To be valid, it seems that any legislation must be regarded by the courts as sufficiently related to New Zealand to be for our peace, order and good government. The Statute of Westminster removed the supposed incapacity of Parliament to pass legislation having extra-territorial effect, but it did not get over this particular difficulty springing from the words of our English constitutional Act. The result is that the status of quite a number of Acts passed by the Parliament ... is uncertain.

It seems that Dr. Finlay also accepted the limitations of the New Zealand General Assembly in relation to matters not falling within the peace, order and good government of NewZealand. Accordingly in 1973 the New Zealand Parliament amended Section 53 by repealing it and enacting in its stand the provision that:

> The General Assembly shall have the full power to make laws having effect in, or in respect of, New Zealand or any part thereof and laws having effect outside New Zealand.[20]

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19 New Zealand Parliamentary Debates (Hansard) 1973 at 5235.

20 For the complete text, see n. 99, p.220 , ante.

In so doing, the New Zealand Parliament removed all doubts pertaining to any restriction that the phrase "peace, order and good government of New Zealand", may have had.

It can be asserted with confidence that as far as the subordinate legislatures were concerned the phrase "peace, order and good government" had a definite meaning. The validity of legislation was judged by reference to this phrase in many cases. As Sir Kenneth Roberts-Wray succintly put it:[21]

> It is now well established, particularly by the long line of cases ... on the vires of laws having extra-territorial operation, that the decisive and only test of validity of any law of a subordinate legislature is whether it is within the legislative powers granted. As a rule that poses the question whether the law can be regarded as one 'for the peace, order and good government of' 'the country concerned.

It is submitted that this has as much application to an independent country like Fiji as to a subordinate legislature. After all the phrase in question, either for a subordinate legislature or a "sovereign" legislature, has been widely used in the context of legislative competence. The rules of statutory interpretation support this view. Thus the same words or phrase, when used in Acts dealing with the same subject-matter, are taken to have the same meaning.[22] Furthermore an interpretation placed upon earlier legislation similar in scope is likely to be adopted when interpreting later statutes.[23] In addition, where a provision in an Act of Parliament which has received judicial inter-

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21 K. Roberts-Wray, Commonwealth and Colonial Law (1966), 369.

22 E.R. Ives Investments Ltd v High [1967] 2 Q.B. 379; Registrar of Restrictive Trading Agreements v W.H. Smith and Son Ltd. [1968] 1 W.L.R. 1541; see also Maxwell, Interpretation of Statutes (12th ed., 1969), 64 et seq., see further J.M. Knowles Ltd v Rand [1962] 1 W.L.R. 893, 896; Bracey v Read [1963] Ch. 88, 96; Fisher v Raven [1964] A.C. 210, 228.

23 Maxwell, op. cit., 71. See also Greaver v Tofield (1880) 14 Ch. D. 563, 571.

pretation is re-enacted in the same terms, the legislature is deemed to have adopted that interpretation[24] and the new legislation generally will be interpreted in the light of the earlier decision.[25]

In Fiji, the legislative powers were initially granted to the Colony on 2 January 1875 by Charter, clause iv of which defined the legislative competence as being "for the peace, order and good government of the Colony of Fiji". Subsequently, the various Letters Patent,[26] the Constitution Orders in Council[27] and finally the Independence Order in Council of 1970 all retained the same phrase. Accordingly, it is submitted that under the rules of statutory interpretation the phrase "peace, order and good government of Fiji" in section 52 of the Constitution must be given the same meaning as it has been in the cases already discussed. This is particularly so in regard to the Privy Council decisions because that body continues to be the highest judicial authority in Fiji.

It is worthy of note that some of the countries which became independent after 1933 (that is after the decision in Croft v Dunphy)[28] have abandoned the formula of "peace, order and good government". For instance, in India the legislative power is "to make laws".[29] Similarly Article 43 of the Constitution of Western Samoa states that:

> Parliament may make laws for the whole or any part of Western Samoa and laws having effect outside as well as within Western Samoa.

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24 Exparte Campbell, Re Cathcart (1870) L.R. 5 Ch. App. 703; Webb v Outrim [1907] A.C. 81.

25 Maxwell, op. cit., 73.

26 Those of 1880, 1904, 1914, 1916, 1929, and 1937.

27 Those of 1963 and 1966.

28 [1933] A.C. 156.

29 Art. 245 (1) of the Constitution of India.

New Zealand, as we have seen has also followed suit. It is submitted that at the very least there are doubts as to the legal implications of the phrase, "peace, order and good government of Fiji". This appears not only from the decisions and pronouncements of various courts but also from the actual practice of some countries[30] which have dropped the phrase completely and have adopted more definite, comprehensive and all-embracing terms. It is submitted that the Fiji Parliament ought also to take a similar step. The doubts surrounding the full implications of the phrase are sufficient reason for an amendment. Otherwise there is a risk illustrated by R. v Fineberg,[31] that there will be a challenge to the competence of the Fiji Parliament in relation to legislation which appears to have little or any bearing on the government of Fiji.

E. Conclusion

From the foregoing, it would appear that the Parliament of Fiji does not satisfy the two tests of sovereignty formulated by Dicey, and it cannot accordingly claim to be sovereign in the sense described by him. The Fiji Parliament is not a sovereign body in the sense of being uncontrolled with unlimited powers. The sovereignty which can be claimed by the United Kingdom Parliament cannot be claimed by the Fiji Parliament. The Fiji Constitution has not adopted the doctrine of parliamentary supremacy but, as has been seen, constitutional supremacy. The legislature in Fiji is bound to follow the provisions of the Constitution and each action and exercise

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30 E.g. India, Western Samoa, New Zealand and Tanzania. Tanzania like New Zealand, had such a phrase initially in its Constitution Act; but later amended the same by dropping the phrase in subsequent Constitution Acts.

31 Supra.

of power is tested against its provisions. In this sense the Constitution is hierarchically superior to rules of law enacted by the legislature except in so far as those rules have been made in accordance with the provisions of the Constitution. Thus to the extent that the Fiji Constitution imposes limitations upon the powers of the legislature, limitations which can not be altered or repealed except in the manner specified, the Constitution is supreme.

It is the function of the Courts to apply the principle of constitutional supremacy in Fiji because it is their function to determine the constitutionality of laws passed under the Constitution. The Constitution has conferred jurisdiction on the Supreme Court to decide these questions. The Courts are bound to treat the Constitution as the fundamental law and all questions of validity or invalidity of laws are to be tested against the provisions of the Constitution.

Accordingly, it is submitted, legal supremacy in Fiji ultimately resides in the Constitution. The Constitution certainly does not establish parliamentary supremacy as understood in English jurisprudence. It seeks to balance the claims of a pluralistic society. It has a Bill of Rights as a check on the illegitimate exercise of governmental and legislative powers, and it also has corresponding provisions for their enforcement.

The requirements of the entrenched provisions of the Constitution and the composition of the House of Representatives are such that no one racial group can be predominant in the multiracial society existing in Fiji. The entrenched provisions require either a two thirds or a three quarters majority for enacting certain laws; and no one racial group on its own can satisfy the requirements of the stipulated majorities.[32] Thus the Constitution in Fiji attempts to establish and

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32 There are 52 members in the House of Representatives, of which 22 are Fijians, 22 Indians and 8 who are neither Indian nor Fijian; (see p.113, ante). Hence no one racial group alone could comprise two-thirds or three quarters of all the members.

maintain an equilibrium not only between the state on the one hand and the individual on the other, but also amongst the ethnic groups of a pluralistic society. In such a constitution there is obviously very little place for legislative supremacy in the English sense. Thus in Fiji if there is an irreconcilable conflict between an Act of Parliament and a provision of the Constitution, the Constitution must prevail.

However, before the decision on constitutionality can be taken a preliminary issue must be resolved - is there an Act of Parliament? It is necessary therefore to decide whether what purports to be an Act of Parliament is truly the authentic expression of the will of the legislature.

CHAPTER VII

THE AUTHENTIC EXPRESSION OF THE WILL OF THE LEGISLATURE

A. Introduction

Notwithstanding the finding that in Fiji the issue of whether the Courts have the competence to determine the validity of Acts of Parliament on constitutional grounds appears to admit of a clear answer in the affirmative, there are other possible difficulties standing in the way of judicial review. These arise from technical common law rules, which if applied in Fiji with its "controlled" Constitution, may well have an unfortunate effect.

The question posing the greatest problem is the old chestnut concerning the competence of the courts to investigate what ex facie appears to be an Act of Parliament. In other words, are the courts entitled to enquire whether the "Act" is an authentic expression of the will of the Legislature?

In the United Kingdom the Courts do not recognise any judicial or other authority as having the right to treat an Act of Parliament as void or unconstitutional. The time is past when one might argue that an Act of the United Kingdom Parliament is void as being contrary to immutable principles of natural or common law.[1] At present, under the British Constitution, legislation of the United Kingdom Parliament can never be challenged as an excess of power.[2]

However, it is submitted, that there is a distinction to be drawn between an inquiry as to whether an Act of Parliament is ultra vires on the one hand, and an inquiry as to whether a document, purported to be an Act of Parliament, is in fact an authentic expression of the will of Parliament.

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1 D.V. Cowen, "Legislature and Judiciary" (1953) 16 M.L.R. 273, 274.

2 This must, however, be seen subject to the obligations of the

(1) Conclusiveness of Parliamentary Roll

In the United Kingdom the chief original source for Acts of Parliament were the Statute Rolls, consisting of enrolments in chancery and proceedings in Parliament. This was the position until 1849. Since 1849 there has been no "Roll" as such. Instead

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2 cont.

United Kingdom under the European Convention on Human Rights and the European Economic Community. For instance under the European Convention the Acts of the United Kingdom Parliament are now subjected to review by the European Commission of Human Rights according to a set of international norms. Thus the United Kingdom itself is liable to "afford just satisfaction to the injured Party" (Articles 28 - 32 and 50 of the Convention) if a "breach" of the European Convention is found; see D.R. Gilmour, "The Sovereignty of Parliament and the European Commission of Human Rights" (1968) Public Law. 62 63.

It is not intended to examine the position of the United Kingdom Parliament and the Courts in relation to the European Convention and the E.E.C., but see D. Thompson and N.S. Marsh, "The United Kingdom and the Treaty of Rome" (1962) II I.C. L.Q. 77; Cmnd. 3301 (1967), Legal and Constitutional Implications of United Kingdom Membership of the European Communities; J.D.B. Mitchell, " 'What Do You Want To Be Inscrutable For, Marcia?' or The White Paper on the Legal and Constitutional Implications of United Kingdom Membership of the European Communities" (1967 - 1968) 5 C.M.L. Rev. 112 esp. 116 - 125; U. Kitzinger, "The Realities of Sovereignty" in Britain and the Common Market (1967) 67 - 75; N.M. Hunnings, "Constitutional Implications of Joining the Common Market," (1968 - 1969) C.M.L. Rev. 60; Alan Campbell, Common Market Law (1969) esp. vol. 1, 56 - 57; J. D. B. Mitchell, "British Law and British Membership" (1971) 6 Europarecht 97; J.D.B. Mitchell, "Constitutional Aspects of the Treaty and Legislation Relating to British Membership" (1972) 9 C.M.L. Rev. 134 esp. 141 - 150; F.M. Auburn, "Trends in Comparative Constitutional Law" (1972) M.L.R. 129 esp. 133 - 139; J. Forman, "The European Communities Act 1972, The Government's Position on the Meaning and Effect of its Constitutional Provisions" (1973) 10 C.M.L. Rev. 39.

since 1849, the Queen's Printer makes two vellum prints authenticated by the Clerk of the Parliament, one of which is kept in the House of Lords and the other deposited in the Public Record Office. These are regarded as the definitive official copies. The significant question arises as to the conclusiveness of the enactment so "enrolled".

The general rule is that the Parliamentary Roll or vellum is conclusive. Thus in Edinburgh & Dalkeith Railway Co. v Wauchope,[3] Lord Campbell stated:

> All that a Court of Justice can do is to look to the Parliamentary roll; if from that it should appear that a bill has passed both Houses, and received the Royal assent, no Court of Justice can inquire into the mode in which it was introduced into Parliament, nor into what was done previous to its introduction, or what passed in Parliament during its progress in its various stages through both Houses.

This was a case where Wauchope claimed certain wayleaves and the matter was dealt with in a private Act of Parliament. He maintained that the provisions of that Act should not be applied because it had been passed without his having had notice as required by the Standing Orders. The Court rejected that contention.

Under this general rule the court would not allow a plea to the effect that an Act was obtained by fraud.[4] In the United Kingdom a court of law would not go behind what has been enacted by the legislature to consider whether the appropriate procedure of Parliament had been followed, or whether it arose out of incorrect information,

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3 (1842) 8 Cl. & F. 710, 723.

4 Waterford Railway Co. v Logan (1850) 14 Q. B. 672.

or indeed, out of fraud or actual deception of someone on whom the Parliament placed reliance. Even in those circumstances the court would accept the enactment as the law.[5] If there are any such circumstances present, it is not for the courts to take cognisance of these facts and declare the Act invalid; it is solely within the jurisdiction of the legislature to rectify the position. This view of the conclusiveness of an Act of Parliament has been so strong in the United Kingdom that there have been occasions on record when Bills containing amendments made by one House have accidentally received the Royal Assent before the amendments were agreed to by the other House. Parliament, under such circumstances, found it necessary to pass validating legislation to correct the "error".[6]

This principle of the conclusiveness of the Act as recorded has recently been reaffirmed and applied by the House of Lords in British Railways Board v Pickin.[7] In this case the plaintiff alleged, inter alia, that the passage of a private Act of Parliament had been fraudulently obtained by the Board and thus the rights secured under the Act by the Board were ineffective to deprive

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5 Hoani Te Heuheu Tukino v Aotea District Maori Land Board [1941] A.C. 308, 322; see also Earl of Shrewsbury v Scott (1859) 6 C.B.N.S. 1, 160; Lee v Bude and Torrington Junction Railway Co. (1871) L.R. 6 C.P. 576, 582; Labrador Co. v The King [1893] A.C. 104, 123.

6 Cowen, loc. cit., 275 and the example cited by the learned writer, i.e. 6 & 7 Vict. C. xxxvi (1843); 1 & 2 Geo. 4 C. xcv; and 7 Vict. C. xix. See further for discussion W.F. Craies, Statute Law (7th ed., 1971), 514 et seq.

7 [1974] A.C. 765.

the plaintiff of his land or proprietary rights. The House of Lords held that the courts had no power to disregard an Act of Parliament, whether public or private, nor had the courts power to examine proceedings in Parliament in order to determine whether the passing of an Act had been obtained by means of an irregularity or fraud. Lord Reid observed:[8]

> The idea that a court is entitled to disregard a provision in an Act of Parliament on any ground must seem strange and startling to anyone with any knowledge of the history and law of our constitution ....

His Lordship continued:[9]

> The function of the court is to construe and apply the enactments of Parliament. The court has no concern with the manner in which Parliament or its officers carrying out its Standing Orders perform these functions. Any attempt to prove that they were misled by fraud or otherwise would necessarily involve an enquiry into the manner in which they had performed their functions in dealing with the Bill ....

Lord Morris of Borth-Y-Gest added:[10]

> The question of fundamental importance which arises is whether the court should entertain the proposition that an Act of Parliament can be so assailed in the courts that matters should proceed as though the Act or some part of it had never been passed. I consider that such doctrine would be dangerous and impermissible. It is the function of the courts to administer the laws which Parliament has enacted .... When an enactment is passed there is finality ..., In the courts there may be argument as to the correct interpretation

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8 Ibid., 782.

9 Ibid., 787.

10 Ibid., 788.

of the enactment: there must be none as to whether it should be on the Statute Book at all.

However, in the United Kingdom, although they have declined to entertain enquiries concerning the internal procedure of Parliament, the courts have inquired whether purported legislation as enrolled is an Act of Parliament. The presence of any document vouched for as a Statute on the Parliamentary Roll, Statute Roll or on Vellum, or its absence therefrom, is not absolutely conclusive for or against its legislative validity. The courts have to some extent power to enquire whether a statute is what it purports to be, viz. an Act of Parliament,[11] and are entitlted to look at what the "enrolled" copy itself says to see whether any fundamental defect appears therefrom. If there is a defect, the court is then entitled to declare the legislation invalid inasmuch as it would then not be an authentic expression of the will of the legislature. Thus in the United Kingdom for there to be valid legislation it is essential that the House of Lords, the House of Commons and Her Majesty consent to it.[12] If one element does not so consent and the defect appears on the "enrolled Act", the court would declare it invalid. Such a question arose in Pylkington's case[13] in which, by a special "Act of Parliament" passed in 1450, Sir John Pylkington was required to appear on a charge of rape. He refused to do so and challenged the validity of the "Act." It was pointed out by the accused that the Bill, as it passed the Commons, required him to surrender himself "before the feast of Pentecost next ensuing". This was interpreted by the court

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11 Craies, op. cit., 37.

12 Except of course in case of certain exceptions falling within the Parliament Act 1911 and 1949.

13 (1450) Y. B. 33 Hen. 6.

to mean Pentecost 1450. Whereas as it passed the Lords, he was to appear "before the feast of Pentecost which shall be in 1451." On these grounds it was argued that as on the face of the Bill there were two different dates, the "Act" had not, in the most important particular, been agreed to by both Houses and therefore was not a valid Act. The majority of the court held that it was invalid. It is submitted that it was so held because the defect appeared in the body of the Parliamentary roll.

This case may be compared with The King v The Countess of Arundel[14] where a Bill which originated in the Upper House was sent down to the Lower House. It was returned with a proviso endorsed on the body of the Bill. There was, however, no such proviso extant upon the record. Royal assent had been given. The Act was challenged on the ground that the Commons had not assented to the Act as it stood without the proviso, and, therefore, it was not an Act of both Houses, as it ought to be. It was held, inter alia, that it was a valid enactment as on the face of the record there was a complete Act without the proviso. The proviso had nothing to do with the validity of the Act. The court said that to determine whether it was an Act, the court must look at the Act itself. It is only from the Act and the record of it that the invalidating ground can come[15] and nothing extrinsic, not even the Parliamentary Journal, can be called in aid.[16]

It was however, accepted that if from the Act itself defects were apparent, the court would be put on inquiry, and if needs be, could treat it as no Act of Parliament at all. Thus the Court observed:[17]

But if the record of the Act itself carry its deaths wound

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14 (1616) Hobart 109.

15 Ibid., 110.

16 Ibid., 111.

17 Idem.

> in itself, then it is true that the parchment, no nor the Great Seal, either to the original Act, or to the exemplification of it will not serve ....

Reliance is generally placed on the words of Lord Campbell in Edinburgh and Dalkeith Railway v Wauchope[18] that the Parliamentary roll is conclusive and that no court will look behind it. His Lordship's pronouncement that the courts will make no further inquiry is based on the basic premise that "from [the Parliamentary roll] it should appear a bill has passed both Houses, and received the Royal assent." As a corollary, it follows that if these requirements are not satisfied the courts would be entitled to question the authenticity of the purported Act. It may, therefore, be asserted that the court is entitled to go by what the enrolled copy itself says to see whether the essential attributes of valid legislation are present. Accordingly, if on examining the enrolled Act, the defect or error appears upon the record, the court is entitled to hold that what purports to be an "Act of Parliament" is not in law such an Act.[19] Similarly, if the enacting clause in the Act and/or the certificate of the presiding officers shows how an Act has been passed, and an irregularity is disclosed the court would be entitled to act on such evidence as the "Act" would itself carry its "deaths wound". This was the case in Harris v Donges[20] where the enacting clause and the original of the Act, signed by the Governor-General and filed with the Registrar of the Court, showed clearly that it was enacted by the respective Houses sitting separately whereas it

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18 (1842) 8 Cl. & F. 710, 723.

19 B. Beinart, "Parliament and the Courts" [1954] S.A.L.R. 134, 167. See also Field v Clark (1891) 143 U.S. 649, 672 where the court said:

> It is admitted that an enrolled Act thus authenticated, is sufficient evidence of itself - nothing to the contrary appearing upon its face - that it passed Congress. (Emphasis added).

See further Gallant v The King [1949] 2 D.L.R. 425.

20 [1952] T.L.R. 1245.

should have been passed by both the Houses sitting together.

In Bribery Commissioner v Ranasinghe [21] the certificate of the speaker required by the constitution was missing from the Act as enrolled. It was held that the certificate of the Speaker was a necessary part of the legislative process and any Bill which did not comply with this condition was invalid even though it had received the Royal Assent. Here too the omission was apparent from the Act as enrolled.

This analysis of the three cases shows that a court need not accept every Act of Parliament so enrolled as valid and that the Parliamentary roll or other "enrolment" of Acts is not conclusive for all purposes. The court is entitled to examine the rolls and should defects appear on their face, it can accept the defects as sufficient proof of the invalidity of the "legislation" and declare it not an Act of Parliament.

(2) Evidence Aliunde

The next important question concerns the extent to which the courts may make further enquiries beyond the enrolled Act. This necessarily involves the question as to how far, if at all, the courts may admit evidence aliunde to determine the authenticity of an Act of Parliament. In other words, to what extent is extrinsic evidence admissible to prove the invalidity of an Act of Parliament which is ex facie authentic?

Prima facie, the dictum of Lord Campbell [22] seems to indicate that the court would not make any inquiry beyond the Act itself.

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21 [1965] A.C. 172.

22 See p.235, ante for the text of the dictum.

In that case, however, the Act was being challenged on the sole basis that the Standing Orders of the House had not been complied with.[23] It is well established that such matters as compliance with Standing Orders fall absolutely within the exclusive jurisdiction of Parliament as being "proceedings in Parliament." Such matters are notoriously within the exclusive jurisdiction of the Parliament and obviously no court would embark upon such an inquiry.

Similarly in The Countess of Arundel[24] the court declined to admit extrinsic evidence of the contents of the Journal in an attempt to show that there was an omission of a proviso from the terms of the Act. In effect it was intended to show that the Act should not have been passed without the proviso. It is not surprising that the court rejected such a contention. To have done otherwise would have been tantamount to the court itself legislating.

However, the House of Lords in the recent case of Pickin[25] seems to suggest that an Act of Parliament, once passed and put on the statute book, is final and conclusive. Thus Lord Morris of Borth-Y-Gest said:[26]

> When an enactment is passed there is finality .... In the courts there may be argument as to the correct interpretation of the enactment: there must be none as to whether it should be on the Statute Book at all.

It is submitted that here too the court was concerned with "proceedings

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23 Under Standing Orders, it was necessary to give notice to interested parties of intention to introduce a private Bill.

24 (1616) Hobart 109.

25 [1974] A.C. 765.

26 Ibid., 789.

in Parliament" as in Wauchope. Nonetheless, it is submitted, that the real reason for the courts in the United Kingdom declining to go behind the enrolled record is historical.[27]

In the early stages of the evolution of Parliament the business of law-making was, of course, for the King and his Council; law-making in the Council was a matter of discussion followed by written memoranda.[28] In some cases the result was a series of documents at various stages culminating in the legislation in its published form.[29] The constitutional struggle of 1258 and 1259 which led to the provisions of the Statute of Westminster is an example. The preliminary drafts of legislation eventually disappeared, and the minutes of the Council became the record of successive drafts until the final form of legislation was presented for approval at a special meeting. In most cases it would be a meeting of parliament but sometimes it would be a meeting of the King's Council with the magnates well represented. This form of procedure continued until the development of the common petition in the fourteenth century. During this time the task of drafting fell normally upon the ministerial members of the Council, especially the judges. The final draft was passed to the chancery with instructions to issue it. The document which the chancery received would be put in proper form and sent to the appropriate minister, including the sheriffs if the legislation was of general application. The intention was to have the contents read in open court and other public places and the document itself preserved for reference by local officers and for duplication.[30]

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27 Beinart, loc. cit., 169. It is acknowledged that considerable assistance has been received on this section from Beinart's article.

28 A.G. Richardson and G. Sayles, "The Early Statutes" (1934) 50 L.Q.R. 540, 544.

29 Idem.

30 Idem.

In the early days various rolls had been used. However, when the Parliamentary roll and other rolls began to be differentiated, the former came to be regarded as virtually decisive in any question as to whether a document was a statute or other form of enactment.[31] Even after legislation came to be by means of a Bill which was not to be changed by the Crown, there was still considerable editing, rephrasing, and rearranging after the Bill had left Parliament.[32] It seems that those matters were also left to the justices or done under their supervision, and it was only after all these had been completed that the Act was enrolled.[33] It was natural, therefore, for judges to regard the statute on the Parliamentary roll as the best and final record of the matter, as they themselves for such a long time supervised its form. By 1341 there seems to have been only one Parliamentary roll which was the roll of the council in Parliament.[34]

The keeping of Journals in the Houses came into use much later. The Lord's Journals commenced in 1509 and the Common's Journals in 1547.[35] By this time of course the Parliamentary roll had already become accepted with respect. The Journals were not treated with the same respect and in fact there were doubts expressed as to whether they were matters of record at all.[36]

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31 Beinart, loc. cit., 169.

32 Anson, The Law and Customs of the Constitution (5th ed., 1922), vol. 1., 262 - 263.

33 Beinart, loc. cit., 169.

34 Idem.

35 Idem.

36 Jones v Randall (1774) 1 Cowp. 17 where Lord Mansfield observed that the journals of the House of Commons was not a matter of record. Also in The Countess of Arundel (1616) Hobart 109, 110 the court stated:

> Now Journals are no records, but remembrances for forms of proceedings to the record, they are not of necessity, neither have they always been ....

All these developments, undoubtedly caused greater value to be placed on the copy of the Act on the Parliamentary roll and contributed to growing recognition of the enrolled Act as the conclusive or definitive copy. This explains why there are dicta which suggest that the Journal should not be admitted as against the Act. Thus in The Countess of Arundel[37] the court observed:

> But now suppose that the journal were every way full and perfect, yet it hath no power to satisfie, destroy or weaken the Act, which being a high record must be tried only by itself teste meipso.

The value of the Journals was stated thus:[38]

> The journal is of good use for the observation of the generalty and materialty or proceedings and deliberations as to the three readings of any bill, the intercourses between the two Houses, and the like, but when the Act is passed, the journal is expired.

In Bowes v Broadhead[39] the court held that they were to be ruled by the Parliamentary roll and not the Journal book. For these reasons, it is submitted, that in the United Kingdom, it can be confidently asserted that the courts would not admit evidence of Journals to answer the question whether what purports to be an Act of Parliament is in fact the authentic expression of the will of Parliament.

It is submitted that, if the Journals cannot be so admitted against the enrolled Act, then a fortiori oral evidence would be rejected. At least the Journals would be written up soon after the happening of the event in the House, and officials were taking down notes and would no doubt be specially engaged to do so, whereas in the case of oral testimony it would be necessary to rely on memories, which in comparison are notoriously fallible and less reliable. In this field the American

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37 Idem.

38 Ibid., 111.

39 (1649) Style 155.

Courts have, generally speaking, been loath to allow the admission of oral evidence to challenge the validity of legislation on the ground that it is not the authentic expression of the legislature.[40]

However, the courts have not always regarded the enrolled record as the only evidence of the Act. Thus in R v John Hampden[41] there was no official record of Edward I's enactment de tallagio non concedendo. The court held it to be a statute because it had for a long time been treated as such, had been printed in books of statutes, and was recited in the Petition of Right of Charles I (1628) as a statute.[42]

In Great Eastern Railways Co. v Goldsmid[43] the question before the court related to an enactment of the first year of King Edward III (1327) but the document was one which did not appear upon the Rolls of Parliament, although these Rolls were extant and apparently perfect.[44] Despite this omission the majority held that it was

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40 Beinart, loc. cit., 170; Hunt v Van Alstyne (1841) 25 Wend. 605 610 cited in Beinart, loc. cit., 170. In United States v Ballen, 144 U.S. 1 (1891) the Supreme Court went to the extent of saying that even if it could look at the journals, it could not go beyond them; see further Wigmore Treatise on Evidence (3rd ed., 1940), vol. IV, 683 et seq.

41 (1637) 3 St. Tr. 825.

42 Beinart, loc. cit., 170. The learned author observes:

> [T]he only original mention of [the enactment] as a statute appeared to be in the book of a monk historian, called Walsingham. Also the de tallagio had come down only in the narratives of certain chroniclers. See J.G. Edwards, English Historical Review, 58 (1943), pp. 273 ff., who after examining various possibilities comes to the conclusion that de tallagio was an incomplete, inaccurate, consolidated summary, of certain other authentic documents and by no means a statute.

43 (1884) 9 A.C. 927.

44 Ibid., 932 - 933, per Lord Selbourne L.C.

a valid statute - the document had been consented to by the King and Parliament, though it was in the form of a charter as in The Prince's case. Thus Lord Blackburn observed:[45]

> The authorities also shew, I think further that whenever it appears that a thing has been done in that way, and when it appears that by usage of the time, it being an early time, by contemporaneous usage or following usage things could have been done under that form of grant which could not validly and properly be done unless it was an Act of Parliament, - that is to say unless there was the assent of the three estatesin that way, - then, notwithstanding that it has not been entered on the Rolls of Parliament which would be the regular way, and which would shew beyond a doubt that it was an Act of Parliament, yet when there is this contemporaneous usage that is sufficient. That was the Prince's Case.

It is apparent that in the United Kingdom there is no absolute authority for saying that the existence or non-existence of the Act on the Roll and the evidence of the record itself, is always treated as conclusive proof that it is a valid or invalid statute and that no other evidence will be admitted to rebut the presumption of validity or invalidity.[46]

In other commonwealth jurisdictions too the courts have declared statutes invalid but in each of these cases, it is submitted the record did "carry its deaths wound in itself." Thus in Harris v Donges[47] the court was able to determine the non-compliance with the constitutional procedure from what appeared on the face of the instrument. The learned Chief Justice did leave the question undecided as to what would have been the position if the defect had not appeared on the face of the record. He merely observed:[48]

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45 Ibid., 950.

46 Beinart, loc. cit., 171.

47 [1952] T.L.R. 1245.

48 Ibid., 1263.

> Had Act 46 of 1951 stated that it had been enacted by the King, the Senate and the House of Assembly in accordance with the requirements of sections 35 and 135 of the South Africa Act, it may be that Courts of law would have been precluded from inquiring whether that statement was correct ....

In Bribery Commissioner v Ranasinghe[49] the defect also appeared on the face of the instrument inasmuch as it was held that the certificate of the Speaker was a necessary part of the legislative process and the certificate did not appear on the face of the instrument.

B. The Position in Fiji

(1) General

The relationship between the English Parliament and the courts cannot be equated with the position in Fiji. As has been seen there are three principal reasons why the English Courts have not questioned the Acts of the English Parliament. They may be summarised as follows:[50]

First, the English Parliament is omni-competent. Its area of legislative powers is unlimited and there are no restrictions on the content of its legislation. As has been seen it has legislative supremacy.[51]

Secondly, both Houses of the English Parliament have extremely wide powers to legislate on any matter. There are no restrictions or limitations[52] as to the manner and form of legislation.

Thirdly, there is the historical basis and the concept of the High Court of Parliament.[53]

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49 [1965] A.C. 172.

50 Heuston, op. cit., Ch. I.

51 Pp.188 et seq., ante.

52 Except perhaps to a limited degree under the Parliament Act 1911 and 1949.

53 Pp.161 et seq., ante.

It is submitted that these three factors were the main contributing elements to the attitude taken by the English courts that there could be no judicial review of Acts of Parliament. Accordingly, the courts would not admit evidence aliunde to challenge the validity of an Act and relied on the conclusiveness of the Act as enrolled. Only if the defect appeared on the instrument so enrolled, was the court put on enquiry.

However, as far as Fiji is concerned, different considerations apply, in view of its written Constitution and its entrenched provisions. This was aptly pointed out by Gavan Duffy J. when he said:[54]

> The principle that the Courts must take all Acts of Parliament as valid is understandable in England, where it has long been settled that Parliament has an unfettered supremacy. To apply it to this country is to overlook the difference between 'controlled' and 'uncontrolled' constitutions ....

The principles applicable in the United Kingdom and other countries with "uncontrolled" constitutions do not apply to Fiji, at least as regards the "manner and form" of legislation. As has been seen,[55] sections 67 and 68 of the Fiji Constitution provide for special procedures for certain classes of legislation and if compliance with those procedures cannot be inquired into, the essential restrictions imposed by the Constitution would be reduced to a nullity. The restrictions on the power of the legislature as to manner and form of legislation would be meaningless if the courts were bound to accept the conclusiveness of the enrolled Act. Those special procedures laid down by the Constitution have been put there for obvious reasons.

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54 McDonald v Cain [1953] V.L.R. 411, 419 in reference to the Legislative Assembly of the State of Victoria.

55 Pp. 206 et seq., ante.

They are constitutional safeguards. Hence, it is submitted, the courts must of necessity inquire whether the Constitution has been complied with, should questions arise, and admit evidence aliunde if necessary. As Murray C.J. in Fowler v Pierce[56] observed:

> If such matters cannot be inquired into, the wholesome restrictions which the Constitution imposes on legislative and executive action become a dead letter, and Courts would be compelled to administer laws made in violation of private and public rights, without power to interfere. The fact that the law-making power is limited by rules of government, and its acts receive judicial exposition from the Courts, carries with it, by implication, the power of inquiring how far those exercising the law-making power have proceeded constitutionally .... It is said that parties would in every case dispute the existence of the law, and that such practice would lead to confusion and perjury. I have already said that this is a question for the Court. Any why should not the citizen whose life, property, or liberty is made forfeit by the operation of a particular law, be allowed to show to the Court, if it is not advised of the fact, that the same was passed in violation of his constitutional rights, or that it has been placed among the archives of government by fraud or mistake, and never had a legal existence? Is there no way of ascertaining whether the approval of the executive was forged, or whether officers have acted contrary to their constitutional obligations? It is no sufficient answer that we must rely on the integrity of the executive or other officers, and that the record of facts is conclusive evidence of the truth of such facts. Our notions of free institutions revolt at the thought of placing so much power in the hands of one man, with no guard upon it but his own integrity.

Thus if the self-imposed restrictions of the courts not to admit evidence of the Journals, or other evidence aliunde, to test the validity

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56 2 Cal. 165 (1852), cited in Wigmore op. cit., 695. Cf. Pangborn v Young, 32 N.J.L. 29, 34 (1866); Evans v Browne 30 Ind. 514, 524 (1869); Ritchie v Richards, 14 Utah 345, 47 Pac. 670 (1896), Webster v Hastings, 56 Nebr. 669 (1898) and State v Jones, 6 Wash. 452, 34 Pac. 201 (1883), all cited in Wigmore, op. cit., para. 1350.

of an Act coming within the entrenched sections were adopted in Fiji, a situation would arise where a rule of evidence would permit what is not law to be treated as if it were. Certainly, this could not have been the intention behind the Constitution. The Fiji Constitution was accepted by the people on the basis that its provisions would be complied with by the judiciary, executive and legislature alike. However, under this rule of evidence, the legislature and the executive can connive to break the equilibrum of power. Thus if the legislature "passes" an Act contrary to the two-thirds majority required by section 67 (3) of the Constitution and the enrolment, as required by the Constitution,[57] merely reads "enacted by the Parliament of Fiji" the rule of evidence under discussion would preclude the courts from admitting evidence aliunde to show that the Act so passed did not secure the two-thirds majority. It is submitted that this is such a fundamental breach of the Constitution that the rule of evidence ought not to be followed in Fiji. In the United Kingdom, it is understandable inasmuch as if there is an error, or if legislation were enrolled which ought not to have been enrolled, the legislature could have the position rectified without much difficulty. However, in Fiji the error might strike at the validity of the Act, and may be difficult for Parliament to set right.[58]

It may be argued[59] that the presiding officer in the House is the best person to know exactly what transpired in the House; he would have had the benefit of first hand knowledge of the events; the votes

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57 S. 53 (7).

58 For instance, if the legislation falls within s. 67 and the rectifying legislation requires two-thirds majority, it may be very difficult to secure the required majority. How could a validating Act be passed under such circumstances?

59 As was done in Hunt v Van Alstyne, 25 Wend. 605, 610, cited in Wigmore, op. cit., para 1350.

taken and the Journal would have been made up under his supervision and control. His means of ascertaining and determining what took place in the legislature when he declares the law to be passed, exceed those of any other tribunal that might be called upon to inquire into it. Besides, it may be said, the speed and relative carelessness with which the Journals are copied, and the modest importance attached to the printed copies, necessarily impair confidence in their correctness. Thus, it may be argued the Journals are a most uncertain basis upon which to found a judicial determination of the rights of subjects, let alone constitutional questions of great importance.[60]

It is submitted, that in practice the presiding officer of the House may not advert to the question of constitutional propriety of legislation when declaring a bill to have been passed. Also the bill may be of such a nature that constitutional issues involved may not appear on the face of the Bill. For example in Fiji in 1973, the Lands Sales Tax bill was presented to the House of Representatives and was duly passed by the House. When this bill was presented to the Senate, it was brought to its attention that the bill was one which contained provisions affecting subjects falling within the entrenched sections of the Constitution.[61] Hence the special procedure prescribed by those sections ought to have been complied with. The bill was then referred back to the House of Representatives. This is a concrete example of constitutional provisions being overlooked by the presiding officer, and for that matter by the House itself. The question arises: is the presiding officer the best person to rely on and should his certificate be accepted as conclusive?

It is also submitted that, although the Journals may be said to

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60 See Wigmore, op. cit., para. 1350, and Beinart, loc. cit., 165 - 176.

61 Ss. 67 and 68.

be less reliable than the enrolled Act, the disparity in their authenticity is not as great as it used to be in the earlier days when this rule of the conclusiveness of the enrolled Act evolved. The Journals and the enrolled Act are both the work of officials who to some extent verify their authenticity. Furthermore, the final version of an Act is now settled by Parliament and the much earlier method of re-editing and re-phrasing is no longer in use.[62] Also in testing the validity of an Act, it is the essential requirements or rather pre-requisites that would be in issue,[63] and not the particular words or phrases. Accordingly, it is unlikely that there would be argument about the text of the enrolled Act.

It is submitted that, in any event, in English jurisprudence the cases in which the courts were asked to decide on the admissibility of other evidence, or to call in aid the assistance of the Journals, were cases where the alleged errors were of relatively little significance or were errors which did not affect the Act as it stood. Thus in The Countess of Arundel,[64] the question arose whether it was a valid Act because a proviso had been omitted from the Act. This omission, it is submitted, had nothing to do with the validity or invalidity of the Act in question. The proviso would merely have added to the meaning of the Act and to its application and interpretation. The Act could stand without the proviso. There is a material difference between challenging the contents of an Act and challenging its validity. In the former case, there may be inaccuracies, but there is a valid Act. Even if there are obvious mistakes made on the part of the legislature, the Act will still be valid. At most, the courts would be concerned with the application

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62 See pp. 243 et seq., ante.

63 E.g. whether the Bill secured the consent of six of the eight senators appointed on the advice of the Great Council of Chiefs (s. 68).

64 (1616) Hobart, 109.

and interpretation of the Act and questions of mistake would be taken care of by the rules of statutory interpretation.[65]

Similarly, as has been seen,[66] in Edinburgh and Dalkeith Railway v Wauchope[67] and British Railways Board v Pickin,[68] the Acts in question were being challenged on grounds which were notoriously within the exclusive jurisdiction of Parliament and obviously no court would embark upon such enquiries.

It is contended, however, that where the fundamental requirements of validity are in dispute, the courts ought to go beyond the enrolled copy to enquire into the validity or invalidity of an Act of the Fiji Parliament. In such cases not only the Journals but also the oral evidence of officials or members of either House should be admissible in evidence. This is not to say, however, that the courts should prefer one kind of evidence to another. The courts will attach such weight to the evidence adduced as it does in other cases. No doubt, as will presently be seen,[69] the courts would act on the presumption of the validity of the legislation, thereby placing the onus on the party asserting invalidity to establish this. Nonetheless the right so to challenge ought to exist. After all, why should a rule of evidence be a decisive factor in a matter so fundamental as compliance with a Constitution?

The court has a duty to see that the constitution is not

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65 Maxwell, op. cit.

66 Pp. 241, et seq., ante.

67 (1842) 8 Cl. and F. 710.

68 [1974] A.C. 765.

69 See pp. 325 et seq., post.

> infringed and to preserve it inviolate. Unless, therefore, there is some very cogent reason for doing so, the court must not decline to open its eyes to the truth.[70]

The English rules cannot really be applied to Fiji because in the constitutional position of the United Kingdom there are no fundamental requirements of legislation that need to be complied with.

> The English authorities have taken a narrow view of the court's power to look behind an authentic copy of the Act.[71]

One of the reasons for the English courts taking the view they did was recognised by Lord Pearce when he said:[72]

> But in the Constitution of the United Kingdom there is no governing instrument which prescribes the law-making powers and the forms which are essential to those powers. There was, therefore, never such a necessity ... for the court to take any close cognisance of the process of law-making.

Although the Fiji Constitution permits each House to regulate its own procedure,[73] it nonetheless makes specific mandatory provisions for the quorum of each House and for the adjournment of the House in the absence of the requisite quorum.[74] There are also entrenched provisions requiring special majorities for the passage of certain legislation.[75] It is submitted, that it certainly could not have been

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70 Bribery Commissioner v Ranasinghe [1965] A.C. 172, 194.

71 Ibid., 195, per Lord Pearce.

72 Idem.

73 Constitution, s. 54.

74 Ibid., s. 58.

75 Ibid., ss 67 and 68.

the intention that the courts could not inquire whether these provisions had been complied with. It would be unrealistic and unreasonable if such fundamental provisions as sections 67 and 68 were to give way to a law of evidence evolved at a time and in a country without comparable constitutional provisions and without entrenched and fundamental requirements for legislation.

Also it is submitted that the enrolment is only an official's certificate and copy, whereas the effective legal act of enactment is the dealing of the legislature with the original document, that is, the viva voce vote, or the votes recorded on a division. The legislature does not deal by vote with the enrolled document; the latter therefore can be only a certificate and record of the enactment.[76] It is not suggested that the legislative journals are the original enactment, for the viva voce vote is not recorded in them. They are, it is submitted, official statements of what has been done at an earlier time, although the House may have heard them read and may have approved them as correct. Thus the question whether the enrolled copy should be conclusive as against the Journal is only a question whether an official report and copy of one degree of solemnity and trustworthiness is to be preferred against another of a lesser degree. It is submitted that this is an inquiry that must be left to the courts to adjudicate upon as a question of fact, should the occasion arise.

Furthermore, as regards the certificate of the Speaker, section 66 of the Constitution makes certain certificates of the Speaker in regard to appropriation bills, money bills and a few other bills and certain aspects of the procedure involved in passing such bills conclusive for all purposes and beyond question in any court of law. In contrast, there is no other provision whatsoever, either in the Constitution or elsewhere, making the certificate of the Speaker necessary

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76 Wigmore, op. cit., para. 1350.

or giving conclusive effect to the enacting words of an Act. There is not even a provision requiring "enrolment" of Acts of Parliament. It is submitted that the expressio unius est exclusio alterius rule would apply. Thus if there is specific provision for the certificate of the Speaker to be conclusive and beyond judicial review for one purpose, and if there were an intention to exclude judicial review from the compliance by the Houses of Parliament of the other mandatory provisions of the same instrument, a similar provision for the conclusive effect of the enacting words or the requirement of a certificate of the Speaker and its conclusiveness would have appeared.

It has also been seen that section 53 (7) of the Constitution provides for the use of certain words of enactment, but no conclusive effect is given to the enacting words of a bill. It is submitted that, at most, the effect of the enacting words is to create a strong presumption in favour of validity. It is merely a presumption and no more.

Thus in R. v Ndobe[77] in holding that the Court had power to enquire into the question whether an Act had been validly passed by Parliament, De Villiers, C. J. stated:[78]

> The Court naturally assumes, until the contrary appears, that any Act of Parliament has been validly passed.

It is important to note that the court accepted that the contrary could appear by some indication in the Act itself "or proof aliunde."[79]

In P. S. Bus Co. Ltd v Members and Secretary of Ceylon Transport Board,[80] the problem confronted the courts in a somewhat complex

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77 [1930] S. A. L. R. 484.

78 Ibid., 497.

79 Idem.

80 (1958) 61 New Law Reports 491 (Ceylon).

form. The plaintiff sought to challenge the validity of an Act on the ground that the House of Representatives was not properly constituted when the Act in question was passed inasmuch as one member was not rightfully elected. The plaintiff's petition for one of the prerogative writs was refused in the exercise of the discretion of the court. However, the learned judge made some observations relevant to the issue under discussion. His Lordship pointed out that section 38 of the Ceylon Constitution (as it then was) provided for the use of certain words of enactment. He referred to section 35, which made declarations of the Speaker conclusive in certain money and other bills. In contrast, he observed that no conclusive effect was given to the enacting words of a bill under section 38. Nevertheless, his Lordship stated that[81] "the effect of the enacting words is at least to create a strong presumption in favour of validity." The court found that the plaintiff's allegation was insufficient to show that the legislation was invalid. This was important because the court did look behind the enacting words to inquire whether Parliament had been properly constituted. On the question of the presumption of validity, it may logically be inferred that the enacting words are not conclusive, though they create a strong presumption of validity. In other words, the courts would commence with the premise of validity until the contrary is proved. Accordingly, it follows that the court can go behind the enacting words to inquire into the procedure required for the passage of legislation in order to determine whether it was in accordance with the provisions of the Constitution. It is of particular importance that in the above case the court did embark upon such an inquiry. It is conceded that the question of "procedure" was not raised in the strict meaning of the term, as was the case say in Harris v Donges.[82] Nevertheless, in its wide

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81 Ibid., 495.

82 [1952] T.L.R. 1245.

sense "procedure" is used to include such matters as the very constitution of Parliament as in the case being discussed.

It is not submitted that in every case the courts should agree to admit evidence aliunde to question the enrolled Act. A distinction must be drawn between fundamental provisions striking at the validity of legislation on the one hand and questions relating to non-fundamental rules for passing legislation. In cases involving fundamental constitutional propriety, the court must investigate, should the question be raised, whether the relevant provisions of the Constitution have been complied with. Thus in Fiji the courts must enquire whether the requirements of the Constitution have been satisfied and, if necessary, admit the Journals and other evidence aliunde to ensure that there has been the observance of the mandatory provisions, especially those relating to the power and authority to enact a law. In any event, it is submitted, that the courts in Fiji ought to be very reluctant to disregard a breach of a constitutional requirement. Whatever appears in the Constitution is usually treated as being fundamental.[83] In any event the Fiji Constitution does not have provisions dealing with trivial matters of detail such as the manner of the reading of a bill.[84] It has been left to each House to settle its own internal proceedings.[85]

Thus where the Fiji Constitution, as opposed to the Standing Orders of either House of Parliament, expressly requires certain legislative procedures to be observed, compliance is a question very rele-

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83 W. F. Dodd, (1931) 80 Univ. Pensyl. L. Rev. 61, 69 and 77. Cf. J.A.C. Grant, "Judicial Control of Legislative Procedure in California," (1949). 1 Stanford L. Rev. 428. The contrary view seems to have taken by the Fiji Court of Appeal in Madhavan v Falvey (unreported, Civil Appeal No. 39/1973) which is discussed at pp. 674 et seq., post.

84 This is the position in several States in the United States of America: Wigmore, op. cit., para. 1350.

85 Constitution, s. 54.

vant to the validity of legislation, and evidence ought to be admissible in judicial enquiries as to their observance. This affects the very "jurisdiction" or powers of the Fiji Parliament. As has been seen earlier,[86] the legislative power of the Fiji Parliament is contained in section 52 of the Constitution and this section commences with the limiting phrase "Subject to the provisions of the Constitution ... Parliament may make laws ...." Hence Parliament cannot act until and unless it complies with the mandatory provisions and restrictions of the Constitution. The dynamic and static concepts of the Fiji Parliament have been discussed at length elsewhere.[87] It has been seen that as a static concept, Parliament is simply the elements which comprise it - viz. The Queen, the Senate and the House of Representatives. The dynamic concept, on the other hand, has reference to the above elements functioning as a law-making body. In this latter concept there has been a functional distribution of legislative powers among the constituent elements referred to above. It has already been said[88] that the Fiji Constitution contains special provisions and rules in accordance with which the constituent elements of Parliament must "combine for action". Thus with regard to matters coming within the entrenched sections,[89] the legislative power belongs to the afore-mentioned elements functioning with certain specified majorities and in respect of other matters legislative power belongs to the aforementioned elements functioning with an ordinary majority.[90] Accordingly, it is submitted, that the court must inquire whether the body that purported to enact the legislation in question was in fact Parliament as a dynamic

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86 P. 212, ante.

87 Pp. 206, et seq., ante.

88 P. 207, ante.

89 Constitution, ss. 67 and 68.

90 Except of course for matters coming within 61 - 65 of the Constitution.

concept within the meaning of the Constitution.

Furthermore, the Constitution prescribes the form of enactment as "Enacted by the Parliament of Fiji".[91] Thus normally even if the mandatory provisions of the entrenched sections had not been complied with, there would be nothing in these words which could possibly show any defect on the face of the instrument. Even the normal certificates of the President of the Senate and the Speaker of the House of Representatives show the words "passed by the Senate" or "passed by the House of Representatives" respectively. Even from the word "passed" the court would not infer that it was passed by ordinary majority as opposed to special majorities. Thus in Akar v Attorney-General of Sierra Leone[92] the plaintiff successfully challenged the validity of a purported amendment to the Constitution of Sierra Leone.[93] The entrenching section, section 43, imposed two requirements by which the validity of the amendment was to be tested. The first requirement was that the amendment must be passed by two successive sessions of the House of Representatives without any intervening dissolution of Parliament. There was no problem as to the evidence by which a failure to comply with this prescription was established, as this fact either seems to have been admitted or taken judicial notice of.[94] Secondly, there was to be a two-third majority. The printed copy of the Act was endorsed merely as having been "passed" without any indication as to the majority received. The Court also considered in this case the effect of another amendment to the Constitution,[95] passed in the same year, where the endorsement

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91 S. 53 (7).

92 [1970] A.C. 853.

93 Act. No. 12 of 1962.

94 [1970] A.C. 853, 866, per Lord Morris of Borth-Y-Gest; see text to n. 96 post.

95 Act No. 39 of 1962.

expressly recited that the provisions of the entrenching section had been complied with.

The appellant argued, inter alia, that the purported amendment, that is Act No. 12, was ultra vires the Constitution, inter alia, on the ground that as the endorsement merely recorded that the bill was "passed", it should be inferred that it was passed in the ordinary and not in the special manner laid down by section 43 of the Constitution. However, the Privy Council, in spite of the fact that it was also considering Act No. 39 (which had the full endorsement to show that the entrenching sections had been complied with)rejected the argument of the appellant. The Judicial Committee held that there was no basis for any suggestion that the bill amending the Constitution was not properly passed or for supposing that a procedural requirement was forgotten or ignored.

It is submitted that the Privy Council tacitly accepted that a court is entitled to go behind an Act of Parliament to see whether a special legislative procedure has been complied with. All that the Judicial Committee held was that it was not prepared to <u>infer</u> that the procedure was not followed. After all, the appellant in this case was merely contending that it should be inferred from the word "passed" that it was passed in the ordinary manner and not in the special manner. It is submitted that had there been evidence forthcoming to show that the special procedure prescribed had not been followed, the Privy Council would have examined it and would not been asked to draw an inference which it felt was unsupported. In this case the Privy Council did take cognisance of the fact that Act No. 12 infringed the first of the special requirements mentioned above, namely, that the Act was not passed by two successive sessions of Parliament because there was a dissolution of Parliament intervening between those sessions. Thus Lord Morris of Borth-Y-Gest

stated:[96]

> Act No. 12 admittedly did not result from a bill passed by the House of Representatives in two successive sessions, there having been a dissolution of Parliament between the first and second of those sessions.

The Judicial Committee held that Act No. 12 was invalid on this ground inasmuch as there was evidence of this defect. Certainly this "defect" did not appear on the face of the instrument. It was a fact proved otherwise than by the enrolled Act itself.

This case clearly shows that the Privy Council accepted the principle that an Act of Parliament is presumed to be validly passed until the contrary is proved or shown. This is in accordance with the pronouncements of the courts of South Africa and Ceylon referred to above.[97]

Thus, it is submitted that the courts are entitled, even obliged to inquire whether the body which purported to legislate was in fact "Parliament" as a dynamic concept as defined in the Constitution, that is, Parliament as defined for the purposes of the kind of legislation in question. In Fiji, where compliance with the Constitution is fundamental to the validity of an Act, the courts would be bound to go behind the enrolled Act and enquire into the validity of the enactment, even if it means admitting the less authentic journals or oral evidence. The category of constitutional provisions include those relating to the quorum and the majorities required under sections 67 and 68. However, the courts would not inquire into matters not so fundamental or matters

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96 [1970] A.C. 853, 866.

97 R v Ndobe [1930] S.A.L.R. 484, and P.S. Bus Co. Ltd v Members and Secretary of Ceylon Transport Board (1958) 61 New Law Reports 491 (Ceylon).

of an intra-Parliamentary nature such as whether a member voted or not and/or whether his vote was counted; or whether a member voted who ought not to have voted.

It is submitted that the questions on which the courts must pronounce may be formulated as follows:

(a) Whether either House had the power and authority to enact the law in question.[98]

(b) Whether it could do so in the manner and form it followed.

(c) If these two questions can be answered in the affirmative, then any other defect will not be of a fundamental nature and the Courts ought not to admit evidence aliunde when looking behind the enrolled Act.

Thus it may be concluded that the whole tenor of the Fiji Constitution manifests an intention that no bill shall become law or be passed unless it has been enacted in accordance with the Constitution.[99] That intent is clear in regard to the entrenched provisions requiring special majorities. The passage by such majorities is made a condition precedent for valid enactment. It is a question of fact whether such a condition has been satisfied and this is determinable by judicial inquiry.[1] Such inquiry into the requirements of legislation is obviously necessary if the distinction between ordinary legislation and legislation falling with the entrenched sections, and therefore requiring special majorities, is to be effective. If the rule of evidence that prevails in the United Kingdom was to be applied in Fiji without qualification, the distinction would not have any effect and the limitations imposed by the Constitution would be of very little value, if any.

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98 This will include the question of quorum and the general power of the House to deal with the Bill.

99 This will include compliance with ss. 67 and 68 of the Constitution.

1 Ranasinghe v The Bribery Commissioner (1962) 64 New Law Reports 449, 454.

Accordingly, it is submitted that the courts in Fiji have a right, even a duty, to go behind the enrolled Act and enquire whether the legislation was passed without jurisdiction in the sense of being in defiance of the mandatory provisions of the Constitution, or by the exercise of powerwhich the legislature does not possess, and to determine whether there was some lack of power or capacity under the provisions of the Constitution from which it derives its power.

However, in Fiji, there is a statutory provision, section 16 of the Parliamentary Powers and Privileges Ordinance 1965,[2] which endangers the effectiveness of judicial review. This is the provision which renders inadmissible evidence as to the proceedings of the Houses of Parliament in the absence of the permission of the House in question. Accordingly this provision requires close examination.

(2) Section 16 of the Parliamentary Powers and Privileges Ordinance

Section 16 is a potential major obstacle in the path of the suggested conclusion that the courts in Fiji have a right and duty to go beyond the enrolled Act and if necessary to admit evidence aliunde in order to decide the validity of the Act in question. This provision is not an

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2 Section 16 provides:

(1) Save as provided in this Ordinance, no member or officer of the House of Representatives or the Senate and no person employed to take minutes of evidence before the House of Representatives or the Senate or any committee shall give evidence elsewhere in respect of the contents of such minutes of evidence or of the contents of any document laid before the House of Representatives or the Senate or such committee, as the case may be, or in respect of any proceedings or examination held before the House of Representatives or the Senate or such committee, as the case may be, without the special leave of the House of Representatives or the Senate first had and obtained.

(2) The special leave referred to in the last preceding sub-section may be given during a recess or adjournment by the Speaker or President or, during any dissolution of the House of Representatives or the Sentate, by the Governor-General.

innovation for Fiji. It can be traced to the common law position in England. In Chubb v Salomons,[3] it was held that Members of Parliament cannot be compelled to give evidence regarding proceedings in the House of Commons without the permission of that House. This of course also conforms to Article 9 of the Bill of Rights.[4] Hence in 1818 a resolution of the House of Commons directed that no clerk or officer of the House, or short-hand writer employed to take minutes of evidence before the House, or any committee thereof, should give evidence elsewhere, in respect of any proceedings or examination at the bar or before any committee of the House, without the special leave of the House.[5]

It is submitted that section 16 is an attempt to preclude judicial review of legislation and hence it is unconstitutional. It has been held, both in the United States of America and India, that such an attempt on the part of the legislature to prevent attack upon the constitutionality of legislation is itself unconstitutional. Thus in United States v Carolene Products Co.,[6] the American Supreme Court held that a statute which precludes the proof of facts which would show that the statute deprived the suitor of life, liberty or property, without a rational basis, per se violates due process. In the words of the Court:[7]

> [A] statute would deny due process which precluded the disproof in judicial proceedings of all facts which would show or tend to show that a statute depriving the suitor of

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3 (1851) 3 Car. & Kir. 75.

4 Generally, see Erskine May, Parliamentary Practice (18th ed., 1971), 85 et seq.

5 C.J. (1818) 389; Parl. Deb. (1818), 968 - 974.

6 304 U.S. 144 (1938).

7 Ibid., 152.

life, liberty or property had a rational basis.

In India, it has been held that any law which seeks to bar or render illusory the powers of the Supreme Court under Article 32 of the constitution is void,[8] because the right to move the Supreme Court for the protection of the fundamental rights is itself guaranteed by that Article.[9] Thus in Gopalan v State of Madras[10] the Court struck down a Statutory Order because it rendered nugatory the power of the Court to test the validity of an order of preventive detention by reference to the constitutional requirements, by withholding from the Court the only materials on which the Court could determine whether the detention was proper or whether the grounds on which the order had been made were relevant to the purposes for which preventive detention is authorised by the Constitution. In this case, section 14 of the Preventive Detention Act 1950 prevented the person detained, on pain of prosecution, from disclosing to the Court the grounds of his detention communicated to him by the detaining authority and thus prevented the Court from being informed of the substance of the grounds. This provision did not formally take away the right of the detained person to move the Supreme Court for a writ of habeas corpus under the Constitution;[11] but nevertheless the Court felt that it rendered the exercise of the Supreme Courts' powers under Article 32 nugatory and illusory. Unless the Court was able to look into and examine the grounds upon which the detention order had been made, it was impossible for the Court to decide whether any of the rights guaranteed to the detained person under the Constitution had been infringed. The rights of the detained person would, for all practical purposes, be rendered unenforceable if the Court was denied

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8 Gopalan v State of Madras A.I.R. (1950) S.C. 88.

9 Kochunni v State of Madras A.I.R. (1959) S.C. 725.

10 Supra.

11 Art. 32.

access to the grounds of detention supplied to the detainee. Since section 14 of the Act in question materially affected the fundamental rights of the detained person, the court declared it illegal and ultra vires.[12]

As regards Fiji, it has been seen that certain mandatory provisions of the Constitution determine the very power of the Parliament to function at all under the Constitution. It has also been seen that in Fiji the courts are the guardians of the Constitution. Ultimately it is for the courts to review and decide whether legislation is within the bounds of the Constitution. It is also the right of every subject to move the Supreme Court for relief under sections 17 and 97 of the Constitution. While it is conceded that section 16 of the 1965 Ordinance does not directly and formally curtail this right to move the Supreme Court for relief, it does in effect render the powers of the Supreme Court nugatory and illusory. Obviously, unless the Supreme Court, as of right, is able to examine, and if needs be, admit in evidence the manner and form of legislation, it is impossible for the Court to decide whether the mandatory provisions of the Constitution have been complied with. After all, the persons who will be in the best position to give evidence on these matters are those precluded from doing so by section 16. To produce any record, journal or other document would require the evidence of the clerk or other person having access to the original. This follows from Chubb v Salomons,[13] where it was held that an entry in a printed copy of the journals of the House of Commons is not receivable in evidence unless it has been compared with some original at the House. It was also held that a copy of an entry in the minute book kept by the clerk

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12 See also Lilavati v State of Bombay, A.I.R. (1957) S.C. 521, 528.

13 (1851) 3 Car. & Kir. 75.

at the table of the House was admissible in evidence in a court of law if the copy has been examined and compared against the original. [14]

As has been seen, the entrenched sections 67 and 68 of the Constitution clearly prohibit either House of Parliament from passing legislation unless the entrenched provisions have been complied with. Thus these provisions affect the very capacity of either House to legislate. They therefore affect the very jurisdiction of either House in its legislative capacity.

The availability of judicial review is, in the constitutional system of Fiji, the necessary premise of legal validity. It is no doubt logically possible for the legislature to keep within imposed limits. For the most part it does so. Yet there is in Fiji's society and her constitutional arrangements a profound, traditional-taught and constitutionally-created reliance on the court as the ultimate guardian and assurance of the limits set upon the executive and the legislative powers by the Constitution. [15] The guarantee of legality by an organ independent of the executive or legislature is one of the profoundest, and most pervasive premises of the Fiji system. In effect, section 16 fetters the Supreme Court in the exercise of its powers to investigate the very questions which the Court is empowered to do under the Constitution. Accordingly, it is submitted that section 16 is unconstitutional as it is inconsistent in its effect with the provisions of the Constitution inasmuch as it attempts to preclude judicial review of the very matters referred to in the entrenched sections. These are matters very much within the province of the Courts. This appears to be so, as we have seen, not only from the assumption on which the

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14 See also Trial of Lord Melville (1806) 29 St. Tr. (Howell) 685 and Forkes v Samuel [1913] 3 K.B. 706, 720.

15 See Ch. V pp. 183 et seq., ante.

Constitution was framed but also from its express terms, particularly sections 10, 17, 97 and 98. Any provision in a statute which attempts to oust the jurisdiction of the courts or attempts to fetter the exercise of the jurisdiction which the Constitution confers would be inconsistent with the Constitution and hence invalid. A right conferred by the Constitution cannot be taken away or curtailed by an enactment falling short of a constitutional amendment. Thus in Balewa v Doherty[16] the Privy Council had to consider inter alia, a provision of an Act of Parliament which provided: "neither the commission itself nor any action of the Prime Minister in relation thereto shall be inquired into in any court of law." The Judicial Committee of the Privy Council, in affirming the decision of the Supreme Court of the Federation of Nigeria, held that this provision was invalid by virtue of sections 21, 31, and 108 of the Constitution, being provisions substantially similar to sections 10, 17, 97 and 98 of the Fiji Constitution.

It is submitted that section 16, the subject of the present discussion, is unquestionably unconstitutional in that it infringes at least sections 97 and 98 which secure to citizens of Fiji the protection of their rights and interests before the Supreme Court. The former section provides in part:

> If any person alleges that any provision of this Constitution ... has been contravened and that his interests are being or likely to be affected by such contravention ... that person may apply to the Supreme Court for a declaration and for relief under this section.

The validity of this submission may be tested by an example.

Let us assume that the Fiji Parliament intends to deprive a

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16 [1963] 1 W.L.R. 949.

certain class of persons - say class A - of their citizenship and that the government has not the support of three quarters of all the members of the House. To pass a discriminatory law of this nature, Parliament has to remove the protection of section 15 (which deals with anti-discriminatory laws) and chapter III (which deals with citizenship generally) from the entrenched sections. Before the passage of the bill removing this protection, the Speaker of the House of Representatives and the President of the Senate respectively have, we are to assume, ordered the withdrawal of all strangers from the Senate.[17] This has been done because strangers are apparently not precluded from giving evidence of the proceedings in Parliament by section 16. The presiding officer in either House may then put the bill to a vote and certify the bill in terms of the enacting clause[18] as "Enacted by the Parliament of Fiji". Parliament would then be able to pass legislation in as discriminatory a manner as it desired and thereby deprive persons belonging to class A of their citizenship. Should a person who is affected by such legislation question it on the ground that the initial removal of section 15 and Chapter III from the entrenched sections had not been passed in accordance with the requirements as to manner and form he would face great difficulties. The whole enquiry would be at the mercy of the Houses of Parliament, the Speaker, the President, or the Governor-General, as the case may be, depending on whether Parliament is in session or not.[19] Under section 16, no person will be able to give evidence of the proceedings or adduce any evidence from the records without special leave being given. The hypothetical applicant's right to move the court under section 97 of the Constitution will have been rendered illusory and nugatory.

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17 Under the powers of s. 8 of the Parliamentary Powers and Privilege Ordinance 1965.

18 Constitution, s. 53 (7).

19 S. 16(2) of the 1965 Ordinance.

Therefore the effect of section 16 is to attempt to withhold from the Court the only materials on which the Court could determine whether the mandatory provisions of the Constitution have been complied with. The entrenched sections are fundamental provisions which affect the "jurisdiction" and "capacity" of either House of Parliament. If the special leave required under section 16 is not forthcoming, the citizen so affected in our hypothetical case will be left without a remedy. This certainly strikes at the root of the protection and rights granted by section 97 of the Constitution. Hence it is reiterated that section 16 is unconstitutional. It is immaterial that this section is part of an Ordinance passed prior to the adoption of the present Constitution. Section 2 of the Constitution declares that the Constitution is the supreme law of Fiji and, if any other law is inconsistent with it, the Constitution shall prevail.[20]

It is submitted that the courts in Fiji ought to approach with suspicion any legislation which may affect their jurisdiction or be a fetter on the exercise of their jurisdiction. It is clear that the country looks, and with good reason, not to the legislature or the executive, but to the courts for its ultimate protection against any breach of the Constitution. The need for judicial protection has undoubtedly differed in various countries and the risks of judicial sabotage under the guise of protection are considerable.[21] But we are dealing with basic institutions and basic attitudes; we must take the bad with the good, the fortuitous with the exigent, the trivial with the necessary. Thus Louis L. Jaffe aptly observed:[22]

> The scope of juducial review is ultimately conditioned

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20 The subject of the effect of the inconsistency between the Constitution and other laws are dealt with in detail elsewhere, see pp. 389 et seq., post.

21 Cf. the New Deal era in the U.S. and early independence days in India.

22 "Judicial Review: Question of Law," (1955-1956) 69 Harv. L. Rev. 239, 274.

and determined by the major proposition that the constitutional courts of this country are the acknowledged architects and guarantors of the integrity of the legal system. I use integrity here in its specific sense of unity and coherence and in its more general sense of the effectuation of the values upon which this unity and coherence are built. In a society so complex, so pragmatic as ours, unity is never realised, nor is it necessary that it should be. Indeed there is no possibility of agreement on criteria for absolute unity; what is contradiction to one man is higher synthesis to another. But within a determined context there may be a sense of contradiction sufficient to create social distress; and it is one of the grand roles of our constitutional courts to detect such contradictions and to affirm the capacity of our society to integrate its purposes .... [The Legislature] is not an island entire of itself. It is one of the many rooms in the magnificent mansion of the law. The very subordination of the [Legislature] to judicial jurisdiction is intended to proclaim the premise that each agency is to be brought into harmony with the totality of the law; the law as it is ... associated with the Constitution.

CHAPTER VIII

PARLIAMENTARY PRIVILEGES AND THE COURTS

A Introduction

Any comprehensive analysis of the relationship between the Judiciary and the Legislature would be incomplete without a discussion of parliamentary privilege. Its significance is amply illustrated by the constitutional struggle in English history between the conflicting claims of Parliament to exclusive jurisdiction in certain matters on the one hand and the Court's assertion of the paramountcy of judicial review on the other.[1] The conflict and its resolution resulted in consequences of great importance for English constitutional jurisprudence.

The question of the limits, if any, on parliamentary privilege is also of paramount importance in Fiji in view of two principles enshrined in the Constitution - first, there is the supremacy of the Constitution[2] itself over any legislative act or power of Parliament and secondly there is the right of the subject to seek judicial relief if there is any infringement of the provisions of the Constitution.[3] In this chapter, we shall examine the relationship in Fiji between the Courts and Parliament from the aspect of parliamentary privilege and the extent and scope of judicial determination.

The Position in England

Parliamentary privilege is a subject which is fundamental

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1 See p.282 post.

2 See pp.210 et seq., ante.

3 See Ch.V pp.183 et seq., ante.

to parliamentary procedure in the sense that it provides the means of protecting Parliament, and, through Parliament, individual members in the performance of their functions. Thus the privileges of Parliament refer to those rights, powers and immunities which in law belong to the individual members and officers of a Parliament and to the House(s) of Parliament acting collectively. Thus Erskine May speaking of the position in the United Kingdom states:[4]

> Parliamentary privilege is the sum of the peculiar rights enjoyed by each House collectively as a constituent part of the High Court of Parliament, and by members of each House individually, without which they could not discharge their functions, and which exceeded those possessed by other bodies or individuals.

Thus there are two levels of these privileges - one for the members which are enjoyed by them individually[5] and one for each House which can be enjoyed by the House collectively[6] or the House as a whole as distinct from its individual members. Since the question of privileges of Parliament and its relations

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4 Erskine May, Treatise on the Law Privileges, Proceedings and Usages of Parliament (18th ed., 1971), 64.

5 E. g., freedom from arrest, immunity of members from legal liability for assertions made during the course of parliamentary proceedings, freedom from certain legal processes, etc.

6 E. g., to exclude strangers from the House, to regulate internal proceedings, to suspend and expel members and to punish for contempt.

to the courts stems from the English Common Law, it will be useful to survey briefly the development and the position of parliamentary privilege in the United Kingdom.

Such privilege was not established by any one statutory provision but has evolved gradually. One significant factor is that, as has already been seen,[7] the English Parliament began its history as a court of justice - the High Court of Parliament.[8] Hence, some of the privileges of English Parliament resemble those of courts of law; for example, the inherent power to punish for contempt. In the early years, two important privileges were won in judicial matters. First, the Commons asserted their right to impeach. This is the prosecution of an offender by the Commons in Parliament.[9] Secondly, the Lords in 1341 made good their claim to trial by their peers.[10]

Most privileges arose out of conflicts between monarchs and Parliament or courts and Parliament. It is well known how King Charles I in his high-crowned black hat was met by muttered cries of "privilege, privilege" as he walked up the floor of the House of Commons to convey to Speaker Lenthall his demand for the arrest of the five members who opposed his policy of taxation.

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7 See pp. 161 et seq., ante.

8 For a fuller treatment of this aspect of the development of parliamentary privilege in Great Britain see E. Campbell, Parliamentary Privilege in Australia (1966), 3 et seq.

9 The first instance of impeachment was that of Lords Latimer and Neville (the Chamberlain and Steward) and certain commoners (chief of whom was one Richard Lyons, a trusted agent of the King), by the Good Government, in 1376: Fielden, op. cit., 21.

10 Idem. Various legislation was passed regarding this freedom. For the legislative history and an account of this privilege, generally, see Anson, op. cit., 164 - 166.

Similarly well known are the roles of John Wilkes and Joseph Stockdale.[11]

Under the Lancastrian Kings, the House of Commons acquired new powers and privileges. Freedom of speech and debate of course existed from very early times, and had been frequently confirmed by legislative and judicial sanctions.[12] In 1397 Sir Thomas Haxey was imprisoned by order of King Richard II and found guilty of treason for having introduced a bill to regulate the expenses of the Royal household; the proceedings against him were reversed, however, in 1399 by King Henry IV and the Lords. This privilege of freedom of discussion was expressly recognized and reconfirmed in 1407.[13] The Commons' right to freedom of deliberation was fully recognized in 1401.[14] In 1429 Members of Parliament were allowed freedom from arrest[15] during the duration of the session and for forty days before its commencement and after its conclusion.

Later there was a demand for access to the Crown, greater security for freedom of speech, and freedom from arrest.[16] Thus from 1541 the privileges of free discussion, free access to the

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11 Heuston, op. cit., 82.

12 Fielden, op. cit., 16. E.g., 4 Hen. VIII, c. 8 declared all suits in consequence of words spoken in Parliament void. See also Anson, op. cit., 166 et seq.

13 Idem.

14 Ibid., 23 and 103.

15 Idem.

16 Erskine May, op. cit., 67.

Crown and freedom from arrest, were formally claimed by the Speaker at the commencement of each Parliament, and formally recognized by the sovereign.[17] Subsequent monarchs sometimes violated these privileges[18] but the Bill of Rights in 1688 secured them for all time. The Bill of Rights declared, inter alia, that:

> the freedom of speech and debates, or proceedings in parliament, ought not to be impeached, or questioned, in any court or place out of parliament.

From then onwards there was no direct interference with the freedom of speech as such.[19]

Secrecy of debates also became a privilege of Parliament. In the early days, it was very important that the King should not know what was being debated because the King then retained some powers over Parliament and the subjects discussed therein. The Long Parliament of 1641 was the first to prohibit the printing of speeches without the leave of the House.[20] Thus in 1680 votes and proceedings were ordered to be printed under the dir-

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17 Idem. Also see Anson, op. cit., 163 et seq.

18 Fielden op. cit., 107 - 108.

19 However, there was indirect interference: e.g. the cancelling of the Commission of General Cornway, who, in 1764, voted against the government on the question of General Warrant: Fielden, op. cit., 243.

20 Sir E. Dering was expelled and imprisoned for failing to comply with this rule: Fielden, op. cit., 109.

ection of the Speaker.[21]

Initially the exclusion of strangers from Parliament, was very strictly adhered to because of the fear that an outsider might inform the King of the proceedings in Parliament. After the Restoration however, the rule was somewhat relaxed. But the privilege was invoked on the grounds of expediency during times of emergency, such as during the war with Spain and the American War of Independence. However, since 1875, strangers can be excluded only by a resolution of the House.[22]

The privilege of freedom of access to the sovereign is of very early origin. Peers, as hereditary counsellors of the Crown, enjoy an individual right of access at any time. The Commons on the other hand have only a collective right of access through the Speaker. Since 1541 this has always been claimed by the Speaker together with these privileges of freedom of arrest and debate.[23]

The right of settling the order of business in the respective

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21 However, in spite of the prohibition, reports of debates frequently appeared. After the Revolution, Parliament made frequent attempts to restrain the publication of debates, and in 1738 characterized it as a "notorious breach of privilege" and resolved to deal sternly with offenders. However, the practice still continued, the reporters being careful to suppress the speakers' names, or to attribute their speeches to characters in Roman history. However, the publication of debates has been permitted in practice but in theory it is still a breach of privilege and liable to prosecution anytime: Idem. See also Wason v Walter (1868 - 1869) L.R. 4 Q.B. 73.

22 Fielden, op. cit., 110.

23 Idem.

Houses was settled early. The question arose under King Richard II, when the judges declared that this right did belong to Parliament.[24] The privilege also developed that the sovereign is bound to put the most favourable construction on everything done in Parliament, and can take notice of nothing pending in Parliament until a decision has been arrived at, and the matter brought officially to him.[25]

It is apparent from the demands for the various privileges referred to above that the conflict between monarch and Parliament revolved around the issue as to which of them should be politically supreme. The nature and scope of the Commons' powers and privileges were of paramount, if not critical, importance. Accordingly, the exclusive power to define and enforce their privileges themselves seemed the vital way of securing absolute supremacy.[26] The Commons were distrustful of the common law judges, due to the fact that in the Middle Ages the judges were appointed and dismissed by the King. Naturally, the judges had to be careful not to give decisions which would prejudice the

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24 Ibid., 113.

25 Ibid., 110. However, it is said that:

> This exists as a matter of courtesy, and is essential as would be the case between ordinary business partners, to the harmonious co-operation of the Crown in its relation with the other members of the legislature.

A. B. Keith in Ridge, Constitutional Law of England (7th ed., 1939), 70. See also Erskine May, op. cit., 70.

26 Enid Campbell, Parliamentary Privilege in Australia (1966), 4.

interests of the monarch.[27]

From the very early times the significant question arose as to the authority of the ordinary courts to determine the nature and limits of parliamentary privileges. As early as 1604 in Benyon v Evelyn,[28] Sir Orlando Bridgman, Chief Justice of the Court of Common Pleas, maintained that if questions of parliamentary privilege did arise in the course of legal proceedings affecting the rights and duties of citizens, it was the court's duty to decide whether the claim of privilege was well founded. However, the Commons remained adamant and adhered to the view that parliamentary privileges should not be adjudicated elsewhere than in the House itself. Thus any judge who dared pronounce on question of privilege was likely to be summoned to the House for alleged contempt.[29] Accordingly in 1689 the House of Commons summoned two judges of the Court of King's Bench[30] to explain why judgement in the case of Jay v Topham[31] had gone against the Sergeant-At-Arms. The explanations were not acceptable to the House and the judges were forced to purge their contempt.[32]

After the Act of Settlement of 1700 the judges of the superior

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27 Ibid., 5. Cf., Eliot's Case (1629) 3 St. Tr. 332.

28 (1664) Tr. 14 Car. 2, cited in Campbell, op. cit., 189.

29 Idem.

30 Sir Francis Pemberton and Sir Thomas Jones.

31 (1684) 12 St. Tr. 822.

32 Campbell, op. cit., 5. See also Ashby v White (1703) 2 Ld. Raym. 938; R v Paty (1704) 2 Ld. Raym 1105, cited in Campbell op. cit., 189.

courts in England were guaranteed security of tenure and were protected against summary dismissal by the Crown. However, while it secured the independence of the judiciary from the executive, it transferred control of the judges to Parliament. A judge could have been removed by address from both Houses to the Sovereign. Nevertheless, a few judges did embark upon the domain of privileges which the Houses of Parliament claimed to be exclusively their own.

Thus in R. v Paty,[33] as in Ashby v White,[34] the House of Commons attempted to prevent actions being brought by citizens to decide the question whether a free burgess of a corporation, who had an undoubted right to give his vote in the election of a burgess to serve in Parliament, and who had been refused and hindered from giving it by the officers, could bring an action on the case against such officers. The House of Commons committed the claimants to prison for contempt of the House. Holt, C. J. maintained that a writ of habeas corpus would go to release any one committed for contempt by the House of Commons, where the cause stated in the return was insufficient in law. The learned Chief Justice observed:[35]

> I will suppose, that the bringing such actions was declared by the House of Commons to be a breach of their privilege; but that declaration will not make that a breach of privilege that was not so before. But if they have any such privilege, they ought to shew precedents of it. The privileges of the House of Commons are well known, and are founded upon the law of the land, and are

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33 Supra.

34 Supra.

35 (1704) 2 Ld. Raym. 1105, 1113.

> nothing but the law. As we all know they have no privileges in cases of breaches of the peace. And if they declare themselves to have privileges, which they have no legal claim to, the people of England will not be estopped by that declaration. This privilege of their concerns the liberty of the people in a high degree, by subjecting them to imprisonment for the infringement of them, which is what the people cannot be subjected to without an Act of Parliament. As to what was said, that the House of Commons are judges of their own privileges, he said, they were so, when it comes before them. And as to the instances cited, where the Judges have been cautious in giving any answer in Parliament in matters of privilege of Parliament; he said, the reason of that was, because the members know probably their own privileges better than the Judges. But when a matter of privilege comes in question in Westminster Hall, the Judges must determine it, as they did in Binyon's case. Suppose these actions against the constables of Aylesbury had gone on, and the defendants had pleaded this privilege; we must have determined, whether there were any such privilege or no. And we may as well determine it upon the return of this habeas corpus, for the defendants are here in a proper course of law, and the matter appears to us upon record as well this way, as if it were pleaded to an action ....
> And the Chief Justice said, if the votes of both Houses could not make a law, by parity of reason they could not declare law.

Although Holt C. J. was not able to convince his brother judges, he did convince posterity. His views of the law were expressly upheld and adopted by Lord Ellenborough in Burdett v Abbott[36] and by Lord Denman in The Sheriff of Middlesex Case.[37]

Hence, it was not until the nineteenth century that the authority of the courts was fully recognized. In the celebrated case

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36 (1811) 14 East 1, 145.

37 (1840) 11 A. & E. 273, 289.

of Stockdale v Hansard[38] it was held that the law and custom of Parliament is part of the law of the land of which the ordinary courts of the land may take notice. Also it was said that neither of the Houses of Parliament had exclusive power to define their privileges. Their Lordships held that if such were the case, its effect would be that Parliament could alter the law by mere resolution. Thus Lord Denman C. J. said:[39] "the resolution of any one of the Houses of Parliament cannot alter the law, or place any one beyond its control".

The sequel to this case is well known. In The Sherriff of Middlesex Case,[40] it was held that if the House commits for contempt generally, without stating reasons, the court is unable to look behind the return; however, if the reasons are stated the courts will examine the validity of the detention.

The combined effect of the pronouncements in Ashby v White,[41] and R v Paty[42] and the decisions in Stockdale v Hansard[43] and The Sheriff of Middlesex[44] is that the courts deny to the Houses the right to determine the limits of their privileges, while allowing them within those limits exclusive jurisdiction. The

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38 (1839) 9 A. & E. 1.

39 Ibid., 108.

40 Supra.

41 Supra.

42 Supra.

43 Supra.

44 Supra.

result is that the British Houses of Parliament may ignore judicial pronouncements on the scope of their privileges with impunity. However, it must be noted that neither of the Houses of the English Parliament have ever expressly renounced the view that their claim to be judges of their own privileges is a claim to judge both in regard to breaches of their undoubted privileges and the very existence and limits of those privileges themselves.

However, the apparent conflict of the jurisdiction of the courts and the Parliament in England may be left in the ashes of history. The decision in The Sheriff of Middlesex[45] seems to be the last occasion when the English House of Parliament and the courts came into conflict. In practice, Parliament seems to respect judicial rulings and accepts them as binding. Thus in 1958 the House of Commons took the unprecedented step of passing a resolution calling on the government to request the Judicial Committee of the Privy Council to advise on the interpretation of the Parliamentary Privilege Act 1770.[46] This, it is submitted, was an important step and event inasmuch as the House of Commons seems to have accepted or at least acquiesced in the doctrine that parliamentary privilege forms part of the law of the land and may be

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45 Supra.

46 Re Parliamentary Privilege Act 1770 [1958] A.C. 331. This was done in pursuance of s. 4 of the Judicial Committee Act, 1833 whereby the British government is authorized to refer legal questions to the Committee for advice. See also Re Macmanaway and Re The House of Commons Clergy Disqualification Act, 1801 [1951] A.C. 161.

judicially determined.[47]

Hence in the United Kingdom some privileges of Parliament rest solely upon the law and custom of Parliament, while others have been defined by statute. All privileges are derived from one of these sources.[48]

C. The Basis of Privilege in Fiji

The basis of the privileges of the Fiji Parliament is the Fiji Constitution, but there is no provision determining these privileges. All that theConstitution provides is authority for Parliament to pass legislation on this subject-matter. Section 54 (3) states:

> Parliament may, for the purpose of the orderly and effective discharge of the business of the two Houses, make provision for the powers, privileges and immunities of those Houses and the committees and members thereof.

No legislation has been enacted under the Constitution, the position

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47 Anson, op. cit., 154; Sir William Holdsworth, History of English Law, (First ed.) vol. X, 539; Beinart, loc. cit., 143; cf. Erskine May, op. cit., 174, where the learned author maintains that the conflict between the courts and the Houses of Parliament as to which is proper and final tribunal remains unresolved. However, he does admit that "since the House of Commons has not for a hundred years refused to submit its privilege to the decision of the courts, it may be said to have given practical recognition to the jurisdiction of the courts over the existence and extent of its privileges."

48 Anson, op. cit., 190. On the subject of the historical aspect of Parliamentary privilege in the United Kingdom, see Anson, op. cit., 153-199; Fieldon, op. cit., 103-161; Campbell, op. cit., 1 - 11, Generally, see Erskine May, op. cit., Chs. 3 to 9.

regarding the privileges of Parliament in Fiji remaining what it was before independence.

Prior to 1965[49] there was no legislation, order-in-council or provision in any of the Royal Instructions making provision for the privileges of "Parliament". The first time the Imperial Parliament conferred specific authority on the legislature of Fiji to enact legislation concerning the privileges of the legislature was in 1963. Section 55 of the Fiji Constitution Order 1963 provided:

> A law enacted under this Order may determine and regulate the privileges, immunities and powers of the Legislative Council and its members, but no such privileges, immunities or powers shall exceed those of the Commons House of Parliament of the United Kingdom of Great Britain and Northern Ireland or of the members thereof.

Before 1963 the Fiji legislature depended on the common law for its privileges. This was the position of colonial legislatures generally. In Fiji, it resulted from the passing of the Supreme Court Ordinance in 1875,[50] shortly after Fiji became a British

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49 That is to the date of enactment of the Parliamentary Powers and Privileges Ordinance No. 26 of 1965.

50 39 Victoria C. 14, particularly ss. 26 and 28. Section 26 provides:

> The Common Law and Rules of Equity and the Statutes of general application which were in force in England ... on the second day of January 1875 shall be in force within the Colony subject to the provisions of section XXVIII of this Ordinance.

Section 28 provides:

> All Imperial Laws extended to the Colony by this or any future Ordinance shall be in force therein so far as the circumstances of the Colony and its inhabitants ... permits ....

Crown Colony on 10 October 1874. To put the matter in its proper perspective, it is intended to examine the position in Fiji as regards the privileges of Parliament at three stages: first, the common law position of colonial legislatures generally, secondly, the position of the Legislative Council in Fiji from 1963 [51] to 1970 and thirdly, the position of the Fiji Parliament under the present Constitution.

(1) The Position of The Colonial Legislatures Generally and Hence in Fiji, 1874 - 1963

The brief treatment of the historical development of parliamentary privileges in England showed that the basis is usage and custom, modified occasionally by statutory provisions. These are the sources of all privileges in England.

However, the legal position of colonial legislatures have been quite different and their privileges have a different basis. Although they closely resemble the English Parliament, legislative assemblies in the Colonies and self-governing states of the Commonwealth do not have any inherent constitutional right to the privileges belonging to the United Kingdom Parliament. They are entitled only to such privileges as are reasonably necessary for them to carry out their legislative functions. [52] This does not

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51 Fiji was governed in terms of various Letters Patent until 1963, when the first Constitution Order was made. The second Constitution Order was made in 1966; and the third was the present Order which became effective on 10 October 1970.

52 Kielley v Carson (1842) 4 Moo. P.C. 63.

mean that colonial legislatures or self-governing states could not pass legislation conferring on themselves powers co-extensive with those of the United Kingdom Parliament. If the Imperial legislation conferring legislative powers were wide enough to include powers to pass such legislation, there would be nothing to stop colonial legislatures passing such legislation.[53] However, until this is done, the position is that as recognized in Kielley v Carson[54] decided shortly after the inception of the Judicial Committee established by the Judicial Committee Act, 1833.

The first decision of the Judicial Committee to settle the position of colonial legislatures was Kielley v Carson.[56] This

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53 E.g., this was done in Australia by the legislature in Victoria in 1857 (20 Vic. No. 1; and see the Constitution Act Amendment Act, 1958, ss. 12 and 13); see also Dill v Murphy (1864) 1 Moo. P.C.N.S. 487.

54 Supra. However, the first case concerning the subject under consideration to come before the newly established Judicial Committee was Beaumont v Barnett (1836) 1 Moo. P.C. 59. However, this case was over-ruled by Kielley v Carson, supra.

55 It is not intended to survey the historical position of the colonial legislatures and the attitudes of the colonial legislatures and the Imperial Parliament prior to 1833 and before the American Revolution. Whatever views had been held regarding the American colonies (including Canada) prior to 1833 would be subject to the pronouncements and decisions of the Judicial Committee established in 1833. The position of colonial legislatures as at 1875 would be relevant to Fiji. However, for a comprehensive survey of the position of the Colonial legislatures regarding the American colonies and Canada, see Campbell, op. cit., 12 - 17.

56 Supra.

case laid down the principle that a colonial legislature is entitled only to such privileges as are reasonably necessary for the proper exercise of its functions and duties as a local legislature. The main question in issue was whether the House of Assembly of Newfoundland had the power to arrest and bring before it, with a view to punishment, a person charged by one of its members with having used insolent language to him out of the House, with reference to the member's conduct as a member of the Assembly. The question was: did the House have the power possessed by both Houses of Parliament in England to adjudicate upon a complaint of contempt or breach of privilege?[57] It was held that a colonial legislature does not possess, as a legal incident, the power of arrest, with a view of adjudication, on a contempt committed out of the House.[58]

Thus Baron Parke, in delivering the opinion of the Judicial Committee, stated:[59]

> It is said, however, that this power belongs to the House of Commons in England; and this, it is contended,

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57 It is interesting to note that the arguments before the Judicial Committee were presented twice. After the first argument was presented, implications and importance of the principles involved caused the case to be argued again before more members of the Judicial Committee; this was done.

58 However, it was expressly said that the question, whether the colonial legislature could commit by way of contempt in the face of it, did not arise and hence that question was left open: (1842) 4 Moo. P.C. 63, 84.

59 Ibid., 89.

> affords an authority for holding that it belongs as a legal incident, by the Common Law, to an Assembly with analogous functions. But the reason why the House of Commons has this power, is not because it is a representative body with legislative functions, but by virtue of ancient usage and prescription; the lex et consuetudo Parliamenti, which forms a part of the Common Law of the land, and according to which the High Court of Parliament, before its division, and the Houses of Lords and Commons since, are invested with many peculiar privileges, that of punishing for contempt being one.

Their Lordships did not accept such an analogy. They also stated:[60]

> Nor can the power be said to be incidental to the Legislative Assembly by analogy to the English Courts of Record which possess it. This Assembly is no Court of Record, nor has it any judicial functions whatever; and it is to be remarked that all those bodies which possess the power of adjudication upon, and punishing in a summary manner, contempts of their authority, have judicial functions, and exercise this as incident to those which they possess, except only the House of Commons, whose authority, in this respect, rests upon ancient usage.

Although the Judicial Committee is not committed strictly to its policy of stare decisis, it has never once gone back on its ruling and the principle laid down in Kielley v Carson. On the contrary, it has repeatedly confirmed the principle on various occasions.[61]

Thus the lex et consuetudo Parliamenti apply exclusively

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60 Idem.

61 Fenton v Hampton (1858) 11 Moo. P.C. 347; Doyle v Falconer (1866) L.R. 1 P.C. 328; Barton v Taylor (1866) 11 App. Cas. 197. See also Toohey v Melville (1892) 13 L.R. (N.S.W.) 132, and Willis v Perry (1912) 13 C.L.R. 592.

to the Lords and Commons in the United Kingdom, and do not apply to the supreme legislature of a colony or dominion by reason of the introduction of the common law there.[62] In this respect there is no distinction between colonial legislative councils and assemblies whose powers were derived by grant from the Crown or created under the authority of an Act of the Imperial Parliament.[63] Furthermore, it does not matter if the alleged contempt was committed in the House or by a member. Even in such cases, (even though the contempt may be committed in the presence of the House and by its member,) the colonial legislature had no power to commit for contempt by analogy to lex et consuetudo Parliamenti.[64]

However, a colonial legislature did have such powers as were necessary for self-preservation and to remove any obstruction offered to its deliberations.

> It is necessary to distinguish between a power to punish for a contempt which is a judicial power, and a power to remove any obstructions offered to the deliberations or proper action of a legislative body during its sitting, which last power is necessary for self-preservation.[65]

Thus if a member behaved in a disorderly manner, he could have been removed from the Chamber, excluded temporarily or even expelled.[66]

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62 Fenton v Hampton, supra.

63 Ibid.

64 Doyle v Falconer, supra.

65 Ibid., 340.

66 Idem.

> [B]ut there is a great difference between such powers and the judicial power of inflicting a penal sentence for the offence. The right to remove for self-security is one thing, the right to inflict punishment is another.[67]

Thus the Speaker or Chairman of committees of a legislative assembly had power, without a resolution of the House, to eject from the chamber a member guilty of disorderly conduct and wilful obstruction and interruption of the business of Parliament.[68] But the Assembly could not remove a member on the ground of contempt when he was not actually obstructing business, but merely refusing to make an apology in terms dictated by the Assembly for an ill-founded accusation.[69] Further, since the colonial legislature had only protective and self-defensive powers, and no punitive powers, it has been held by the High Court of Australia that the Speaker of New South Wales had no authority to cause a member who had been disorderly in the Chamber, and had left it in a disorderly manner, to be arrested outside the Chamber and brought back into it.[70] In the same case an allegation that the Speaker reasonably believed the bringing back of the member was necessary to prevent further disorder in the Chamber was held irrelevant.

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67 Idem.

68 Toohey v Melville (1892) 13 L.R. (N.S.W.) 132.

69 Landers v Woodworth (1878) 2 S.C.R. 158. In this case The Supreme Court of Canada dissented from several earlier decisions of cases in Quebec. In this case the Assembly of Nova Scotia was involved and the accusation was against the Provincial Secretary.

70 Willis v Perry (1912) 13 C.L.R. 592.

The powers incidental to or inherent in a colonial legislature were such as were necessary to the existence of such a body and the proper exercise of its functions. They did not justify punitive action or unconditional suspension of a member during the pleasure of the legislature.[71]

It is submitted that what has been stated described the position in Fiji. The principles discussed above applied to Fiji inasmuch as the Privy Council decisions applied to Fiji and the decisions of other colonial courts were in fact applications of the principles pronounced and applied by the Judicial Committee.

(2) The Position of the Legislature in Fiji, 1963 to 1970

Theoretically, the Fiji Legislative Council could have passed legislation regarding its privileges at any time up to 9 October 1970.[72] This could have been done under its general legislative power to enact legislation for the "peace, order and good government of Fiji". Any such legislation would have been subject to the proviso that it was not repugnant to the laws of England.[73] It could not have provided for privileges or powers exceeding those of the Parliament of Westminster.

The Fiji Constitution Order 1963[74] expressly authorised the Fiji Legislative Council to enact laws regarding its powers,

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71 Barton v Taylor (1866) 11 App. Cas. 197.

72 Fiji secured independence on 10 October 1970.

73 Colonial Laws Validity Act 1865, s. 5.

74 See p. 288, ante.

privileges and immunities provided they did not exceed those of the House of Commons of United Kingdom. As a result, the Fiji Legislative Council enacted the Parliamentary Powers and Privileges Ordinance in 1965.[75] This Ordinance provided for various accepted privileges of Parliament, namely;

(a) Immunity from legal proceedings in respect of words spoken in the Council, (later amended to read "Parliament"),[76] that is freedom of speech inside Parliament.

(b) Freedom from arrest for members[77] and immunity from service of process.[78]

(c) Expulsion of strangers from the Council (Parliament) or the precincts thereof.[79]

(d) Immunity of members from giving evidence of proceedings in Parliament without leave of the House.[80]

There are provisions for various other matters appertaining to the proper conduct of the business of the House and for the protection of the members of the House.[81] Some of these provisions

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75 No. 26 of 1965. This Ordinance is still in force.

76 Ibid., s. 3.

77 Ibid., s. 4.

78 Ibid., s. 4.

79 Ibid., ss. 6 and 8.

80 Ibid., s. 16. However, as to the validity of this provision since the enactment of the Constitution, see pp. 265 et seq., ante.

81 Ibid., 22. 19 and 20.

are the equivalent of those concerning contempt of Parliament under the English parliamentary law.[82]

This Ordinance, it is submitted, is a codification of the privileges, immunities and powers of the English House of Commons. It is clear that a selection has been made of such privileges, immunities and powers of the House of Commons as were reasonably suited and convenient for adoption by the Fiji legislature, taking into account the local conditions. The provisions constitute a reasonable representation of the essential powers and privileges for the efficient functioning of the Legislative Council and virtually incorporate the essential and basic privileges, immunities and powers in the House of Commons. Part II of the Ordinance contains and incorporates the fundamental privileges and immunities of the legislature and of the members and they are comparable to the like privileges of the House of Commons.[83]

Part III of the Ordinance similarly contains and incorporates provisions relating to questions of evidence and enables the legislature to provide for the attendance of persons before the House and for the production of documents. These, again, are similar to those relating to the House of Commons.[84]

Part IV of the Ordinance makes provision for offences and

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82 E.g., disobeying any order of the House for attendance or for production of documents; ibid., s. 20 (a).

83 See nn. 76 to 81, p. 296, ante.

84 See Erskine May, op. cit., 666-675.

penalties. All of the offences constituted in this part are in fact breaches of privileges of the House of Commons.[85] However, there are a number of offences mentioned under this Ordinance which were already offences if committed against any member of the public.[86] It may seem redundant but perhaps they have been included to draw specific attention to them as constituting offences against the privileges of the House or any of its members.

Part V of the Ordinance contains miscellaneous provisions; and here too are provisions corresponding to privileges, immunities and powers of the English House of Commons. Thus it is an offence to print any false copy of any ordinance or of any report, paper, minutes, or votes of proceedings of the House of Parliament.[87] There is also provision affording protection to persons responsible for publications authorised by the legislature, and protection in civil proceedings in respect of the publication of the proceedings of the House, provided that such publication has been made in good faith and without malice.[88]

The outstanding feature of the provision relating to privileges of Parliament is that relating to breaches of privilege. It has been seen that in the United Kingdom there has been major

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85 Ibid., Ch X.

86 E.g., to assault any member coming to, being within, or going from the precincts of Parliament. Assault was already an offence under the Penal Code; s. 276.

87 Parliamentary Powers and Privileges Ordinance, s. 25.

88 Ibid., ss. 26 and 27.

conflict between the House of Commons and the courts as to whether the jurisdiction of one supersedes the other. The series of cases which culminated in Stockdale v Hansard [89] and The Sheriff of Middlesex [90] created uncertainty. Under the principles there stated, the courts deny to the Houses of Parliament the right to determine the limits of their privileges, while allowing them within the limits of established principles exclusive jurisdiction. However, neither House has ever expressly renounced its claim to be judge of its own privileges meaning thereby the determination both of breaches of its undoubted privileges and of the existence and limits of those privileges. [91]

In the United Kingdom, the House of Commons, subject to the principle adopted in Stockdale v Hansard [92] and The Sheriff of Middlesex, [93] is the sole guardian of its own privileges and the House claims to be the sole judge of any matter that may arise which in any way infringes those privileges. Once a breach of privilege is established, it will punish whom it considers to be guilty of a breach of privilege or of a contempt of the House.

However, it is clear from the Ordinance in question that the legislature in Fiji has voluntarily divested itself of the power of

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89 (1839) 9 A. & E. 1.

90 (1840) 11 A. & E. 273.

91 See n. 47, p. 287, ante.

92 Supra.

93 Supra.

judging what is and what is not a contempt and/or breach of its privileges. It has invested the courts with the power of judging and punishing offenders.[94] This is a very significant and profound constitutional change from the position existing in the United Kingdom.

In Fiji no punitive powers have been bestowed on Parliament, nor did they exist in common law, as has been seen. At most the Houses of Parliament in Fiji may remove strangers[95] and/or suspended members,[96] and/or persons behaving in such a manner as to hinder or obstruct the proceedings in the House. The House may also possibly expel a member, or take such measures as are reasonably necessary for the proper exercise of its functions and duties as a local legislature.[97] But it certainly cannot take punitive action or punish for contempt as such.[98] This is left to the courts and there are specific offences created in respect of most of what are breaches of parliamentary privileges. It is interesting to note that the Houses may have a

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94 Except perhaps to a limited extent mentioned below. See p. 309, post.

95 Parliamentary Powers and Privileges Ordinance, s. 8.

96 Ibid., s. 9.

97 See pp. 289 et seq., ante.

98 Cf. Madhavan v Falvey (unreported) Civil Appeal No. 34 of 1973 (Fiji Court of Appeal). In this case there is an obiter dictum of the Fiji Court of Appeal that "the power in the Fiji Parliament to punish for contempt" was one of "those established privileges of the House itself". It is submitted, with respect, that this dictum is wrong. The authorities, particularly of the Privy Council, show the contrary. See e.g., Kielley v Carson (1842) 4 Moo. P.C. 63 and pp. 289 et seq., ante.

warrant issued and if needs be, have a person arrested to secure his attendance before the House. However, if he persists in refusing to answer questions, without lawful excuse, the House in question has no other power to deal with such "offenders" other than to have him prosecuted before a court of law. Such a person would have committed an offence under section 20 (b) of the Ordinance. The important point is that the House itself is powerless to deal with such persons. Ultimately it is for the courts to punish. Such a power does not exist in the legislature even at common law.[99]

It is submitted that it is a fortunate state of affairs that the Fiji Parliament has no power to punish for contempt and that those guilty of actions tantamount to contempt may be dealt with by a court of law should such actions fall within the offences created by the 1965 Ordinance. The present position of the United Kingdom Parliament[1] with regard to the matters that constitute contempt of Parliament and the procedures adopted to determine whether or not a person is in contempt, leaves much to be desired.

Contempt of Parliament has been generally stated as[2]

> any act or omission which obstructs or impedes either House of Parliament in the performance of its functions, or which obstructs or impedes any member of officer of

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99 See pp. 289 et seq., ante.

1 For that matter all Commonwealth Parliaments having the power to punish for contempt.

2 Erskine May, op. cit., 132.

> such House in the discharge of his duty, or which has a tendency, directly or indirectly, to produce such results ... even though there is no precedent of the offence.

There is no limitation on the power of the English Parliament to determine that in a particular case certain conduct constitutes contempt. Parliament is the judge of what is and what is not contempt, and the courts are virtually powerless to interfere. Thus if the warrant issued by the Speaker is in general terms, that is, if it simply says that the person named in it has been found in contempt of Parliament, the courts cannot intervene. [3]

A person can, theoretically be found guilty of contempt without being given any opportunity to be heard on the matter. This can be demonstrated by Cahill's case. [4] A member of the Legislative Assembly of Victoria, who was the Chairman of a Standing Committee, sought from one Cahill certain information. This was refused and the member raised a question of privilege in the Assembly within an hour of the refusal. Cahill, before the matter came to be debated in the Assembly, supplied the information and explained his conduct by a letter to the member concerned. As a result the member moved an amendment to his motion: [5]

> That the refusal ... to provide the information ... sought

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3 See however the combined effect of Stockdale v Hansard, supra, and The Sheriff of Middlesex supra, discussed at pp. 284 et seq., ante. See also The Queen v Richards; Exparte Fitzpatrick and Browne (1955) 92 C.L.R. 157.

4 D.C. Pearce, "Contempt of Parliament-Instrument of Politics or Law?" (1968) 3 F.L. Rev. 241, 243. The facts of the case are those stated in the article.

5 A motion of this kind is not unusual. See Erskine May, op. cit., 164.

> ... constitutes a contempt of this House of Parliament but, having regard to the prompt supply of the [information] and to the letter tendered ... this House now feels there may have been some misunderstanding and will now proceed to the consideration of the Orders of the Day.

This motion was carried. This still found Cahill guilty of contempt although he had not been called upon to make any explanation. The fact that no penalty was imposed is irrelevant. The whole concept of natural justice is offended by a finding that a person has committed an offence without being given an opportunity of defending himself. Thus in the contempt proceedings before Parliament, there are no legal guarantees that the person charged will be given a proper hearing. Proceedings in Parliament are political in nature. To expect a political body suddenly to drop its normal approach and to adjudicate upon some matter with the impartiality of a court is asking the impossible. The basic factors are that the Parliament, in such contempt proceedings, is the complainant, the prosecutor and the judge. This infringes the very basic requirements of natural justice. Moreover, politicians are not all legally trained adjudicators. Certainly, in such questions, they could be politically motivated and could also vote on party lines. The question must be posed: should proceedings for contempt be tried by agencies and in accordance with principles of the law or of politics? [6]

Another glaring example of the injustice that may occur is

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6 E.g., the case in 1968 of the Premier of the Victorian Legislative Assembly, Sir Henry Bolte. See (1968) 3 F.L. Rev. 241, 246. In this case the Leader of the Opposition alleged that the Premier was guilty of contempt for remarks allegedly made over the radio by the Premier. The voting was on party lines; ibid., 248.

Klaebe's case.[7] The South Australian Parliament referred a Bill to prohibit scientology to a select committee, the chairman of which was Hill. The select committee heard evidence from the members of the public. Among them was Klaebe. The latter had asked for an assurance from the committee that he would be granted an unbiased hearing and that the evidence tendered by him would be examined in a completely impartial manner. The minutes disclosed that this assurance was given and accepted by Klaebe.[8] Klaebe had, however, written a letter to the Secretary of the committee which reflected upon the conduct of the Chairman. The substance of the letter was that he believed that Hill was[9]

> unduly biased against Scientology [and] I must formally charge him with that short-coming .... In doing so I restate the allegations I made in my evidence which I may point out the Honourable Gentleman was not prepared to deny.

Klaebe was brought to the Bar of the House on the appointed day to answer questions. He acknowledged that he had signed the letter and then he was asked to withdraw. He was recalled and asked by the President whether he wished to offer an apology at that stage. He replied that he was not sure for what he should apologise. He said that all he could say was that he had signed the letter and it was his intention to send it. He was again asked to withdraw. It was resolved that the writing and sending of the

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7 Pearce, loc. cit., 248. The facts of the case are those stated in the article

8 1968 Parl. Deb. (S.A.) 2160 - 2161.

9 Idem.

letter was highly improper conduct and, without proceeding to the question of whether that constituted contempt, that Klaebe should be warned to refrain from a repetition of such conduct in the future. The President gave the warning to Klaebe and the latter withdrew.

There are various unfortunate features to this case. Klaebe was not given an opportunity to offer anything by way of explanation of the letter or in justification of the matter referred to in the letter. All that he was offered was an opportunity to apologise for his statements in the letter. Theoretically, the Council could have passed a motion finding Klaebe guilty of contempt.

It is difficult to see how else it would have been possible for Klaebe to have raised the question of whether or not a member of the select committee was biased. It would seem to be a person's democratic right to assert that a parliamentary committee was not conducting its enquiry impartially. Surely it was in the public interest that such an assertion be made. One would have thought that Parliament would be prepared to receive, and indeed enquire into, an allegation of this type rather than to silence the maker of the complaint by a threat of use of its punitive powers.[10] If such an allegation is justified, surely it would be in the public interest for it to be made.

The two cases mentioned show clearly the short-comings of contempt proceedings in Parliament. At least, they show that the proceedings do not measure up to the usual basic standards expected of a body exercising penal jurisdiction. The cases also

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10 Pearce, loc, cit., 251.

give some insight into the very great power that the right to punish for contempt gives to a Parliament.

The Select Committee on Parliamentary Privilege in the United Kingdom investigated the subject and made a report to Parliament in 1967.[11] The main criticisms levelled against parliamentary jurisdiction to punish contempts enumerated by the Committee were:

(a) The scope of Parliament's penal jurisdiction is too wide and too uncertain; the press and the public are wrongly inhibited from legitimate criticism of parliamentary institutions and members' conduct by fear that the penal jurisdiction may be invoked against them.[12]

In relation to this criticism the committee said:[13]

> Your Committee accept that the uncertainty which clouds the exercise of the penal jurisdiction of the House may play some part in inhibiting legitimate criticism of the way in which the House works and of the conduct of its members. Your Committee have no doubt that these matters should not be immune from criticism. They accept the principle that a legislature which is isolated from informed and accurate criticism from outside cannot hope to recognise and to remedy all its own defects.

The Committee felt that some of the fears expressed were exaggerated and that the House had exercised its penal jurisdiction

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11 Report from the Select Committee on Parliamentary Privilege H.C. 34 of 1967 - 68.

12 Ibid., para. 10.

13 Ibid., para. 17

sparingly. However, it did concede that the uncertainty in the minds of many people as to precisely what constituted contempt of Parliament served to perpetuate the fear that Parliament might exercise its jurisdiction more widely than was justified. Klaebe's case illustrates the uncertainty of a person when dealing with parliamentary proceedings. It is not clear when some comment or remark will be treated as constituting contempt. It will depend on the attitude of individual members of Parliament and perhaps the attitude of the party to which they belong.

(b) Some members are too sensitive to criticism and invoke too readily the penal jurisdiction of the House; they do so not merely in respect of matters which are too trivial to be worthy of that jurisdiction, but also on occasions when other remedies are available to them as citizens, for instance by court action.[14]

The Committee conceded this to be a justifiable criticism. Instances referred to by the Committee showed that many matters raised by members were found not worthy of pursuing by summoning the persons concerned before the Bar of the House. Here too Klaebe would be a good illustration, and perhaps Cahill's case also. In the latter case there were obviously other channels open to the chairman to secure the information.[15]

(c) The procedure for invoking the penal jurisdiction encourages

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14 Ibid., para. 10.

15 E.g., it was open to the chairman to ask the Premier, as head of Cahill's department, to arrange for the delivery of the document.

its use for the purposes of publicity, is inequitable to persons whose conduct is under scrutiny, and fails to accord with the ordinary principles of natural justice.[16]

The validity of this criticism was conceded by the Committee which was satisfied that the procedure did not ensure for the person "charged" a hearing that complied with the basic principles of natural justice - the right to know the charge against him, the right to present his side of the case, the right to be present at the hearing and to be represented by counsel, and the right to cross-examine witnesses.[17]

(d) There is too much uncertainty about the defences which may legitimately be raised by those who are subjected to the penal jurisdiction; in particular it is a matter of doubt whether a person who has made truthful criticisms should be allowed to testify to their truth.[18]

(e) It is contrary to principle that Parliament should be both prosecutor and judge.

These criticisms and the specific cases referred to above demonstrate the undesirable situations and the areas of uncertainty that may arise in countries where Parliament has unspecified power to punish for contempt. Despite assertions that Parliament would exercise its penal jurisdiction sparingly and

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16 Report, para. 10.

17 E.g., Cahill's Case.

18 Report, para. 10.

only when it is satisfied that to do so is essential in order to provide reasonable protection for each House, its members or its officers from such improper obstruction, or attempt at, or threat of, obstruction as causing, or as liable to cause substantial interference with the performance of their respective functions,[19] the potential dangers remain. Uncertainties remain. Parliament may still arbitrarily declare that which was lawful when done to be unlawful.[20] It is not sufficient to say that members of Parliament represent the people and would not abuse their power. The actions of Parliament may have popular support and still constitute a travesty of justice. It is fundamental to the rule of law that a person ought to be found guilty of a breach of the established law and sentenced to the prescribed penalty for that breach. However, as the rules pertaining to contempt proceedings stand in the United Kingdom, there is arbitrariness as to offence, trial and penalty.

All of these difficulties, uncertainties and criticisms do not apply to Fiji. As has been seen, in Fiji the actions constituting contempt have been specified as specific offences with prescribed penalties. Jurisdiction to try breaches of the laws is obviously vested in the courts, where an alleged'bffender" will have full rights to put in his defence and present his case in accordance with natural justice.

It has been stated that it is proper and consistent with Parlia-

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19 Cf. Report, para. 15.

20 Cf. the position in Queensland, Tasmania, Western Australia and Northern Territory where there is specific legislation prescribing conduct for which the legislature may punish a person: Pearce, loc. cit., 258.

ment's dignity as the highest authority in the land that it should handle the punishment of contempt or breach of privilege.[21] It is submitted that the dignity of Parliament does not justify an arbitrary determination of what conduct constitutes contempt nor does it justify failure to give a person charged the benefit of the basic principles of natural justice. Courts are accustomed to view all matters with impartiality whereas a Parliament is not, inasmuch as the members have varied and politically motivated views and may be influenced by matters alien to impartiality.

Thus in Fiji, since the courts are invested with the power to deal with questions of contempt of Parliament, many advantages are gained. Some of the more obvious are:

(a) It avoids the use of contempt procedure for political purposes.

(b) It deters hasty allegations of the commission of contempt.

(c) It assures those charged of the protection of the principles of natural justice.

(d) There is greater certainty. Accordingly, the press and the public are not unduly inhibited from legitimate criticism of parliamentary institutions and the conduct of parliamentarians. They know in advance what conduct is prohibited and accordingly they are in a position to keep their criticisms within the boundaries allowed by law.

(e) Perhaps the most important advantage is that in Fiji it cannot be said, as it is of Parliament in the United Kingdom, that it is both prosecutor and judge.

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21 Odgers, Australian Senate Practice (3rd ed., 1967), 463.

It is of interest to note that in the application of the contempt provisions the Fiji Ordinance relating to parliamentary privileges makes no distinction between members of Parliament and other persons. Parliamentarians are as much subject to prosecution in the courts for a breach of the Ordinance as are other persons. This is a commendable position in that it avoids any doubts or misunderstanding that members of Parliament might be a class completely above the law or superior to other citizens. Parliament, unlike most other organizations, has not retained the power to discipline its own members.

The complete transfer of Parliament's penal jurisdiction to the courts does mean that members of Parliament in Fiji are less likely to be subjected to actions for "political" contempts. But frivolous and vexatious prosecutions for contempt are obviated by the fact that no prosecutions for an offence under the Ordinance can be instituted without the written authority of the Attorney-General and the consent of the Speaker of the House of Representatives or the President of the Senate as the case may be.[22]

It is submitted that the Fiji Ordinance balances the interests of the citizen, the public and the press with those of the House, its members and officers. It relates the role of parliamentary privilege to the basic requirements of a modern legislature.[23]

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22 Parliamentary Powers and Privileges Ordinance, s. 32.

23 This was also the basis of the approach taken by the Select Committee of the House of Commons on Parliamentary Privilege in 1967: Report para. 11.

It determines and provides reasonable limits of protection, power and immunity essential for Parliament to fulfil its proper functions. For members, there is full freedom of speech inside Parliament,[24] freedom from arrest, and other specified protections.[25] For the respective Houses of Parliament, there is power to expel strangers,[26] to exclude a suspended member,[27] to order[28] and compel attendance of witnesses,[29] and there are other specified safeguards.[30] On the other hand, protection is afforded to the citizen summoned to appear before the House to give evidence.[31] Persons responsible for publications authorized by either House[32] and those who publish without malice proceedings in Parliament are given protection.[33]

(3) The Position of the Legislature in Fiji since 1970[34]

Under the Constitution, the Parliament of Fiji has express legislative authority to enact legislation defining the powers,

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24 Parliamentary Powers and Privileges Ordinance, s. 3.

25 Ibid., s. 20.

26 Ibid., ss. 8 and 19.

27 Ibid., s. 9.

28 Ibid., s. 10.

29 Ibid., s. 12.

30 Ibid., ss. 18, 20, 21, 22, 25, 26 and 27.

31 Ibid., ss. 14, 15 and 17.

32 Ibid., s. 26.

33 Ibid., s. 27.

34 The Independence Constitution came into effect on 10 October 1970.

privileges and immunities of the Houses of Parliament and the committees and members thereof.[35] Because the Fiji Parliament, since 1970, has not enacted any such legislation, the 1965 Ordinance remains in force by virtue of the Fiji Independence Order 1970[36] and what has been said in the preceding section continues to apply.

The Parliament of Fiji, may, by ordinary legislation, repeal and re-enact the 1965 Ordinance or vary it. There is one limitation on the powers of Parliament. It cannot, by a statute passed in the ordinary way, invest itself with the penal power to punish for contempt.[37] Section 52 of the Constitution, which as we have seen gives general powers to the Fiji Parliament to make laws, commences with the phrase "Subject to the provisions of the Constitution". Section 54, which provides the specific power for Parliament to regulate the procedure in each House and their powers, privileges and immunities, also commences with a similar phrase, namely, "Subject to the provisions of this Constitution". It has already been seen[38] that Parliament in Fiji cannot pass any legislation in contravention of the provisions of the Constitution. Under section 5 (1) of the Constitution

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35 S. 54 (3).

36 Ss. 2 and 5 of the Order. Also see Ch.XI pp. 452 et seq., post.

37 It can be done, as will be presently seen, but only after there has been an amendment to other provisions of the Constitution.

38 Pp. 210 et seq., ante.

it is provided that:

> No person shall be deprived of his personal liberty save as may be authorized by law in any of the following cases, that is to say ....

Then follow the specified cases contained in paragraphs (a) to (j) inclusive.[39] There are specific provisions made for contempt of court or other tribunal[40] where an order of the court is required. But there are no provisions relating to contempt of Parliament under section 5 of the Constitution. It is submitted that section 5 (1) being very specific, imposes a total prohibition of deprivation of personal liberty except in accordance with that section.

The powers given by sections 52 and 54 of the Constitution are themselves subject to the provisions of the Constitution. The

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39 The substance of the respective paragraphs are as follows:

(a) relates to criminal law matters and conviction in respect of a criminal offence.

(b) relates to an order of a court punishing for contempt of court or other tribunal.

(c) relates to execution of an order of a court made to secure the fulfilment of a legal obligation.

(d) relates to bringing of a person before a court in execution of the order of a court.

(e) relates to suspicion of a person having committed, or being about to commit, a criminal offence.

(f) relates to an order of a court in relation to young person.

(g) relates to the prevention of diseases.

(h) relates to persons of unsound mind, addicts or vagrants, their treatment and protection of the community.

(i) relates to unlawful entry into Fiji and expulsion.

(j) relates to the movement of persons in Fiji.

40 Constitution, s. 5 (1) (b).

powers and privileges of the Parliament in Fiji cannot be asserted in contravention of the fundamental rights guaranteed, inter alia, by section 5.[41] In any event, it has already been seen that the penal power to punish for contempt was not possessed by the Fiji legislature even prior to 1970.[42] Moreover, section 5 is an entrenched provision in terms of section 67 of the Constitution. Accordingly, for the Fiji Parliament to invest itself with the penal powers to punish for contempt, it must amend section 5 of the Constitution by following the special procedure laid down in section 67[43] and include the powers to punish for contempt among the exceptions enumerated in section 5. Thereafter it could pass whatever legislation it requires acting by simple majority under section 54 of the Constitution. Until this has been done, it is submitted, the Fiji Parliament has no power to pass legislation to punish for contempt of itself. If this amendment is not made, any person committed for contempt of the Parliament in Fiji is entitled to make application to the Supreme Court under section 17 of the Constitution on the ground that he has been deprived of his personal liberty in contravention of section 5 (1) of the Constitution. The principle applicable in England that a general warrant issued by the Parliament is not questionable by a court

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41 See also D.D. Basu, Commentary on the Constitution of India (5th ed., 1965) vol. II, 277 citing Sharma v Krishna Sinha, A. 1959 S.C. 395 and Ref. Under Art. 143 of the Constitution. A. 1965 S.C. 745, 786.

42 Pp. 289 et seq., ante.

43 See pp. 206 et seq., ante.

of law is not applicable in Fiji in view of the express provisions of the Constitution discussed above.

CHAPTER IX

THE CONSTITUTION AND INTERPRETATION

A. General Principles and the Need for Differentiation

The Constitution or more accurately the written Constitution in Fiji has a very short history.[1] The fundamental mechanism of government in Fiji and the relationship between government and citizen and between citizens are all enshrined in the Constitution. The Constitution is essentially a written body of rules; the courts have been assigned the duty of determining the precise meaning and scope of these rules whenever there is a question of doubt. Although the courts are bound by the express terms of the document, they have a very wide latitude in the application and interpretation of it. They may place a wide construction on one provision and a narrow one on another; they may give particular emphasis to one provision and less to another. Hence the courts are able to effect considerable change in the working of the Constitution without formally modifying its provisions. As the guardian of the Constitution, the courts in Fiji will play a very positive role in the development of the legal order. This will become more obvious as they exercise their function of interpreting the Constitution. Bishop Hoadley had aptly observed:[2]

> Whoever hath an absolute authority to interpret any written or spoken laws, it is he who is truly the law-giver to all intents and purposes, and not the person who first wrote or spoke them.

The 1970 Constitution of Fiji, like the Constitutions of many

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1 The first written Constitution was granted in 1966 and was superseded by the 1970 Independence Constitution.

2 Cited in J. C. Gray, The Nature and Sources of the Law (2nd ed., 1931), 102.

former British territories, takes the form of an Order in Council under the Fiji Independence Act, 1970, an Act of the United Kingdom Parliament.[3] Hence a question of major consequence arises: in interpreting the provisions of the Constitution, must the courts apply the ordinary rules of statutory interpretation as they would apply to any Act of Parliament or is the Constitution to be placed on a different plane?

Judicial pronouncements on the application of the principles of interpretation to written constitutions have oscillated between two views. The first view is that a written constitution should be interpreted in the same manner as any other statute, namely, by reference to its terms and to them alone. Thus in 1878 Lord Selborne, delivering the opinion of the Judicial Committee and addressing himself to the question of whether particular legislation exceeded the power granted, said:[4]

> The established Courts of Justice, when a question arises whether the prescribed limits have been exceeded, must of necessity determine that question; and the only way in which they can properly do so, is by looking to the terms of the instrument by which, affirmatively, the legislative powers were created, and by which, negatively, they are restricted. If what has been done is legislation, within the general scope of the affirmative words which give the power, and if it violates no express condition or restriction by which that power is limited ... it is not for any Court of Justice to inquire further, or to enlarge constructively those conditions and restrictions.

Similarly in 1912 Lord Loreburn L. C., delivering the opinion

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3 The 1970 Constitution of Fiji is a schedule to the Fiji Independence Order 1970.

4 R. v Burah (1878) 3 A.C. 889, 904.

of the Judicial Committee, stated: [5]

> In the interpretation of a completely self-governing Constitution founded upon a written organic instrument ... if the text is explicit the text is conclusive, alike in what it directs and what it forbids. When the text is ambiguous ... recourse must be had to the context and scheme of the Act.

Such an approach has also been taken in relation to the Constitution of Australia. [6] In the same context it has been held that a judicial tribunal has no concern with the policy of any Act which it may be called upon to interpret. [7] Thus Viscount Simon L.C. delivering the opinion of the Judicial Committee, stated: [8]

> [I]n construing enacted words we are not concerned with the policy involved or with the results, injurious or otherwise, which may follow from giving effect to the language used.

The second view is that the principles pertaining to constitutional interpretation must be different from those of ordinary enactment. This view has been put succinctly by Higgins, J.: [9]

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5 Attorney-General for Ontario v Attorney-General for Canada [1912] A.C. 571, 593. (Emphasis added).

6 Webb v Outrim [1907] A.C. 81; Attorney-General v Colonial Sugar Refining Co. Ltd [1914] A.C. 237. See also W.A. Wynes, Legislative, Executive and Judicial Powers in Australia (4th ed., 1970), 8.

7 Vacher and Sons Ltd v London Society of Compositors [1913] A.C. 107, 118.

8 King Emperor v Benoari Lal Sarma [1945] A.C. 14, 28.

9 Attorney-General for New South Wales v Brewery Employees' Union (1908) 6 C.L.R. 469, 611, (original emphasis).

> [A]lthough we are to interpret the words of the Constitution on the same principles of interpretation as we apply to any ordinary law, these very principles of interpretation compel us to take into account the nature and scope of the Act that we are interpreting - to remember that it is a Constitution, a mechanism under which laws are to be made, and not a mere Act which declares what the law is to be.

Similarly in Northern Ireland the distinction between constitutional and other statutes was expressly acknowledged by the highest judicial body when it was stated that:[10]

> A flexibility of construction is admissible in regard to [constitutional statutes] which might be rejected in construing ordinary statutes or inter partes documents.

It is submitted that as far as Fiji is concerned the second view is to be preferred and ought to be adhered to. No doubt it is to be expected that judges trained in the common law and accustomed to orthodox canons of statutory interpretation would approach the Fiji Constitution, which is part of a United Kingdom statutory instrument, as an ordinary statute. But it must be borne in mind that there are differences of function and character between constitutional and other enactments. The special character and status of the Constitution must be given due recognition in its interpretation. In Fiji, as in most other countries, the constitutional instrument is the very foundation of all powers - be they legislative, executive or judicial. The whole constitutional structure of the country depends on the Constitution. This

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10 Belfast Corporation v O.D. Cars Ltd [1960] N.I. 60, 86, per Viscount Simonds.

fact must be borne in mind when it is interpreted.

A constitutional document does not contain all the minute details that are normally provided in statutes. It cannot be regarded as " a political strait-jacket for the generations to come" [11] or as "though it were a mathematical abstraction, an absolute having no relation to the lives of men". [12] Its provisions are obviously couched in broad and general terms. As Frankfurter J., stated: [13]

> From generation to generation fresh vindication is given to the prophetic wisdom of the framers of the Constitution in casting it in terms so broad that it has adaptable vitality for the drastic changes in our society which they knew to be inevitable, even though they could not forsee them .... The Constitution cannot be applied in disregard of the external circumstances in which men live and move and have their being.

Similarly O'Connor J., observed: [14]

> [I]t must always be remembered that we are interpreting a Constitution broad and general in its terms, intended to apply to the varying conditions which the development of our community must involve.

Accordingly, the broad and general terms of a Constitution must

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11 Schneiberman v United States 320 U.S. 118, 137 (1942), per Justice Murphy.

12 Martin v Struthers 319 U.S. 141, 152 (1942), per Justice Frankfurter.

13 Idem. See also British Coal Corporation v The King [1935] A.C. 500, 518, per Viscount Sankey L.C.; Bain Peanut Co. of Texas v Pinson 282 U.S. 499, (1931); Edwards v Attorney-General for Canada [1930] A.C. 124, 136 per Lord Sankey, L.C.

14 Jumbunna Coal Mine No Liability v The Victorian Coal Miners' Association (1908) 6 C.L.R. 309, 367.

be given broad and general interpretation. So the interpretation of the terms in a Constitution must be distinguished from the interpretation of ordinary statutes. Thus in R. v Public Vehicles Appeal Tribunal,[15] the High Court of Australia stated:

> We must ... remember that it is a Constitution we are construing and it should be construed with all the generality which the words used admit.

B. Interpretation of the Constitution in Practice

The Fiji Constitution is contained in a statutory instrument. Because the British Constitution is unwritten, the common law does not contain authorities of direct relevance and application to the constitutional problems that may arise in Fiji. Nor did Fiji experience the gradual constitutional development from limited self government to independence that was common to most dependent British territories. In many cases this was hastened by a strong nationalist sentiment. Fiji proceeded from a Crown Colony with very limited representative government to a much enlarged measure of representative government in 1966 and suddenly to responsible government and independence in 1970. Independence was achieved suddenly despite the fact that a significant and decisive section of the people of Fiji had consistently and strenuously opposed it.[16] Hence Fiji has had very modest experience of the operation of a written constitution.[17]

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15 (1964) 113 C.L.R. 207, 225.

16 See pp. 83 et seq., ante.

17 It is only from 1966 that the first written Constitution with provisions of legislative and executive limitations and fundamental rights operated in Fiji.

The courts in Fiji must of necessity draw upon the experience and knowledge of other jurisdictions and adapt a comparative approach to questions of constitutional interpretation. Such an approach was approved by the highest judicial tribunal in Northern Ireland, when Viscount Simonds stated:[18]

> It is right ... that in the interpretation of constitutional instruments guidance should be sought from those courts whose constant duty it has been to construe similar instruments.

His Lordship also stated:[19]

> The courts of Northern Ireland have not hesitated to adopt this course and have found assistance in their task of construing their own constitution from the manner in which great judges among the English-speaking peoples overseas have dealt with kindred problems.

This approach should, however, be used with caution; there are possible shortcomings and limitations of which the courts in Fiji must be conscious. In relation to the fundamental rights incorporated in a written constitution framed along American lines, there is a danger that judges searching for judicial precedents to aid the interpretation of abstract phrases might rely too heavily on American decisions. Those decisions may be entirely suitable and achieve acceptable social and economic adjustments in the United States, but may not be appropriate in Fiji.

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18 Belfast Corporation v O.D. Cars Ltd [1960] N.I. 60, 86.

19 Idem. See also Harry Calvert, Constitutional Law in Northern Ireland (1968), 122 - 124.

It must not be forgotten that societies differ in character. Also the political function which a particular constitutional formula may discharge in one state will not necessarily be suitable for another state, even though the formula may be couched in identical or substantially similar terms.

Consideration of certain specific principles and doctrines of constitutional interpretation may show that analogies are dangerous and that reliance on foreign authorities is misplaced; on the other hand, certain principles and doctrines applied in other jurisdictions may be of invaluable assistance to Fiji. Principles and doctrines of constitutional interpretation are many and varied. Consideration of all of them would be out of place in this work but a few may be considered as representative of the two views of constitutional interpretations and provide guidance as to the stand to be taken in Fiji. Attention will be concentrated on the vital part the judiciary should play in making the constitutional scheme work.

(1) The Presumption in Favour of Constitutionality

The Constitution contains no specific provision - as distinct from implications [20] - that the constitutionality of legislation is to be presumed. However, an examination of the stand taken by the American, Australian and Indian courts shows quite clearly that the judiciary has imposed limits upon the power of judicial review by adopting the presumption in favour of the constitutional

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20 As to which see p.329 , post.

validity of legislation.

In the United States, a presumption in favour of the constitutionality of legislation was settled quite early. It was strongly stated that:[21]

> It is but a decent respect due to the wisdom, the integrity, and the patriotism of the legislative body, by which any law is passed, to presume in favour of its validity, until its violation of the constitution is proved beyond all reasonable doubt.

This presumption has been held to mean that before the judiciary may review any law in the light of the Constitution:[22]

> The opposition between the constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other.

The presumption of constitutionality is given added weight if the statute has been in force for a long period.[23] But this weighting will play a decisive role only where there is ambiguity or doubt as to some expression in the statute.[24] Thus it has been held that where the meaning of statute is doubtful, its practical construction by the executive is entitled to great weight but where

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21 Ogden v Saunders 12 Wheat. 213, 270 (1827).

22 Fletcher v Peck 6 Cr. 87, 128 (1809).

23 Life and Casualty Ins. Co. v McCray 291 U.S. 566 (1933).

24 Swift v United States 105 U.S. 691 (1882).

the meaning appears to the court to be clear, no practice inconsistent with that meaning can have any effect.[25]

It follows from this presumption that the burden rests upon him who seeks to attack the legislation as unconstitutional.[26] The Court has stated that:[27]

> There is a strong presumption that a legislature understands and correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by experience, and that its discriminations are based upon adequate grounds.

In Australia too the Court has accepted the presumption of constitutionality. The Privy Council approved and adopted the statement that:[28]

> [U]nless ... it becomes clear beyond reasonable doubt that the legislation in question transgresses the limits laid down by the organic law of the Constitution, it must be allowed to stand as the true expression of the national will.

In India also the Supreme Court has accepted the principle

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25 United States v Alger 152 U.S. 384 (1893); Fairbanks v United States 181 U.S. 283 (1901).

26 Basu, op. cit., 199.

27 Middleton v Texas Power Co. 249 U.S. 152, 157 (1919).

28 Shell Co. of Australia Ltd v Federal Commissioner of Taxations [1931] A.C. 275, 298; see also Owners of S. S. Kalibia v Wilson (1910) 11 C.L.R. 689; Harding v Federal Commissioner of Taxations (1917) 23 C.L.R. 119, 134; Attorney-General for Victoria v The Commonwealth (1945) 71 C.L.R. 237; Waterside Workers Federation v Commonwealth Steamship Owners' Association (1920) 28 C.L.R. 209, 219.

of the presumption in favour of constitutionality. Fazl Ali J. enunciated the principle thus:[29]

> The presumption is always in favour of the constitutionality of an enactment, and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles.

What will be the position in Fiji? It is submitted that the courts in Fiji should accept the same principle whereby constitutionality is presumed, with certain limitations. This submission is made not because of the views of the courts in other jurisdictions but because of the implications of certain provisions contained in the Constitution.

Almost invariably, the issue of constitutionality of legislation in the United States, and to a significant extent in India and Nigeria, arises in relation to fundamental rights provisions. Constitutional issues do arise in relation to other matters, but almost all relate to basic human rights. It is in this field that the real conflict arises between the subjects and the state and it is here that the courts have the unenviable task of reaching a balance between the two conflicting interests.

Almost all the sections on fundamental rights in the Fiji Constitution[30] have provisions providing for derogation from fundamental rights; the typical provision containing such exceptions[31]

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29 Chiranjit Lal v Union of India (1950) S.C.R. 869, 879; See also Basu, op. cit., vol. 1, 202 - 203.

30 See ss. 6, 9, 11, 12, 13, 14 and 15.

31 Emphasis added. This qualification appears in the provisions referred to in the footnote 30.

and qualifications states that:

> Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section ... except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society.

It is submitted that such a provision presupposes the validity of the measure or of any action or thing done thereunder. There is an implied presumption in favour of constitutional validity. In substance, the provision states that to render the measure inconsistent with the fundamental right protected by the relevant section of the Constitution, it must be "shown not to be reasonably justifiable in a democratic society". The provision also begins with a supposition of validity inasmuch as it commences by stating that "nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention" of the relevant fundamental right unless it is shown not to be reasonably justifiable. It follows that not only is there a presumption in favour of constitutional validity but the onus is placed on the person challenging the legislation. The provision requires the measure or action to be held constitutional unless it is shown not to be reasonably justifiable in a democratic society.[32] If this is established, the legislation is invalid.

This state of affairs is very unfortunate as it undermines the real value of fundamental rights. The basic idea of the fundamental rights provisions, as will be seen,[33] is the protection

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32 As to a discussion of the phrase "reasonably justifiable in a democratic society" see pp. 453 et seq., post.

33 Ch. XI, post.

of the individual from the arbitrary actions of the executive and the legislature, and governmental agencies generally. Fundamental rights ought to be the rule and derogation from them the exception. Hence the onus ought to be on the State to show justification for any derogation from fundamental rights. The onus ought to be on the State to prove that a certain state of affairs exists which requires the invoking of the provisoes and qualifications to fundamental rights.

Furthermore, the present position could create procedural difficulties for a litigant attempting to have a statute declared unconstitutional.[34] It has been seen[35] that, under section 16 of the Parliamentary Powers and Privilege Ordinance, evidence of proceedings in Parliament is not admissible as of right but is at the mercy of the House, the presiding officers or the Governor-General, depending on whether or not the House is in session. In practice, it will be far easier for the party claiming validity (usually the State) to secure the required consent than for the party asserting invalidity.[36]

It is submitted that it would have been better for the provisions to require the State to justify any derogation from fundamental rights. This would have meant that basic rights were the rule rather than the exception and would have given true effect to the intention that rights be guaranteed and have enhanced their value.

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34 This contention is made on the basis that s. 16 is itself constitutional. As to the contention that s. 16 is unconstitutional, see pp. 265 et seq., ante.

35 Pp. 265 et seq., ante.

36 See further p. 271, ante.

However, the judiciary in Fiji can still "rectify" such shortcomings of the Constitution. The courts ought not to act on the presumption of the constitutionality of legislation unless the language of a statute is ambiguous. Nor should they strain the language of a statute, unless the ordinary rules of interpretation so require, in order to uphold the validity of a statute. The courts in Fiji ought to heed the views of the High Court of Australia:[37]

> [The Court] will always assume, where the language of Parliament is ambiguous, that it did not intend to exceed its powers, and will construe ambiguous expressions so as to maintain the validity of the legislation, if it is possible to do so without doing violence to the language used. But the Court is not justified in saving the constitutionality of an Act by giving to the words of the legislature a meaning which they cannot reasonably bear.

On the question of the burden of proof, it is submitted that the Fiji courts ought not to require the burden of proof to be beyond reasonable doubt but on the balance of probabilities. This rule of proof beyond reasonable doubt seems also to be a product of the policy of judicial self restraint invoked by the courts in the United States and other countries. That such a rule developed in the United States, India and Australia is understandable inasmuch as those constitutions do not contain as many exceptions and provisos, particularly to the fundamental rights provisions. As will be seen later,[38] the Fiji Bill of Rights contains little to inhibit the curtailment by the State of fundamental rights. The exceptions and provisos are so wide that one is left with the impression that

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37 Owners of S.S. Kalibia v Wilson (1910) 11 C.L.R. 689, 708.

38 Pp. 453 et seq., post.

restraint is the rule and liberty the exception rather than "liberty is the rule and restraint is the exception".[39] The whole idea of the fundamental rights provisions would be defeated if the legislature could, without much inhibition, make inroads into fundamental rights in Fiji. As the constitutional provisions stand, it seems that the legislature in Fiji enjoys the benefits of all worlds. There is a presumption of constitutionality of legislation; the onus is on the party attacking the legislation; the legislature has very wide powers, because of the many exceptions and provisos, to make inroads into the fundamental rights provision. Hence, the courts in Fiji must, in order to make the fundamental rights provisions effective, at least establish that the burden of proof is on the balance of probabilities. They would be well justified in doing so.

As has been seen, one of the reasons justifying the presumption of constitutional validity of legislation is the recurring proviso which states that:[40]

> Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of [the provisions for certain specified reasons unless it is] shown not to be reasonably justifiable in a democratic society.

It is "shown" and not "proved". Had the latter word been used, the subject would have enjoyed less protection. The word "shown", it is submitted, is a milder requirement. In Jones v Director of Public Prosecutions,[41] it was necessary to interpret the word

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39 E. S. Corwin, The Constitution and What It Means Today (12th ed., 1958), 221.

40 See nn. 30 & 31, p. 328, ante.

41 [1962] A.C. 635.

"show" in the phrase "tending to show" in the Criminal Evidence Act 1898. The Crown contended, inter alia, that "tending to show" meant tending to prove. The House of Lords rejected this contention. Lord Reid questioned:[42]

> Does [tend to show] mean tend to prove or tend to suggest?

His Lordship answered the question by saying:[43]

"In my judgement 'tends to show' means tends to suggest". Further, His Lordship equated "show" with "reveal".[44] Viscount Simonds also stated:[45]

> Primarily ["show"] may mean a visual demonstration, but in relation to the giving of oral evidence it can only mean "make known".

Accordingly, it is submitted that in the above provision of the Fiji Constitution "shown" ought to be interpreted as "suggesting" or "disclosing", as opposed to "proving". Prima facie "proof" would be enough. At most, it ought to be on balance of probabilities. As long as the "proof" advanced by the party alleging infringement of the Constitution "suggests" or "reveals" or "discloses" on the face of it that the matter legislated in terms of the proviso cannot be justifiable in a democratic society, the Courts in Fiji ought to accept that as sufficient to discharge the

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42 Ibid., 663.

43 Idem.

44 As did Lord Morris of Borth-Y-Gest; ibid., 689.

45 Ibid., 659.

burden and onus of proof. When such a prima facie invasion is shown, then the onus, it is submitted, ought to rest on those sustaining the legislation or defending it to prove a complete justification for the derogation from the constitutional rights secured by the Constitution.

Furthermore, the obligation to discharge the onus should depend upon the character of the right involved and the nature of the breach. There are certain rights which are truly basic to a free society in the sense that without them democracy will not survive. Even the Fiji Constitution expressly recognises certain rights as "fundamental".[46] These rights are absolutely essential for a "society of free man and free institutions".[47] These rights, it is submitted, stand on a different ground from, say, the right to contest an election or the right to citizenship.

In the United States, the Courts have accepted the "preferred position" of certain rights guaranteed by the First Amendment. It was for this reason that the Supreme Court held that the presumption of constitutional validity of legislation is inapplicable

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46 See s. 3 which provides:

> Whereas every person in Fiji is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following namely -
>
> (a) life, liberty, security of the person and the protection of the law;
> (b) freedom of conscience, of expression and of assembly and association; and
> (c) protection for the privacy of his home and other property and from deprivation of property without compensation ... (Emphasis added)

47 See the preamble to the Fiji Constitution.

where an enactment appears on its face to invade the fundamental rights guaranteed by the First Amendment. Thus in Saia v New York,[48] a municipal ordinance prohibited the use of amplifying devices casting sound upon streets and public places, except with the permission of the Chief of Police, but it did not prescribe standards for the exercise of his discretion. A majority of the Supreme Court of the United States held that the ordinance violated the constitutional right of free speech. Mr Justice Douglas, in announcing the opinion of the majority, said:[49]

> We hold that s. 3 of this ordinance is unconstitutional on its face, for it establishes a previous restraint on the right of free speech in violation of the First Amendment which is protected by the Fourteenth Amendment...

The Supreme Court applied a similar rule in relation to infringement of other fundamental rights guaranteed by the First Amendment, viz., freedom of press,[50] freedom of religion[51] and freedom of assembly.[52] In all these cases the court held the rights therein specified to be in a "preferred position" under the Bill of Rights.[53] It was for this reason that the Supreme Court

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48 334 U.S. 558 (1948).

49 Ibid., 559.

50 Lovell v Griffin, 303 U.S. 444 (1938).

51 Cantwell v Connecticut, 310 U.S. 296 (1940).

52 Hague v Committee for Industrial Organisation 307 U.S. 496 (1939).

53 However, there have been protests against this theory of the "preferred position" of the fundamental rights provisions, e.g. Frankfurter J. in Kovacs v Cooper, 336 U.S. 77, 88 and 90 (1948) and in Dennis v United States, 341 U.S. 494, 526 (1951); Justice Jackson in Brinegar v United States, 338 U.S. 160, 180, (1949).

seems tohave maintained that, when there is such a prima facie invasion of the right in question, the onus will rest upon the party maintaining the validity of the legislation to show that the legislation was justified on some "clear and present dangers" to public security. Thus in Thomas v Collins [54] the court stated:

> The case confronts us again with the duty our system places on this Court to say where the individual's freedom ends and the State's power begins. Choice on that border, now as always delicate, is perhaps more so where the usual presumption supporting legislation is balanced by the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment. That priority gives these liberties a sanctity and a sanction not permitting dubious intrusions. And it is the character of the right, not of the limitation, which determines what standard governs the choice.
>
> For these reasons any attempt to restrict those liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger.

The Court went on to distinguish the upholding of legislation affecting other matters. It stated:[55]

> The rational connection between the remedy provided and the evil to be curbed, which in other contexts might support legislation against attack on due process grounds, will not suffice. These rights rest on firmer foundation. Accordingly, whatever occasion would restrain orderly discussion in pursuasion ... must have clear support in public danger, actual or impending. Only the gravest abuses, endangering paramount interest, give occasion for permissible limitation.

Thus the application of this "double standard" has been accepted

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54 323 U.S. 516, 529 (1944) (Emphasis added).

55 Ibid., 530 (Emphasis added).

by the Supreme Court of the United States.[56]

The position in India has been succinctly put by Basu:[57]

> [T]hough the general presumption in favour of the constitutionality of the law arises when a restriction imposed by the law is impugned under Article 19 which relates to fundamental freedoms, if the Petitioner succeeds in showing that the impugned law prima facie violates any of the rights coming under any of the sub-clauses of that Article, the onus then shifts upon the Respondent to show that the legislation comes within the permissible limits imposed by the Article and also to place materials before the Court in support of that contention.

He concludes that:[58]

> If the Respondent does nothing in that respect, it is not for the Petitioner to prove negatively that it is not covered by any of the permissive clauses e.g., that the legislation is not for the public welfare and the like. If however, the Respondent shows that the law is covered by one of the permissible grounds of restriction ... then the onus to show that the restriction is unreasonable would shift back to the Petitioner.

It is submitted that the courts in Fiji ought to play a creative role and give real significance to the fundamental rights provisions.

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56 E.g., Hague v C.I.O. 307 U.S. 496 (1939); Bridges v California, 314 U.S. 252 (1941); Jones v Opelika, 319 U.S. 103 (1943); West Virginia State Board of Education v Barnette, 319 U.S. 624 (1943); Thomas v Collins, 323 U.S. 516 (1944); Saia v New York 334 U.S. 528 (1948); Kovacs v Cooper 336 U.S. 77 (1948); Terminiello v Chicago, 337 U.S. 1 (1949). See generally Henry J. Abrahams, Freedom and the Court (2nd ed., 1972), Ch. II, 8 - 28. Cf. Basu, op. cit., vol. I, 207 - 209.

57 Basu, op. cit., vol. I, 208, citing Saghir Ahmed v State of U.P. (1954) S.C.A. 1218, 1234.

58 Basu, op. cit., vol. I, 208.

Judicial review of legislation affecting fundamental rights ought to be placed on a different plane from that of other constitutional provisions. There are at least three justifications for such an approach.

(a) The very nature of the basic rights and freedoms demands such an approach. These rights and freedoms are the foundation for all other freedoms in a free democratic society. Mr Justice Jackson pointed out:[59]

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

In the same case the learned Judge clearly distinguished the Bill of Rights provisions from other regulatory provisions of the Constitution of United States. Thus he stated:[60]

> In weighing arguments of the parties it is important to distinguish between the due process clause of the Fourteenth Amendment as an instrument for transmitting the principles of the First Amendment and those cases in which it is applied for its own sake ... The right of a State to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a "rational basis" for adopting. But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds.

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59 West Virginia State Board of Education v Barnette, 319 U.S. 624, 638 (1943).

60 Ibid., 639.

(b) The very language of the constitutional provisions providing for fundamental rights supports the contention that the Bill of Rights provisions are in a special position. All the provisions relating to fundamental rights are couched as specific limitations on legislative or executive power. They specifically state that "no person shall be deprived" of his life, liberty and so forth. The language used is not merely explicit; it is categorical. There are of course exceptions and provisos, but nonetheless it is the character of the right and not the exceptions which should determine where the individual's freedom ends and the State's power begins.[61]

(c) The fundamental rights provisions are for the protection of individuals as opposed to groups. They are intended to protect individuals whether they fall into minority groups or larger groups. The usual interest or pressure groups have easier access to the legislative and administrative processes to obtain redress of public grievances than does the racial, political or religious minority group or an individual. The minority groups or individuals are the ones who are in most need of protection.

Accordingly, it is submitted, the presumption of constitutional validity and rules as to onus and burden of proof adopted in the United States should be applied in Fiji. But in the operation of the rules, the nature of the breach and the character of the right involved should be decisive. The more basic the right involved the greater ought to be the burden of justifying the derogation. The ultimate solution will be provided by the judiciary.

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61 Thomas v Collins, 323 U.S. 516 (1944).

(2) The Doctrine of Severance

(a) General

The doctrine arises in cases where only part of a statute infringes the Constitution. The question then arises whether the whole enactment should be struck down or only that part which is unconstitutional. The general rule in the United States has been that, if any particular provision in a statute is unconstitutional and such a provision is independent of or severable from the rest, only the offending provision should be declared invalid by the court. If the provision is not severable, the whole statute must be struck down.

> It is elementary that the same statute may be in part constitutional and in part unconstitutional, and if the parts are wholly independent of each other, that which is constitutional may stand while that which is unconstitutional will be rejected.[62]

In applying the doctrine, the fundamental consideration is the intention of the legislature. In the absence of a legislative declaration that invalidity of a portion of a statute shall not affect the remainder, the presumption is that the legislature intends the act to be effective in its entirety.[63] In the United States, the legislature has used separability or saving clauses whereby this presumption has been expressly negatived.[64] The

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62 Pollock v Farmers' Loan and Trust Co. 158 U.S. 601, 635 (1894).

63 Williams v Standard Oil Co. 278 U.S. 235 (1929).

64 E.g., Carmichael v Southern Coal Co. 301 U.S. 495 (1936).

statute will contain a direct statement of separability followed by a declaration of intent that all the provisions of the enactment are to be given effect irrespective of the invalidity of other provisions of the same enactment. In such cases it becomes the duty of the court to sift the legislation. As a result, wherever an act contains an unobjectionable provision separable from those found to be unconstitutional, it becomes the duty of the court to so declare and to maintain the enactment in so far as it is valid.[65] However, a provision that the invalidity of any part shall not affect the remainder is not an "inexorable command" but merely operates to negative the ordinary presumption that the statute was intended to operate in its entirety.[66] In other words the presumption of severability created by a legislative declaration may be overcome or rebutted by establishing the clear probability that the legislature would not have been satisfied with the statute unless it had included in the invalid part.[67]

The question of severability applies not only to a section of a statute in relation to the whole statute but also to different parts of the same section.

> As one section of a statute may be repugnant to the Constitution without rendering the whole act void, so one provision of a section may be invalid by reason of its not conforming to the Constitution, while all the other provisions may be subject to no constitutional infirmity. One part may stand, while another fall, unless the two are so connected or dependent on each other in subject matter, meaning, or purpose, that the good cannot remain without the bad. The point is not whether the parts are contained in the same section for the distribution into

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65 El Paso and North Eastern Railway Co. v Gutierrez 215 U.S. 87 (1909).

66 Carter v Carter Coal Co. 298 U.S. 238 (1935); Dorchy v State of Kansas 264 U.S. 286 (1924)

67 Carter v Carter Coal Co., supra; Dorchy v State of Kansas, supra.

> sections is purely artificial; but whether they are essentially and inseparably connected in substance, - whether the provisions are so interdependent that one cannot operate without the other.[68]

An unconstitutional amendment to a statute is clearly separable from the original enactment. If the original enactment is constitutional but a subsequent amendment is found to be unconstitutional, the statute will be read without the amendment.[69]

Whether or not there is a severability or separability clause, one part of a statute cannot be held unconstitutional and another part as separable, if they are mutually dependent upon one another.[70] Whether the provisions of a statute are so interwoven that the invalidity of one requires that others fall is a question of statutory construction and legislative intent.[71] The doctrine of severability would not be applied where the effect would be "to substitute for the law intended by the legislature one they may never have been willing, by itself to enact".[72]

The general test of severability, as laid down by the Supreme Court of the United States, may be stated as follows:[73]

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68 Loeb v Columbia 179 U.S. 472, 490 (1900); see also Berea College v Kentucky, 211 U.S. 45, 55 (1908).

69 Frost v Corporation Commission 278 U.S. 515 (1928).

70 Carter v Carter Coal Co. 298 U.S. 238, 313 (1935).

71 Idem.

72 Poindexter v Greenhow, 114 U.S. 270, 304. (1885); see also United States v Reese, 92 U.S. 214, 221 (1875).

73 Robert L. Stern, "Separability and Separability Clauses in the Supreme Court", (1937-1938) 51 Harv. L. Rev. 76. It is acknowledged that significant assistance has been derived from this article.

The invalidity of part of a law or of some of its applications will not affect the remainder:

(a) if the valid provisions or application are capable of being given legal effect standing alone, and

(b) if the legislature would have intended them to stand with the invalid provisions struck out.

In Australia, too, the doctrine of severance has become part and parcel of the working of the Constitution. As has been seen,[74] the process of severance has been applied in Australia by two methods - "reading down" and "blue pencilling".[75] Reading down puts into operation the principle that, as far as reasonably possible, statutes should be construed as being constitutional.[76] Blue pencilling occurs when the invalid part of an enactment containing two or more distinct provisions can simply be struck out without any need to reword the rest.[77]

Reading down is merely a technique of construction. Hence it will yield to any contrary intention appearing in the Act.[78] However, if a statute cannot be read down, it does not necessarily follow that the whole enactment is invalid. The next inquiry is whether the invalid parts can be severed from the rest. Here the Australian courts have adopted the American approach, but have emphasised that severance of one part of a statute is not accept-

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74 P.178, ante. For a fuller treatment of the position in Australia see Wynes, op. cit., 46 - 53 and C. Howard, Australian Federal Constitutional Law (2nd ed., 1972), 18 - 27; Sawer, op. cit., 113.

75 As to the explanation of these terms see pp.178 et seq., ante.

76 E.g., D'Emden v Pedder (1904) 1 C.L.R. 91.

77 See p.178, ante.

78 E.g., Federated etc. Service Association v New South Wales Railway Traffic Employees' Association (1906) 4 C.L.R. 488.

able if it alters the meaning of the remaining parts, in effect producing a new law. This "new law" test was adopted in R v Commonwealth Court of Conciliation and Arbitration, ex parte Whybrow and Co.[79] In this case, on the issue of the constitutionality of a statute, it was suggested that the court should decide whether the legislature would have adopted what was left after severance of the invalid parts. If the answer is in the affirmative, severance is in order, otherwise not. Three judges adopted the "new test".[80] Thus Griffith C. J. stated:[81]

> Are they severable? It is contended, on the authority of decisions of the Supreme Court of the United States, which are entitled to the greatest respect that the test is this, that if the Court, on a consideration of the whole Statute, and rejecting the parts held to be ultra vires, is unable to say that the legislature would have adopted the rest without them, the whole Statute must be held invalid. With profound deference I venture to doubt the accuracy of this test .... I venture to think that a safer test is whether the Statute with the invalid portions omitted would be substantially a different law as to the subject matter dealt with by what remains from what it would be with the omitted portions forming part of it.

Isaacs J. analysed the test as follows:[82]

> If good and bad provisions are wrapped up in the same word or expression, the whole must fall. Separation is there from the nature of the case impossible, and as it is imperative to eject the bad ... the good must share the same fate. But where the two sets of provisions are not, so to speak, physically blended ... further considerations are necessary....
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> If [the good and the bad parts] 'are so mutually

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79 (1910) 11 C. L. R. 1.

80 Griffith C. J., Barton and O'Connor J. J.

81 Ibid., 26 - 27.

82 Ibid., 54.

> connected with and dependent on each other ... as to warrant a belief that the legislature intended them as a whole and that, if all could not be carried into effect, the legislature would not pass the residue independently, and some parts are unconstitutional, all the provisions which are thus dependent, conditional or connected, must fall with them.'

In Australia, as in the United States, severability clauses play an important role. As well as the specific provision in various legislation and the practice of "reading down", section 15A of the Acts Interpretation Act 1901 - 1966 provides that:

> Every Act shall be read and construed subject to the Constitution, and so as not to exceed the legislative power of the Commonwealth, to the intent that where any enactment thereof would, but for this section, have been construed as being in excess of that power, it shall nevertheless be a valid enactment to the extent to which it is not in excess of that power.

This section has been interpreted as a general legislative direction to apply the doctrines of reading down and severance wherever possible. It operates as an indication of legislative intention additional to the term of any particular Act. Basically it does not affect the principles of reading down or severance.[83]

(b) The Position in Fiji

It is submitted that the doctrine of severability must be applied by the courts in Fiji. This is strongly implied by section

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83 Howard op. cit., 23 - 26. See R. v Poole, ex parte Henry (No. 2) (1939) 61 C.L.R. 634, esp., at 652; Fraser Henleins Pty Ltd. v Cody (1945) 70 C.L.R. 100, esp., at 127; Australian National Airways Pty. Ltd v Commonwealth (1945) 71 C.L.R. 29, esp., at 92.

2 of the Constitution, which enjoins that any law offending the Constitution shall be void "to the extent of the inconsistency". This means that, when a provision of a law is held to be unconstitutional on account of inconsistency with the provisions of the Constitution, only the repugnant provisions of the law in question, and not the whole law, shall be treated by the courts as void. Inconsistency with or repugnance to the provisions of the Constitution may arise in two ways - first in relation to the application of the law and secondly in relation to the words or language of the statute.[84] Accordingly, it is submitted, it is inherent in section 2 that cases of severability will fall into two general classes, one when the invalidity is apparent in the language of the enactment and the other when the invalidity is apparent only in certain applications of it. Cases in the first class may be dealt with by severing the unconstitutional words or sections. With the second class, such 'blue pencilling' will not be appropriate; here the courts must decide how the broad terms of an enactment must be construed to limit its application to constitutional bounds. This is a similar approach to the 'reading down' of the Australian courts.

It is submitted that whether there ought to be "severance" as to application and/or language must in the ultimate depend upon legislative intent. It is a question whether the legislature would have intended the valid parts or application of an enactment to stand if it had known, when the law was enacted, of the invalidity of the remainder. But it is unlikely that the legislature would have directed its attention to the question now the subject of judicial inquiry. Hence the court will have the difficult task of ascertaining what the intention of Parliament would have been if

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84 This distinction is made by Stern loc. cit. 79.

such a situation had been contemplated. In the United States and Australia, there seems to be no problem so long as there is a severance clause in the enactment being considered. In the absence of such a clause, the whole matter is left to conjecture on the part of the court. In such a case, the court ought to have recourse to the terms of the statute and its legislative history. However, when neither the statute itself nor its legislative history offers any clue to the intention of Parliament, it is submitted that the court should look to the policy sought to be achieved by the enactment. The court should consider whether the policy of the enactment will be better achieved by partial application or by its complete nullification. The court ought also to consider whether the curtailed enactment would be substantially a different law (subject matter) from what it would be with the impugned portions included in it.[85] Furthermore, if the valid and invalid parts are so mutually connected with and dependent upon each other as to lead the court, upon applying the language to the subject matter, to believe that Parliament intended them as a whole, and did not pass the valid parts as independent provisions, all the provisions so connected and dependent must fall together.[86]

It is submitted that penal statutes should be invalidated in toto and the rule of partial application ought not to apply. This accords with the general principle that penal statutes must be strictly construed and that criminal law should be unambiguous. If there is a severability clause, the position would of course be

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85 R. v Commonwealth Court of Conciliation and Arbitration, Ex parte Whybrow & Co. (1910) 11 C. L.R. 1, 26 - 27.

86 Ibid., 54.

different.[87] Nonetheless even with such a clause, strict construction must be placed on the application of the legislation.

> Penal statutes ought not to be expressed in language so uncertain. If the Legislature undertakes to define by statute a new offence, and provide for its punishment, it should express its will in language that need not deceive the common mind. Every man should be able to know with certainty when he is committing a crime.[88]

When invalidity arises from the words of an enactment as opposed to its application, the problem is less involved. In such a case, the simplest course is to excise the offending part of the enactment and then see whether the remainder conforms with the intentions of the legislature.

In this field, it is submitted, the United States Supreme Court has applied the same tests both to statutes imposing criminal penalties and to those involving only civil obligations.[89] The intention of the legislature is of paramount importance in determining the validity of a statute. It was on the issue of legislative intent that the court in some cases held the parts remaining after severance valid[90] and in other cases invalid.[91]

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87 Sonzinsky v United States 300 U.S. 506 (1937).

88 United States v Reese 92 U.S. 214, 220 (1875).

89 E.g., Allen v Louisiana 103 U.S. 80 (1880), where a civil statute was held inseparable and New York Central and H. R.R. Co. v United States 212 U.S. 481 (1909), where a criminal statute was held separable.

90 Utah Power and Light Co. v Pfost 286 U.S. 115 (1952).

91 Guinn v United States 238 U.S. 347 (1915).

It is submitted that whether the issue be in the application of the statute or its language, the court will remain free to decide each case the way it pleases without having its discretion fettered by any restraining doctrine. The issue of severable application differs from the issue of severable language only in that in the latter instance the court does not need two alternative formulas. There is no such need because the statement of the general principles for determining severability, as they appear in United States decisions, is necessarily phrased in such broad language that the court can easily hold the provisions of any statute separable or inseparable, as it chooses. In fact, it is very difficult at times to reconcile decisions on the issue of separability. A striking example is provided by the two cases involving substantially identical congressional legislation regulating trading in grain futures, Hill v Wallace [92] and Chicago Board of Trade v Olsen. [93]

The purpose of the Future Trading Act 1921 was to regulate trading in grain futures, and to avoid manipulation of the market by establishing a system of rules applicable to Boards of Trade designated by the Secretary of Agriculture as contract markets. The Secretary was authorised to withdraw his designation and to force refusal of trading privileges to persons violating the Act or any rules or regulations established thereunder. In order to compel Boards of Trade to comply with the regulatory system established for "designated contract markets", section 4 of the Act imposed a prohibitive tax of twenty cents a bushel upon all

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92 259 U.S. 44 (1922).

93 262 U.S. 1 (1923).

Boards of Trade not designated as contract markets by the Secretary. The statute contained a separability clause. In Hill v Wallace [94] section 4 was held unconstitutional on the ground that it was not really a tax but an attempt to regulate intra-state transactions, which was not within the power of Congress. The court expressly declared that it was unnecessary to consider whether the transactions directly affected interstate commerce. [95] The court also held that all the regulatory provisions were invalid inasmuch as section 4 was so interwoven with the regulations that they could not be separated, notwithstanding the separability clause.

Immediately afterwards Congress amended the Act in question. In substance this new Act was identical in its regulatory aspects with the original Act except that section 4, instead of imposing a penalty tax on the transactions on Boards of Trade not designated as contract markets excluded such transactions from interstate commerce and the mails. It seems that Congress heeded the court's intimation in Wallace that trading in grain futures might be regulated under the "commerce clause". However, the relationship between section 4 and the regulatory provisions was exactly the same as in the original Act. In both Acts section 4 contained a sanction which compelled persons to trade only on markets subject to the Secretary's regulations. Both contained the same separability clauses. In Chicago Board of Trade v Olsen [96] the regulatory provisions of sections 5 and 6 were upheld

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94 Supra.

95 259 U.S. 44, 68 - 69 (1944).

96 Supra.

as a valid exercise of the commerce power of Congress. However, the interesting part is that the court refrained from passing on the validity of section 4 on the ground that the separability clause made it manifest that this section was separable from the remainder of the Act.

It is submitted that the decisions are clearly irreconcilable. A decision that section 4 of the new Act was separable from the regulatory provisions cannot be squared with the earlier ruling that the identical regulatory provisions of the old Act were inseparably interwoven with section 4. It is considered that separability need not be reciprocal; one part of a statute may be entirely capable of standing alone if another part is held invalid while the matter might not be independent of the former.[97] However, in the two cases under consideration the statutes were not of the type of which it may be said that separability need not be reciprocal. Section 4 was not independent in the sense of having an independent purpose of its own. On the contrary it was the primary sanction behind the other provisions.[98] Hence, it is submitted, it is impossible to reconcile these two decisions delivered by the same judge within a period of about eleven months. It has been suggested that:[99]

> The two decisions on separability, written within eleven months of each other by the same judge, can be reconciled only on the ground that the Court approved of the substance of one statute and not of the other.

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97 E.g., Brazee v Michigan 241 U.S. 340 (1916); Weller v New York 268 U.S. 319 (1925); cf. Securities and Exchange Commission v Electric Board and Share Co. 18 F. Supp. 131 (S.D. N.Y. 1937).

98 Cf. Stern, loc. cit., 112.

99 Idem.

The decisions of individuals judges are equally difficult to reconcile with those of other members of the same court on the issue of severability. In important cases judicial decisions on severability often reflect the attitude of the particular judge towards the merits of the particular statute and are not an attempt to apply objectively the principles determining severability.[1] It is submitted that the constitutional philosophies of individual judges determine the scope of severability.

(c) The Severability Clause

As has been seen, whether or not the provisions of a particular statute may be severed is a question of statutory construction which necessarily involves an examination of legislative intent. The power of Parliament to enact such laws as it desires, within its constitutional competence, of course carries with it the power to declare its legislative intent. This intention is gathered from the enactment itself and the permissible extrinsic sources. When legislative intent is not clear, courts are called upon to decide the issue. A severability clause is one way, adopted in the United States and Australia, to state legislative intent. In the United States the effect of such a clause was first raised before the courts in 1910.[2] The standard severability clause at present used takes this form:[3]

> If any provision of this chapter, or the application of such provision to any person or circumstance, shall be held

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1 E.g., Pollock v Farmers' Loan and Trust Co. 157 U.S. 429 (1895) and rehearing 158 U.S. 601 (1895); Lemke v Farmers Grain Co., 258 U.S. 50 (1922);and Railroad Retirement Board v Alton R.R. 295 U.S. 238 (1936).

2 Stern, loc. cit., 115.

3 Labor Management Relations Act 1947, Title 29 s. 144.

> invalid, the remainder of this chapter, or the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby.

Initially, the courts regarded these provisions in the literal sense. Separability clauses were regarded as conclusively establishing legislative intent that the valid parts of the enactment were to be saved unless what remained was incapable of standing alone.[4] Thus, in Hill v Wallace[5] the court stated:

> Undoubtedly such a provision furnishes assurance to courts that they may properly sustain separate sections or provisions of a partly invalid act without hesitation or doubt as to whether they would have been adopted, even if the legislature had been advised of the invalidity of part.

Nevertheless that court, as has been seen, held the invalid part so interwoven with the valid part that they were inseparable.

In some cases the court has given automatic effect to the separability clause[6] while in others[7] it has reverted to the principle stated in the dissenting judgement of Chief Justice Hughes:[8]

> [W]hen Congress states that the provisions of the Act are not inseparable and that the invalidity of any provision

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4 Stern, loc. cit., 116.

5 259 U.S. 44, 71 (1944).

6 E.g., Chicago Board of Trade v Olsen, supra, and National Life Insurance Co. v United States 277 U.S. 308 (1928).

7 E.g., High Land Farms Dairy v Agnew 300 U.S. 608 (1937); Hill v Wallace, supra, and Carmichael v Southern Coal and Coke Co. 301 U.S. 495 (1937).

8 Carter v Carter Coal Co. 298 U.S. 238, 322 (1935).

> shall not affect others, we should not hold that the provisions are inseparable unless their nature, by reason of an inextricable tie, demands that conclusion.

It is submitted that the severability clause has not made legislative intent more conspicuous or clearer than it would otherwise have been. The clause merely assists in determining legislative intent. It "provides a rule of construction which may sometimes aid in determining that intent. But it is an aid merely, not an inexorable command".[9]

This view has developed into the presumptions of divisibility and indivisibility. As has been said:[10]

> In the absence of such a legislative declaration, the presumption is that the legislature intends an act to be effective as an entirety....
>
> The effect of the statutory declaration is to create in the place of the presumption just stated the opposite one of separability. That is to say, we begin, in the light of the declaration, with the presumption that the legislature intended the act to be divisible; and this presumption must be overcome by considerations which make evident the inseparability of its provision or the clear probability that the invalid part being eliminated the legislature would not have been satisfied with what remains.

Before this pronouncement and the development of the new

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9 Dorchy v State of Kansas 264 U.S. 286, 290 (1924).

10 Williams v Standard Oil Co. 278 U.S. 235, 241 (1929); see also Champlin Refining Co. v Corporation Commission 286 U.S. 210, 234 (1932); Railroad Retirement Board v Alton R.R. 295 U.S. 330, 362 (1935).

principle, the courts had assumed that statutes were separable even in the absence of severability clauses. But it is submitted that this pronouncement and the concept of presumptions has had various effects.

First, the courts are likely to apply the same principles to a statute whether or not it contains a severability clause. In other words, a statute with a severability clause would not be in any way better off because the court will still insist on seeking the intention of the legislature. Of course a statute with a severability clause will appear to have made that intention clearer than one without such a clause.

Secondly, if the court strictly applied the presumption of indivisibility to statutes not containing separability clauses, more statutes would be held invalid in toto. It would then be necessary in order to avoid the unfavourable presumption of indivisibility, to include severability clauses in all statutes, particularly those of doubtful constitutionality.

Accordingly, the value of severability clauses would not depend so much on their presence as on their absence. In other words, if a severability clause is present, the court must still ascertain legislative intention and the clause assists the court in determining that intention. If a severability clause is omitted, the court is still obliged to find the intention of the legislature, but in such a case there is a presumption of indivisibility.

In any event, the severability clause cannot be interpreted literally. The court cannot give literal effect to the intention of the legislature as contained in a severability clause. If this were done, it would lead to absurdity. If an enactment has a major

objective and auxiliary ones and the major provision is held invalid, would the court be justified in upholding the validity of the auxiliary provisions which could be meaningless without the main provision? The answer must be in the negative. Railroad Retirement Board v Alton R. R.[11] affords a striking illustration. The majority of the court held invalid the provision for the pooling of the pension funds for the employees of all the carriers. It was argued that a statute establishing a single pension fund for all the railroads could not remain as an operative law with the provision for the single fund eliminated. To save anything, the court would have been required to write a completely new statute. As the court said:[12]

> But notwithstanding the presumption in favour of divisibility which arises from the legislative declaration, we cannot rewrite a statute and give it an effect altogether different from that sought by the measure viewed as a whole .... In this view we are confirmed by the petitioners' argument that as to some of the features we hold unenforceable, it is 'unthinkable' and 'impossible' that the Congress would have created the compulsory pension system without them. They so affect the dominant aim of the whole statute as to carry it down with them.

It is fortunate that severability clauses have not been given literal interpretation. If this had been done, it could have produced a result which it could not be imagined the legislature intended. Thus in Mazurek v Farmers Mutual Fire Ins. Co.,[13]

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11 295 U.S. 330 (1935). See also Williams v Standard Oil Co. 278 U.S. 235 (1929), and Stern, loc. cit., 123.

12 295 U.S. 330, 362 (1935).

13 320 Pa. 33; 181 Atl. 570 (1935). The facts and substance of the case are related as they appear in Stern, loc. cit., 124.

the only valid provision of a statute (apart from the severability clause itself) was the section repealing the earlier law which the unconstitutional provisions were to replace. The legislature had clearly enacted the repealing clause only to permit the new statute to take the place of the old; it was not intended that the old law be repealed and the subject matter left entirely free from regulation. But literal application of the severability clause would have left neither the old nor the new statute in effect. The clause could not possibly be given a literal interpretation.

This raises the further question as to what principles should the courts in Fiji adopt to decide whether a severability clause is to be given a literal interpretation or not. It has been said that:[14]

> A reasonable solution of the problem was to give the separability provision effect except when the result would have been clearly unintended or unworkable. Some of the decisions appear to have accepted this view. And the doctrine that a separability clause, while not an "inexorable command", establishes a presumption of divisibility which may only be overcome "by considerations which establish 'the clear probability that the invalid part being eliminated the legislature would not have been satisfied with what remains' " is in substantial accord with it.

It is submitted that the use of a severability clause has necessitated courts in the United States giving effect to its literal meaning in some cases but not in others. It may be doubted that the legislature avails itself of a separability clause whenever it desires the provisions of law to be severable, and omits to use the device only because it has a contrary intention. The reason

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14 Stern, loc. cit., 124.

for the omission may simply be careless draftsmanship or the fact that there are few doubts, if any, in relation to the validity of the statute, This, however, may be taken as evidence of a contrary intention on the part of the legislature. It seems that the use of severability clauses will have to be considered in each and every statute otherwise the court may be left to apply the presumptions of divisibility and indivisibility on the basis of the absence or otherwise of a severability clause.

It has been suggested [15] that:

> If separability clauses were made applicable only to provisions or situations which the legislature really intended to be separable, and which could be administered separately, the clause might receive more judicial respect .... A separability clause should refer specifically to those sections, paragraphs and provisions of an act or to those applications of it which the legislature really intended to stand alone.

But it is submitted that this proposition is based on several assumptions. This is particularly apparent when the proposition is adopted in the context of the constitutional position in Fiji. It presupposes that there are very experienced and conscientious draftsmen who are well trained in the constitutional implications of statutes. It assumes that the draftsmen, and for that matter the legislators, are fully aware and conscious of the constitutional implications in all the statutes and all the sections that are passed. This is quite unrealistic. Fijian draftsmen and legislators will not have this experience or appreciation because the Constitution is still in an early stage of development and operation. No case

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15 Ibid., 125.

is known to the writer whereby the validity of any enactment has been the subject of judicial review on the basis that it is in conflict with the Constitution.

Furthermore, it is submitted that the type of severability clause suggested by Mr Stern is impracticable. All the problems of separability in relation to each and every statute cannot be recognized in advance. This is particularly so in the case of a new Dominion like Fiji which has had very little experience of government under a written Constitution - a Constitution with limitations particularly in the fundamental rights area where it will be most difficult to anticipate the problem of severability. It will only be in obvious cases that the question of constitutionality will be expressly adverted to. In a country like the United States of America, which has had experience of government under a written constitution for almost two centuries, the courts every year strike down legislation as being unconstitutional. In a new Dominion like Fiji there is more chance of statutes being declared unconstitutional. Until 1966, the Fiji legislature had few limitations on its competence to legislate; there were repugnancy[16] and the apparent limitation involved in the phrase "peace, order and good government" of Fiji.[17] In all other respects, as to both the content of legislation and its manner and form, there was no limitation. Supremacy of Parliament was the rule for all practical purposes. However, now and at the earliest since 1966, there are substantial limitations on the power of the legislature.[18] There

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16 E.g., the Colonial Laws Validity Act 1865, s. 5.

17 As to this, see pp. 215 et seq., ante.

18 E.g., Ch.VI, and ss. 67 and 68 of the Constitution. See also pp. 206 et seq., ante.

is now supremacy of the Constitution as fundamental law as opposed to the sovereignty of Parliament as described by Dicey.[19]

Accordingly, it is submitted that the chances of appreciating, except perhaps in very obvious cases, the likelihood of unconstitutionality of proposed legislation would be remote. Moreover to provide for severability in relation to specific parts of every enactment would obviously not be a practicable measure. This of course is the case not only in Fiji but also elsewhere.

In any event, it is submitted that the use of a specific severability clause could have the unfortunate result of causing the court to presume that in all cases where the provision was not included, the legislation was intended to be inseparable.[20] It would be an example of expressio unius est exclusio alterius. The presumption would be excluded in relation to a particular statute by including not only a specific severability clause but also a general one applicable to the whole enactment. Even then there would remain the danger of expressio unius est exclusio alterius being applied to other statutes. If any statute did not contain the general severability clause, it could be interpreted as evidence that severability was not intended. We would be thrown back to the problem discussed earlier. Accordingly, it is submitted that the neatest solution in Fiji would be to include in the Constitution provision for a general severability clause and for that provision to be entrenched so that it may not be the subject of an implied repeal.[21]

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19 See p.210, ante.

20 Cf. Stern, loc. cit., 127.

21 Cf. McCawley v The King [1920] A.C. 691 and Bribery Commissioner v Ranasinghe [1965] A.C. 172.

There is no question of the beneficial nature of a severability clause. The attitude of court should be to effectuate rather than to thwart legislative policies. In this field an analogy can be drawn from the related doctrine that a statute should be given that construction which will sustain it. Hence, a suitable general severability clause would be the legal foundation for the principle that the courts should uphold the validity of statutes. The general severability clause suggested should include both the application and the language of all enactments as discussed above.[22] This would also be consistent with the principle of enforceability intrinsically present in sections 17 and 97 of the Constitution which make it a pre-requisite to the invoking of these enforcement sections that the applicant be in some way affected by the contravention of the Constitution. Hence, if there is a breach of fundamental rights provision, the complainant must prove its breach "in relation to him".[23] Thus the question of application to him will arise. The law will not be struck down despite the fact that the application of the law to others would contravene the Constitution. Severability would play an important role and should be given a firm legal foundation. But a general severability clause would need to give way, where contrary intention was shown in a particular statute.

However, in the absence of such a general clause, the courts in Fiji must apply the principles of severance already discussed. It is submitted that certain guiding principles that the courts in Fiji may apply in their determination of the question of severability

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22 See pp. 346 et seq., ante.

23 See pp. 184 et seq., and p. 682 , post.

can be stated.

1. If the valid and the invalid portions are so interwoven that they cannot be separated, both parts must be struck down as invalid. This does not necessarily mean that, if part of the same section is valid and another part invalid, the whole section must be struck down, but this will occur where the substance of the provision, whether in the same section or a different section of the same Act, are so connected or dependent that one cannot stand without the other. The two parts must be

> so connected or dependent on each other in subject matter, meaning, or purpose, that the good cannot remain without the bad. The point is not whether the parts are contained in the same section ... but whether they are essentially and inseparably connected in substance, - whether the provisions are so interdependent that one cannot operate without the other. [24]

This dependency may be of various types. For instance, the whole Act or a substantial part thereof may be part of a connected scheme. In such circumstances severance would be very difficult if not impossible.[25]

2. If the portion which is held invalid renders the remainder devoid of any effective operation, the whole must be struck down. Thus in Attorney-General of Alberta v Attorney-General of Canada [26] of the two parts to the statute in question one was held

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24 Loeb v Columbia 179 U.S. 472, 490 (1900); See also Berea College v Kentucky 211 U.S. 45, 55 (1908).

25 Attorney-General of Alberta v Attorney-General of Canada [1947] A.C. 503.

26 Supra.

ultra vires. The Judicial Committee stated:[27]

> The whole thing hangs together, and if part II goes there is nothing left to be added to the statute law of Alberta which would have any effective operation.

3. If the invalid portion is struck down and in so doing the nature or the structure or the object of the enactment is not affected, severance would be in order. The statute should remain substantially the same after the invalid portion is excised.

> [O]r, as it has sometimes been put, whether on a fair review of the whole matter it can be assumed that the legislature would have enacted what survives without enacting the part that is ultra vires at all. [28]

In such cases it may be said that the invalid and valid portions are independent and complete on their own and in no way dependent on the other.

> If the parts are wholly independent of each other, that which is constitutional may stand while that which is unconstitutional will be rejected. [29]

4. If after excising the invalid part, what remains cannot be enforced without making alteration and modifications therein - or "rewriting" the enactment - the whole must be struck down and severance will not apply. The doctrine of severance does not entail judicial legislation. [30]

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27 [1947] A.C. 503, 519.

28 Ibid., 518.

29 Pollock v Farmers Loan and Trust Co. 158 U.S. 601, 635 (1894).

30 R. v Commonwealth Court of Conciliation and Arbitration, ex parte Whybrow and Co. (1910) 11 C.L.R. and United States v Reese 92 U.S. 214 (1875).

C. Extrinsic Evidence

(a) General

A question of paramount practical importance, as far as the interpretation of the Constitution in Fiji is concerned, is the admissibility of extrinsic evidence. As a general rule, in the interpretation of an ordinary statute, extrinsic evidence has been held to be inadmissible. "Extrinsic evidence" includes such matters as the legislative history, official reports and the like. Hence, the exclusion extends not only to the proceedings in Parliament, but also to extra-parliamentary matters such as the report of a Royal Commission or other committee which preceded the enactment of the legislation.[31] This rule is "well settled" and "well established".[32]

However, Lord Halsbury once referred to the report of the Commission that led to the enactment in question for the purpose of seeing what was the mischief or defect intended to be remedied.[33] Thus in cases where the courts find it relevant to

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31 For critical examinations of the exclusionary rule see F. Frankfurter, "Some Reflections on the Reading of Statutes", (1947) 47 Colum L. Rev. 527; D.G. Kilgour, "The Rule Against the Use of Legislative History", (1952) 30 Can. Bar Rev. 769; K.C. Davis, "Legislative History and the Wheat Board Case", (1953) 31 Can. Bar Rev. 1; J.A. Corry, "The use of Legislative History in the Interpretation of Statutes", (1954) 32 Can. Bar Rev. 624.

32 Hollinshead v Hazleton [1916] 1 A.C. 428, 438, per Lord Atkinson; see also Re Viscountess Rhonddas' Claim [1922] 2 A.C. 339; P. Brazil, "Legislative History and the Sure and True Interpretation of Statutes in General and the Constitution in Particular" (1964) 4 Univ. Queens. L.J. 1.

33 Eastman Photographic Materials Co. v Comptroller-General of Patents, Designs, and Trade Marks [1898] A.C. 571.

consider the state of the law and of affairs preceding the Act in question, they have a wide choice of materials upon which they may draw for information.[34]

As regards the determination of the constitutionality of a statute the courts have, as a general rule, in countries where they have the power of judicial review, admitted extrinsic evidence to see whether a statute is in conflict with the Constitution. In this field of admissibility of extrinsic evidence, the distinction between the interpretation of an ordinary statute and a Constitution has been well drawn by Evatt J. who said:[35]

> In considering the question of admissibility of evidence, a fundamental distinction has to be drawn between cases where the court has no function committed to it except that of interpreting a statute, and cases where, in accordance with a constitutional charter, the court has to determine whether there has been an infringement by the legislature of some overriding constitutional provision. In the former case, the court's function is to interpret the language which the legislature has employed, though, even there, the court is not bound to shut its eyes to public general knowledge of the circumstances in which the legislation was passed.
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> In the latter case, the court may entirely fail to fulfil its duty if it restricts itself to the language employed in the Acts which are challenged as unconstitutional.

There may be instances in which legislation is constitutional only when there is a factual basis justifying it. On the other hand, there may be instances in which legislation prima

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34 Ibid., See also Assam Railway and Trading Co. v Commissioner of Inland Revenue [1935] A. C. 445, esp. at 458 - 459.

35 Deputy Federal Commissioner of Taxation (N.S.W.) v W. R. Morgan Pty Ltd. (1939) 61 C.L.R. 735, 793.

facie valid is unconstitutional because of factual background not revealed by the statute. May the courts receive evidence of the relevant facts in order to determine the validity of legislation?

In the United States, the general rule is that in the determination of the constitutionality of any legislation the court cannot necessarily reach a decision by a mere comparison of the legislation with the relevant portion of the Constitution. It may first need to establish the truth of some question of fact which the statute postulates or with reference to which it is applied; the validity or otherwise of the enactment may turn on the determination and conclusions arrived at.[36] The court's surveillance of constitutional facts has been emphatically acknowledged by the United States Supreme Court which stated:[37]

> In cases brought to enforce constitutional rights, the judicial power of the United States necessarily extends to the independent determination of all questions, both of fact and law, necessary to the performance of that supreme function.

Hence in the United States a statute may be without inherent constitutional invalidity but may be impugned in its application

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36 H.W. Bickle, "Judicial Determination of Questions of Fact Affecting the Constitutional Validity of Legislative Action", (1924-25) 38 Harv. L. Rev. 6. This article has a comprehensive collection of all the major American decisions in this field.

37 Crowell, Deputy Commissioner v Benson, 285 U.S. 22, 60 (1922); see also Zorach v Clauson, 343 U.S. 306, 322 (1952); Watts v Indiana, 338 U.S. 49, 51 (1949); and Hoover & Allison Co. v Evatt, Tax Commissioner of Ohio, 324 U.S. 652, 659 (1945).

to the particular situation.[38] It has been held that:[39]

> although an ordinance might be lawful upon its face, and apparently fair in its terms, yet, if it was enforced in such a manner as to work a discrimination against a part of the community, for no lawful reason, such exercise of power would be invalidated by the courts.

Where the reasonableness of a statute in relation to the permissible objects depends upon factual considerations, the Court will admit evidence of those facts.[40] Where the validity of a statute is challenged on the ground that the circumstances, on the existence of which the statute was based, have changed and the application of the statute to the changed circumstances has become unconstitutional, evidence will be also admitted.[41]

The Supreme Court in the United States has relied on information and facts obtained or brought before it in various ways. It has dealt with the question just as it deals with the question of law, as a matter dependent upon reasoning and precedent and not merely upon facts disclosed upon the record.[42] Another method has been the inclusion in the brief of counsel of pertinent statistical data, legislative practice, scientific

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38 Bikle, loc. cit., 11.

39 Caroline W. Dobbins v City of Los Angeles 195 U.S. 223, 240 (1904); see also Yick Wo v Hopkins 118 U.S. 356 (1886).

40 Weaver v Palmer Bros. 270 U.S. 402 (1925); Borden's Farm Products v Baldwin, 293 U.S. 194 (1934); United Fuel Gas Co. v Railroad Commission of Kentucky 278 U.S. 300 (1928).

41 Bikle, loc. cit., 12.

42 McCulloch v Maryland 4 Wheat (U.S.) 316 (1819); Hepburn v Griswold, 8 Wall (U.S.) 603 (1869); Legal Tender Cases, 12 Wall (U.S.) 457 (1870).

discussion by eminent persons in their respective professions, departmental reports, and the like and by asking the court to take judicial notice of the materials so presented.[43] In certain cases, evidence has been submitted at a trial with reference to the underlying questions of fact.[44] Evidence of the report of the committee in charge of a bill has been admitted to show the basis upon which the legislation rested.[45] Thus the Supreme Court, in deciding the constitutionality of a statute, will act on the facts as stated or admitted in the pleadings and affidavits,[46] or facts of which the court may take judicial notice, or those which appear on the face of the record or are proved by other evidence.[47]

In Australia, too, the courts have admitted similar evidence to determine the constitutionality of legislation. It has been said that:[48]

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43 Bikle, loc. cit., 13; see also Muller v Oregon 208 U.S. 412 (1908); Bunting v Oregon 243 U.S. 426 (1917); Stettler v O'Hara 243 U.S. 629 (1917); Adkins v Children's Hospital 261 U.S. 525 (1923).

44 Smith v Texas, 233 U.S. 630 (1914); The Chastleton Corporation v Sinclair, 264 U.S. 543 (1924).

45 James Everards Breweries v Day, 255 U.S. 545 (1924).

46 Hadacheck v Sebastian 239 U.S. 394 (1915).

47 Australian Communist Party v The Commonwealth (1951) 83 C.L.R. 1, 222; see also Hughes and Vale Pty. Ltd v The State of New South Wales (No. 2) (1955) 93 C.L.R. 127, 165.

48 Australian Communist Party v The Commonwealth (1951) 83 C.L.R. 1, 222.

> it is the duty of the Court in every constitutional case to be satisfied of every fact, the existence of which is necessary in law to provide a constitutional basis for the legislation.

The courts in Australia acquire the relevant constitutional facts either by invoking the doctrine of judicial notice or by reliance on the evidence given by the parties to the proceedings.[49] At an earlier time it was generally assumed that the only facts relevant to the solution of problem of validity were facts of which judicial notice could be taken.[50] Subsequently however, the High Court has accepted and considered evidence led by the parties.[51]

(b) The Position in Fiji

In Fiji, no case has so far arisen which called for the judicial determination of the principles involved in the admission of extrinsic evidence. However it is submitted that the

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49 P.H. Lane "Facts in Constitutional Law", (1963) 37 A.L.J. 108, 109; see also Sir Owen Dixon, "Marshall and the Australian Constitution" (1955) 29 A.L.J. 420.

50 J.D. Holmes, "Evidence in Constitutional Cases", (1949) 23 A.L.J. 235, 237; see also Stenhouse v Coleman (1944) 69 C.L.R. 457, 469 where it was stated: "Ordinarily the Court does not go beyond matters of which it may take judicial notice. This means that for its facts the court must depend upon matters of general public knowledge".

51 Jenkins v Commonwealth (1947) 74 C.L.R. 400; Sloan v Pollard (1948) 75 C.L.R. 445; Bank of New South Wales v The Commonwealth (1948) 76 C.L.R. 1.

very nature of the constitutional provisions in Fiji will necessitate the judiciary embarking upon such enquiries as have been made in America and Australia. It is contended that if the constitutionality of a law is impugned in a legal proceeding in Fiji there is no reason for not admitting evidence which could be called in other proceedings.

A distinction must however be drawn between ordinary facts and those facts on the basis of which the court determines the constitutionality of a law - "constitutional facts",[52] as they have been described,

> Facts in litigation fall into two classes, ordinary facts and legislative facts - constitutional facts are a particular type of the latter class. Constitutional facts are those on the basis of which the court determines the content of a law in relation to the Constitution .... Constitutional facts ... are described as 'information', 'factual information', 'background facts'; they are 'of a general nature', furnishing 'information which the court should have in order to judge properly of the validity of this or that statute or of this or that application by the executive government ... of some power or authority it asserts'; they are the facts 'the existence of which is necessary in law to provide a constitutional basis for the legislation'.[53]

Some provisions in the Constitution are such that they can easily be compared with a statute to see whether the two are in harmony or in conflict. For example, a statute which curtails the right of an individual to make application to the Supreme Court to enforce his rights under the Constitution may be held

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52 Lane, loc. cit., 108.

53 Idem. The term "constitutional facts" will be used hereafter.

to be intrinsically invalid.[54] Other provisions in the Constitution may not be capable of being so readily compared with a statute until the court has first established the truth of some question of fact which the legislation postulates or with reference to which it is applied. In such cases the validity or otherwise of the enactment will turn on the conclusions reached by the court on that question of fact. An example is the question as to what is "reasonably justifiable in a democratic society". This phrase recurs in the fundamental rights provisions of the Fiji Constitution.[55]

In the United States and Australia, as has been noted, the courts have judicially determined questions of fact affecting the constitutional validity of legislative action, either by the doctrine of judicial notice or by admitting evidence of constitutional facts as they would admit evidence of other facts. It is submitted that the courts in Fiji should exercise their powers under the doctrine of judicial notice very sparingly, if at all. Ordinarily it may be assumed that the training and experience of a judge qualifies him to decide questions of law, including the conflicts between the text of a constitutional provision and that of a statute. However, with respect, there is no sound basis for the assumption that a judge is equally well qualified to determine underlying questions of fact on which the constitutionality of a law depends, unless those facts are adduced in

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54 Balewa v Doherty [1963] 1 W.L.R. 949; Gopalan v State of Madras (1950) S.C.R. 88.

55 See ss 6, 9, 11, 12, 13, 14 and 15. As to this phrase see pp.453 et seq., post and Akar v Attorney-General for Sierra Leone [1970] A.C. 853.

evidence and properly weighed by him or are such as to justify judicial notice being taken. Otherwise there is the possibility that "the decision will depend on a judgement or intuition more subtle than any articulate major premise". [56]

Where the court acts on facts of which it takes judicial notice, the litigant may not know of which facts the court will take judicial notice. There may also be uncertainty if judges hold different views as to the facts of which judicial notice should be taken. This is particularly so in regard to facts which are not obviously incontestable. Hence arises the necessity for adducing evidence of those facts.

Furthermore, if as a rule the court acts on evidence properly presented to it, the evidence will be on record. This will not be so if judicial notice is taken of facts. Inclusion of evidence in the record would strengthen the position of a court by dispelling any suggestion that the court was proceeding upon artificial and academic assumptions rather than upon the facts of daily life.

Also, it is submitted, the litigant challenging the validity of legislation must be accorded a judicial determination of the question in such a way that he is able to meet the issues squarely before the court. If the court intends to invoke the doctrine of judicial notice, the litigant ought to be warned so that he can refute the facts of which judicial notice might be taken. This is not to deny the court the power to take judicial notice of facts.

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56 Lochner v New York 198 U.S. 45, 76 (1905), Holmes C.J.

What is being said is that, if the court is asked or, of its own motion, intends to take judicial notice of matters, the court, in order to command public support, should base its decision upon the record of the case before it. It should find in the evidence, or in matters properly brought before it for judicial notice, a complete basis for a determination of the validity of the legislation in question. The record will then disclose the basis for its validity or invalidity.

The formulation of law (and policy) in the judicial process will obviously gain strength to the extent that information will replace guesswork, intuition or general impressions. Questions of law will be firmly based on findings of fact and matters of record. There will not be an uneven mixture of a priori conjectures and partially informed guesses. Also when the extra-record facts are disputable or rebuttable, a determination that fails to take into account any explanation or rebuttal that may be offered would render the process unfair.

It is submitted that if the court, in determining constitutional facts, intends to utilise the doctrine of judicial notice, it should in most cases afford each party reasonable opportunity to present to it information relevant to the propriety of taking judicial notice of the matter concerned. However, it is submitted, this rule must be discretionary, not absolute. One should bear in mind that,

> In conducting a process of judicial reasoning, as of other reasoning, not a step can be taken without assuming something which has not been proved. [57]

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57 C. J. B. Thayer, A Preliminary Treatise on Evidence (1898), 279.

Thus a judge may assume the meaning of an ordinary word without consulting a dictionary, or take judicial notice of the fact that New Zealand is in the southern hemisphere without calling for an atlas or expert evidence. Practically every simple case involves assumption of many facts which are not proved. But, there are some facts which may be the core of the whole case and very close to the centre of the controversy between the parties, while others may be incidental or unimportant. Some facts may be obviously indisputable while others may be debatable; some facts may be obvious in relation to others; some facts may be obvious to a certain class of person while not so to others. One could go on multiplying instances. In view of so many variables, it is submitted, the courts should have a discretion as to whether or not the parties are notified when it is intended to take judicial notice of facts.[58]

If the judge plans to take notice of facts assumed to be obvious and a party requests the opportunity to challenge them, it is submitted that such a party should be accorded the opportunity. The Supreme Court in the United States stated:[59]

> [N]otice, even when taken, has no other effect than to relieve one of the parties to a controversy of the burden of resorting to the usual forms of evidence ... 'It does not mean that the opponent is prevented from disputing the matter by evidence if he believes it disputable.'

After all, judges are fallible human beings. One of the functions

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58 Davis, loc. cit., 977.

59 Ohio Bell Tel.Co. v Public Utilities Commission 301 U.S. 292, 301 -302 (1936).

of the adversary system is to point out mistakes so that they may be corrected. Rulings on judicial notice should be subject to reconsideration to the same extent as any other ruling.[60] This means that requests for reconsideration of the ruling must be entertained and, needless to say, the court will retain a discretion to allow or deny the request. Such an exercise of discretion, both in the original instance and in the request for reconsideration, must be subject to the review of the higher courts.

In summary, it is submitted that the courts should have the discretionary power:

(i) to determine whether or not to notify the parties of its its intention to take judicial notice of facts and

(ii) to allow or to deny the opportunity to challenge facts that have been judicially noticed either by calling evidence or by argument. The exercise of such a discretion, should be guided by the following factors:

(a) Whether the facts are close to the centre of the real controversy between the parties or are background or incidental facts.

(b) Whether the facts are obviously indisputable or probably debatable or certainly debatable.

(c) Whether the matters of which judicial notice has been taken are contained in sources of indisputable accuracy.

(d) Whether the facts are such that they may be judicially

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60 Davis, loc. cit., 979.

noticed by virtue of any statutory provision.

(e) Whether there is an application by either party to rebut the facts or matters judicially noticed.

However, should the matter be such that it is close to the centre of the real controversy between the parties, the discretion ought to be exercised in favour of rebuttal evidence or argument. After all, the entire case may depend on the truth or otherwise of such matter or on facts requiring proof. In matters pertaining to constitutional facts, the court would be dealing with facts and matters which determine the content of a law and policy; ordinarily such facts are of general nature and do not merely concern the immediate parties. Their general application necessitates the investigation of every angle. The very validity or constitutionality of the legislation will depend upon determination of such facts, so the courts must admit any rebuttal matter that a party wishes to introduce. When the court makes a finding after both parties to the litigation have had the chance of subjecting it to thorough criticism and cross examination, such a finding rests on a more solid foundation than if the court took judicial notice of a matter which might later be found contestable.[61] On the question of the admissibility of extrinsic evidence when deciding the constitutionality of legislation, the Australian courts have taken the view that adjudicating upon a constitutional matter is not only of concern to the parties to the proceedings but to everyone.

Accordingly, it is said that not all the facts peculiar to the

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61 Lane, loc. cit., 110.

parties should be admissible in evidence when making findings of constitutional facts. The facts must be such as are common to all persons. Kitto J., when speaking of typical facts which form the basis of a constitutional decision, stated:[62]

> Although it is only in litigation between parties that the Court may decide whether Commonwealth legislation is valid, it is upon the validity of the legislation in relation to all persons that the Court has to pronounce. The question is whether the legislation forms part of the law of the Commonwealth. Since it is impossible to affirm the validity of a measure upon a particular basis of fact unless that basis of fact can be seen to be common to all persons, it cannot be material, for the purpose of considering validity, to decide an issue of fact which is of such a nature as to admit of different findings in different cases.

In Fiji the admissibility of evidence to ascertain constitutional facts would be of paramount importance. This is particularly so in regard to the fundamental rights provisions. As has been said, evidence could be introduced to establish that a law valid in its outward form is "in substance" or "in reality" beyond the power of the legislature. The Judicial Committee of the Privy Council has stated:[63]

> But where the law-making authority is of a limited or qualified character, obviously it may be necessary to examine with some strictness the substance of the legislation for the purpose of determining what it is that the Legislature is really doing.

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62 Australian Communist Party v The Commonwealth (1951) 83 C.L.R. 1, 276; Peanut Board v Rockhampton Harbour Board (1933) 48 C.L.R. 266, 304, per Evatt J; Breen v Snedden (1961) 106 C.L.R. 406.

63 Attorney-General for Ontario v Reciprocal Insurance [1924] A.C. 328, 338.

In such cases, it may be imperative for the courts to investigate by means of evidence the real nature of the legislation. As Evatt J. stated:[64]

> But it is often necessary to produce evidence in order to determine whether the executive has employed for one purpose a power which can only be lawfully exercised for another. On such occasions the field of admissible evidence is widened.
>
> A similar rule applies although no executive action is involved or questioned. The issue may be whether legislation which at first sight appears to conform to constitutional requirements is colourable or disguised. In such cases the court may have to look behind names, forms and appearances to determine whether or not the legislation is colourable or disguised. This is a fundamental principle applicable to the Constitutions of the United States and Canada as well as to that of the Commonwealth of[Australia].

Evatt J. went on to say that the same principle is also applicable to constitutional guarantees or prohibitions, and if the legislation in effect produces the prohibited effect by indirect or devious methods,

> it may become the duty of the court to examine closely whether the legislature has deliberately set out to produce the forbidden result although by a somewhat indirect method. In principle there is no reason whatever why public announcements of governmental policy, official governmental records and communications, and even the records of the proceedings in parliament, including records of debates, must necessarily be excluded from the field of relevant evidence. In special circumstances, some of this material

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64 Deputy Federal Commissioner of Taxation (N.S.W.) v W.R. Morgan Pty Ltd (1939) 61 C.L.R. 735, 794.

> may afford strong, even conclusive, evidence as to the scheme, object or purpose of the statute, although, as has been said: 'Generally speaking', however, 'the speeches of individuals' (in the legislature) 'would have little evidential weight'.[65]

It is imperative that the Fiji courts should have the power to investigate and examine the operation of the enactment which forms the subject of the attack. They will then be able to judge whether the enactment infringes the fundamental rights of the subject and in doing so, extrinsic evidence would be admitted to determine whether the legislation is valid or constitutional.

This will be of particular importance where a statute is passed on the basis of certain facts because, if those facts change, the enactment will become inoperative or unconstitutional.[66] The courts may need to hear evidence to determine whether the

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65 Idem. See also Attorney-General for New South Wales v Homebush Flour Mills Ltd. (1936-37) 56 C.L.R. 390, 418 where Evatt J. stated:

> I am strongly of opinion that, where the court has to investigate the question whether a State enactment imposes a duty of excise, it may be necessary to enquire into the actual operation of the enactment ....
>
> Had the present question been, in my view, susceptible of doubt, I would have favoured an investigation into the operation of the present Act upon the milling business - an investigation which this court could have directed.

See also Attorney-General for British Columbia v McDonald Murphy Timber Co. [1930] A.C. 357, 383.

66 Armstrong v The State of Victoria (No. 2) (1957) 99 C.L.R. 28, 49 and 73 - 74.

facts have changed. Thus Dixon J. stated:[67]

> The American doctrine is that a law which nothing but transient circumstances justify is valid from its inception only in its operation in or upon those circumstances and never is or becomes capable of operating further. It is not that it is invalidated by changing circumstances but rather that it never had a valid application except to or in existing conditions .... If a power applies to authorise measures only to meet facts, the measure cannot outlast the facts as an operative law.

Thus in Chastleton Corporation v Sinclair,[68] it was held that a law depending for its validity upon the existence of an emergency or other certain state of facts may cease to operate if the emergency ceases or the facts change, even though the legislation was valid when passed. In United States v Carolene Products Co.,[69] it was held that where the existence of a rational basis for legislation whose constitutionality is attacked depends upon facts beyond the sphere of judicial notice, such facts may properly be made the subject of judicial inquiry. The constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist.

Accordingly, it is submitted that, if an initially valid enactment is liable to be invalidated by circumstances, evidence to show or prove the change of circumstances should be admissible.

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67 Australian Textiles Pty Ltd v The Commonwealth (1945) 71 C.L.R. 161, 180 - 181; See also Hume v Higgins (1949) 78 C.L.R. 116, 133.

68 264 U.S. 543 (1923). See also Penin v United States 232 U.S. 478, 486 - 487 (1913) United States v Carolene Products Co. 304 U.S. 144 (1937); Nashville, Chattanooga & St Louis v Walters 294 U.S. 405, 415 (1935).

69 304 U.S. 144 (1937).

That this is the position seems to have been the view of the Judicial Committee of the Privy Council in Fort Francis Pulp and Power Co. Ltd v Manitoba Free Press Co. Ltd,[70] although Viscount Haldane said:[71]

> [V]ery clear evidence that the crisis had wholly passed away would be required to justify the judiciary, even when the question raised was one of ultra vires which it had to decide, in overruling the decision of the Government that exceptional measures were still requisite.

The admissibility of evidence to establish changed circumstances would be of crucial importance in relation to the fundamental rights provisions of the Fiji Constitution because those provisions contain so many exceptions permitting derogation from fundamental rights.[72] Most of the exceptions relate to some specific purpose or object, e.g., "public safety", "public order", "public morality", "defence" and so forth; and, as will be seen,[73] the test is whether the derogation is "reasonably justifiable in a democratic society". When the power to legislate in derogation of fundamental rights provisions is defined by reference to such purposes or objects, it is submitted that the application of any principle, whereby validity is to be determined, must depend upon whether in fact there is a connection between the legislation in question and the specified object or purpose. This will necessitate the admission of evidence of the circumstances on enactment as well as at the time

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70 [1923] A.C. 695.

71 Ibid., 706.

72 E.g., Constitution, ss. 5, 8, 9, 11, 12, 13, 14 and 15.

73 See pp.453 et seq., post.

of the challenge to the legislation.

> [A] law which nothing but transient circumstances justify is valid from its inception only in its operation in or upon those circumstances and never is or becomes capable of operating further.[74]

The Privy Council has recognised that where purpose is relevant to validity, evidence of the operation of the legislation is admissible.[75]

This question of admissibility of extrinsic evidence is important in cases where the legislature has declared the objects of the enactment in the preamble. Will the court be bound by the declaration of the legislature or may it admit evidence in rebuttal? It is submitted that the court ought not to be so bound; otherwise, the legislature may be able to achieve indirectly what it could not do directly. No doubt the court ought to give great respect to such a declaration but it should not be treated as conclusive because the legislature would then be able to flout the Constitution with impunity by ousting judicial review of legislation. In relation to the declaration in the preamble Latham C. J. stated:[76]

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74 Australian Textiles Pty Ltd v The Commonwealth (1945) 71 C.L.R. 161, 180.

75 In Attorney-General for Alberta v Attorney-General for Canada [1939] A.C. 117, 130, the Judicial Committee stated:

> The next step in a case of difficulty will be to examine the effect of the legislation .... For that purpose the Court must take into account any public general knowledge of which the Court would take judicial notice, and may in a proper case require to be informed by evidence as to what the effect of the legislation will be.

76 South Australia v The Commonwealth (1942) 65 C.L.R. 367, 432. See also R. v University of Sydney; Ex parte Drummond (1943) 67 C.L.R. 95, 102 - 103; Chastleton Corporation v Sinclair Ltd 264 U.S. 543, 547 (1924); Block v Hirsh 256 U.S. 135, 154 (1921).

> The Court should treat this expression of the view of Parliament with respect. In a doubtful case it might turn the scale, the presumption being in favour of the validity of Acts rather than of invalidity. But such a declaration cannot be regarded as conclusive. A Parliament of limited powers cannot arrogate a power to itself by attaching a label to a statute.

From the foregoing there would appear to be a general consensus that extrinsic evidence may play a significant role in constitutional decisions. Facts or supposed facts and the views of the courts on those facts will assume great importance. The vital question is whether the facts should be the subject of judicial notice or be settled after the admission of evidence and cross examination of witnesses in open court. It is submitted that the second approach should be adopted in Fiji. To leave such matters to the assumed knowledge, the belief and even the prejudices of the judiciary would fail to accord these issues their proper importance. It would not only be unfair to leave such matters to the judiciary but it would also be undesirable. Political and policy questions may have to be determined, e.g., whether discriminatory legislation under section 15 (e) of the Constitution is "reasonably justifiable". Such important questions should not be answered by the judges without evidence of the facts being admitted. To leave such questions to the judges alone and to have them making unchallengeable assumptions without an inquiry conducted in open court will have undesirable results and possibly cause loss of respect for the judiciary.

Conclusion

From the foregoing consideration of only three representative principles of constitutional interpretation, it is obvious

that the courts in Fiji will have to adopt a liberal approach to constitutional interpretation. They should not adhere rigidly to the orthodox canons of statutory interpretation and apply them to the Constitution. The Constitution must be accepted as a dynamic, developing instrument. The whole structure of government - including all the necessary agencies - is based on the Constitution. The courts must be fully prepared to shoulder the burden of adapting the Constitution to contemporary social and economic requirements. They will be able to do so only by adopting methods of interpretation which will ensure the proper functioning of the Constitution according to its spirit.

In promoting the proper functioning of the Constitution no doubt the courts will, as far as permissible, ensure that "Parliament is mistress in her own house".[77] But this should not be the only factor for the courts to consider. There are other rights and interests entrenched in the Constitution as well as matters of "national" concern which must be recognised and protected. Effective government on the one hand and the rights of individuals and groups on the other must be reconciled by the courts.

It must be accepted that Constitutions are "living" instruments and "organic" enactments.[78] The spheres of

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77 Edwards v Attorney-General for Canada [1930] A.C. 124, 136, per Lord Sankey.

78 British Coal Corporation v The King [1935] A.C. 500, 518.

activity of all three basic agencies of the state - the legislature, the executive and the judiciary - are delineated by it. The Constitution provides a framework within which the state can function. Hence to give full effect to such an instrument, a flexible and dynamic interpretation is necessary. As Holmes J. stated:[79]

> The interpretation of constitutional principles must not be too literal. We must remember that the machinery of government would not work if it were not allowed a little play in its joints.

Fiji, as a young nation, will have to move with the times and face up to many changes in all spheres of activity. Needs will vary at different stages of development. However, whilst society changes, the Constitution (like many others) prescribes special procedures for its amendment. Hence the interpretations placed on the provisions of the Constitution must be such as will permit modification without formal amendment. The Constitution must be treated as a "living tree capable of growth and expansion within its natural limits".[80] It should be the duty of the court to make a constitutional scheme work. This was acknowledged by Lord Sankey, L.C.,[81] who declared that the duty of court, in interpreting a constitution, is not

> to cut down the provisions of the [Constitution] Act by a narrow and technical construction, but rather to give it a large and liberal interpretation so that the Dominion

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79 Bain Peanut Co. of Texas v Pinson 282 U.S. 499, 501 (1930).

80 Edwards v Attorney-General for Canada [1930] A.C. 124, 136.

81 Idem.

> to a great extent, but within certain fixed limits, may be mistress in her own house ....

Furthermore, the Fiji Constitution like that of Ceylon, represents "a solemn balance of rights between the citizens .. [and contains] the fundamental conditions on which inter se they accepted the Constitution".[82] The Constitution is based on the general agreement of the three major races in Fiji - the Indians, the Fijians and the Europeans. The Constitution is the result of much give and take, involving various political considerations and issues of more far reaching importance than the rights and duties of individual citizens. Various checks and balances against the dominance of one race or one class have been provided for. Hence in interpreting the Constitution, the courts are bound to enter into questions of policy - an area which the courts have declared as beyond their competence when interpreting ordinary enactments.[83] Even in relation to the interpretation of a Constitution, the view has been advanced that it is no part of the functions of the judiciary to examine the social and political motivations of legislation.[84] This view, it is submitted, cannot be adopted in Fiji. The provisions of the Fiji Constitution require the courts to become involved with these questions.

As will be seen later,[85] a recurring but vital phrase in

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82 Bribery Commissioner v Ranasinghe [1965] A.C. 172, 193.

83 See p. 320, ante.

84 C. Howard, Australian Federal Constitutional Law (2nd ed., 1972), 7.

85 Ch. XI, post.

the Constitution relating to fundamental rights is "reasonably justifiable in a democratic society". This phrase is used in those sections permitting derogations from fundamental rights. One example is section 15 which prohibits discriminatory legislation. A determination as to whether discriminatory legislation is "reasonably justifiable in a democratic society" must involve the courts in an examination of the social and, at times, the political justification for the legislation concerned. The meaning and implications of this phrase will vary from subject to subject and from one stage of social, economic or political development or needs to the next. The meaning and working of the fundamental rights provisions in Fiji - and hence the implication of the phrase in question - is going to change as society and other conditions change. Change in society is not restricted to social change but also includes factors such as economic conditions. The meaning of the phrase in question will be affected by the society's own "libertarian impulses".[86] When it comes to giving meaning and practical effect to guarantees of human rights, when in practice one will be called upon to evaluate and balance one interest against another - for example, freedom of speech against state security - the critical factors are likely to range well beyond a study of the written text and of legal decisions as to its meaning. They will include one's conviction (or absence of conviction)about the basic rights, and various social factors, the political climate and the needs of the day, as far as the society is concerned. In short, a reasonably close correlation between the law and society must be maintained.

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86 E. McWhinney, "The Supreme Court and the Bill of Rights - The Lessons of Comparative Jurisprudence" (1959) 37 Can. Bar Rev. 16, 27.

CHAPTER X

THE EFFECTS OF "UNCONSTITUTIONAL LAWS"

A. Introduction

The concept of a society ordered by law presupposes that particular laws do not produce conflicting results when applied to the same facts. If two laws inconsistent with each other in this sense exist, a rule is needed to decide which of them prevails. This problem is anticipated by section 2 of the Fiji Constitution which, as has been seen elsewhere,[1] gives supremacy to the Constitution. It states that:

> This Constitution is the supreme law of Fiji and if any other law is inconsistent with this Constitution, that other law shall, to the extent of the inconsistency, be void.

This section raises a number of issues. Is a law found to be inconsistent with the Constitution to be void ab initio? Is a distinction to be drawn between "inconsistent" laws passed before and after the commencement of the Constitution? Is the Constitution to have retrospective effect? What is the effect of judicial invalidation of a law? The problems will be dealt with under the following headings:

(a) The meaning of "inconsistency"

(b) Inconsistency of pre-Constitution laws.

(c) Inconsistency of post-Constitution laws.

(d) Legal consequences of judicial invalidation.

B. Inconsistency

"Inconsistency" is defined[2] as:

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1 Pp. 210 et seq., ante.

2 The Shorter Oxford English Dictionary (3rd ed. revised, 1964), 983.

> 1 . . . lack of accordance or harmony (with something or between things); incompatability, contrariety, opposition . . . .
>
> 2. Want of agreement between two things or parts of a thing; a discrepancy, an incongruity.

"Inconsistent" has been defined as:[3]

> Mutually repugnant; or contradictory; contrary the one to the other, so that both cannot stand, but the acceptance or establishment of the one implies the abrogation or abandonment of the other . . . .

From these meanings of the terms "inconsistency" and "inconsistent", it is submitted that for a law to be inconsistent it is really the impact or effect of the legislation rather than its form that matters. Legislation can be said to be inconsistent with the Constitution if both cannot stand together. A statute may on its face be quite consistent with the Constitution but it is necessary to look further and examine its substantive character and nature.

> The legislature need not adopt any form of statement or finding for, in the enforcement of restraints imposed by the . . . Constitution . . . this Court regards the substance of their enactments as controlling rather than mere forms of expression employed.[4]

Further the United States Supreme Court has declared:[5]

> In resolving the issue we are not concluded by the name or description of the tax as found in the act; our duty is to ascertain its nature and effect. 'The substance

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3 Black's Law Dictionary (4th ed. revised, 1968), 907.

4 Chesebro v Los Angeles County Flood Control District, 306 U.S. 459, 464. (1938).

5 Stewart Dry Goods Co. v Lewis, 294 U.S. 550, 555 (1934).

and not the shadow determines the validity of the exercise of the power.'

A classic illustration of the application of the principle is the judgement of the Swaziland Court of Appeal in Ngwenya v Deputy Prime Minister and Another.[6] Ngwenya was elected a member of the Swaziland House of Assembly early in 1972. Soon afterwards, he was served with a deportation order made by the Deputy Prime Minister (the respondent) who was acting under section 9 (1) (g) of the Immigration Act 1964. Under that Act a citizen of Swaziland could not be deported. Ngwenya applied to the High Court to have the order set aside on the ground that as a citizen he was not liable to deportation. On 29 August 1972, the High Court, after hearing oral evidence, found on a balance of probability that Ngwenya was a citizen of Swaziland by birth and accordingly the deportation order was set aside.[7]

On 14 November 1972, the Swaziland Parliament passed an amendment to the Immigration Act, inserting a new section

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6 (1973) - unreported - cited in W.A. Ramsden, "Judicial Protection in Swaziland" (1973) 6 The Comparative and International Law Journal of Southern Africa, 378. However, it is pertinent to note that the provisions of the Constitution referred to in the judgement may no longer be of any effect in Swaziland due to the purported rejection of the Constitution by King Sobhuza II and his Parliament. However the case is very relevant to the present discussion because the relevant provisions of Swaziland Constitution are substantially similar to the corresponding provision of the Fiji Constitution.

7 Ramsden, loc. cit., 378 et seq.

10 bis. This section established a tribunal consisting of five persons, to be appointed by the Deputy Prime Minister, to decide any doubtful question as to whether any particular person belonged[8] to Swaziland. It was specifically provided that the decision of the tribunal should not be subject to appeal by any court, but any person affected by it might appeal to the Prime Minister whose decision should be final. It also specifically provided that the tribunal had jurisdiction notwithstanding any judgement, decision or order previously made, inter alia, by any court on or in connection with any issue as to whether or not such a person belonged to Swaziland, and the decision of the tribunal or the Prime Minister would supersede any such previous judgement or decision of a court. The burden rested on the person concerned to prove that he "belonged" to Swaziland.

The Deputy Prime Minister appointed a tribunal under the new section 10 bis and through his permanent secretary referred to it the issue whether Ngwenya belonged to Swaziland in terms of the Act. Ngwenya applied to the High Court for an order declaring section 10 bis to be inapplicable to him and/or ultra vires the Constitution. The High Court gave judgement against Ngwenya who appealed.

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8 S. 3 defined a person who belongs to Swaziland as:

(a) citizen of Swaziland; or

(b) a child, stepchild or child adopted in a manner recognized by law, under the age of sixteen years; or the wife;
of a person referred to in paragraph (a).

Under section 14 of the Constitution [9] (which was almost identical with section 14 of the Fiji Constitution), whilst the freedom of movement of non-citizens could be curtailed with impunity, that of citizens could be curtailed only under conditions specified in the Constitution. [10] None of those conditions applied in the instant case. Chapter 3 of the Constitution (an entrenched chapter) provided for "citizenship" rights. Section 26 (2), which was part of Chapter 3, provided that Parliament could by legislation deprive a person who is a citizen by registration or naturalisation of his citizenship. There was no other provision for depriving a citizen of his status.

Section 17 of the Constitution [11] (which was almost identical

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9 S. 14 of the Swaziland Constitution provided:

> Protection of Freedom of Movement
> 14(1) No person shall be deprived of his freedom of movement, that is to say, the right to move freely through Swaziland, the right to reside in any part of Swaziland, the right to enter Swaziland, the right to leave Swaziland ....
> (3) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provisions ....
> (d) for imposing restrictions on the freedom of movement of any person who is not a citizen of Swaziland ....

10 E.g., detention under an order of court, extradition, and so forth.

11 S. 17 of the Swaziland Constitution provided:

> Enforcement of Protective Provisions
> (1) If any person alleges that any of the foregoing provisions of this Chapter [which includes s. 14] has been, is being, or is likely to be, contravened in relation to him ... then... that person... may apply to the High Court for redress.

Subsection 2 gave the High Court jurisdiction to hear and determine the application "and make such orders" etc. as "it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of this Chapter" (which included s. 14).

to section 17 of the Fiji Constitution) provided for the right to make an application to the High Court in respect of infringements of fundamental rights. Sections 14 and 17 were both entrenched provisions of the Constitution and could be amended only by special procedures. Section 10 bis was passed in the ordinary way. When this matter came before the Supreme Court, Hill C. J., in disallowing the application, stated:[12]

> S. [10 bis] is not intended to deprive any citizen of entrenched or indeed any rights of citizenship whatsoever. The Tribunal is established to decide an issue of citizenship only where a doubt exists as to whether a person is or is not a citizen. If the question is to be decided by a Court of law the result may be the same but the legislature, no doubt, is of the opinion that the Tribunal as constituted is in a better position to investigate and determine the issue. It must be assumed that the Tribunal will deal with the matter impartially and in accordance with the principles of justice.

However the Court of Appeal, in allowing the appeal, stated:[13]

> Broadly speaking the appellant's case was that the Constitution protects various rights belonging to Swazi citizens and expressly or impliedly gives the High Court jurisdiction to decide whether such rights have been infringed. In order to decide such issues the Court must decide whether the person affected is a Swazi citizen, such citizenship being dealt with in Chapter III of the Constitution. Legislative interference with such express or implied jurisdiction of the High Court would be an alteration of the Constitution, requiring a joint sitting.

The judgement of the Court of Appeal continued:[14]

> While this general approach can be supported, it is not

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12 Ramsden, loc. cit., 382.

13 Ibid., 383.

14 Idem.

necessary to examine the matter on these wider lines. For there is available at least one example of an express constitutional grant of jurisdiction to the High Court which provides a test whether the Amending Act purports to alter the Constitution by curtailing the jurisdiction of the High Court. Section 56 (1) of the Constitution provides:-

'(i) The High Court shall have jurisdiction to hear and determine any question whether
(c) any person has been validly elected as an elected member of the House;'

Section 43, so far as material, reads -

'A person shall be qualified ... to be elected as an elected member ... of the House of Assembly if, and shall not be qualified to be so elected ... unless, he...
(b) is a person qualified for registered as a voter;'

Section 51, so far as material, reads -

'(i) ... a person shall be qualified to be registered as a voter for the purpose of elections of elected members of the House of Assembly if, and shall not be so qualified unless, he ... is a citizen of Swaziland.'

Since these provisions expressly grant jurisdiction to the High Court to determine whether a person elected to the House of Assembly is a citizen of Swaziland it had to be decided in the present proceedings whether the Amending Act purported to cut down that jurisdiction by granting sole jurisdiction on the issue whether a person belongs to Swaziland in terms of section 10 (a) to the Special Tribunal.

It was rightly conceded for the respondents that if the new section 10 bis introduced by the Amending Act did curtail the jurisdiction of the High Court under section 56 (1) (c) of the Constitution this could only be done effectively by a joint sitting under section 134. But it was argued by counsel for the respondents that, properly construed, the new section 10 bis is limited to proceedings connected with immigration and deportation and does not apply to questions of citizenship for the purpose of qualification to be elected to Parliament,

which remain within the jurisdiction of the High Court.

The suggested limitation, it was argued, is to be extracted from the use in subsections (2) and (7) of the new section of the expression 'in terms of section 10 (a)', which counsel submitted had the effect of restricting the proceedings in which the Special Tribunal was to have sole jurisdiction to immigration proceedings.

It seems to us that the respondent's argument seeks to read far more into the words 'in terms of section 10 (a)' than they can bear. On the face of them they do no more than show, by reference to section 10 (a) and so to section 3, what is meant by belonging to Swaziland. There is in our view no suggestion that the jurisdiction of the Special Tribunal is to be limited to any particular kind of proceedings. Nor does the respondents' argument receive any support from the opening words of section 10 (a), as was suggested.

Our view is reinforced by consideration of what would be the result of the High Court's continuing to have jurisdiction to declare a person a citizen so as to be eligible for election to Parliament, while the Special Tribunal would have jurisdiction to decide that he was not a citizen for immigration purposes and must be deported accordingly. It is inconceivable that in enacting the Amending Act Parliament intended to leave this obvious source of conflict unresolved.

It would be noted that our conclusion does not flow from the fact that the appellant was elected to Parliament. That is merely a concomitant circumstance, which illustrates the operation of the Amending Act if applied to section 56 (1) (c) of the Constitution. What makes the Amending Act bad is that it alters the substance of Section 56 (1) (c) without having been passed in accordance with section 134. Whether the jurisdiction granted to the High Court by section 56 (1) (c) was exclusive or not need not be decided. It was the exclusive jurisdiction given to the Special Tribunal which took away all jurisdiction, exclusive or not, granted to the High Court by section 56 (1) (c). It was not, and could not successfully have been contended that any part of the Amending Act could be severed from the rest and so be rescued from invalidity.

It is suggested that the Court of Appeal seems to have taken a long and roundabout way of coming to its decision, although the reasoning appears valid and cogent. A more direct approach would have been to invoke section 17 of the Constitution.[15] The purpose of this provision was clearly to enable the High Court to safeguard fundamental human rights from invasion by the legislature. Nevertheless, whatever approach was taken, it is clear that the real effect and impact of the amendment to the Immigration Act was to infringe the constitutional rights of the subject. Prima facie, the amendment was merely an amendment to the Immigration Act, but, on investigation, it transpired that it was more than that. It purported to alter and modify the Constitution - which it could not lawfully do if passed in the ordinary way. Accordingly, it was found to be inconsistent with the Constitution.

The same view was taken by the Privy Council in Balewa v Doherty.[16] There, too, it was held that the substance of the enactment was such that it took away the rights of the subject to make an application to the High Court for redress. Such a provision was contrary to the provisions of the Nigerian Constitution.

In determining the validity of an enactment on the basis of its substance, a number of principles have been adopted.

(a) The validity of legislation is not to be determined

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15 See n. 11 p. 393, ante.

16 [1963] 1 W.L.R. 949. As to this case see p.270, ante. See also Gopalan v State of Madras (1950) S.C.R. 88.

by the motives or the "ultimate end" of a statute. Thus in R v Barger[17] there was a sharp difference of opinion as to the true nature of the legislation there in question (the Excise Tariff Act 1906). But there was a general agreement amongst the judges who held that the circumstance that an indirect effect may be produced by the exercise of an admitted power of legislation is irrelevant to the question of whether the legislature is competent to prescribe the same effect by direct law. Also irrelevant are the motive which actuated the legislature and the ultimate end desired. The constitutional validity is to be determined by what the law enacts.[18] Thus when the substance of an enactment is to be determined, it is not a general question as to whether the legislature has power by some means or other to acquire the end result of the legislation. The question of power must be considered separately in relation to the particular means adopted in the Act.[19] It is respectfully submitted that Latham C. J. illustrated the point well, when he stated:[20]

> The operation and effect of a customs duty on certain goods is to make the importation of those goods subject to the duty imposed. That is what the law does. The motive of Parliament may have been to assist a particular industry or business. When validity is in question, that fact is irrelevant. An indirect consequence of the law may be to ruin some other industry or business. That fact also is irrelevant.

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17 (1908) 6 C.L.R. 40.

18 Bank of New South Wales v The Commonwealth (1948) 76 C.L.R. 1, esp. 152.

19 Idem.

20 Ibid., 186.

Thus it is the duty of the court, when the question of validity of legislation arises, to determine what is the actual operation of the law in question in

> creating, changing, regulating or abolishing rights, duties powers, or privileges, and then to consider whether that which the enactment does falls in substance within the relevant authorised subject matter, or whether it touches it only incidentally, or whether it is really an endeavour, by purporting to use one power, to make a law upon a subject which is beyond power. [21]

Ngwenya case is a good illustration of such a test.

(b) The court must have regard to the object, purpose and true intention of the enactment as a whole. The object of an Act will be ascertained from its actual operation and effect, and not merely from the statement by the legislature of its objects. [22] It has been said: [23]

> A statement of objects in an Act can operate like a preamble 'as a key to open the meaning of the makers of an Act and the mischiefs it was intended to remedy' ... but in the end the objects of the Act must be ascertained from its actual operation and effect.

The legislation must have some real connection with and afford some reasonable and substantial basis for the conclusion that it is for a purpose in respect of which Parliament has power to make laws. [24]

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21 Ibid., 187.

22 Ibid. 248-253.

23 Ibid., 248.

24 Idem. See also Victoria v The Commonwealth (1942) 66 C. L. R. 488, 508; Australian Woollen Mills v The Commonwealth (1944) 69 C. L. R. 476, 490.

> If, on the view of the statute as a whole, you find that the substance of the legislation is within the express powers, then it is not invalidated if incidentally it affects matters which are outside the authorised field. The legislation must not under the guise of dealing with one matter in fact encroach upon the forbidden field.[25]

Therefore, in short, in determining the validity of a law it is in the first place obviously necessary to construe the law and to determine its operation and effect, that is, what the Act in fact does. Secondly, it is necessary to determine the relation of that which the statute does to a subject matter in respect of which it is contended that Parliament has power to legislate upon. Hence a power to make laws on a certain subject matter is a power to make laws which in reality and substance are laws upon that subject matter. It is not enough that a law should refer to that subject matter or apply to it. For instance, an immigration law may apply to parliamentarians, but it cannot be said to be laws relating to members of Parliament.

(c) The effect of a statute is to be determined from the general object at which the legislation is aimed and not necessarily by its effect in a particular case. Thus in Thornhill v State of Alabama[26] the Court said:

> There is a further reason for testing the section on its face. Proof of an abuse of power in the particular case has never been deemed a requisite for attack on the constitutionality of a statute purporting to license the dissemination of ideas .... [T]he rule is not based on any assumption that application for the license would be refused or would result in the imposition of other unlawful regulations. Rather it derives from an appreciation of the character of the evil

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25 Gallagher v Lynn [1937] A.C. 863, 870.

26 310 U.S. 88, 97 (1939) (emphasis added).

> inherent in a licensing system ... It is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion. One who might have had a license for the asking may therefore call into question the whole scheme of licensing when he is prosecuted for failure to procure it .... [I]t is the statute, and not the accusation or the evidence under it, which prescribes the limits of permissible conduct and warns against transgression.

It is submitted that, in determining the effect of legislation and its substance, both the indirect and direct effects ought to be judged by whether the effect is proximate and not remote or incidental. If the effect is proximate, then of course the statute should be struck down but not if the effect is merely indirect or a possible consequence. What is or may be proximate or incidental or of possible consequence may be illustrated by the decision of the Indian Supreme Court in Express Newspaper v Union of India.[27] A 1955 Act was enacted for the "amelioration of the conditions of the workmen in the newspaper industry". It provided, inter alia, for the fixing of wages rates by a Wage Board constituted by the Act It was contended that the Act would operate harshly upon the employers in the newspaper industry and that it might lead to the extinction of some concerns unable to bear the rates fixed by the Board above the contract rates. It was argued that this constituted an infringement of freedom of the press. The Court rejected the contention, while recognising that the press would be affected by the enactment. But the statute was not directed against the press as such; it was beneficient legislation intended to regulate the conditions of service. Hence the consequences alleged were not direct effects. As Bhagwati J. observed:[28]

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27 (1959) S. C. R. 12, cited in Basu, op. cit., vol. 1, 230.

28 (1959) S. C. R. 12, 134-135 (emphasis added).

> These are all incidental disadvantages which may manifest themselves in the future working of the industry, but it could not be said that the Legislature in enacting that measure was aiming at these disadvantages when it was trying to ameliorate the conditions of the workmen. Those employers who are favourably situated, may not feel the strain at all while those of them who are marginally situated may not be able to bear the strain and may in conceivable cases have to disappear after closing down their establishments. That, however, would be a consequence which would be extraneous and not within the contemplation of the Legislature. It could therefore hardly be urged that the possible effect of the impact of these measures in conceivable cases would vitiate the legislation as such .... Unless [the effects] were the direct or inevitable consequences of the measure enacted in the impugned Act, it would not be possible to strike down the legislation as having that effect and operation. A possible eventuality of this type would not necessarily be the consequence which could be in the contemplation of the legislature while enacting a measure of this type for the benefit of the workmen concerned.

(d) In determining the substance of an enactment, it is not only the object that is important but also the means sought to secure the object or the manner of its administration. A statute may have a lawful object but if the methods adopted or to be adopted are unconstitutional, it is submitted, the legislation must be struck down as being in substance a breach of the Constitution.[29] It must be noted that this does not mean that legislation, constitutional either in scope or method on its face, would be struck down merely because in the administration or the execution of the law there is a possibility of unlawful actions by the administrator.[30] It is only when the very terms of the statute authorise unlawful actions that it will be struck down.

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29 Gallagher v Lynn, [1937] A.C. 863, 869-870.

30 Alabama Power Co. v Ickes, 302 U.S. 464, (1937); Duke Power Co. v Greenwood 302 U.S. 485 (1937).

Let us assume emergency legislation is passed in Fiji granting a certain sum of money to the District Officer stationed in Suva from which payments for hurricane damage were to be made to those he thinks are proper recipients. The District Officer might act in an absolutely discriminatory manner by providing payments only to members of a certain race. The statute itself could not be impugned although the administrative actions of the District Officer might.[31] The constitutionality of the law is to be determined not with reference to the manner in which it is actually administered or will probably be administered but by the terms of the statute.

This question of determining the validity of an enactment with regard to its substance is a very important feature of constitutional interpretation. By adopting such an approach, the court is able to keep an effective check on the legislature. The legislature is prevented from doing indirectly what it could not do directly. On the other hand, the court is able to carry out the intentions of the legislature without unnecessarily taking into account irrelevant considerations.

(1) Inconsistency of Pre-Constitution Laws

Section 2 of the Constitution is very wide inasmuch as it declares the supremacy of the Constitution against not only future laws but also laws existing at the inauguration of the Constitution.[32] The Constitution speaks of "any other law" and does not limit or specify the time of enactment. It is submitted

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31 Under s. 15 (1) (b) of the Constitution.

32 See also pp. 210 et seq., ante.

that the Constitution is deemed to have retrospective effect. It is conceded that under the ordinary rules of statutory interpretation no statute is to be construed to have retrospective operation, unless the Act expressly so provides or there is a necessary and clear implication.[33] It is submitted that there is a contrary intention in the Fiji constitutional instrument showing that the Constitution was intended to have retrospective effect. Thus section 5 (1) of the Fiji Independence Order 1970 provides:

> ...[A]nd the existing laws shall have effect on and after the appointed day as if they had been made in pursuance of the Constitution and shall be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Fiji Independence Act 1970 and this Order.

Also under section 15 (5) relating to protection from discrimination, it is expressly provided that:

> Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of sub section (1) of this section -
> (a) if the law in question was in force immediately before 23rd September 1966 and has continued in force at all times since that day, ...

The terms of section 2 itself are very broad and speak of "any other law". There are no limits on its application.

If the Constitution was not intended to have retrospective effect, there would be no need for the saving clause contained in section 15 (5) of the Constitution. If the effect of the Constitution

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33 Re Athlumney [1898] 2 Q. B. 551, 552. See also Maxwell on Interpretation of Statutes (12 ed., 1969), 215 - 227.

was intended to be prospective only, this particular saving clause would be meaningless and redundant because a law in force on 23 September 1966 would have been out of reach of the 1970 Constitution. Accordingly, the inclusion of such a clause shows clearly that the Constitution was intended to affect laws existing at the commencement of the Constitution. This also follows from section 5 of the Independence Order which shows clearly that the intention is to read all the existing laws subject to the provisions of the Constitution. The intention has been expressed that all the existing laws must be construed and applied in such a way as to bring them into conformity with the constitutional instruments.

What is the effect of pre-Constitution laws being "inconsistent" with the Constitution? It is submitted that it does not follow from what has been said earlier that any law, passed before the commencement of the Constitution and in force at that date which is inconsistent with the Constitution, is void ab initio. Such laws are void only with effect from the commencement of the Constitution. Therefore, inconsistency ought not to affect transactions or matters completed and closed or things, acts or omissions done prior to the commencement of the Constitution. The continued operation of pre-Constitution laws was expressly recognised and accepted by the Fiji Independence Order 1970:[34]

> It is hereby declared, for the avoidance of doubt, that, save as otherwise provided either expressly or by necessary implication, nothing in this Order shall be construed as affecting the continued operation of any existing law.

As has been seen, the Constitution itself makes provision for existing laws being read with such modifications and qualifications

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34 S. 5 (5).

as make then conform with the Constitution.[35] In other words rights and liabilities accrued before the commencement of the Constitution cannot be subjected to the Constitution unless they are being enforced by unconstitutional procedures after the commencement of the Constitution.[36]

Thus in Mahendra v State of Uttar Pradesh,[37] an order was made on 13 September 1949 by the Rent Controller under the Mysore House Rent and Accommodation Control Order, 1948, alloting the vacant house of the petitioner to A and directing the petitioner to deliver the possession of the house to A. On the failure of the petitioners to deliver possession to A, possession was taken forcibly under another order of 11 April 1950. It was held that as the order of allotment was validly made before the Constitution came into force it could not be impugned on the grounds that it infringed the new Constitution of India.[38] The fact that possession was actively taken after the Constitution came into force was immaterial as the petitioner's right to possession had been lost earlier.

Similarly in Guru Datt v State of Bihar[39] the appellant's

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35 Fiji Independence Order 1970 s. 5 (2).

36 Basu, op. cit., vol. 1, 148.

37 (1963) S.C. 1019, cited in Basu, op. cit., vol. 1, 149.

38 The Bulk of the Indian Constitution came into effect on 26 January 1950. However 15 Articles came into effect on 26 November 1949.

39 (1961) S.C. 1684, cited in Basu, op. cit., vol. 1, 150.

interest as a lessee, which would otherwise have extended up to 1954, was extinguished, on payment of compensation, by a notification of 1946 under a 1946 statute which was valid when enacted. In an action brought in 1952 the appellant challenged the constitutionality of the Act and the notification as infringing his constitutional rights. The Supreme Court rejected the claim inasmuch as the appellant's interest had been lawfully terminated before the Constitution came into effect and accordingly he could not invoke the provision of the Constitution to support his claim.

Thus it is clear that where substantive rights and liabilities have accrued prior to the Constitution, there is no question of contesting their legitimacy on constitutional grounds. However, this does not mean that in their enforcement, unconstitutional procedures can be adopted. As the Indian Supreme Court has stated:[40]

> The Constitution has no retrospective operation to invalidate that part of the proceedings that has already been gone through, but the Constitution does not permit the special procedure to stand in the way of exercise of enjoyment of post-constitutional rights and must, therefore, strike down the discriminatory procedure if it is sought to be adopted after the Constitution came into operation.

Similarily, even in relation to procedure, if the proceedings have been completed or become final before the commencement of the Constitution, it is submitted that they should be

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40 Lachmandas v State of Bombay, (1952) S.C. 235, 245, per Das J., cited in Basu, op. cit., vol. 1, 148.

treated in the same way as accrued rights and liabilities. The Constitution cannot operate retrospectively so as to affect those proceedings. Thus in Abdul Khader v State of Mysore, [41] the appellant was tried and convicted by a special court in 1949. The Act which created the special court took away all rights of appeal and revision but provided that "the proceedings shall be submitted for review by a person nominated in this behalf by the government ... and the decision of that person shall be final". While the matter was still pending before the person so nominated, the Constitution came into force. It was held that the Constitution did not operate to invalidate the proceedings because the proceedings (except for the review) had been concluded before the commencement of the Constitution.

Therefore, it is submitted, that the Constitution of Fiji has a retrospective effect in the sense that whatever the law and whenever it was enacted, either before or after the commencement of the Constitution, it will be subject to the provisions of the Constitution. If a legislation is held to be unconstitutional, it will be invalid only in so far it affects rights or liability accruing after the commencement of the Constitution and not earlier.

The following propositions summarise the effect of the Constitution on pre-existing laws.

(1) The "inconsistent" pre-constitutional law will be valid as regards rights and liabilities accrued prior to the commencement of the Constitution.

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41 (1953) S.C. 355, cited in Basu, op. cit., vol. 1, 148.

(2) No question of constitutionality may be raised as regards any proceeding completed before the commencement of the Constitution.

(3) Questions of constitutionality may be raised in regard to the operation of any law after the commencement of the Constitution in respect of any act, omission or thing done after the commencement of the Constitution.

(2) Inconsistency of Post-Constitution Laws

After the commencement of the Constitution, the legislative power of the Fiji Parliament, contained in section 52 of the Constitution, is stated to be "subject to the provisions of the Constitution". The Constitution, particularly the provisions contained in Chapter 2 relating to fundamental rights, includes mandatory provisions prohibiting Parliament from making laws contravening the Constitution. For example, section 15 expressly says:

> Subject to the provisions of this section
> (a) No law shall make any provisions that is discriminatory either of itself or in its effect ....

The intention is clear that in regard to laws passed after the commencement of the Constitution, legislative power and competence is to be determined with reference to the constitutional provisions as they stood at the time when the Act was passed.[42] Accordingly if such an enactment is found to be unconstitutional, it must

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42 Unless of course a subsequent constitutional amendment is given a retrospective effect.

necessarily be held void ab initio. Anything done or omitted under such an enactment will be absolutely null and void. Contravention of the Constitution occurs at the very moment of enactment. In other words, the enactment is a "still-born law either wholly or partially depending upon the extent of the contravention".[43] Latham C. J., expressly acknowledged:[44]

> A pretended law made in excess of power is not and never has been a law at all. Anybody in the country is entitled to disregard it. Naturally he will feel safer if he has a decision of a court in his favour - but such a decision is not an element which produces invalidity in any law. The law is not valid until a court pronounces against it - and thereafter invalid. If it is beyond power it is invalid ab initio.

Therefore as far as the post-Constitution laws are concerned, they could not be made in contravention of the Constitution. They are invalid from their very inception. On the other hand, as has been seen, the pre-Constitution laws cannot subsist after the commencement of the Constitution[45] if they are inconsistent with it. In the case of post-Constitution laws, the Constitution strikes at the very root of the enactment but does not so in the case of pre-Constitution laws.

C. Legal Consequences of Judicial Invalidation

(1) General

We must now consider the effect of a statute being declared

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43 Mahendra v State of Uttar Pradesh (1963) S.C. 1019, 1029.

44 South Australia v The Commonwealth (1942) 65 C.L.R. 373, 408.

45 That is on 10 October 1970.

unconstitutional by the courts. This is of greater importance where there is already a constitutional ruling on the validity or otherwise of a statute and a subsequent decision upsets the previous one.

In the United States, the Supreme Court accepted or rather assumed that a decision determining the meaning of the Constitution must be retroactive. Thus, in rejecting the argument that state legislation, held unconstitutional, might nevertheless give validity to official action taken pursuant to it before the announcement of unconstitutionality, the Supreme Court made the classic pronouncement:[46]

> An unconstitutional Act is not a law; it confers no right; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed.

Later, however, the Supreme Court declared that there are appropriate limits to treating unconstitutional federal law "as though it had never been passed." Accordingly in a unanimous opinion by Chief Justice Hughes in Chicot County Drainage District v Baxter State Bank,[47] the court stated:

> It is quite clear, however, that such broad statements as to the effect of a determination of unconstitutionality must be taken with qualifications. The actual existence of a statute, prior to such a determination, is an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration. The effect of the subsequent ruling as to invalidity may have to be considered in various

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46 Norton v Shelby County 118 U.S. 425, 442 (1886).

47 308 U.S. 371, 374 (1940).

> aspects, - with respect to particular relations, individual and corporate, and particular conduct, private and official. Questions of rights claimed to have become vested, of status, of prior determinations deemed to have finality and acted upon accordingly, of public policy in the light of the nature both of the statute and of its previous application, demand examination. These questions are among the most difficult of those which have engaged the attention of courts ... and it is manifest from numerous decisions that an all-inclusive statement of a principle of absolute retroactive invalidity cannot be justified.

The classic formulation of the view that judicial decisions are of their nature retrospective was made by Blackstone when he stated that the duty of a court is not to "pronounce a new law, but to maintain and expound the old one".[48] It is the responsibility, or rather the duty, of a court to discover the law to be applied and to declare it as being the controlling principle in the case. In applying the law the judge merely declares what the law is and does not pronounce new law. It was a necessary consequence that the decision had retrospective effect. According to this view, decisions were merely "evidence" of what the law is. However, if a decision is subsequently overruled, then the earlier decision was "erroneous evidence". Thus a later decision which seems to change the law has not really done so at all but has only discovered the "true" rule which was always the law.[49] Dean Sulman stated:[50]

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48 1 Blackstone, Commentaries 69 (1769), cited in Notes and Comments, "Prospective Overruling and Retroactive Application in the Federal Courts" (1961 - 1962) 71 Y.L. Rev. 907, 909.

49 For detailed treatment of this traditional view, see Notes and Comments, loc. cit., 907 et seq.

50 "Retroactive Legislation" (1954) 13 Encyc. Soc. Sci. 355, 356, cited in ibid., 908. Cf. R.H. Freeman, "The Protection Afforded Against the Retroactive Operation of an Overruling Decision" (1918) 18 Colum. L. Rev. 230.

> The doctrinal reasons are that courts do not "pass" laws, but merely apply them to specific cases; that the overruled decision was a mistake as to the law and consequently never was the law; that the overruling decision is not a new law but the application of what is and therefore had been, the true law.

From this it follows that any judicial "change" in the law must necessarily be retroactive. This "declaratory theory" of the Blackstonian approach has been subjected to much criticism.[51]

As a result of the rejection of the Blackstonian approach, there developed in the United States the notion of prospective overruling. Under this rule, it was urged that a court should recognize a duty to announce a new and better rule for future transactions whenever the court has reached the view that an old rule (appearing in precedents) is unsound, in spite of the fact that on the principle of stare decisis the court is compelled to apply the old rule to the instant case and to a transaction which had already taken place.

However, this concept of prospective overruling, even in its early stages of formal development, did not go unchallenged.[52] Support for prospective overruling was increasing. Chief Justice Cardozo expressly espoused prospective overruling in 1932. He took this view not only off the bench,[53] but also when he was the

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51 E.g., B.H. Levy, "Realist Jurisprudence and Prospective Overruling" (1960) 109 U. Pa. L. Rev. 1.

52 E.g., R.V. Moschzisker, "Stare Decisis in Court of Last Resort" (1924) 37 Harv. L. Rev. 409, 426 - 427.

53 E.g., Address by Chief Justice Cardozo, New York State Bar Association, January 22, 1932, in 55th Report of N.Y.S.B.A. 263, cited in Levy, loc cit., 12 - 13.

Chief Justice in New York and when he was an Associate Justice of the Supreme Court of the United States. Thus in the Sunburst Case [54] Mr Justice Cardozo, for an unanimous Court, held that it is not a denial of due process for a court to adhere to a precedent in an adjudicated case and simultaneously to state its intention not to adhere to this precedent in the future. The learned justice also dealt with other variations of the same theme. He held that the court may give its ruling on an earlier decision retroactive effect, thereby making invalid what was valid when the act was done. Thus, according to him, the court has a choice whether the new rule declared by it shall operate prospectively only, or apply as to past transactions, and the choice is available - whether the subject of the new decision is common law or the construction of a statute. The choice will be determined by the juristic philosophy of the judges and their conception of the nature of law. This decision won favourable acclaim initially [55] but it received its share of attack. [56] Nevertheless, the courts in the United States generally favoured prospective overruling although with certain limitations. [57]

(2) The Position in Fiji

It is submitted that in Fiji there is no justification for

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54 Great Northern Railway Co. v Sunburst Oil and Refining Co. 287 U.S. 358 (1932).

55 E.g., Levy, loc. cit., 17.

56 E.g., "The Effect of Overruled and Overruling Decision on Intervening Transactions" (1933 - 1934) 47 Harv. L. Rev. 1403.

57 E.g., James v United States 366 U.S 213 (1961); see also Linkletter v Walker 381 U.S. 618 (1965), Mapp v Ohio 367 U.S. 643 (1961). Generally see articles referred to in n. 63, post.

departing from the rule that judicial interpretations are retroactive. There is no room for prospective application in Fiji. As has been seen, under section 2 of the Fiji Constitution any law which is inconsistent with the Constitution shall to the extent of the inconsistency be void.[58] "Void" has been defined as:[59]

> Null; ineffectual; nugatory; having no legal force or binding effect; unable in law to support the purpose for which it was intended ....

Further,

> Void in the strict sense means that an instrument or transaction is nugatory and ineffectual so that nothing can cure it.[60]

Also,

> The word "void" in its strict sense, means that which has no force and effect, is without legal efficacy, is incapable of being enforced by law, or has no legal or binding force.[61]

When something is void, it has no effect whatsoever. Hence the invalidity of the law would not result from the declaration of

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58 Void ab initio in the case of post-Constitution law and void from the time of the commencement of the Constitution and in the case of pre-Constitution laws; see pp. 403 et seq., ante.

59 Black, Law Dictionary, op. cit., 1745.

60 Allis v Billings, 6 Metc., Mass, 415, 39 A.M. Dec. 744, cited in Black, op. cit., 1745.

61 Re Validation of $150,000 Serial Funding Bonds of Clarke County 187 Miss. 512, 193 So. 449, 452 cited in Black, op. cit., 1745.

the court. As has been held in Australia,[62] though a declaration from the court is perhaps necessary to determining the rights of parties, the invalidity of the statute does not depend upon it. Consequently, the unconstitutional law (in whole or in part, as the case may be) should notionally be taken to be obliterated for all intents and purposes.

Hence, it is submitted, if a statute in Fiji is held constitutional in one case and subsequently held inconsistent with the Constitution, the Court must give effect to the mandatory provision of section 2 of the Constitution and declare the statute "void to the extent of the inconsistency". The courts in Fiji have no power to lay down two rules, one to govern the instant case and another to control a similar case subsequently arising. If a statute is void, as being inconsistent with the Constitution, it is void for all purposes. Prospective application is inappropriate. It is submitted that even on policy grounds prospective overruling should not be applied in Fiji as has been done in the United States.

There are three main reasons advanced against retroactive application of overruling decisions.[63] First, retroactive over-

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62 South Australia v The Commonwealth (1942) 65 C.L.R. 373.

63 For other views on prospective overruling, see C.E. Carpenter, "Court Decisions and the Common Law," (1917) 17 Colum. L. Rev. 593; Freeman, loc. cit., and Notes and Comments, (1962) 71 Yale L. Rev. 907; Levy, loc. cit., and Note, (1947) 60 Harv. L. Rev. 437; B.N. Cardozo, The Nature of the Judicial Process (1921) 142-169; P.J. Mishkin, "The Supreme Court-Forward" (1965) 79 Harv. L. Rev. 56; R.D. Schwartz, "Retroactivity, Reliability, and Due Process: A reply to Professor Mishkin" (1965-1966) 33 Univ. Chic. L. Rev. 719; Comments: "Linkletter, Short, and the Retroactivity Problem in Escobedo" (1965-1966) 64 Mich. L. Rev. 832; P. Bender, "The Retroactive Effect of an Overruling Constitutional Decision: Mapp v Ohio" (1962) 110 U. Pa. L. Rev. 650.

ruling worked unfair surprise on persons who had justifiably relied upon judicial decisions, thereby "frustrating the reasonable expectations of well-intentioned men".[64] Secondly, the courts in order to obviate undue hardship and anticipate the frustration of reasonable expectations, would be inhibited in overruling decisions and precedents which were outmoded and erroneous and would thereby perpetuate "wrong" legal rules. Thirdly, "adherence to the rule of retroactive overruling obscured in 'the murky shadow of Blackstonian jurisprudence' the important teachings of the Legal Realists that judges as much as legislators exercise an 'ineluctable lawcreating function' thereby discouraging open and honest analysis of what courts do in fact."[65]

On the other extreme there have been equally strong objections to prospective application of overruling decision. The main grounds for such objections have been: first, that it was a piece of judicial legislation. Secondly, that it would turn out to be ineffective as a practical matter, because parties would not institute appeals to challenge an old rule when its overruling would give them no benefit because the "new" rule would apply prospectively only. Thirdly, the attempted future ruling would be only dictum. Finally, the proposal would require " a decidedly questionable change" in the judicial system. It has been argued that courts cannot deliberately lay down two rules, one to govern the instant case and another to control similar cases subsequently arising.[66]

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64 Notes and Comments, loc. cit., 916.

65 Ibid., 911.

66 Moschzisker, loc. cit., esp. 426 - 427.

Those who occupy the middle ground argue that a court ought to have a discretion whether an overruling decision ought to have retrospective application or be merely prospective.

> Once a court has properly before it the specific issue of retroactivity, and once it has recognized the desirability of accompanying its decision with explicit reasons, it should rely upon reasons that functionally relate to the newly-announced rule and that reflect an awareness of the operative effects of its decision.[67]

On this approach the purpose of the newly announced rule should be an important factor. In deciding whether to give a new rule retrospective effect, a court to which the issue is properly presented should first attempt to identify the purposes of the new rule. Then it should determine whether on balance those purposes will be served by general retroactive application of the new rule. Finally, it should decide whether those purposes will be best served by retroactive application of the new rule in the instant case before it.

Another factor suggested under this view is the element of surprise. Even if a court determines that the purposes underlying a new rule will on balance be served by retroactive application, it must still decide whether any further consideration would speak against retroactive application. One such consideration is the degree and quality of the surprise to the parties which would result from the change in the rule of law. This is akin to the principle of reliance referred to earlier.

It has also been suggested that, in determining whether to

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67 Notes and Comments, loc. cit., 940.

give retroactive application to an overruling decision a court may be urged to consider the effect such retroactivity will have on the administration of the courts.[68]

In substance, the "middle view" is that when a court overrules a prior decision and announces a new rule of law by applying it to the litigants in the case or controversy before it, it should withhold any statement as to the retroactive effect of the new rule. The question of whether the new rule should be applied retroactively should not be decided until it is presented to a court as an actual case and controversy. The decision as to retroactivity should then be made, but only after a consideration of the criteria relevant to the purpose of the new rule and to the equitable and effective operation of the legal system.[69] This view seems to have gained judicial support in the famous case of Linkletter v Walker[70] where, in rejecting an application for habeas corpus, the court stated that it was "neither required to apply, nor prohibited from applying a decision retrospectively ...."[71] Then, having claimed a general power to refuse retroactive application in the area of constitutional adjudication, and having limited that power to cases when judgements have become final, the court set forth the threefold criteria it considered in reaching its determination thus:[72]

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68 Ibid., 950.

69 Ibid., 951.

70 381 U.S. 618 (1965).

71 Ibid., 629.

72 Ibid., 636.

> [W]e must look to the purpose of the Mapp rule; the reliance placed upon the Wolf doctrine; and the effect on the administration of justice of a retrospective application of Mapp.

In the United States it seems to be well settled that the Supreme Court is "neither required to apply, nor prohibited from applying a decision retrospectively . . . ."[73] It seems that the court has a discretion whether to make application retroactive in a particular case or not and will apply the threefold criteria already mentioned in reaching its determination, namely the purpose of the rule, the reliance placed on it and the effect on the administration of justice of a retrospective application.[74]

It is submitted that a rule giving such a wide and uncontrolled discretion to the courts is open to strong criticism. It will be very difficult for the courts to lay down specific guidelines for controlling their own discretion. For example, a law may have a variety of purposes, some of which will be served by retroactive application and some of which will not. A court faced with the rules adopted in the United States may find it difficult to decide whether on balance the dominant function of the law will be furthered by retrospective application. This determination of the function of a new law will be a very difficult task, with no ultimate solution.

> All that can reasonably be asked is that a court must diligently search out and identify every reasonable purpose

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73 See n. 71, p.419, ante.

74 Linkletter v Walker 381 U.S. 618 (1965).

> underlying the rule and wisely employ its judicial expertise in arriving at a balanced and articulated decision.[75]

However, even if a court determines that the purposes underlying a new rule will on balance be served by retroactive application, it must still decide whether further considerations, such as surprise, weigh against retroactive application. This of course depends on how much the parties have relied on the "old rule". Here too there will be differences of degree and quality of surprise. Looking at the realities of the situation, how many times would the element of surprise really be an operative factor? In most of the cases the parties will have acted without any knowledge at all of what the governing law was. As Judge Cardozo, who was an advocate of prospective overruling, stated:[76]

> The picture of the bewildered litigant lured into a course of action by the false light of a decision, only to meet ruin when the light is extinguished and the decision is overruled, is for the most part a figment of excited brains.

Hence it is submitted that in very few cases indeed will the element of surprise or reliance be a major factor. The unfairness arising from retroactive application of decisions will be more apparent than real. In any event, it will be very unrealistic to suggest that the highest court of the land would be overruling a prior decision so haphazardly and frequently as to create major surprises. The court will have to show very cogent and strong reasons for overruling its prior decisions. It is submitted

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75 Notes and Comments, loc. cit., 944.

76 Cardozo, op. cit., 122.

that the quality of surprise would be unlikely to be as pronounced as in a case where the court departs from a prior rule embodied in a landmark decision which has been consistently adhered to and re-affirmed. In most of the cases, if not all, there are two or three overlapping and partially inconsistent lines of cases in an area. This happens frequently. A subsequent case may attempt to "settle" the law and in the process overrule some cases. It is submitted, that the court in such a situation is really settling the rule rather than stating a new rule. This is a common occurence in courts of all jurisdictions. Secondly, if the law is doubtful and a party intends to mould his conduct or enter into a transaction on the basis of the existing law the choice is his either to risk the application of one of the cases or to seek a declaratory judgement. In any event, the element of surprise cannot be said to be so pronounced as to form a basis for prospective overruling.

The suggestion that retroactivity is to be avoided because of its effect upon the administration of the courts is not seen as a serious problem. In the United States it has often been argued that retroactive effect should be denied to a new rule of criminal due process if as a result of retroactivity the courts will be faced with petitions for habeas corpus from incarcerated prisoners.[77] According to this view, there must be some indication given, either by statistics or otherwise, as to how many incarcerated prisoners would be likely to burden the courts with a habeas corpus application based on the new rule. It seems that expediency and administrative difficulties are being permitted

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77 Griffin v Illinois 351 U.S. 12, 25 (1955).

to determine what should be the effect of a decision on the basic constitutional rights of an individual. It is submitted that the sense of injustice which compels retroactive application of the new rule in favour of convicted persons ought not to be defeated merely by a fear of overworking the judiciary or temporarily postponing hearings in other cases.

Furthermore, a litigant may not have any incentive to urge the adoption of a new rule when he knows that the benefit of the new rule, if he is successful, will be denied to him. Who wants to make the effort and incur expenses in challenging the old rule when he will not, or there is no certainty that he will benefit from the new rule even if he is successful? [78]

It is also submitted that the judicial framework of the United States is much more complex that it is in Fiji. In Fiji the judiciary consists of the Magistrates Court, the Supreme Court, the Fiji Court of Appeal, with Privy Council as the ultimate tribunal. There is no apparent reason for changing the present principle of stare decisis under which decisions have retrospective application.

In any event, since the norms expressed in constitutional

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78 Of course, the position with respect to the so called institutional litigants may be different. The interest of an institutional litigant such as an insurance company in having a rule of law changed is not limited to the specific cases in which it seeks the change. It extends to a whole class of cases which will be governed in future by the new rule. However, such institutional litigation will be very rare compared to individual litigation; Notes and Comments, loc. cit., 945.

decisions reflect fundamental principles, it is submitted that no rights or convictions, inconsistent with these principles should be "enforced" or permitted to stand. Constitutional rights are fundamental to the whole legal system. They are part of the basic charter and immune from ordinary legislative change, as has been seen. Accordingly, if a matter is found to be unconstitutional, it should not be given effect to, irrespective of other incidental "inconveniences" that might arise.