PART FIVE

FUNDAMENTAL RIGHTS AND FREEDOMS

CHAPTER XI

THE NEED FOR FUNDAMENTAL RIGHTS AND FREEDOMS IN FIJI AND THEIR SCOPE AND APPLICATION

A. Introduction

The concept of fundamental human rights is not a recent innovation but can be traced back several centuries. English jurisprudence regards such rights as implicit in the Magna Carta, 1215, the Petition of Right, 1628, the Bill of Rights, 1688.[1] From very early times, writers have advanced and developed the theory that man has certain essential, basic, natural and inalienable rights or freedoms and that it is the function of the state to recognise these rights and freedoms. Concepts of fundamental law and natural rights are expressed in the celebrated works of Coke and Locke.[2] Since the Great Charter, the English Crown agreed not to rule the state arbitrarily but according to the laws of the land.[3]

> The ultimate effect of ... part of the Charter was to give and guarantee full protection to every human being 'who breathes English air'.[4]

However, the methods adopted to give and guarantee full protection of human rights varied from country to country. In England the protection of personal rights and freedoms has been left to the common law and ordinary legislation.

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1 D.O. Aihe, "Fundamental Human Rights Provisions as Means of Achieving Justice in Society: The Nigerian 'Bill of Rights' ", (1973) 15 Malaya L. Rev. 39.

2 See John Locke, Two Treatises of Government (revised ed., 1965, edited by P. Laslett).

3 A.V. Dicey, The Law of the Constitution (10th ed. reprint 1965), 184.

4 Aihe, loc. cit., 40.

In other countries it was thought to be desirable to entrench these rights in such a way that they may not be vitiated, violated, tampered or interfered with by an oppressive majority in the legislature. In most countries with written constitutions, it is usual to have some basic and fundamental rights and freedoms declared in the instrument with provisions preventing any organ of the government from altering them or contravening them. Where these provisions are alterable, it can be done only by constitutional amendment invariably requiring special procedures which are usually difficult to achieve. Entrenched provisions for the protection of fundamental rights and freedoms are invariably judicially enforceable.

Fiji has followed this trend and included fundamental human rights and freedoms provisions in the Constitution.[5] These provisions are modelled on those enacted for the African countries which gained independence after 1960. It seems that the pattern was set with Nigeria in 1960 and since then the United Kingdom government has duplicated the Nigerian provisions in other constitutions with only insignificant alterations.[6] The Fiji provisions follow the same pattern.[7] The Nigerian fundamental human rights provisions have been described as "the epitome of the English Bill of Rights, 1688, and the United Nations Universal Declaration of Human Rights".[8]

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5 Ss. 3 to 18.

6 By the end of 1964 the following countries had the Nigerian pattern of "bills of rights" in their respective constitutions: Sierra-Leone, Jamaica, Trinidad, Uganda, Kenya and Zambia.

7 Ss. 3 to 18 of the Fiji Constitution, 1970, are very similar to ss. 17 to 32 of the 1960 Constitution of Nigeria and ss. 18 to 28 of the 1963 Nigerian Republican Constitution.

8 Aihe, loc. cit., 39.

After the Second World War, legislative protection of human rights became a focus of interest almost all over the world. In the international sphere, a significant achievement was the Universal Declaration of Human Rights adopted by the United Nations in 1948. The Charter of the United Nations treats the promotion of human rights and human welfare as an essential condition of the preservation of peace. Its provisions show the determination of the member nations to work together for the realisation of fundamental rights and freedoms for all human beings throughout the world without distinction of race, sex, colour, language or religion. It seems that the prominence given to human rights in the Charter was a consequence of the appalling atrocities and degradations inflicted by the Nazi regime on the Jews and on other peoples of the occupied territories. To obviate a recurrence of such outrages provisions were adopted to make the preservation of the fundamental rights and freedoms of the individual, wherever he may be, a matter of international concern to every state. With this idea and purpose in mind the General Assembly rapidly adopted the Universal Declaration of Human Rights and the Western European countries adopted the European Convention of Human Rights, in 1950.[9] Juridically the Universal Declaration of Human Rights is devoid of binding force. The question of putting the same principles into the form of a juridically binding covenant has been kept under continual consideration by the organs of the United Nations. Regrettably the pace of progress has been slow and the future is uncertain.[10]

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9 The same motive and idea inspired the inclusion of "crimes against humanity" in the Charters of the Nuremberg and Tokyo War Crimes Tribunals and the Genocide Convention. See generally on "Protection of Human Rights", L. Oppenheim, International Law, Vol. 1 (8th ed., 1955), 736 - 753.

10 P. Kastari, "The Constitutional Protection of Fundamental Rights in Finland" (1960) 34 Tul. L. Rev. 695.

However, with the adoption of the Universal Declaration and the European Convention, the human rights movement acquired an entirely new impetus and direction. The campaign to include fundamental human rights provisions in the sphere of internal national legislation has resulted in their incorporation in many of the numerous new constitutions framed in different parts of the world since the Second World War. How successful the operation of such provisions has been is of course another question.[11]

It is well known that there are countries which either have no written constitution or do not have elaborate fundamental rights provisions in their constitutions. Nonetheless, the fundamental rights and freedoms of individuals in such countries may still be equally effectively protected by ordinary legislation and by the courts. In relation to United Kingdom, for instance, Professor Sir Ivor Jennings stated:[12]

> In Britain we have no Bill of Rights; we merely have liberty according to law; and we think - truly, I believe - that we do the job better than any country which has a Bill of Rights or a Declaration of the Rights of Man.

Similarly in certain countries specific guarantees are ineffectual in practice because there is no judicial review or any other procedure for ensuring that the legislature will keep within the defined limits.[13] On the other hand, there are countries with fundamental rights provisions which are guaranteed constitutionally,

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11 The Ugandan Asians were expelled despite constitutional guarantees.

12 I. Jennings, The Approach to Self-Government (1956), 20.

13 See p.447, post.

and in which any legislation contrary to the constitutional provisions is of no effect and can be declared to be so by the courts or other tribunals. Fiji is such a country.[14]

However, as there have been doubts concerning the usefulness of constitutional guarantees of fundamental rights, it will be useful to examine the position in Fiji.

B. The Need For a Constitutional Guarantee in Fiji

Traditionally, English lawyers distrusted declarations of fundamental rights. They preferred the negative approach of the common law.[15] As Professor Wheare stated:[16]

> The ideal Constitution, then, would contain few or no declarations of rights, though the ideal system of law would define and guarantee many rights. Rights cannot be declared in a Constitution except in absolute and unqualified terms, unless indeed they are so qualified as to be meaningless.

This view has been taken, it is submitted, because of the historical development of English law and the acceptance of the principle of parliamentary sovereignty and the limited powers of the courts in relation to judicial review of legislation. During the centuries of England's constitutional development, respect for and practice of basic rights have become commonplace in the English tradition.

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14 Pp. 448 et seq., post.

15 See Generally S. A. de Smith, The New Commonwealth and Its Constitutions (1964), 162 - 170.

16 K. C. Wheare, Modern Constitutions (1951), 49.

Although England has no formal enumeration of fundamental rights of the people, it is correct to assume that:

> The safeguard of British liberty is in the good sense of the people - and in the system of representative and responsible government which has been evolved.[17]

The traditional opposition amongst the English lawyers to the inclusion of a Bill of Rights in a constitutional instrument stems not from any basic disagreement with the values which these Bills of Rights express, but rather with the elevation of those values to the status of constitutional guarantees. The English lawyer finds political manifestos out of place in a legal document.[18]

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17 Liversidge v Anderson [1942] A.C. 206, 261, per Lord Wright. See also R.H. Jackson, The Supreme Court in the American System of Government (1955), 81:

> I am a fairly consistent reader of British newspapers. I have been repeatedly impressed with the speed and certainty with which the slightest invasion of British individual freedom or minority rights by officials of the government is picked up in Parliament, not merely by the opposition, but by the party in power, and made the subject of persistent questioning, criticism, and sometimes rebuke. There is no waiting on the theory that the judges will take care of it. In this country, on the contrary, we rarely have a political issue made of any kind of invasion of civil liberty .... The attitude seems to be, leave it to the judges .... In Great Britain, to observe civil liberties is good politics and to transgress the rights of the individual or the minority is bad politics. In the United States, I cannot say that this is so.

18 Thus the Weimar Constitution of 1919 was described by an English writer as "the best textbook so far written on modern democratic ideas: R. T. Clark, The Fall of the German Republic (1935), 81.

Where a Bill of Rights has been adopted, all organs of the government are bound to respect those rights. But the principle of parliamentary sovereignty, understood in the United Kingdom to mean that Parliament may enact legislation on any subject matter whatsoever, is inconsistent with the object of a Bill of Rights. Where there are constitutional guarantees, legislation which does not conform with the substantive provisions of the constitution is invalid. In the majority of cases, the task of deciding the legal issues, and declaring legislation unconstitutional and hence invalid, falls upon the judiciary whose powers are thereby increased. This is absolutely contrary to English tradition and parliamentary sovereignty.[19] The principle denies that there is any limit to the powers of Parliament. As a matter of legal theory, Parliament is free to make any law it pleases even though it affects the basic rights and liberties of the subject. Also, in the United Kingdom, there are two opposing views as to whether a Bill of Rights could be entrenched and protected from repeal by a later Act of Parliament.[20] This could be another factor in the traditional English view rejecting constitutional guarantees of human rights.

Paradoxically, the genesis of protection of human rights and some of the famous declarations of rights can be found in English constitutional history. The great constitutional conflicts culminated in famous constitutional charters - The Magna Carta in 1215, the Petition of Right in 1628, and the Declaration and Bill of Rights in 1689 and Act of Settlement in 1700 - involved

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19 See pp. 188 et seq., ante.

20 See pp. 193 et seq., ante.

the liberty of the subject and its protection against arbitrary and unlawful power. Conflict resulted from the Stuart theory that the king reigned by divine right and that he was above the law. By the end of the seventeenth century the supremacy of the law was restored and had displaced any theory of royal supremacy. Since then the liberty of the subject has been secured by law. Gradually, step by step, the libertarian tradition of the common law and its system of justice secured for the Englishman his present freedom and right. In this gradual process, the common law has shown zealous concern for the private rights of the individual, including both civil and political liberties. The English courts have gone to great pains to uphold the rights of the individual against encroachments by the executive.[21]

The expectation that the courts would uphold the individual's liberties became part of each Englishman's life. Over several hundred years his freedoms grew and developed. They were accepted by the executive, the legislature and the judiciary and became an integral and indispensable part of the legal system. An English Lawyer might therefore be excused for seeing no need for constitutional guarantees of human rights. To him the protection afforded under the ordinary law is sufficient. Thus Dicey stated:[22]

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21 In Eshugkayi Eleko v The Officer Administering the Government of Nigeria [1931] A.C. 662, 670, Lord Atkin declared:

> As the executive he can only act in pursuance of the powers given to him by law. In accordance with British jurisprudence no member of the executive can interfere with the liberty or property of a British subject except on the condition that he can support the liberty of his action before a court of justice. And it is the tradition of British justice that judges should not shrink from deciding such issues in the face of the executive.

22 Dicey, op. cit., 199.

> The Habeas Corpus Acts declare no principle and define no rights, but they are for practical purposes worth a hundred constitutional articles guaranteeing individual liberty.

This opposition to the inclusion of a Bill of Rights in a constitutional instrument is reflected in the conspicuous omission of such provisions in the constitutions of those countries which achieved self-government during the period of the Empire.[23] They were intentionally omitted.[24]

In the United Kingdom, the fundamental rights and freedoms rest on public opinion, the good sense of the people, and the strength of the common law tradition. The position in a homogeneous community like the United Kingdom is in strong contrast with the problems faced by other nations comprised of diverse elements, traditions, culture and backgrounds. Here there are

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23 E.g., Australia, New Zealand, Canada, South Africa and India. However, there were limited guarantees provided for in the Canadian and the Australian Constitutions - such as the protection of French language in the former and acquisition of property by the Commonwealth on just terms in the latter.

24 Thus in relation to India, the Simon Commission, Cmd. 3569 (1930) 22 - 23 stated:

> Many of those who came before us have urged that the Indian constitution should contain definite guarantees for the rights of individuals in respect of the exercise of their religion and a declaration of the equal rights of all citizens. We are aware that such provisions have been inserted in many constitutions, notably in those of the European states formed after the war. Experience, however, has not shown them to be of any great practical value. Abstract declarations are useless, unless there exists the will and the means to make them effective.

no deep-rooted and uniform traditions of individual liberties and freedoms.

Fiji's population is not homogeneous. In fact one of the major obstacles to the granting of independence was the racial question. Fiji is characterised by its multiracial population: substantial Indian, Fijian and European communities. There were two major obstacles to independence. First, official encouragement had been given to thinking along racial lines, the principle illustrations being the reservation of seats in the legislature for different communities, communal rolls, communal schools and other communal facilities on a social level. Secondly, in pre-independence days the relatively small European community occupied a dominant position not only politically but also economically and socially.[25] Very much later[26] the Indians, who were predominantly small scale farmers and wage-earners, began to compete with the Europeans in certain commercial fields.[27] But the indigenous Fijians made little progress in the economic and/or educational fields.

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25 E.g., the Colonial Sugar Refining Company Ltd (a European concern) was regarded as a partner to the government. Also the other major companies (all controlled by Europeans) were: Morris Hedstrom Ltd, now the Carpenter's Group, the Union Steamship Company Ltd, Emperor Gold Mining Co. Ltd, Loloma Gold Mining Co. Ltd and others. Huge copra plantations and estate were owned by Europeans, including Garrick, Sir Henry Marks, Sir Henry Scott and Bailey. All the major industries - exporting, importing, shipping, copra, sugar, gold mining, newspaper, contractors and builders, hotels, aircrafts etc., were in European hands.

26 In late fifties and sixties.

27 E.g., in retail and wholesale trades, importing and exporting and the hotel industry and tourist industry generally.

In any multi-racial society, each race cannot help but fear that their rights may be infringed and their interests prejudiced by governmental action, particularly where one particular race is in power. This fear has been present in most of the countries which secured independence in the Commonwealth era. In Africa there were not only racial problems but also tribal and regional questions to be resolved. The Imperial government was well aware of these problems in territories with heterogeneous populations. That is why when granting a constitution to each territory from 1924 onwards it invariably reserved for itself the power to disallow bills which were contrary to the tenets of fundamental rights.[28]

In Fiji immediately prior to independence there were two major races in terms of number, the Indians and the Fijians, although the Europeans played a very effective and important role in commerce, industry and in the economic sphere generally, in the courts, in the administration and the government. The position remains the same today.[29] In terms of the effective roles played by the various races in Fiji we may conclude that there are three major races comprising the multi-racial

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28 D.O. Aihe, "Neo-Nigerian Human Rights in Zambia: A Comparative Study with Some Countries in Africa and West Indies", (1970) 12 Journal of the Indian Law Institute, 609, 611.

29 E.g., of the 13 Cabinet Ministers (excluding the Prime Minister) seven are Fijians, three are Europeans (including the Attorney-General) and there are three Indians.

society.[30] As long as Fiji was under colonial rule, there were few fears that one race or racial group would dominate the others and encroach upon their individual rights and liberties. Although the majority of the administrators and legislators were Europeans, this was a fact which was generally accepted as being an incident of colonial rule. British rule had been tolerant and shared the same restraint and respect for the rights of minorities especially for their freedom of speech, as are embedded in the British tradition.[31] Centuries of legislative, administrative and executive traditions had a large influence on colonial rule in Fiji.[32]

In England, modern democracy was a reaction against the absolutism of an autocratic executive. For the Englishman par-

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30 There are of course Chinese, Tongans and Samoans, but they are relatively insignificant in number. Accordingly for purposes of electoral roll, the Chinese are grouped with the Europeans on the "General Roll" and the latter two with the Fijians (s. 32 of the Constitution). The population figures according to the last census in 1966 were:

Indians	240,960
Fijians	202,176
Rotumans	5,797
Other Islanders ..	6,095
Europeans	6,590
Part Europeans ..	9,687
Chinese	5,149

31 Thus under Clause 19(9) of the Royal Instructions to the Governor of the then Colony of Fiji dated 9 February, 1929, he was instructed not to assent to Bills which were discriminatory as between Europeans and non-Europeans: he could only do so under stipulated conditions: Fiji Royal Gazette (1929), 167.

32 Perhaps one should say that British diplomacy was of paramount significance.

liamentary sovereignty was an adequate safeguard. The position of Fiji was very different. The people were inexperienced in government and had little opportunity of absorbing the traditions and methods of the British system. From the beginning, racial stresses had been a part and a fact of life in Fiji. Those stresses permeated all aspects of life; they intruded into education and the economic, social and political fields. The three major groups saw themselves as racial identities with separate schools,[33] and very little social intercourse. There was no thought of training political leaders to accept racial tolerance and adopt a multi-racial outlook. It was not until the early sixties that political parties reaching across racial boundaries came into existence.[34] Prior to this the legislature consisted of elected or nominated Indian, Fijian or European members. Even when the nuclei of political parties were formed, the general view was that the Federation Party was an Indian party and the Alliance an association of the Europeans and Fijians with a handful of the Indians to give the impression that it was a multi-racial party.[36] Rep-

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33 This is still reflected in the names of various schools as either being an "Indian" school or a "Fijian" school but there is no law prohibiting any student of any race from attending any school.

34 There were only two parties which were fully organised as political parties - the Alliance and the Federation Party.

35 Now the National Federation Party.

36 This view is demonstrated by the result of the 1966 national elections and 1967 by-election for all the "Indian" seats. In both these elections all the Indian communal seats were won by the Federation Party. In the 1966 elections all the Fijian and European communal seats were won by the Alliance Party. All the cross-voting seats were won by the Alliance Party. As to the meaning of the terms "communal" and "cross-voting" see p.94 , ante.

resentation in the legislature has been and still is on racial lines.[37]

The people of Fiji have had very little, if any, opportunity to develop a national outlook and to begin to think of the country as a whole rather than their own racial group. The cold fact must be faced that they had less than four years experience with a representative legislature before independence was secured![38]

It is against this background of a multi-racial and racially conscious society that the need in Fiji for a constitutional guarantee of fundamental rights and freedoms must be judged. With independence imminent after the 1970 Constitutional Conference,[39] it became necessary to decide how best to implant the libertarian heritage in a legislature composed of representatives of racial groups. Given the history of Fiji and the want of adequate training - the disgraceful legacy of colonial rule - and the strength of

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37 In the House of Representatives there are 52 members of whom 22 are Indians, 22 Fijians and 8 "General". See n. 30 p.438, ante.

38 It was in 1966 that the Legislative Council became truly representative with thirty-six members elected as follows:

(a) 12 indigeneous Fijians elected by the Fijians
(b) 2 indigeneous Fijians elected by the Great Council of Chiefs.
(c) 12 Indians elected by the Indians.
(d) Ten others (who were neither Indians nor Fijians) elected by those who were neither Indians nor Fijians.

AND there were four official members: Fiji (Constitution) Order 1966, s. 43.

As to the composition of the legislative council prior to 1966, see p. 85 , ante.

39 Held at Marlborough House in April 1970.

racial sentiment, it would have been naive to repose confidence in a majority in the legislature and give the Parliament in Fiji, as in the United Kingdom, full control over the liberties and freedoms of the people. There was an obvious need for constitutional guarantees against legislative action to secure what had been achieved by the common law in respect of the executive.

Disparaging remarks have been made against constitutional guarantees of rights[40] and their usefulness. However, to use the words of Professor D. V. Cowen:[41]

> No knowledgeable person has ever suggested that constitutional safeguards provide in themselves complete and indefensible security. But they do make the way of the transgressor, of the tyrant, more difficult. They are, so to speak, the outer bulwarks of defence.

Furthermore, it is submitted, in a multi-racial society like Fiji, different races have different traditions, culture, background and accordingly different values. Fundamental rights provisions[42] at least provide "a criterion or standard upon institutions, whether political or judicial [and also would] guard the liberties of all persons ....".[43] In the final analysis, the success of constitutional guarantees of rights in Fiji will depend

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40 E.g., S.A. de Smith, op. cit., Ch. 5.

41 The Foundation of Freedom (1960), 119.

42 Constitution, s. 3 - 17.

43 Report of the Monckton Commission, Cmd. 1148 (1960).

upon the society itself. Whether the society is multi-racial or homogeneous, all the legislature can do is pass the laws to regulate the relationship of the component parts of the society at all levels - social, economic and political.[44] Wina, a Nigerian legislator, declared:[45]

> We ... consider that a Bill of Rights would be an essential part of the constitution of this country. We think that, although it has been doubted, that it will never work. It will certaintly be at least an indication of the intention of this side of the House .... Obviously a Bill of Rights is not the cure for all. A Bill of Rights is an expression of intention, and I think the most important aspect of the substance of a Bill of Rights rests with the population itself .... If such a thing as a Bill of Rights has to achieve its objective, a substantial degree of progress must be made in establishing a real sense of mutual confidence between races, between employers and employees, between district and district and tribe and tribe if it is necessary.

It is submitted that these words apply equally to Fiji. It is for the society in Fiji and its component elements either to make full use of the provisions for fundamental rights and freedoms and to perpetuate their intentions or to nullify their effect.

In Fiji, no doubt, there will be times when it will be necessary to pass legislation encroaching upon the basic freedoms and liberties of the individual. To do so it will be necessary to secure the required three-quarters majority.[46] If such legislation is seen to be for the benefit of the country as a whole, then

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44 Aihe, loc. cit., 612.

45 45 Northern Rhodesia (Legislative Council) Hansard No. 106, 1963 Cols. 260-261, cited in Aihe, loc. cit., 612.

46 Constitution, s. 67; see pp. 207 et seq., ante.

no doubt the required majority will be secured. However, if the legislation represented an attempt by one major racial group to impose its will on another group, it would be very difficult indeed to secure its passage when regard is had to the representation of the several races in the House of Representatives. This provides an innate check on legislation aimed at a racial group.

The fundamental rights guaranteed by the Constitution are not new rights. All the rights and freedoms enumerated in the Fiji Constitution exist at common law.[47] The Constitution declares and preserves these rights from encroachment by ordinary legislative process. Even if the entrenchment of these rights were removed, the rights would still exist as long as common law remains part of the law of Fiji. No doubt they would not then enjoy the special position they do now. The legislature would then be at liberty, as in England, to enact legislation in derogation of the fundamental freedoms and liberties of the subject. Only the executive would be limited, as in England, in its actions against the liberty of the subject. Unless there was legislative provision to the contrary, the executive would not be able to encroach upon the liberty of a subject.[48]

It is submitted that the provisions pertaining to fundamental rights and freedoms of the individual are clearly needed in Fiji. They were not put in as a matter of course or because of the modern pattern set since the Nigerian Constitution of 1960. The various factors already discussed necessitated such provisions. It is submitted that the view of the Minorities Commissions

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47 See pp. 450 et seq., post.

48 See n. 21 p. 434, ante.

supporting a Nigerian Bill of Rights is as much applicable to Fiji as Nigeria.

> Provisions of this kind in the constitution are difficult to enforce and sometimes difficult to interpret. Nevertheless we think that they should be inserted. Their presence defines beliefs widespread among democratic countries and provides a standard to which appeal may be made by those whose rights are infringed. A government determined to abandon democratic courses will find ways of violating them. But they are of great value in preventing a steady deterioration in standards of freedom and the unobtrusive encroachment of a government on individual rights.[49]

Thus the object behind the inclusion of constitutional guarantees of rights is the establishment of a system of government in which absolute power is not vested in the hands of any one organ of the state. Even the Founding Fathers of the American Constitution had the painful experience of even a representative body being tyrannical. The Americans had learnt of the frailty and weakness of human nature when the same Parliament which had forced Charles I to sign the Petition of Right in 1628, acknowledging that no tax could be levied without the consent of Parliament, in 1765 and subsequent years insisted on taxing the colonies without this right to representation. While the English people in their fight for freedom from absolutism and autocracy stopped with the establishment of the sovereignty of Parliament and the supremacy of the law, Americans went further and placed the Constitution above the legislature itself. They felt it was the restraint of this paramount law which could save them from autocracy. They wanted to prevent dictatorship and despotism. Thus

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49 Cmd. 505 (1958), 95.

Miller J. stated:[50]

> It must be conceded that they are such rights in every free government beyond the control of the State. A government which recognized no such rights, which held the lives, the liberty and the property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power, is after all but a despotism. It is true it is a despotism of the many, of the majority, if you choose to call it so, but it is nonetheless a despotism.

The experiences of various countries show that the application of the Rule of Law has not been altogether satisfactory. In several countries it has not been administered evenly. Legislation trampling upon the freedoms and liberties of subjects has been passed in countries which had adopted the concept of the sovereignty of Parliament. There is therefore a need to protect the fundamental rights and freedoms not only from the executive but also from the legislature. Jackson J. aptly said:[51]

> 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.

A constitutional guarantee of rights was needed in Fiji to remove from a bare majority in the legislature the right to encroach upon the liberties and freedoms of the individual. No

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50 Citizens Savings and Loan Association v Topeka (1874) 20 Wall, 655, 662.

51 Board of Education v Barnette, 319 U.S. 624, 638 (1943).

doubt in some respects there will be inconveniences caused to the government of the day in its "useful exertions". In the words of Thomas Jefferson,[52]

> The inconveniences of the Declaration are that it may cramp government in its useful exertions. But the evil of this is short-lived, moderate, and reparable. The inconveniences of the want of a Declaration are permanent, afflicting and irreparable: they are in constant progression from bad to worse. The executive in our governments is not the sole, it is scarcely the principal object of my jealousy. The tyranny of the legislatures is the most formidable dread....

However, these are temporary inconveniences and if a measure is in fact absolutely essential for the benefit of the nation, the government is likely to muster the required majority to enact it. The constitutional guarantees in Fiji are not absolute as in America. The Fiji provisions are flexible, as is about to be seen.

C. The Scope and Extent of Application of Fundamental Rights and Freedoms in Fiji

(1) General

As a general rule there are three ways of providing for fundamental rights and freedoms in a constitution.[53] First, they may be included as a declaration of objectives in the preamble, or in a substantive provision, or in the oath of office to be taken by the head of State. In such cases, the provisions are only declar-

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52 The Papers of Thomas Jefferson, vol. 14, 60, cited in B. Schwartz, The Bill of Rights: A Documentary History (1971) 621.

53 B.O. Nwabueze, Constitutionalism in the Emergent States (1973), 42.

ations of what the state should do. They confer no rights on citizens. Such provisions are not justiciable but merely serve as a form of principles of policy.[54] Thus Article 6 of the Ivory Coast Constitution provided that the state

> shall ensure the equality of all citizens before the law, without distinction of race, religion and social conditions.

In Ghana the Republican Constitution of 1960 required the President, immediately after his assumption of office, solemnly to declare his adherence to the protection of certain human rights, including freedom from discrimination, freedom of speech, religion and assembly and the right of property. These have been held not to be justiciable rights.[55]

Secondly, the provision may take the form of a guarantee of rights in the preamble of the constitution. Thus the preamble not only recites but also guarantees the rights. The French adopted this form in the Constitution of both the Fourth and Fifth Republics. The Constitution of the Central African Republic has a preamble of three pages. It proclaims the state's attachment to the rights of man and its recognition of "the existence of inviolable and inalienable rights of man as the basis of any human society, of peace and of justice in the world," and goes on to guarantee a list of individual human rights. It is submitted that if the ordinary principles of statutory interpretation are applied,

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54 Nwabueze, op. cit., 42.

55 Re Akoto, 1, civil appeal No. 42/61, cited in Nwabueze, op. cit., 42. See also Tanzania Constitution and Pakistan Constitution of 1962.

these provisions cannot really guarantee to a subject any of the rights enumerated inasmuch as the preamble does not form part of the statute. It may be that the state in passing legislation would be expected to adhere to such principles and follow them as a matter of policy but not as a matter of law. As Professor Nwabueze has rightly, it is submitted, pointed out,[56] "civil liberties guaranteed in a preamble can therefore have no more than a moral force."

The third method of providing constitutional guarantees of fundamental rights is to include them in the substantive provisions of the constitution. In most cases, the provisions so made are justiciable. In many constitutions the provisions are entrenched in order to preclude their amendment or repeal by ordinary process of legislation.

This last method is the one employed in Fiji. Chapter II of the Fiji Constitution sets out the various rights and freedoms which are specifically granted. They are:

(a) The right to life.[57]

(b) The right to liberty and security of person.[58]

(c) Freedom from slavery and forced labour.[59]

(d) Freedom from torture and from inhuman treatment or punishment.[60]

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56 Nwabueze, op. cit., 43.

57 Constitution, s. 4.

58 Ibid., s. 5.

59 Ibid., s. 6.

60 Ibid., s. 7.

(e) The right of property.[61]

(f) The right to privacy of home and other property.[62]

(g) The right of protection of law and the right of a fair trial.[63]

(h) Freedom of thought, conscience and religion.[64]

(i) Freedom of expression.[65]

(j) Freedom of assembly and association.[66]

(k) Freedom of movement.[67]

(l) Protection from discrimination.[68]

(m) The right to an effective remedy if one's rights are violated.[69]

The above rights and freedoms are, of course, defined in considerable detail. In most cases the first sentence or paragraph of the section concerned contains a general affirmation of the right and the following paragraphs set out the limitations to which that right may be subjected. For instance, the right to liberty can be restricted after conviction by a competent court or

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61 Ibid., s. 8.

62 Ibid., s. 9.

63 Ibid., s. 10.

64 Ibid., s. 11.

65 Ibid., s. 12.

66 Ibid., s. 13.

67 Ibid., s. 14.

68 Ibid., s. 15.

69 Ibid., s. 17.

in the event of a lawful arrest or detention. The limitations are carefully formulated and, in general, permitted only when they are prescribed by law and reasonably justifiable in a democratic society in the public interest.[70]

In determining the scope of fundamental rights in Fiji, two matters stand out.

(a) First, the provisions of the Constitution dealing with the fundamental rights seem, for the most part, to make little change in the existing law and to be mostly declaratory of the existing law.

(b) Secondly, the precise scope and effect of fundamental rights will depend not only upon the range of the rights guaranteed but on the qualifications, provisoes and exceptions contained in the respective provisions relating to various rights and other general limitations.

(2) The Fundamental Rights and the Existing Law

As already mentioned,[71] in Fiji the constitutional guarantee of rights does not create any new right. The rights enumerated existed immediately prior to the coming into force of the Constitution. Thus section 4 of the Constitution which in sub-section (1) provides that no person shall be deprived of his life intentionally save in execution of the sentence of a court in respect of a criminal offence of which he has been convicted, goes on to provide

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70 This aspect is treated in greater detail elsewhere. See pp.453 et seq., post.

71 See p. 443, ante.

exceptions in sub-section (2). They are,

(a) Self defence as regards person or property.

(b) Lawful arrest.

(c) Suppression of riots etc.

(d) Prevention of commission of a crime.

All four were already law.[72]

Other provisions of the Constitution similarly reiterate the existing law.[73] The rules pertaining to a criminal trial and arrests - fair hearing, the right to defend oneself, the double jeopardy rule, and the right of an accused person to refuse to give evidence at the trial - are all familiar to an English lawyer.

It is submitted that all that the Constitution did was to declare and preserve existing rights from encroachment by ordinary legislative process. Even without constitutional protection, these rights would still exist as long as the common law remains part of the law of the land in Fiji.[74]

The fact that these fundamental rights have been specified and enumerated does not, it is submitted, mean that the list is exhaustive of the rights of the subject or that the common law

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72 The Penal Code, Chap. 11 of the Laws of Fiji, ss. 17, 18, 83 and 419 ; the Criminal Procedure Code, Chap. 14 of the Laws of Fiji, ss. 52 - 55.

73 See ss. 24 - 43 of the Penal Code; ss. 3, 18, 22, 23 and 24 of the Supreme Court Ordinance; The Court of Appeal Ordinance (Chap. 8 of the Laws of Fiji); the Magistrates' Courts Ordinance (Chap. 10 of the Laws of Fiji); and the Criminal Procedure Code.

74 See p. 443 , ante.

has been displaed. Section 5 (1) of the Fiji Independence Order 1970 provides:

> The revocation of the existing Orders shall be without prejudice to the continued operation of any existing laws made, or having effect as if they had been made, under any of those Orders; and 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.

"Existing laws" include ordinances in force in the Dominion immediately before independence.[75] One such ordinance is the Supreme Court Ordinance,[76] section 22 (1) of which provides:

> The common law, the 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 Fiji ...

Accordingly, it is submitted that the common law rights which have not been specified in the Constitution continue to apply subject to "such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Fiji Independence Act 1970" and the Fiji Independence Order.[77]

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75 S. 2 of the Fiji Independence Order 1970.

76 Chap. 9 of the Laws of Fiji.

77 Cf. the American provision which expressly says that "the enumeration of the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people." : IXth Amendment of the Constitution of U.S.A.

(3) The Limits of Constitutional Guarantee

It is submitted that there are four major qualifications which have direct impact on the scope and application of the fundamental rights provisions in the Fiji Constitution. They are:

(a) The phrase "reasonably justifiable in a democratic society".

(b) The apparent limitation under section 15 (5) relating to protection from discrimination.

(c) Derogations from fundamental rights provisions during emergencies.

(d) Many areas of social behaviour will raise issues that would conventionally be classed as fundamental rights but the Constitution may have no application.

(a) "Reasonably Justifiable in a Democratic Society"

It may be safely generalised that no fundamental human right can be granted in absolute terms. In securing or granting such rights, the interests and rights of each individual on the one hand and the society and nation on the other have to be considered. Thus in the protection of the freedom of speech of one individual, the protection of the reputation of another individual, or the interests of the public order, have to be considered. It is highly unlikely that any of the guarantees in a Bill of Rights in any country, unqualified as their terms seem to be, will ever be judicially interpreted as absolute. Considerations of public order and rights of other individuals must necessarily limit and condition the actual exercise of the verbally unqualified prescriptions of the Bill of Rights. The task of judicially determining whether violation of a

constitutionally sanctioned interest has taken place necessitates the balancing of such interests.[78] Thus a statement of the fundamental rights of subjects must be subject to qualifications and exceptions. Even in a country like the United States, where the constitution guarantees the fundamental rights in absolute terms, they cannot be enjoyed without qualification. Justice Brandies stated:[79]

> But, although the rights of free speech and assembly are fundamental, they are not in their nature absolute. Their exercise is subject to restriction, if the particular restriction proposed is required in order to protect the state from destruction or from serious injury, political, economical or moral.

The paramount question is where to draw the line between the fundamental rights and their qualifications. As has been stated,[80]

> the problem is where to draw [the line] so as to leave ample room for the enjoyment of individual rights and at the same time make it possible for the government to discharge its obligations towards the society and the political community itself. This would involve a delicate balancing of objectives.

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78 Cf. the "clear and present danger" test enunciated by Justice Holmes in Schneck v United States 249 U.S. 47, 52 (1919), necessarily presupposes that any absolutist claims to free speech must be qualified by consideration of countervailing interests in national security. See also Francis v Chief of Police [1973] A.C. 761.

79 Whitney v California 274 U.S. 357, 373 (1926); and Schneck v United States, supra.

80 Nwabueze, op. cit., 44.

In Fiji, the answer depends upon the construction to be placed on the phrase "reasonably justifiable in a democratic society". This phrase features prominently in many of the fundamental rights provisions of the Constitution.[81] Encroachment upon the basic rights is allowed, in most cases, if it is "reasonably justifiable in a democratic society".

This places a heavy burden on the judiciary to evolve a rational synthesis between individual freedom on the one hand and claims for the public good on the other hand. The courts will have to ascertain the limits within which the legislature should be allowed to interfere with individual liberties and the weight to be attached to the public interest. This is an unenviable task.

The words "reasonably justifiable in a democratic society" are manifestly vague and flexible. What are the universally acceptable minimum standards of a democratic society? There is, it is submitted, no formula or definition of such minimum standards. It seems that one has to depend upon what is commonly accepted in a democratic society in practice rather than rely on any specific definition. Although the basic concept of democracy is well understood, the nature and form of "democracy" varies from one country to another. Thus in the United States a democratic society has been said to be[82]

> a free society in which government is based upon the

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81 E.g., ss. 8(5), 9(2), 11(6), 12(2), 14(3)(b) and 15(3), dealing with deprivation of property, privacy of home and other property, freedom of conscience, freedom of expression, freedom of assembly and association, freedom of movement and protection from discrimination respectively.

82 Speiser v Randell 357 U.S. 513, (1958).

consent of an informed citizenry and is dedicated to the protection of the rights of all, even the most despised minorities.

It is submitted that it is in this context that we may view the phrase "democratic society". In any event, the phrase "democratic society" cannot be seen in isolation from the phrase "reasonably justifiable". The first will be better understood after determining the meaning of the latter.

"Reasonably justifiable" also seems to be a very wide and flexible phrase, especially when it is compared with the rather restrictive phrase used in the European Convention of Human Rights, "necessary in a democratic society". It has been rightly said,[83] as will be seen presently, that under the European Convention "the standard for laws restricting the guaranteed rights and freedoms is more exacting".

"Justifiable" connotes something which is capable of being shown to be just, right, proper, reasonable or warranted, something for which adequate grounds can be shown,[84] or something which is defensible.[85]

"Necessary" on the other hand connotes something which is needful, requisite, that cannot be done without, an essential.[86]

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83 S.A. de Smith, op. cit., 188.

84 The Shorter Oxford English Dictionary (3rd ed., 1964), 1076.

85 Black's Law Dictionary (Revised 4th ed., 1968), 1004.

86 Shorter Oxford English Dictionary, op. cit., 1315.

Accordingly, it is submitted that the term "justifiable" is of wider application and connotation than is the term "necessary". Quite clearly the latter is much more restrictive than the former. A measure may be useful or just but it may not be necessary; it would be held valid as "justifiable" but not valid as "necessary". But what is "necessary" would certainly always be "justifiable".

However, it is submitted, the wide connotation of the term "justifiable" has been restricted to some extent by the word "reasonably". That is, to derogate from the fundamental rights provisions the measure must not only be justifiable but it must be "reasonably" so. Hence the courts in Fiji would be entitled, even obliged, to see that such a measure fulfils both the qualifications. What of the cases? This question as to what is reasonably justifiable in a democratic society has been raised in three cases in Africa [87] - two in Nigeria [88] and one in Zambia. [89]

In Chike Obi v Director of Public Prosecutions [90] the defendant, a member of the House of Representatives and the leader

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87 The provisions relating to fundamental rights in Fiji are similar to those in Nigeria and Zambia, as they stood at the time of the relevant cases.

88 Cheranci v Cheranci (1960) N. R. N. L. R. 24 and Chike Obi v Director of Public Prosecutions [1961] All N. L. R. 186.

89 Patel v Attorney-General for Zambia H P/ Const. /Ref. 1/1968.

90 Supra.

of the Dynamic Party, was charged with sedition under section 50 (1) (c) of the Nigerian Criminal Code. It was alleged that he had distributed a seditious pamphlet with the title:"The People: Facts that You Must Know." The seditious part was "Down with the Enemies of the people, the Exploiters of the Weak and the Oppressors of the Poor...." The substance of the publication alleged that ministers were interested only in benefiting themselves and not in the well-being of the people as a whole.

The question before the Supreme Court was whether the criminal code provision relating to sedition was contrary to section 24 of the Constitution relating to freedom of expression (a provision which is substantially the same as section 12 of the Fiji Constitution.) The defence contended that:[91]

> Any law which punishes a person for making a statement which brings a Government into discredit or ridicule or creates disaffection against the Government irrespective of any repercussions on public order or security is not a law which is reasonably justifiable in a democratic society.

The court, however, held that to contend that, under section 24 of the Constitution a law is only valid if the acts prohibited by it are in every case likely to lead directly to disorder is to take too narrow a view of the constitutional provision. It is justifiable to take reasonable precautions to preserve public order and this may involve the prohibition of acts which, if unchecked or unrestrained, might lead to disorder, even though those acts would not do so directly. It was further held that the Supreme Court must be the arbiter of whether or not any particular law is justifiable. Thus Brett F. J. stated:[92]

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91 Ibid., 91.

92 Ibid., 97.

> Nevertheless, it is right that the courts should remember that their function is to decide whether a restriction is reasonably justifiable in a democratic society, not to impose their own views of what the law ought to be.

His Lordship continued:[93]

> [T]he point which I would make is that we have to approach sections 50 and 51 of the Criminal Code not merely as part of the legacy of a former regime but as something ... which ... has been considered reasonably justifiable in a democratic society by the majority of the elected representatives of the people of the Federation. This does not in any way relieve the Court of the duty to judge for itself, but it is among the matters to be taken into consideration.

In Patel v Attorney-General for Zambia,[94] the accused was charged with contravening the provisions of the Exchange Control Regulations, 1965, by attempting to export Zambian currency to London. Evidence was adduced that a customs officer searched and seized some postal packets belonging to the accused. The defence contended that the customs officer's action violated the human rights of the appellant. The following questions were raised for determination by the High Court.

> (a) Did the opening, examination and seizure of the postal articles constitute a contravention of the applicant's right to privacy of property as guaranteed by section 19 of the constitution or a contravention of the applicant's freedom of expression as guaranteed by section 22 of the constitution?

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93 Ibid., 98.

94 Supra.

(b) Did the opening, examination and seizure of the postal articles constitute a contravention of the applicant's right to protection from deprivation of property as guaranteed by section 18 of the constitution?

In Zambia, as in Fiji, there are provisions for derogation from fundamental rights. A law may be made in the interest of defence, public safety, public morality, public health, and public order, despite the constitutional safeguards for fundamental rights if the law is reasonably justifiable in a democratic society.

The court, before elaborating on the substantive part of the issue, examined the conditions precedent to the exercise of the powers conferred on an "authorised officer" by Regulation 35 of the Exchange Control Regulations. That Regulation states that the "authorised officer" must have reasonable suspicion that a postal article contains foreign currency or that Zambian currency is being exported or imported in contravention of the Regulations. Was reasonableness to be judged by the objective or the subjective test? The court adopted the objective test. It seems that the court was influenced by the status[95] of the person upon whom power is conferred when it said that "even the majority in Liversidge v Anderson applies the subjective test only to the Secretaries of State".[96]

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95 Cf. Ekundare v Governor in Council [1961] All N. L. R. 159; Awolowo v Federal Minister of Internal Affairs [1962] N. L. R. 177. These cases seem to suggest that the courts would not invalidate the executive actions of a head of state, state governor or even a Minister of State; Aihe, loc. cit., 618.

96 As cited in Aihe, loc. cit., 618.

Having considered this preliminary question, the court answered the first question in the negative inasmuch as the opening, examination and seizure was held to be "reasonably required" for the purpose beneficial to the community. The state argued that the Exchange Control Act and Regulations were necessary or expedient in the interest of public safety, but the court disagreed as there was no nexus between the immediate danger to public safety and the regulation of national economy. However, the court did hold that the taking possession of the postal articles, was expedient in order to secure the development of the nation's financial resources for a purpose beneficial to the communtiy. Accordingly, the court answered the second question in the negative also.

In relation to the question as to what is reasonably justifiable in a democratic society, the defence argued that neither Regulation 35 nor a search conducted under it was reasonably justifiable in a democratic society. The State contended on the contrary, that as long as Zambia continued to be a democracy, that which is reasonably required in Zambia must be reasonably justifiable in a democratic society. However, the court held that what is reasonably justifiable in a democratic society must be viewed objectively and not subjectively.

The interpretation placed on the law and its relation to the fundamental rights in this case exemplifies the scope of the wide operation of the phrase "reasonably justifiable" as opposed to "reasonably necessary". In this case the court found that a measure may not be necessary but at the same time it may be expedient and hence justifiable. This allows wider scope for judicial review of a measure as to whether it is necessary, than

as to whether it is justifiable. Hence a measure may be justifiable either because it is necessary or because it is expedient. Consequently, "reasonably necessary" is more restrictive than "reasonably justifiable".

In Cheranci v Cheranci [97] it was sought to impugn legislation which prohibited persons under the age of 15 years from taking part in any "political activity" as defined. The High Court of the Northern Region of Nigeria held that there is a presumption that the legislature has acted constitutionally and that the laws which it has passed are necessary and reasonably justifiable. The burden of proof rests on the person who alleges that the legislature has infringed a fundamental human right. The court further concluded that for a restriction upon a fundamental human right to be considered reasonably justifiable:

(i) it must be necessary in the field in question, e.g. public safety, public order, public morality etc; and

(ii) it must not be excessive or out of proportion to the object sought.

It is submitted, however, that the High Court's strictures of "not excessive or out of proportion", if it was not meant to incorporate, must be extended to include "not arbitrary". [98] As Professor Nwabueze points out, correctly, it is submitted, [99]

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97 (1960) N.R.N. L.R. 24.

98 Nwabueze, op. cit., 46.

99 Idem.

> [t]his is important as it is with the arbitrariness of discretion that the concept of constitutionalism is essentially concerned. It may be said therefore, that the phrase "reasonably justifiable" imports the aspect of the American concept of due process which has enabled the U. S. Supreme Court to strike down any law considered to have unreasonably or arbitrarily interfered with liberty.

After all, the whole idea of protection of fundamental rights is against not only arbitrary actions of the executive but also against arbitrary actions of the legislature. Sovereignty of Parliament, as interpreted in English jurisprudence, allows a Parliament to pass any legislation on any topic whatsoever even if it means curtailing the liberty of the subject. It is such a possibility that the Fiji Constitution, or any constitution for that matter which has a Bill of Rights, seeks to exclude. Thus it is submitted, to be reasonably justifiable in a democratic society, a restriction on the fundamental right must not be arbitrary. This conclusion is supported by the use of the term "reasonably". A law, to be valid, must not only be justifiable but reasonably so. This requirement of reasonableness is incompatible with arbitrariness.

In assessing the reasonableness of challenged legislation and hence its constitutionality, two approaches can be taken. The first approach involves a presumption that a legislative act is valid. Under this approach, it is assumed that if a state of facts could exist that would justify the legislation, it must also be assumed that those facts actually did exist when the statute under consideration was passed. On the contrary, if no circumstances could exist to justify the legislation, it must be declared void as being in excess of the legislative power. [1]

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1 Munn v People of Illinois 94 U.S. 113, 132 (1875). See also Powell v Pennsylvania 127 U.S. 678. (1887) and United States v Carolene Products Co.; 304 U.S. 144 (1937).

The second approach requires special justification for encroaching upon or making new inroads into the freedoms and liberties of subject, secured by the constitution. In other words, the court proceeds upon the basis that fundamental rights cannot be violated unless it can be shown that the legislation is reasonably justifiable.[2] The court puts itself in the same position as the legislature when the legislation was adopted. It balances the apparent detriment of the measure from the point of view of the fundamental rights of the individual as against the anticipated benefits from the point of view of the public as stated in the Constitution be it public safety, public order, public health, etc. It is only when the scale is tipped in favour of the public purpose concerned that the measure will be upheld as constitutional. Until that happens, the measure will be held unconstitutional. On this basis the United States Supreme Court, in 1923, set aside as "unreasonable" and "arbitrary" an Act of Congress establishing a minimum wage for women industrially employed in the District of Columbia.[3]

As far as Fiji is concerned, there are no decided precedents as to which approach should be taken. However, as has been seen, in Nigeria, which has very similar provisions to those included in the Fiji Constitution, it has been held that there is a presumption of the validity of legislation as being constitutional.[4]

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2 Adkins v Children's Hospital of the District of Columbia 261 U.S. 525 (1922). However, the decision on the constitutionality of the legislation in this case was overruled by West Coast Hotel v Parrish 300 U.S. 379 (1936).

3 Adkins, case, supra.

4 Cheranci v Cheranci (1960) N.R.N.L.R. 24. However, as to fuller treatment of this subject see Ch. IX pp.325 et seq., ante.

Further it was held in the same Nigerian case that the burden of proof rests on the party alleging unconstitutionality. In view of the similarity in the constitutional provisions, it seems that the Fiji courts would be bound to adopt the Nigerian approach. Almost all the sections on fundamental rights containing exceptions and qualifications have the provision,

> 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 this provision clearly presupposes the validity of the measure and of any action or thing done thereunder. A presumption in favour of validity is implied. The provision in substance 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. Also, the provision begins with the supposition of validity inasmuch as it commences by stating "Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention" of the fundamental right unless it is "shown" not to be reasonably justifiable. Quite clearly the onus rests on the person challenging the validity of the legislation or action.[5]

This is a very unfortunate state of affairs. It undermines

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5 However, there may be circumstances when the onus may shift; see Ch. IX, ante, relating to constitutional interpretations and particularly pp. 328 et seq., ante.

the real value of the fundamental rights provisions which were intended to protect the individual from the arbitrary actions of the government - executive and legislature. Surely, the State should have the onus of proving that a certain state of affairs exists justifying the invoking of the provisoes, exceptions and qualifications of the fundamental rights provisions. As the position stands today, the impression is given that the fundamental right is the exception rather than the rule.

Having seen the various aspects of the phrase "reasonably justifiable in a democratic society" in isolation, one comes to the question of paramount practical importance: what standards, social philosophy and scale of values should be used by the courts in Fiji? It is submitted that the courts will have to determine for themselves what is reasonable in all the circumstances of a given case. There cannot really be a common standard applicable in all circumstances. But there may be some guiding principles. The Supreme Court of India stated:[6]

> In evaluating such elusive factors and forming their own conception of what is reasonable, in all the circumstances of a given case, it is inevitable that the social philosophy and the scale of values of the judges participating in the decision should play an important part, and the limit to their interference with legislative judgement can only be dictated by their sense of responsibility and self-restraint and the sobering reflection that the Constitution is meant not only for people of their own way of thinking but for all, and that the majority of the elected representatives of the people have, in authorising the imposition of the restrictions, considered them to be reasonable.

Ultimately, the court will have to rely on its own judgement.

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6 State of Madras v Row (1952) S.C.R. 597, 607.

It does not necessarily follow that because a legislature has passed an enactment every provision thereof is reasonably justifiable in a democratic society. The court will be bound to view and assess the enactment objectively and not subjectively.[7] No doubt the judiciary will respect the legislative determination in matters involving legislative policy, the desirability of the measure or its expediency. It is the function of the court to determine the constitutional validity of a statute not to sit in judgement on the wisdom of the legislature.[8] The courts in Fiji have been appointed as sentinels by the Constitution to watch over the fundamental rights secured to the people of Fiji and to guard against any violation of their rights by the State. If the courts are to be effective and realistic guardians, they must not only act with self-restraint and due respect for the judgement of the legislature, but they must also use their own impartial judgement without undue regard to the claims of either the citizen or the State. In so doing, they must have some standard by which to judge whether or not any legislative provision is reasonably justifiable.

The Fiji Constitution has been in operation for only five years and there has been insufficient time to establish these standards. Hence it is necessary to draw upon the experience of other countries where similar problems have arisen - such as America, India and the African countries.[9]

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7 Patel v Attorney-General of Zambia H P/ Const. / Ref. 1/1968.

8 D.D. Basu, Commentary on the Constitution of India (5th ed., 1965), Vol. 1, 209-216.

9 See Cheranci v Cheranci (1960) N.R.N.L.R. 24.

One thing is clear: the meaning and operation of the fundamental rights provisions are going to change as society changes. Thus a reasonably close correlation between the society and law must ensue.[10] Changes in society include not merely social changes. Ohter factors such as economic conditions and the needs of the society in the broad context will also be relevant. The content and scope of the fundamental rights provisions will accord with the society's own "libertarian impulses".[11] This may best be illustrated by two sets of examples in the United States.

In Plessy v Ferguson,[12] The Supreme Court sustained a Louisiana statute of 1890 requiring "equal but separate accommodations" for white and negro railway passengers. However, in Brown v Board of Education[13] in 1954, segregation (even where equal facilities were provided) was held to be unconstitutional.

Similarly in 1922 in Adkins v Children's Hospital of the District of Columbia,[14] the Supreme Court struck down as unconstitutional an Act of Congress establishing a minimum wage

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10 E. McWhinney, "The Supreme Court and the Bill of Rights - The Lessons of Comparative Jurisprudence" (1959) 37 Can. Bar Rev. 16, 27.

11 Idem.

12 163 U.S. 537 (1896).

13 347 U.S. 483 (1954).

14 261 U.S. 525 (1922).

for women industrially employed in the District of Columbia. However, in 1936 in West Coast Hotel Co. v Parrish,[15] the opposite result was reached. In coming to its conclusion the court paid regard to the circumstances then prevailing - particularly the economic position. Thus, in delivering the judgement of the Court, Chief Justice Hughes stated:[16]

> There is an additional and compelling consideration which recent economic experience has brought into a strong light .... We may take judicial notice of the unparalleled demands for relief which arose during the recent period of depression and still continue to an alarming extent despite the degree of economic recovery which has been achieved .... The State of Washington has encountered the same social problem that is present elsewhere.

However, it is submitted, this is not to say that the relationship between the social outlook and the actions of the court would be virtually automatic. It will depend upon weighing the intent of the "positive law and the societal facts."[17] It is in this field that the courts can be expected to play a creative role. This is where the absolute independence and the strength of the judiciary will be needed most. It is hoped that the courts in Fiji will be able to play a role within the framework of the Constitution with professional courage, viewing the situation at hand dispassionately, uncoloured by partisan attitudes. It has been said that:[18]

> The court is a dependent institution, and for this reason, if the judges wish to set themselves against the course of society as a whole or for that matter even of political authority in the executive - legislative arenas of govern-

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15 300 U.S. 379 (1936).

16 Ibid., 399.

17 McWhinney, loc. cit., 29.

18 Idem.

> ment, theirs must tend to be a Fabian, delaying role rather than to involve the employment of direct, frontal assault tactics.

The courts ought not to become too involved with policy decisions. This could lead the judiciary into disrepute. The judiciary in Fiji will play a decisive role in the implementation and elaboration of the fundamental rights provisions. This is not only necessary and inevitable but highly desirable. It is hoped that the courts will not pay undue regard to the claims of either the citizen or of the State. They should be guided by the stand taken by the Supreme Court of United States in the New Deal era and the Supreme Court of India in the early years of independence.

(b) Apparent Limitation under Section 15 (5)

Prima facie, it seems, the effect of section 15 (1) [19] of the Constitution has been significantly affected by sub-section 5 of the same section which provides that:

> Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of

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19 Section 15 (1) provides:

> Subject to the provisions of this section -
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> (a) no law shall make any provision that is discriminatory either of itself or in its effect; and
>
> (b) no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority.

subsection (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; or

(b) to the extent that it repeals and re-enacts any provision which has been contained in any written law at all times since immediately before that day.

The date, 23 September 1966, is not an arbitrary date; it was then that the 1966 Constitution of Fiji came into force and effect. The 1966 Constitution gave Fiji its first "Bill of Rights". The provisions of that "Bill of Rights" were very similar, if not almost identical in substance, to the current 1970 Constitution.

Practically all the legislation which is basic to the administration of the country had been enacted well before the relevant date. The legislation includes the administration of justice, and ranges over the entire area of state activity.[20] Prima facie, if any person acts in a discriminatory manner in the performance of his functions as a public officer by virtue of the provisions of any of the ordinances adopted before 1966 the person affected cannot be given redress by the Supreme Court inasmuch as subsection

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20 E.g., Banking, Broadcasting, Cocoanut Industry, Commission of Inquiry, Companies, Co-operative Societies, Courts, Crown Lands, Crown Acquisition of Lands, Currency, Customs, Education, Electricity, Factories, Fiji Development Bank, Fiji Military Forces, Fijian Affairs, Finance (Control and Management), Fisheries, Forests, Fruit Export and Marketing, Gold Dealers, Harbours, Hotels Aid, Immigration, Income Tax, Industrial Association, Land Development, Legal Practitioners, Licence, Liquor, Insurance, Merchant Shipping, Marine, Mining, Native Lands, Newspaper Registrations, Police, Pilots, Post Office, Prisons, Public Assemblies, Public Health, Public Hospitals, Shops, Sugar Industry, Telecommunications, Town Planning, Trade Disputes, Trade Unions etc.

(5) of section 15 seems to provide a defence to such a claim. That provision obviously has a very far-reaching effect. Not only the original law but also any subsequent re-enactment is covered. It seems that the protection granted by section 15 (1) will have very little practical effect.

It is sincerely to be hoped that the courts in Fiji, when the question is raised, will give subsection (5) a very strict and restrictive construction - a construction in accordance with the spirit of the fundamental rights provisions. It is submitted that this subsection must be interpreted to mean that the exemption applies only where there is an express provision or a clear implication in the legislation permitting potentially discriminatory actions. The courts should examine the whole spirit and policy of the law in question. The law must be such that it was virtually necessary for power to act in a discrminatory manner to be given. Thus if the provisions of the enactment do not spell out, either expressly or by very clear and necessary implication, the power and necessity to act in a discrminatory manner, the law in question and/or the actions of the person acting by virtue of such law ought not to be upheld.

Section 5 of the Banking Ordinance [21] provides an illuminating example. It authorises the Minister of Finance to grant licences for the purposes of carrying on the business of banking

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21 Ch. 182 of the Laws of Fiji.

in Fiji.[22] The power so granted is very wide. No doubt, under

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22 Section 5 provides: ....

4 (a) The Minister may and without assigning any reason therefor -

(i) refuse to grant a licence to any commercial bank other than a scheduled commercial bank; or

(ii) grant a licence to any commercial bank subject to such conditions as to him may seem desirable as to the commercial bank having at all times available for its use assets sufficient to meet its liabilities within Fiji.

(b) No decision made by the Minister under this sub-section shall be called in question in any court.

5 The Minister may and without assigning any reason therefore -

(a) refuse to grant a licence to any savings bank, other than a scheduled savings bank, or to a financial institution; or

(b) grant a licence to any savings bank or financial institution subject to such conditions as he may think fit and may vary or revoke any conditions attached to the grant of such licence or impose additional conditions; or

(c) revoke a licence granted to a savings bank or financial institution if in his opinion the conditions attached to such licence or any of such conditions have not been complied with or have been contravened.

Provided that before any licence is revoked under this sub-section the Minister shall give to the savings bank or financial institution notice in writing of his intention to do so, specifying a date upon which revocation will take effect (which date shall not be less than fourteen days from the date of the notice) and calling upon the savings bank or financial institution to show cause to him why such licence should not be revoked.

such wide powers, the Minister concerned could act in a discriminatory manner by refusing a licence to a citizen of Fiji of (say) Chinese race. He would be acting under the authority of the law because this Ordinance was in force on September 1966.[23] Very strictly, one may say that the Minister acted, albeit in a discriminatory manner, under the provisions of the law which was in force on the relevant date. Hence his actions would be exempted.

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22 continued.

No decision made by the Minister under the provisions of paragraph (a) or paragraph (b) of this subsection shall be called in question by any Court.

6. The Minister may, upon receiving a report from an examiner appointed under the provisions of section 15 of this Ordinance, at any time revoke a licence -

(a) if he considers that a company licensed under this Ordinance is not carrying on its business in a sound financial manner or is contravening the provisions of this Ordinance.

(b) if the holder ceases to carry on banking business in Fiji or goes into liquidation or is wound up or otherwise dissolved:

Provided that before any licence is revoked the Minister shall give to the company notice in writing of his intention to do so specifying a date upon which revocation will take effect (which date shall be not less than fourteen days from the date of the notice) and calling upon the company to show cause to him why such licence should not be revoked.

23 Although amended in 1971 and 1972 but the provisions covered in the example were not affected.

However, it is submitted, such an interpretation would not be in keeping with the spirit of the fundamental rights provisions of the Constitution. The Banking Ordinance does not spell out expressly or by clear implication the power and necessity to act in a discriminatory manner. It is submitted that the purpose of such power is to regulate banking business in Fiji and such a power does not authorise discriminatory actions.

(c) Derogation from Fundamental Rights Provisions During Emergencies

Besides the usual restrictions on fundamental human rights and freedoms for specified reasons, e.g. public safety, public order and public morality, certain rights and freedoms can be derogated from during a period of public emergency[24] which is defined as the period during which -[25]

(a) Fiji is engaged in any war; or

(b) There is in force a proclamation by the Governor-General declaring that a state of public emergency exists.

Such a proclamation, unless revoked earlier, will be valid for only six months from the date when it was made unless in the meantime it has been approved by a resolution of each House of Parliament. Once so approved, the proclamation remains in

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24 Constitution, ss. 5 (7), 8 (2) and 16.

25 Ibid., s. 18 (6).

force as long as those resolutions remain in force.[26] Resolutions remain in force for only six months but they may be extended from time to time for periods not exceeding six months.[27]

It is submitted that as regards the derogation of fundamental rights provisions touching the personal liberty of the subject, the measure must be one which is reasonably justifiable for the purpose of dealing with the situation existing in Fiji during the period of emergency.[28] For the purpose of defining what constitutes a "period of public emergency" the proclamation by the Governor-General is all important. There is no definition of "emergency" nor is any basis provided for deciding whether or not an emergency has arisen. Accordingly, it appears that the courts will not have judicial power to review the proclamation of the Governor-General to decide whether in fact a situation of "emergency" had arisen. The Governor-General is not required to give reasons for declaring that a state of emergency exists. All that is required is for the Governor-General to declare that a state of emergency exists and such a proclamation would be quite constitutional. This is an example of power being conferred in subjective terms. In Nigeria, a similar power to declare a state of emergency by a resolution of each House was vested in Parliament under the 1960 Constitution. It was held that whether a state of emergency existed or not was a matter for Parliament, and not for the courts to decide.[29] It is submitted that such provisions as section 18(5),

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26 Ibid., s. 18(7).

27 Ibid., s. 18(8).

28 Williams v Majekodunmi [1962] 1 ALL N.R. 413.

29 Williams v Majekodunmi [1962] 1 ALL N.R. 413. The court did state however, that it had jurisdiction to determine whether or not certain acts are reasonably justifiable during an emergency. As to this, see p. 478, post.

18 (6) and 18 (7) are too wide and make it easy for the executive and the government to declare a state of emergency and to continue the declaration in force with the support of a bare majority in Parliament. It provides an opportunity for the authorities to use the power for political purposes rather than the preservation of law and order.[30] It is also clear that the authorities can maintain a state of emergency over any part of Fiji, no matter how peaceful that area may be. The courts will have no control over the exercise of the power. This again is most unfortunate inasmuch as during periods of emergencies far-reaching powers are taken by the government. It is possible for the liberty and freedom of the individual and the fundamental rights provisions generally to be greatly undermined. Professor D. O. Aihe has aptly observed in relation to Zambia:[31]

> This lack of judicial review is a threat to the guaranteed rights since certain human rights ... are completely taken away and others restricted during emergency. The nakedness of this threat is apparent from the fact that the constitution, did not define 'emergency', thus it is conceivable that the declaration of emergency might be made even when, prima facie, emergency conditions to not appear to exist.[32]

However, judicial review is not completely excluded. The

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30 The invoking of similar powers in India in June 1975 provides an illuminating example.

31 Aihe, loc. cit., 624.

32 Cf. the situation in India since June 1975. It seems that the emergency powers were invoked in the personal interests of Prime Minister Indira Gandhi rather than to combat emergency conditions.

measures taken must be such as are reasonably justifiable for the purpose of dealing with the situation existing in Fiji. Under section 17, if any person alleges that any of the provisions relating to fundamental rights have been contravened in relation to him, he may apply to the courts for relief. Thus, it is the courts which will ultimately decide whether or not deprivation of personal liberty is reasonably justifiable in a period of emergency. It was so held in Nigeria that the court had jurisdiction to determine whether or not certain acts were reasonably justifiable during an emergency, although it had no jurisdiction to inquire whether the state of emergency should have been declared. Williams v Majekodunmi[33] illustrates this. As a result of a crisis in the Western Region of Nigeria, the Federal Parliament had declared a state of emergency. The crisis was brought about by a rift in the Action Group which was the ruling party in the House of Assembly of the Western Region. As a result the Premier, Chief Akintola, no longer commanded the majority support of the party. The Governor of the Region refused a request by the Premier to dissolve Parliament and the speaker also rejected a request by the Premier to assemble Parliament. In the meantime, the Governor appointed Chief Adegbenro as the Premier. When the assembly met, there was an uproar and riot, as a result of which a declaration of emergency was pronounced by the Federal Parliament. The plaintiff, Williams, was the legal adviser and a member of the national executive of the ruling party when the rift occured. The Administrator, appointed for the Region during this period of emergency, served restriction orders on a number

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33 [1962] 1 ALL N.R. 413.

of people, including the plaintiff. His freedom of movement was restricted to a distance of three miles. Chief Williams admitted to being a member of the national executive of the Action Group and the legal adviser to the party, but he had, prior to the crisis within the party, attempted to restore peace between the two warring factions and he had not been present at the meeting of the national executive which deposed Chief Akintola from his position as leader. It was held by the Federal Supreme Court of Nigeria that on these facts, even though the disturbances were regarded as rendering restriction orders reasonably justifiable, the plaintiff had established that such a restriction was not reasonably justifiable in his case and the evidence of the defendant had failed to rebut this. Bairamian F. J., giving the judgement of the court, put it thus:[34]

> Apparently the learned Attorney-General left it to be inferred that the mere fact of being legal adviser made it reasonably justifiable to restrict the plaintiff's freedom of movement. Merely from that fact, such an inference could not legitimately be drawn.

The court set aside the restriction order while recognising that the fact that Parliament had declared an emergency was a factor to take into consideration when deciding whether or not the measures were reasonably justifiable in any given circumstances.[35]

It is submitted that the courts in Fiji should examine the application of a measure taken during a period of emergency in

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34 Ibid., 421.

35 Ibid., 422.

relation to the particular person who invokes the powers of the court by seeking redress under section 17 against infringement of a fundamental rights provision. A measure may be reasonably justifiable against certain persons or class of persons, but fail to be reasonably justifiable against others. Hence every individual case must be decided on its own merits and circumstances.[36] This would reduce the possibility of decisions being mala fide or being politically motivated when orders are made restricting or curtailing fundamental rights, liberties and freedoms. If the application of general measures to individual cases is examined by the courts, they will be able, to a limited extent of course, to embark upon an enquiry as to the need or necessity for the proclamation of the emergency and thereby require it to be justified objectively. This, it is submitted, would be in keeping with the real spirit of the fundamental rights provisions and would inhibit the executive and the government from acting in an absolutely arbitrary manner. In other words, the courts, while bound to accept the validity of the proclamation of the Governor-General that an emergency exists, will inquire into measures taken to ensure that the interference with fundamental rights is reasonably justifiable under the circumstances of each case.[37] As Chief Justice Ademola said:[38]

> If [human rights] are to be invaded at all, it must be only to the extent that is essential for the sake of some recognised

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36 See Williams v Majekodunmi [1962] 1 ALL N.R. 413.

37 If such a provision had been included in the Indian Constitution, perhaps Indira Gandhi would have been spared much of the criticisms levelled against her and the Congress Party.

38 [1962] 1 ALL N.R. 413, 426.

public interest and may not be farther.

It is submitted that, if the courts do not take this approach, their inability to review the validity of the proclamation will be a very serious threat to the constitutional guarantees of fundamental rights. The executive and the government, under the guise of "emergency" or "public defence" or "public safety", would otherwise be able to act in an arbitrary manner.[39] Arbitrariness and its avoidance is the central theme running through the constitutional guarantees in Fiji. The basic intent of the fundamental rights provisions is the protection of the subject from arbitrary actions by the authorities - executive and legislature alike.

The courts must establish themselves as the guardians of the liberty of man, even in times of emergency. Any provision which purports to derogate from the fundamental rights provisions should be construed strictly. Thus in Nigeria in Agbaje v Commissioner of Police of Western State,[40] it was firmly established that the right to personal liberty guaranteed under the 1963 constitution would be strictly upheld, even in times of emergency. It was further held that whoever alleges that a citizen has been lawfully deprived of his liberty must prove his allegation strictly. Aguda J., delivering the judgement of the High Court of Western State said in relation to the powers granted to the Inspector-General of Police under a Decree:[41]

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39 The arbitrary exercise of emergency powers in India in June 1975 could equally be repeated in Fiji.

40 (1969) 1 Nigerian Monthly Law Rep. 137.

41 Ibid., 139. The relevant part of the provision of the decree is quoted:

> If the Inspector-General of Police ... is satisfied that any person is or recently has been concerned in acts prejudicial to public order, or in the preparation or instigation of such acts, and that by reason thereof it is necessary to exercise control over him, he may by order in writing direct that person be detained....

> As it should be noted these are wide and arbitrary powers in derogation of the entrenched clauses of the Constitution relating to fundamental rights as contained in Chapter III of the Constitution. It is clear and I have not the slightest doubt in my mind that in that circumstance, there is cast upon the Inspector-General of Police the onus to establish before any court in which the exercise by him of powers conferred on him by the above provision has been challenged, that he has complied strictly with the enactment under which he has acted. Not only that, but it must also be shown that every other person acting under his control or in purported execution of his orders complied strictly with the provisions of the Act ....
>
> I bear it in mind that where the liberty of the citizen comes into conflict with the safety and the corporate existence of the state, the liberty of the person has to give way to the latter, salus populi suprema lex, especially during times of war or national emergency .... However, it is clear that in the process the Courts have a vital role to play - in fact it is partly for the resolution of such conflicts that the courts of the land have been established.

When a person is detained under emergency laws he is entitled, within seven days of the commencement of his detention, to know in writing, in a language that he understands, the grounds of his detention.[42] Within a month of his detention, and thereafter during his detention at intervals of not more than six months, his case shall be reviewed by an independent and impartial tribunal. On any such review, the tribunal may make recommendations concerning the necessity or expediency of continuing his detention to the authority by which the detention was ordered. Unless the law provides otherwise, the authority concerned will not be bound by any such recommendation.

It seems that protection is given with one hand but diluted by the other. It may be said that the authority concerned would

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42 Constitution, s. 16.

give great weight to the recommendation of the tribunal. However, since the authority concerned will not be constitutionally bound by the recommendations of the tribunal, arbitrary power is uncontrolled; this gives cause for alarm. It is submitted that there ought to have been a proper balance drawn between the interests of the individual and the needs of the state. The authority concerned ought not to be allowed to reject, in its absolute discretion, the recommendation of the tribunal under all circumstances. After all, appointments to the tribunal, being in the hands of the Chief Justice, should be non-political and enjoy the confidence of the people. It is suggested that the provisions would be improved by requiring termination of detention if the tribunal has made three successive recommendations to that effect. This must be without prejudice to an earlier termination if the authority concerned deems it fit. Representations would be made to the tribunal on behalf of the authority concerned and the detainee. As it is only after consideration of all the factors relating to the necessity and expediency of continuing the detention that the tribunal would make its recommendations, it would be better for the impartial tribunal to be invested with powers to make binding recommendations. This would strike a better balance between the interests of the state and the rights of an individual.

Furthermore, it must also be provided that a person released from detention should not be detained upon the same grounds without leave of the tribunal recommending his release. Otherwise, a man released to day might be re-arrested and detained tomorrow.

(d) Social Behaviour

(i) General

The future of a country depends upon the relationship of the people and their outlook. This is particularly so in a multi-racial

society like Fiji. When one speaks of the government of a country, the question arises as to who is "the government"? The broad answer is the people because the government represents the will of the majority of the people. Hence the government will to a great extent mould its actions and policies to satisfy the general wish. The general relationship of the people inter se will be of paramount importance for the stability and security of the government and the country as a whole.

The fundamental rights provisions of the Fiji Constitution are intended to place restraint only on the actions of the executive and the legislature. Occasions involving fundamental rights will arise in many areas of social behaviour that are outside the sphere of the constitutional provisions. In important fields such as discrimination, group or individual invasion of human rights are not covered by the Constitution, except to a limited extent as regards shops, hotels and other defined places of public resort.[43] Otherwise an individual's right to restrict the use of his property, however unregenerate a particular exercise of that right may be thought, lies beyond the reach of the fundamental rights provisions of the Constitution.

In view of the fact that Fiji is a society with significant racial elements there is a strong need to treat this question of social behaviour pertaining to discriminatory actions in greater detail. Racial harmoney will play a vital part in the future of the country.

Importance attaches to the interpretations placed on sections 3 and 15 of the Constitution.[44] These two sections

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43 Ibid., s. 15 (6).

44 S. 3 provides:

(cont)

disclose a unity of purpose comparable to the "equal protection of the laws" phrase of the Fourteenth Amendment of the United States Constitution, a blanket provision securing the "protection

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44 continued.

> 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 person and the protection of the law;
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> (b) freedom of conscience, of expression and of assembly and association; and
>
> (c) protection of the privacy of his home and other property and from deprivation of property without compensation,
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> the provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any person does not prejudice the rights and freedoms of others or the public interest.

Section. 15 (1) provides:

> Subject to the provision of this section -
>
> (a) no law shall make any provision that is discriminatory either of itself or in its effect; and
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> (b) no person shall be treated in a discrminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority.

of the law" without regard to "race, place of origin, political opinion, colour, creed or sex". The enjoyment of all the fundamental rights by every person is subject to the overriding factor of "the public interest".

Section 15 is a stricture not only on the legislature but also on the actions of "any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority". It is unfortunate that the Constitution does not strike at discrimination in any form as it has done in the limited cases of shops, restaurants, and other "public" places. This would have made the position clearer and thereby obviated uncertainties and the need for judicial interpretations. The precise effect of sections 3 and 15 will depend upon the view taken by the Fiji courts. It is sincerely hoped that they will interpret the provisions liberally and thereby give full effect to the concept of non-discrimination embodied in sections 3 and 15.

It is submitted that this concept was intended to shield every person living in Fiji in the most ample way from discrimination resulting from the actions of government, its officials or individuals. To give maximum effect to the concept, the courts not only ought to scrutine government action but also to treat private conduct abridging individual rights as a violation of the Constitution when the state in any of its manifestations becomes involved. Certain private actions should also be subject to the restraints imposed by sections 3 and 15 of the Constitution if they constitute the exercise of a "public" function.

(ii) Public Function and State Involvement

In the United States of America, the social behaviour of individuals is controlled to a significant extent by the provisions of the "equal protection of the laws" secured by the Fourteenth Amendment of the Constitution which states that:

> No State shall ... deny to any person within its jurisdiction the equal protection of the laws.

The Supreme Court has been able to strike down as discriminatory action taken by private individuals. What was apparently private conduct was treated as state action and thereby subjected to the Fourteenth Amendment restrictions. However, the extent to which other seemingly private activities could be included in this concept of State action was often obscure. One of the earliest but potentially very far-reaching theme in the expansion of the state action concept, was the view that "private" action was subject to the Fourteenth Amendment if it constituted the exercise of a "public function". Also, it came to be recognised that private action or conduct abridging individual rights did no violation to the equal protection clause of the Fourteenth Amendment unless to some significant extent the state in any of its manifestations had become involved in it.[45] Thus the decisions of the courts in the United States before 1964[46] may be examined with advantage.

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45 Peterson v Greensville 373 U.S. 244 (1963).

46 From 1964 the civil liberties were covered by legislation which declared discrimination unlawful in all walks of life affecting the public.

In Marsh v Alabama,[47] the majority opinion delivered by Black J. extended the "public function" aspect of the state action concept. In this case the Supreme Court reversed a state trespass conviction of a Jehovah's Witness who had distributed religious literature in a company-owned town contrary to the wishes of the town's management. Black J. rejected the contention that the corporate owner's control of the town was "co-extensive with the right of a homeowner to regulate the conduct of his guests." The learned judge stated:[48]

> Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it .... Thus, the owners of privately held bridges, ferries, turnpikes and railroads may not operate them as freely as a farmer does his farm. Since these facilities are built and operated primarily to benefit the public and since their operation is essentially a public function, it is subject to state regulation.

The learned judge added:[49]

> The 'business block' serves as the community shopping center and is freely accessible and open to the people in the area and those passing through. The managers ... cannot curtail the liberty of press and religion of these people consistently with the purposes of the Constitutional guarantees, and a state statute, as the one here involved, which enforces such action by criminally punishing those who attempt to distribute religious literature clearly violates the First and Fourteenth Amendments to the Constitution.

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47 326 U.S. 501 (1945). See also Amalgamated Food Employees Union v Logan Valley Plaza 391 U.S. 308 (1968).

48 326 U.S. 501, 506 (1945) (emphasis added).

49 Ibid., 508.

In Evans v Newton [50] the question arose concerning the use of a park created pursuant to a trust established in a will. The trust provided that the park be used by white people only. The city originally acted as trustee. After the city had stated that it could no longer constitutionally enforce the racial restriction, the state courts accepted the city's resignation as trustee and appointed private trustees. The Supreme Court held that the park could nevertheless not be operated on a racially restrictive basis.[51] The majority relied on the "public function" ground as additional[52] support for its conclusion. Douglas J. said:[53]

> This conclusion is buttressed by the nature of the service rendered the community by a park. The service rendered even by a private park of this character is municipal in nature.... Mass recreation through the use of parks is plaintly in the public domain...; and state courts that aid

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50 382 U.S. 296 (1966).

51 Cf. Evans v Abney 396 U.S. 435 (1970. See also Pennsylvania v Board of Trusts 353 U.S. 230 (1957); Re Girard College Trusteeship 357 U.S. 570 (1958); Brown v Pennsylvania; 391 U.S. 921 (1968); E. Clark, "Charitable Trusts, The Fourteenth Amendment and the will of Stephen Girard," (1957) 66 Yale L. J. 979.

52 The first ground was that the record showed that there had been no change in municipal maintenance and concern over the park. The court said at p. 301 that:

> where the tradition of municipal control had become firmly established, we cannot take judicial notice that the mere substitution of trustees instantly transferred this park from the public to the private sector.

53 382 U.S. 296, 301 (1966). See also Terry v Adams 345 U.S. 461 (1952), and Public Utilities Commission v Pollak 343 U.S. 451 (1951).

> private parties to perform that public function on a segregated basis implicate the State in conduct proscribed by the Fourteenth Amendment.

In Shelly v Kraemer,[54] the relief sought was the enforcement, by means of injunction, of agreements among property owners imposing restrictions against occupancy of certain lands by any persons not of Caucasian race. The only issue before the court was the constitutional one. It was held that enforcement by state courts of the restrictive agreements denied the equal protection of the laws within the Fourteenth Amendment. The discriminatory covenant was not, if taken by itself, in violation of the Constitution: it was the intervention by the state that offended the Amendment. The emphasis was on enforcement.[55]

> [T]he principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no sheild against merely private conduct, however discriminatory or wrongful.

So long as the purposes of the agreements were effectuated by voluntary adherence to their terms, there was no action by the state and the provisions of the Amendment had not been violated. However, it was finally held that:[56]

> The enforcement of the restrictive agreements by the state courts .... bears the clear and unmistakable imprimatur of the state.

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54 334 U. S. 1 (1948).

55 Ibid., 13.

56 Ibid., 19.

The Supreme Court has extended the principle applicable to an enforcement of a restrictive covenant by a damages suit against a co-covenantor.[57]

As a sequel to Evans v Newton[58] the state court ruled that the testator's intention to provide a park for the white community only had become impossible to fulfil. Accordingly the trust had failed and the parkland reverted by operation of Georgia law to the heirs of the testator. The Supreme Court held that this ruling did not constitute state discrimination under the Fourteenth Amendment.[59] It is submitted that this case shows that the Shelley case had not barred all state involvement in enforcing private restrictions on property.

The Shelley case has however, been extended to other fields. It has been used to bar the enforcement of state trespass laws against persons excluded from private property on racial grounds. Thus in Peterson v Greenville[60] the demonstrators engaged in a "sit-in" in a restaurant refused to leave when requested by the manager. There was a state law which prohibited integration at a restaurant. The manager admitted that he had refused to serve the Negros because of this law and his personal convictions. The Supreme Court refused to inquire whether he would have excluded the demonstrators if the State had been

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57 Barrows v Jackson, 364 U.S. 249 (1953).

58 382 U.S. 296 (1966).

59 Evans v Abney 396 U.S. 435 (1970).

60 373 U.S. 244 (1963). See also Bell v Maryland, 378 U.S. 226 (1964).

wholly silent. The majority held that the conviction of the demonstrators for breach of the state trespass laws could not be sustained even assuming the restaurant manager acted in accordance with his personal conviction. Chief Justice Warren said:[61]

> [T]he convictions had the effect, which the State cannot deny, of enforcing the ordinance passed by the City of Greenville, the agency of the State. When a state agency passes a law compelling persons to discriminate against other persons because of race, and the State's criminal processes are employed in a way which enforces the discrimination mandated by that law, such a palpable violation of the Fourteenth Amendment cannot be saved by attempting to separate the mental urges of the discriminators.

The principle of "state" action has also been extended to the lessee from a municipal authority carrying on business as a restaurant owner in a building forming part of a parking building.[62]

These illustrations from the United States point out the ways in which a private action may be subjected to constitutional limitations pertaining to discrimination. What is the position in Fiji?

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61 373 U.S. 244, 248 (1963).

62 Burton v Wilmington Parking Authority 365 U.S. 715 (1961). However, see the qualification placed at p. 725 where the court said

> [T]he conclusions drawn from the facts and circumstances of this record are by no means declared as universal truths on the basis of which every state leasing agreement is to be tested.

As submitted earlier, the courts in Fiji may declare even private conduct abridging individual rights to be in violation of the Constitution if the state in any of its manifestations becomes involved to a substantial extent. An obvious example would be the invoking of the judicial process to enforce a discriminatory element in an agreement. In such a case the court, as an agency of the state would become involved and the constitutional provisions would come into play.

As submitted earlier, "private" actions may be subject to the Constitution where they constitute the exercise of a "public" function. In these cases the Fiji courts ought to assume jurisdiction to declare such actions unconstitutional. This was one of the earliest and potentially very far-reaching basis for expanding the state action concept in the United States.[63] Its usefulness in Fiji will be illustrated by reference to public transport.

Public transport is a public service. The entire transport industry in Fiji is regulated by the government and the necessary facilities such as roads and bridges are controlled and manned by the state. The system is supervised by various Boards;[64] but no matter who is the agent or what is the agency, the function performed is that of the state. Although the owners running the services are all private companies or individuals, they operate by leave of the state. Thus, it is submitted, a company offering

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63 Pp.487 et seq., ante.

64 E.g., the Transport Control Board established under the Traffic Ordinance (Ch. 152 of the Laws of Fiji) is responsible for all public transport on land.

public transport is a governmental agency in terms of its "function"; it was created primarily to discharge a "public function" and must expect to be controlled for the public benefit. Such companies or private individuals cannot be heard to maintain that, should they act in a discriminatory manner, their actions are of a "private" nature. Their actions must be subjected to the provisions of section 3 and 15 in particular and other provisions generally.[65] It was in this context that the Supreme Court of the United States held[66] that a common carrier exercises "a sort of public office, and has public duties to perform, from which he should not be permitted to exonerate himself without the assent of the parties concerned." A private company or individual operating public transport is engaged in quasi-public employment. The law gives him certain privileges[67] and he is charged with certain duties[68] and responsibilities to the public.

It is contended that these considerations apply in other fields. Actions of all private concerns exercising public or quasi-public functions will be subject to sections 3 and 15 of the Constitution. But if the actions of a private individual or concern are not of a public or quasi-public nature, the Constitution cannot

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65 Cf. Marsh v Alabama 326 U.S. 501 (1945).

66 New Jersey Steam Navigation Co. v Merchants' Bank of Boston 47 U.S. 344 (1848). See also Olcott v Supervisors 83 U.S. 382 (1872).

67 Traffic Ordinance ss. 63 - 66.

68 Ibid., s. 67.

extend to their actions.

In any event at common law a discriminatory clause in an agreement will not be enforced by the courts of law if it is contrary to public policy. Thus in Re Drummond Wren[69] a restrictive covenant in a transfer of land prohibiting alienation to "jews or persons of objectionable nationality" was held void as being contrary to public policy. In a significant passage Mackay J. said:[70]

> Ontario, and Canada too, may well be termed a Province, and a country, of minorities in regard to the religious and ethnic groups which live therein. It appears to me to be a moral duty, at least, to lend aid to all forces of cohesion, and similarly to repel all fissiparous tendencies which would imperil national unity The common law Courts have, by their actions over the years, obviated the need for rigid constitutional guarantees in our polity by their wise use of the doctrine of public policy as an active agent in the promotion of the public weal.

Similarly Lord Justice Denning (as he then was) said:[71]

> [I]t is clear beyond peradventure that the common law of England has always regarded a man's race or colour as just as irrelevant in ascertaining his rights and duties as the colour of his hair

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69 [1945] 4 D. L. R. 674. See also Noble and Wolfe v Alley [1951] 1 D. L. R. 321 and D. A. L. Smout, "An Inquiry into the Law on Racial and Religious Restraints on Alienation", (1952), 30 Can. Bar Rev. 863.

70 [1945] 4 D. L. R. 674, 679.

71 Freedom and the Law (1949), Chap 2.

Section 3 of the Constitution expressly provides that the enjoyment of the rights of an individual shall be subject to the overriding factor of "public interest". It is submitted that when something is contrary to public policy, it necessarily affects "public interest". The concept of public policy could be incorporated in the term "public interest". As was said by Tindal C. J.[72]

> Whatever is injurious to the interests of the public is void, on the ground of public policy.

For a government agency and especially a court to give effect to a discriminatory practice would be injurious to the public good and hence contrary to the "public interest". The consequences, particularly of judicial approbation of discrimination, are portentous.

Thus, a discriminatory element, for instance a restrictive term in an agreement, standing by itself, cannot be regarded as violative of any right guaranteed by the Constitution. So long as the agreements are honoured or followed by voluntary adherence to their terms no complaint can be made; but as soon as the assistance of the court, or of any other governmental organ is sought for its enforcement, it involves the state and hence sections 3 and 15 of the Constitution come into play.

State involvement could come in a less direct way. For instance, public assistance to discriminatory organisations will be a form of state complicity that might result in the Constitution being invoked. This may be well illustrated by a recent decision

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72 Horner v Graves (1831) 7 Bing 735, 743.

of the United States Supreme Court. In Norwood v Harrison,[73] a unanimous court struck down a state text book loan programme applied to all schools regardless of their racially discriminatory policies. The court found the constitutional infirmity of the programme to be that it significantly aided the organization and continuation of a private system that was free to discriminate if it so desired.[74] However, the court conceded that assistance in the form of "generalised services provided to schools in common with others" that cannot readily be obtained "on the open market", e.g. police and fire protection, may be permissible.[75] The court maintained that any aid to discriminatory private schools going beyond that level is a violation of equal protection guarantees.

It has been argued, regarding less direct means of state involvement, that mere enjoyment by a corporation of a state charter is sufficient to incur constitutional limitations on the corporation's activities.[76] However, it has been held that discrimination by an otherwise private entity is not violative of the equal protection clause of the Fourteenth Amendment of the United States Constitution merely because the private entity

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73 413 U.S 455 (1973).

74 Ibid., 467.

75 Ibid., 465.

76 A.A. Berle, "Constitutional Limitations on Corporate Activity - Protection of Personal Rights from Invasion Through Economic Power," (1952) 100 U. Pa. L. Rev. 933, 951-952.

receives some sort of benefit or service from the state or because it is subject in some degree to state regulation.[77] Where the impetus for discrimination is private, the state must significantly involve itself with the invidious discrimination in order for the discriminatory action to fall within the ambit of the constitutional prohibition.[78] However detailed in some particulars the regulations may be, such regulation cannot be said in any way to foster or encourage racial discrimination.[79] Thus in Moose Lodge No 107 v Irvis[80] a Negro guest of a member of an all-white Moose Lodge had been refused service in the club's dining room. As a result, he sought to have the club's state liquor licence revoked on equal protection grounds. The majority of the Supreme Court refused to find the requisite "state action" in the extensive state regulations governing the sale and distribution of liquor sold by the club. In the majority's view, state regulation could rise to the level of "state action" only if it played a part in establishing or enforcing the club's discriminatory policies.[81] However, the court did suggest that if the state regulation can be deemed to "foster or encourage racial discrimination"[82] the result would be different. It must in some way be implicated in the policies of the entity to render the action "state action".

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77 Moose Lodge No. 107 v Irvis 407 U.S. 163 (1972)

78 Ibid.

79 Ibid.

80 Supra.

81 Ibid., 175 - 177.

82 Ibid., 177.

Accordingly, it is submitted, where legislation requires the registration of a certain body and the Registrar has a discretion to refuse an application for good reason, the state does become involved if the registration of such a body is accepted with knowledge of the discriminatory purposes or objectives of the body concerned. In such a case the state would be "fostering" and "encouraging" racial discrimination. An illustration in Fiji would be the registration of a trade union which discriminates between applicants for membership on any of the grounds prohibited by section 15 of the Constitution.

CHAPTER XII

ENFORCEMENT AND INSTITUTIONAL SAFEGUARDS OF FUNDAMENTAL RIGHTS

In any Constitution a Bill of Rights, no matter how comprehensive, will not by itself provide a complete safeguard for the interests of the people it is designed to protect. The process of enforcement and institutional safeguards are as important as the presence of fundamental rights provisions themselves. It is one thing to devise something in theory and quite another to implement it.

Under the Fiji Constitution, anyone whose guaranteed right has been, is being, or is likely to be contravened "in relation to him" can apply to the Supreme Court for redress; and the Supreme Court is empowered to make such orders, issue such writs and give such directions as it may consider appropriate for enforcing the right.[1] In Nigeria it has been held that the High Court even has jurisdiction, in appropriate cases, to make a declaratory judgement.[2]

However, the experience of other countries such as United States, India and Nigeria, has shown that there are limitations and technicalities in the enforcement of fundamental rights provisions by means of judicial review.[3] The constitutionality of

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1 S. 17.

2 Olawoyin v Attorney-General [1961] 1 ALL N. L. R. 269. The fundamental rights provisions in Nigeria in 1961 were fundamentally the same as the present provisions of the Fiji Constitution.

3 For a more detailed treatment of the position in the United States see Gunther and Dowling, Cases and Materials on Individual Rights in Constitutional Law, (1970), 67 - 198; for the position in India see D. D. Basu, Commentary on the Constitution of India (5th ed. 1965), vol. 1, 170-203.

a statute cannot be determined by the court until some individual whose right is affected by it comes to the court to have his rights adjudicated upon. The court cannot act on its own initiative. A statute may be obviously and patently unconstitutional, but if the matter is not brought before the court in the prescribed manner, it will remain on the statute books. Sometimes there is a considerable time lag between the enactment or operation of the statute and the declaration of its invalidity by the courts.[4]

There are other technical and self-imposed limitations. The competence of the complainant to bring the dispute before the court may be open to challenge.[5] The fundamental rule is that the complainant must prove that a fundamental rights provision has been, is being or is likely to be contravened "in relation to him", an exception is made of course, in the case of a detained person.[6] A dispute also has to be presented in a justiciable form.[7] The court may refuse jurisdiction under the political question doctrine[8] if the question is such that the courts ought not to intervene but to leave the redress to the legis-

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4 E.g., Myers v United States 272 U.S. 52 (1926), where the statute was declared invalid 50 years after its enactment.

5 Olawoyin v Attorney-General [1961] 1 ALL N.L.R. 269.

6 Constitution, s. 17 and see Gunther and Dowling, op. cit., 68 - 108 and Basu, op. cit., vol. 1, 170-203.

7 Massachusetts v Mellon 262 U.S. 447 (1932).

8 Gunther and Dowling, op. cit., 67 et seq., and Basu op. cit., vol. 1, 170 et seq.

lature.[9] Also, the question of constitutionality will be determined only in the last resort, and the court will not pass upon a constitutional question further than is necessary for the disposal of the particular case before it.[10] In Fiji, there does not seem to be provision for an advisory opinion being given by the courts.[11] Hence the judicial process can only be invoked if there is a breach, or likely breach, of a fundamental right provision of the Constitution. There is no provision whereby the court can advise the legislature as to the form of legislation or other action to be taken which will avoid the contravention of the human rights provisions.

There are provisions in the Fiji Constitution which, in practice, may not be very appropriately tackled in the courts of law. For instance, discrimination may not be harmful in certain circumstances, as for example, where it is used in the interests of certain weaker elements in society. Because Fiji is a heterogeneous society, discrimination may be present in many kinds of human activity. It may be desirable to assess and distinguish the beneficial and harmful discrimination outside a court by a truly independent body. Thus the Monckton Commission, which looked into the question of a Council of State in the Central African Federation stated:[12]

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9 Colegrove v Green 328 U.S. 549 (1946).

10 Euclid v Ambler Realty Co. 272 U.S. 365 (1926).

11 Cf. the position in Canada when the Supreme Court may give a decision on a "reference" made to it.

12 Cmnd. 1148 (1960), para. 240.

> A Bill of Rights, however comprehensive, will not by itself provide a completely satisfactory safeguard for the inhabitants of the Federation. There remains the problem peculiar to a multiracial state, that of discrimination on grounds of race, colour or religion .... Discrimination open or disguised, is present in many kinds of human activity and may occur in a wide range of laws and executive actions. It is often harmful, but it may at times be beneficial where it is used to protect the interests of weaker classes or groups. To distinguish between beneficial and harmful discrimination is a difficult and delicate task which the courts cannot appropriately be asked to undertake. We believe that this is a political problem for which a different safeguard is needed.

Further, in practice, the enforcement of fundamental rights will be available only to individuals able to afford the costs of application to the Supreme Court. Redress for breach or threatened breach of fundamental rights can be given only by the Supreme Court.[13] Fiji is not an affluent society and many people may not be able to employ lawyers to present their grievances properly to the Supreme Court. Hence the usefulness of these provisions will be diminished.

For these reasons, alternatives must be found to ensure that everyone in Fiji has the greatest possible benefit and practical enjoyment of the comprehensive fundamental rights enshrined in the Constitution. There are three methods by which the operation of the provisions can be made effective. They will be discussed under these headings:

(a) The role of the judiciary

(b) Proposed Constitutional Council

(c) Proposed Statutory enforcement

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13 Constitution, s. 17.

CHAPTER XIII

THE ROLE OF THE JUDICIARY

A. Introduction

It has been seen that to permit the legislature to make laws derogating from the declared rights and freedoms "in the interest of defence, public safety, public order" so long as the laws are "reasonably justifiable in a democratic society" is to allow a great deal of latitude. The major restraint on the legislature in this matter will be the courts.[1] The courts' conception of the minimum standards justifiable in this particular society and the extent to which they are prepared to defer to the legislature are of critical importance. The courts, it is submitted, have a great potential to develop the law in the field of fundamental human rights provisions under Chapter II of the Constitution. They will decide whether a derogation is justified.[2] Derogation will be permitted only if it is essential to secure some recognised public interest.[3] It has also been firmly established that the right to personal liberty must be strictly upheld even in times of national emergency.[4]

The fundamental rights provisions are entrenched and a special procedure for amendment is prescribed. The judiciary must ensure that the special procedure is complied with.[5] They

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1 See pp.455 et seq., ante.

2 D. P. P. v Dr Chike Obi [1961] 1 ALL N. L. R. 180 and see generally pp.455 et seq., ante.

3 Williams v Majekodunmi [1962] 1 ALL N. L. R. 413 and see generally pp.455 et seq., ante.

4 Agbaje v Commission of Police (1969) 1 Nigerian Monthly Law Reports 137.

5 See pp.206 et seq., ante.

must also decide how far the Bill of Rights fetters legislative action and the extent to which those provisions in force when the Constitution came into operation affect the law.[6] The courts will be involved in interpreting the Constitution and determining the validity of statutes in the light of the Constitution. The task of the judiciary will not be an easy one particularly when it asserts its power of review over a strong legislature.[7]

These are matters related to the question of the extent to which the fundamental rights provisions fetter legislative freedom. But, it must not be overlooked that the fundamental rights provisions also place restrictions on the powers of the executive which has responsibility for implementing legislative policies. Here too the judiciary has an important creative role.

Rights and Remedies

In Fiji, there are two ways of enforcing the fundamental rights provisions. The first is by direct action under section 17 of the Constitution and the second is by invoking the provisions of the Constitution as a means of invalidating, indirectly, legislation or other executive action.

(a) Affirmative Action

Direct affirmative action may be taken under section 17 of the Constitution which empowers the Supreme Court of Fiji to

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6 See pp.389 et seq., ante.

7 This matter is dealt with in great detail in Chap. IX, ante, entitled "Interpretation of the Constitution".

entertain applications for breaches or threatened breaches of the fundamental rights provisions.

In the United States it is rare for a constitutional right to be the basis of an affirmative cause of action. In the great majority of cases, the positive law of the Constitution had been created and applied in cases where constitutional guarantees were used as a shield to ward off actions taken by the government.[8] If successful, the result was to invalidate the legislation attacked. In this situation, the court "indirectly" enforced the constitutional guarantees, e.g. by not admitting the evidence illegally obtained.[9] In those cases in which an attempt was made to enforce the constitution "directly", the claimant invariably relied on legislative authority. However, in the celebrated Bivens v Six Unknown Named Agents of the Federal Bureau of Narcotics,[10] the Supreme Court ultimately held that, notwithstanding the absence of legislation creating a cause of action, violation of the Fourth Amendment's command against unreasonable searches and seizures by a federal agent acting under colour of federal authority, gave rise to a federal cause of action against the agent for damages consequent upon the agent's unconstitutional conduct. The Court held that, where federally protected rights have been invaded, the courts will be prepared to provide a remedy and grant the necessary relief. This decision was based on necessary implications of the Constitution.

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8 See W.E. Dellinges, "Of Rights and Remedies: The Constitution as a Sword" (1972) 85 Harv. L. Rev. 1532.

9 Mapp v Ohio 367 U.S. 643 (1961).

10 403 U.S. 388 (1971).

In Fiji, there is an express provision in the Constitution granting an affirmative right of action in respect of breaches of the fundamental rights provisions. [11] But how wide is the Supreme Court's power to grant relief? Section 17 (1) enables an application be made to the Supreme Court for "redress" of breaches or likely breaches of fundamental rights provisions and section 17 (2) gives the Supreme Court the power to "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. It is submitted that this power is very wide. It includes authority to grant a declaratory judgement, injunction and any other remedy that might be available in an ordinary action.

But, does this include the award of monetary damages? It is submitted that the fundamental human rights provisions have been included in the Constitution to guarantee their protection. The framers of the Constitution have given such provisions a special position by entrenching them. The common law principle of ubi jus ibi remedium suggests that for the breach of rights specially protected a monetary award in the form of damages must be within the power of the Supreme Court. In fact, such an award would in many cases by the most appropriate remedy. The only effective remedy for a breach of section 12 (1), protecting an individual's correspondence from interference, is an award of damages. Once the "damage" has been done, an injunction would no longer be satisfactory as a primary remedy.

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11 S. 17.

It is acceptable only as an ancilliary remedy. Remedial law must be adequate to protect personal interests defined in "political" documents like the Constitution. It is only then that the development of the norms of a legal system can become meaningful. The continuing validity and effectiveness of a Constitution demands a full range of remedies. It will be noticed that section 17 conferring the right to apply for redress speaks of a right that "has been, is being, or is likely to be contravened." Accordingly, the remedy is available not only when unconstitutional activity is threatened, but also when it has been accomplished. When a breach has occurred, redress by way of injunction may not fully compensate the injured person; only the award of damages will do this.

The action of trespass as it developed around the middle of the thirteenth century was initiated by the writ of trespass vi et armis contra pacem. The peace of the realm was seen to be threatened by personal injuries. The ordinary tort "action on the statute" - a cause of action in tort resulting from activity in violation of a legislatively created duty or standard - is, it is submitted, analogous to a tort action affecting the liberty of a person. The history of the action on the statute can be traced to the customary judicial use of money to settle disputes. Well before the development of trespass as a distinct form of action, money had been awarded in criminal appeals and the assize of novel disseisin.[12] The use of money as a means of settling disputes has been a feature of the English legal system from very

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12 Al Katz, "The Jurisprudence of Remedies: Constitutional Legality and the Law of Torts in Bell v Hood" (1968) 117 U. Pa. L. Rev. 1, 18.

early days. As has been said:[13]

> A second reason for the flexibility of the forms of action in the early thirteenth century [the first being the effort by the king's court to draw judicial business away from the feudal courts] lies in the principle of damages, so important in English law, which had been introduced through the medium of the assize of novel disseisin and was gradually spreading to other forms of action. Until after 1250 these actions for damages took no fixed form, but were brought usually by a complaint in the form of a quare writ out of Chancery.

History reveals that the award of damages was the principal means of redressing wrongs.[14] However, as has been pointed out by Al Katz,[15] it must be remembered that, prior to the emergence of the common law, there existed two main types of procedure under what was then the Germanic customary law. One was a demand for specific relief, praecipe quod reddat, the other a complaint of wrong, quare, looking toward compensation by way of bot or similar settlement. It was around these practices that the development of the common law was built. One of the consequences was the emergence of the action on the statute.[16] As a general proposition, this rule may be stated as, "in the

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13 E. J. Dix, "The Origins of the Action of Trespass on the Case," (1937) 46 Yale L. J. 1142.

14 Al Katz, loc cit., 19.

15 Idem.

16 As to a comprehensive history of the early developments of the law in this field see Al Katz, loc cit., and Dix, loc cit.; T. Plucknett, A Concise History of the Common Law (5th ed., 1956), 367.

absence of contrary legislative intent, an action will lie for breach of a statutory duty provided such remedy is consistent with the purpose of the legislation".[17] However, constitutional rights manifest the basic and fundamental proposition that an ordered society is impossible without a system of redress for wrongs between individuals. The concept of an ordered society runs through the fundamental rights and freedoms provisions. Thus Chief Justice Holt stated in his dissenting opinion in Ashby v White:[18]

> A right that a man has to give his vote at the election of a person to represent him in Parliament, there to concur to the making of laws, which are to bind his liberty and property, is a most transcendent thing, and of an high nature, and the law takes notice of it as such in divers statutes .... The right of voting at the election or burgesses is a thing of highest importance, and so great a privilege, that it is a great injury to deprive the plaintiff of it .... If the plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the exercise or enjoyment of it and indeed it is a vain thing to imagine a right without a remedy; for want of right and want of remedy are reciprocal.... Where a new Act of Parliament is made for the benefit of the subject, if a man be hindered from the enjoyment of it, he shall have an action against such person who so obstructed him.

As the constitutional fundamental rights and freedoms are intended to afford protection to individuals, they should have the

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17 Al Katz, loc. cit., 31.

18 (1702) 2 Ld. Raym. 938, 952. This dissenting opinion was accepted by the House of Lords.

same remedy as is available in an action on the statute in the law of torts. The Supreme Court in Fiji should interpret the Constitution in such a way as to ensure that there is an effective remedy for any breach or threatened breach of the fundamental human rights provisions. To achieve this, the breach of a fundamental right must be treated as giving the individual a cause of action similar to that in tort. The fundamental rights provisions will become a sword in the hands of the injured person. It would then be open to the courts to award damages, (special general, exemplary and/or punitive), injunctions etc. In so doing the courts will secure the maximum respect for fundamental rights and freedoms provisions by potential offenders.

(b) Negative Action

The value of the fundamental rights provisions do not depend solely on their being used as a "sword" but also when they are used as a "shield". They may be enforced not merely by direct action or application arising under section 17 of the Constitution but also in other proceedings. The constitutional rights of individuals may be breached directly or indirectly; any onslaught on these rights whether direct or indirect, must be scrutinized by the judiciary very carefully before any derogation is permitted. The courts must not tolerate any governmental action which will be an indirect infringement. This may be illustrated by an aspect of the administration of criminal justice in the United States. The constitutional rights of the accused have been a major source of judicial business for the United States Supreme Court which has adopted a creative role of extending the field of constitutional law into the administration of criminal justice. It

is not possible to give an exhaustive treatment in the present context [19] but the exclusionary rule of evidence will be mentioned as an illustration.

Section 9 (1) of the Constitution provides -

> Except with his own consent, no person shall be subjected to the search of his person or his property or the entry by others on his premises.

Then follow certain exceptions [20] which recognise that a law may provide for searches or entry in derogation of the above provision if the law is made in the interests of "defence, public safety, public order" etc. and such provisions are "reasonably justifiable in a democratic society". [21] Search of private premises may be made by virtue of search warrants, [23] and property seized by virtue of such search warrants may be detained. [24] There are also powers vested in police officers to

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19 For a more detailed treatment of the protection available in the United States e.g. right to counsel, interrogation, confession and self-incrimination, the retroactive effect of new constitutional rulings, fair hearing and fair tribunal, double jeopardy, punishment and bail, etc., see Gunther and Dowling, op. cit., 258-340.

20 S. 9 (2).

21 As to a discussion of "reasonably justifiable in a democratic society", see pp. 455 et seq., ante.

22 Chap. 14 of the Laws of Fiji.

23 Criminal Procedure Code, ss. 104 - 108.

24 Ibid., s. 107.

search and detain persons and vehicles in certain circumstances.[25] These relate to matters pertaining to goods stolen or unlawfully obtained, or any article in respect of which a criminal offence or an offence against the customs law has been, is being, or is about to be committed.

In the United States, "unreasonable searches and seizures" are prohibited by the Constitution.[26] There, a search without a warrant is in general "unreasonable" unless very strong grounds justify it. What are the consequences of an "unlawful" search? In the United States unlawful searches by the police have been discouraged by excluding the evidence so procured from the trial, and reversing convictions where it has been admitted.[27] Thus in Mapp v Ohio[28] the accused was convicted by the Ohio court of knowingly having had in her possession and under her control certain lewd and lascivious books, pictures and photographs in violation of the statute. She was convicted primarily upon the evidence introduced as a result of an unlawful search of her home. The police officers' demand to enter her house without a search warrant was refused. A door was then forcibly opened and the policemen gained entrance. The defendant again demanded to see the search warrant. She was handcuffed and taken to her upstairs bedroom where the officers searched. A search of the entire house produced the obscene materials for possession of which she was ultimately convicted.

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25 Ibid., s. 108.

26 Amendment IV.

27 See Weeks v United States 232 U.S. 383 (1914).

28 367 U.S. 643 (1961).

At the trial, no search warrant was produced nor was the failure to produce one explained. It was held by the Supreme Court that all evidence obtained by searches and seizures in violation of the Constitution is, by virtue of the Constitution guaranteeing the right to privacy free from unreasonable state intrusion, inadmissible. It was observed that, however much in a particular case insistence upon observance by law officers of traditional fair procedural requirements may appear as a technicality that inures to the benefit of a guilty person, the history of the criminal law proves that tolerance of short-cut methods in law enforcement impairs its enduring effectiveness.

The above cases may be compared with the Privy Council case of Kuruma v The Queen[29] where it was held that the test to be applied, both in civil and criminal cases, in considering whether evidence is admissible, is whether it is relevant to the matters in issue. If it is relevant, it is admissible and the court is not concerned with how it was obtained.

It is submitted that in Fiji, if the new legal order is to be given the maximum effect and operation, the Mapp principle must be preferred to Kuruma. The provisions and protection of section 9 of the Constitution are the result of the determination of the framers of the Fiji Constitution to secure to the people safeguards against unreasonable searches and seizures. Section 9 is a reaction against general warrants which resulted in invasions of the home and privacy of the citizen. This section

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29 [1955] A.C. 197.

was considered by the Supreme Court of Fiji in Regina v Mohammed Hanif.[30] In this case Grant J. (as he then was) had to rule, inter alia, on the admissibility of a notebook and a savings account pass-book seized from the accused by means of physical search while he was unlawfully detained at the police station. It was established that the accused did not consent to the search; neither was he arrested nor were there grounds for arresting him at the relevant time.

The learned judge referred to the exclusionary rule as it developed in the United States and made this pertinent observation:[31]

> However, it does not follow that because the Supreme Court of the United States of America found it necessary to judicially imply in the Constitution an exclusionary rule, which is in opposition to the ordinary assumptions of the Anglo-American law of evidence which generally postulates that competent evidence is not rendered automatically incompetent by virtue of the fact that it was obtained in an improper or illegal fashion, that the Supreme Court of Fiji should necessarily come to a similar conclusion.

Ultimately, the learned judge preferred the ordinary common law principles of excluding evidence to that of the stand taken by the Supreme Court of the United States. In so doing the learned judge took into account various factors, including the differences between the Constitution of the United States and that of Fiji. He said that one vital distinction was the fact that the Supreme Court of the United States had only appellate jurisdiction and not original jurisdiction as in the case of Fiji. Grant J. held:[32]

> In ... view of the power to enforce protective provisions and provide redress conferred on the Supreme Court by section 17 of the Fiji Constitution, I am not persuaded at this time that

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30 (Unreported); Criminal Case No. 12 of 1972.

31 Ibid., 3.

32 Ibid. 4.

> the Supreme Court would be justified in implying an exclusionary rule and I think, on balance, that the common law principle should prevail.

It is submitted, with respect, that it is rather very unfortunate that the Supreme Court of Fiji took the above view. With the greatest of respect, it is submitted, that the distinction drawn between the jurisdiction of the Supreme Court of Fiji and that of the United States is irrelevant. The issue is the admissibility or otherwise of the illegally obtained evidence. In any event the Supreme Court of Fiji is also the appellate court of decisions from the Magistrates' Courts. Onemay respectfully ask: does it mean that the ruling of the Supreme Court in Fiji will depend on whether it is sitting as an appellate Court or as a court of first instance? Does it follow that if the Supreme Court in Mohammed Hanif had been sitting as an appellate court, this would have weighed with the Court as to whether or not to follow the American Supreme Court approach?

Further, it seems with respect, that the learned judge took the view that because section 17 of the Constitution gives a power to the Supreme Court to grant redress if there is a breach of the Constitution, the exclusionary rule should not be applied.

As mentioned earlier, section 9 of the Fiji Constitution is a reaction against general warrants which resulted in invasions of the home and privacy of the citizen. It was to prevent such arbitrary practices that section 9 has been enshrined in the Fiji Constitution recognising that a man's house is his castle, which is not to be invaded under any general authority to search and seize his personal chattels.[33]

Once such a protection is enshrined in the Constitution it is then clothed with the dignity of fundamental law which is not limited

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33 Weeks v United States 232 U.S. 383, 390 (1914)

by the rules of the common law. The principles laid down by the Mapp case have a far reaching effect. As has been said by Mr Justice Bradley:[34]

> The principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions, on the part of the Government and its employees, of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors and the rummaging of his drawers that constitutes the essence of the offence, but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offence; it is the invasion of this sacred right, which underlies and constitutes the essence [of the breach] .

Accordingly, it is the duty of the courts to give full force and effect to the constitutional right. The courts have a special responsibility for the enforcement of the law and should fulfil it faithfully. It is submitted that any evidence, whether it is a confession or other material secured by unlawful seizures, should not be admitted by the courts, which are charged at all times with the preservation and enforcement of the Constitution. If "illegally" obtained evidence is admitted, the protection of the Constitution, which declares the right to be secure against such searches and seizures, will be of no practical value whatsoever.[35] The courts ought to declare themselves opposed to such "illegal" acts. Otherwise they would be "required to participate in, and in effect condone, the lawless activities of law enforcement officers".[36] Mr Justice Traynor aptly observed:[37]

> Out of regard for its own dignity as an agency of justice and

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34 Boyd v United States 116 U.S. 616, 630 (1885).

35 Idem.

36 People v Cahan 282 P. 2d. 905, 912 (1955).

37 Idem.

custodian of liberty the court should not have a hand in such "dirty business".

It is true that section 17 of the Constitution does give a right to make application to the Supreme Court for relief in cases of breaches of the fundamental rights provisions. But, if "illegally" obtained evidence has already been admitted, the damage will already have been suffered and any later application to the Supreme Court under section 17 may become an academic exercise. The Supreme Court must be zealous to protect constitutional rights.

> [C]onstitutional provisions for the security of persons and property should be liberally construed .... It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachment thereon.[38]

If an act is unconstitutional, it affects the very root of the system. As Mr Justice Clark said:[39]

> Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence.... The ignoble shortcut to conviction left open to the State tends to destroy the entire system of constitutional restraints on which the liberties of the people rest. Having once recognised that the right to privacy embodied in the [Constitution] is enforceable against the States, and that the right to be secure against rude invasions of privacy by state officers is, therefore, constitutional in origin, we can no longer permit that right to remain an empty promise. Because it is enforceable in the same manner and to like effect as other basic rights secured by the [Constitution], we can no longer permit it to be revocable at the whim of any police officer who, in the name of law enforcement itself, chooses to suspend its enjoyment. Our decision, founded on reason and truth, gives to the individual no more than that which the Constitution guarantees him, to the police officer no less than that to which honest law enforcement is entitled, and, to the court, that judicial integrity so necessary in the true administration of justice.

It is conceded that the constitutional provisions in Fiji do not themselves expressly answer the question whether evidence obtained

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38 Boyd v United States 116 U S. 616, 635 (1885)

39 Mapp v Ohio 367 U.S. 643, 659-660 (1961).

in violation thereof is admissible in courts. Neither has Parliament provided an answer. But, it is submitted that if the courts are to give practical reality to the fundamental rights provisions and for the other reasons advanced, this evidence must be excluded. If this is not done, it is difficult to see what other remedies are available to secure compliance by public officers with the constitutional provisions. An exclusionary rule will at least act as a deterrent to the law enforcement officers and give the victim a practical and realistic protection.

If the constitutional guarantees are to have significance, they must be enforced, and, if the courts in Fiji are to discharge their duty of supporting the Constitution, they must be ready and willing to aid in their enforcement. The court must play its role effectively and maintain the Constitution with dignity. In this field for the development and protection of fundamental rights the primary responsibility rests with the judiciary.

CHAPTER XIV

PROPOSED CONSTITUTIONAL COUNCIL

A. Introduction

This scheme envisages the appointment of a special body to consider all bills and possibly other legislative measures before they are finally adopted. During the colonial era, the Governor was almost invariably instructed not to assent to a bill of a discriminatory character. He was required, expressly or implicitly, to reserve any such bill unless he had been authorised by the Secretary of State to assent to it, or the bill included a clause suspending its operation until Her Majesty's pleasure had been signified, or it was necessary to bring the bill into operation immediately.[1] In Fiji such a bill was identified as one[2] whereby persons not of European birth or descent may be subjected or made liable to any disabilities or restrictions to which persons of European birth or descent are not also subjected or made liable. In some countries non-discrimination was extended not only to racial communities but also to religious communities.[3]

In some colonial jurisdictions additional extra-judicial safeguards were provided. For example, in Basutoland, the High Commissioner's proclamations had to be referred to the Secretary of State at the request of the Basutoland National Council and Bills had to be reserved at the request of the Paramount Chief if

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1 S. A. de Smith, "Fundamental Rights in the Commonwealth;" (1961) 10 I. C. L. Q. 83, 94. Much assistance has been derived from this article.

2 Royal Instructions dated 9 December 1929: Council Paper No. 67 of 1929, 11.

3 E. g., British Guiana (Royal Instructions, 1953, cl. 10 (h)); and also Fiji (Royal Instructions, 1963, cl. 6 (i)).

the ground of the objections was that they were discriminatory.[4]

In Kenya a Council of State was created.[5] The Council consisted of a chairman and ten members, appointed by the Governor of the Colony, holding office during Her Majesty's pleasure. The appointments were not to be made on any principle of sectional representation and members of the Legislative Council were debarred from concurrent membership of the Council of State.[6] The powers of the Council were merely advisory and supervisory. All it could do was examine proposed legislation to see if it was a "differentiating measure", which was defined by the Order in Council as[7]

> Any Bill or instrument any of the provisions of which are, or are likely in their practical application to be, disadvantageous to persons of any racial or religious community and not equally disadvantageous to persons of other communities, either directly, by prejudicing persons of that community or indirectly, by giving an advantage to persons of another community.

The Council of State considered the matters in one of two ways.

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4 Basutoland (Constitution) Order in Council (1959 S.I. 1959, Vol 2 appx), ss. 46 (2), 58 (2) (b) (iii).

5 The Constitution of the Council was set out in the Kenya (Constitution) Order in Council, 1958. For a detailed study of the Council of State in Kenya see Y.P. Ghai, "The Kenya Council of State" (1963), 12 I.C.L.Q. 1079.

6 S.I. 1958 No. 600, s. 48 (2).

7 Ibid., s. 54 (2).

A member of the public could write in and object to a measure and if he could convince a member, the latter could raise the matter in Council. Or Council members themselves could have the Council consider a Bill. The Council would consider the Bill before its third reading in the Legislative Council, and lay a statement before the Legislative Council declaring whether a measure was differentiating and whether it could be corrected by amendments suggested by the Council. The Legislative Council was obliged to consider the report of the Council of State and to notify its decision to the Council. After any Bill had been passed by the Legislative Council, and whether or not the Council of State had made a report on it, the Council could request its reservation for the signification of Her Majesty's pleasure on the ground that the legislation was differentiating. The Governor then had to reserve the Bill unless he was satisfied that it was urgently necessary in the public interest that the Bill be brought into immediate operation. In such a case the matter had to be reported to the Secretary of State.[8]

The Council of State also had the general function of giving assistance to the Governor or the Legislative Council (or a Minister), if so required, in the form of information or advice, particularly in relation to matters affecting persons of any racial or religious community in the country.[9]

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8 Ibid., s. 57.

9 Ibid., s. 53. It had other functions which are not relevant for present purposes; see Ghai, loc. cit., 1096. However, the Kenya Council of State was put out of existence by the 1963 Constitution.

Another institutional safeguard against discriminatory legislation was the African Affairs Board in the Federation of Rhodesia and Nyasaland. The Board was a Standing Committee of the Federal Assembly and consisted of six members, three Africans and three Europeans. Its general function was to make representations to the Federal Government on matters affecting the interests of Africans. It also had the particular function of drawing attention to any Bill or subordinate legislation considered to be a "differentiating measure". A differentiating measure was one "by which Africans [were] subject or made liable to any conditions, restrictions or disabilities disadvantageous to them to which Europeans [were] not also subjected or made liable," or one "which [would] in its practical operation have such an effect".[10] The Board had the power to present to the Assembly a statement giving reasons why it considered a Bill to be a differentiating measure. If the Bill which the Board so considered was passed, the Board could submit a request for it to be reserved, and the Governor-General was normally obliged to comply with the request.[11] Basically, this institution, the African Affairs Board, worked on the same principle as the Kenyan Council of State.

The Monkton Commission in 1960, having decided that discrimination was present in some form -directly or indirectly - in every sphere of human activity, recommended the establishment in the African colonies of Councils of State on the model of

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10 The Federation of Rhodesia and Nyasaland (Constitution) Order in Council, 1953 (S.I. 1953, No. 1199), Annex. Art. 71 (2).

11 Ibid., Arts. 74 and 75. There were other powers of the Board which are not relevant here. See S.A. de Smith, op. cit., 95 et seq.

the Kenya State Council. The main function of such councils was the review of proposed legislation and they would be empowered to delay its passage if it was unfairly discriminatory.[12] In Northern Rhodesia, the Constitutional Council was established by the 1963 Constitution but was abolished on the gaining of independence. Instead, an ad hoc special tribunal was to be set up wherever there was a request for a report on a bill or statutory instrument whose provisions were considered to be inconsistent with fundamental rights provisions in the Constitution.[13] The function of the special tribunal is to scrutinise discriminatory provisions of a bill or instrument and to report with reasons to the President and the Speaker of the National Assembly. The tribunal consists of two persons who hold or have held office as a Judge of the High Court, appointed by the Chief Justice.[14] A request for a report on a bill or statutory instrument must come from at least seven members of the National Assembly by notice in writing delivered to the Speaker of the House within three days after the third reading in the case of a bill and to the appropriate ministry within fourteen days of the publication of the statutory instrument in the gazette.[15]

Institutional safeguards also appear in other forms in other

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12 Cmnd. 1148 (1960), paras. 240 - 250.

13 Zambia Constitution, 1964 Art. 27 (as amended) cited in Aihe, loc. cit., 626,

14 Idem.

15 Ibid., 627.

jurisdictions. As has been seen elsewhere,[16] there is no judicial review of legislation in France and no court can declare unconstitutional any law of the French Parliament. The French Constitution provides for scrutiny of legislation before promulgation by an extra-judicial body called the Constitutional Council.[17] The Constitutional Council consists of nine members, three nominated by the President of the Republic, three by the President of the National Assembly, three by the President of the Senate.[18] In addition, former Presidents of the Republic are ex-officio life members of the Constitutional Council. The Council's president is appointed by the President of the Republic.[19] The Constitutional Council has various functions.[20] All "organic laws" must be submitted to it before their promulgation.[21] Other bills may be submitted by the President of the Republic, the Prime Minister, or the President of either Assembly. The declaration of the Council is final and may not be appealed against.[22] A provision declared unconstitutional by the Council cannot be promulgated or applied. If the Constitutional Council does not declare

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16 P. 169, ante.

17 The Constitution of the Fifth French Republic, Arts. 56 - 64.

18 Ibid., Art. 56.

19 Idem.

20 E.g., supervising the election of the President (Art. 58); deciding, in disputed cases, on the regularity of the election of Deputies and Senators (Art. 59); supervising the conduct of referenda (art. 60).

21 Art. 61

22 Art. 62.

a measure unconstitutional, there is no other way of challenging legislation.

B. A Constitutional Council For Fiji

Fiji needs an institutional safeguard to ensure protection for fundamental rights. It could take the form of a Constitutional Council [23] which could scrutinise proposed legislation, and possibly legislation passed prior to the establishment of the Council to ensure, as far as humanly possible, that the measures do not contravene the fundamental rights provisions of the Constitution.

The proposal will be examined under four heads:

(1) The nature and general function of the Council.

(2) The powers and particular functions of the Council.

(3) Composition of the Council.

(4) Proceedings of the Council.

(1) The Nature and General Function of the Constitutional Council

The success of the Council will depend largely on its nature and function. The Kenya Council of State and the African Affairs

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23 Hereinafter the proposed Constitutional Council will be referred to as "the Council". The proposals are closely related to the operation of the Kenya Council; see Ghai, loc. cit., 1091 et seq.

Board may usefully be contrasted.

> The African Affairs Board emerged very much as a political body. It was part of the legislature, and there was no security of tenure of the members, as they lost their membership if they failed to get re-elected to the legislature. In Kenya, the Council [of State] was thought of more as a quasi - judicial body. There [was] the Council's complete separation from, and independence of, the legislature; there [was] security of tenure and non-sectional principle of representation. The Council was set up to safeguard the interests of all races, whereas the Board was confined to look after the interests of the Africans only ....
>
> The Board took the view that their function was merely to label Bills as discriminatory or otherwise, and not to judge as to the desirability of discrimination .... The Kenya Council, on the other hand, felt that it was its duty to look into the merits of the legislation, and to reserve because of discrimination only if it was unfairly so.[24]

Any Council established in Fiji should be modelled on the Kenya Council which approached its tasks by recognising that some derogations from fundamental rights are not necessarily bad. They may be beneficial, though prima facie discriminatory. If the object of legislation is equalisation, an attempt to achieve social justice, the legislation should not be condemned outright.[25] Such legislation may be reasonably justifiable[26] or may satisfy the

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24 Ghai, loc. cit., 1124 - 1125.

25 Ibid., 1126. See also A.M. Honore, "Social Justice," (1962) 8 McGill Law Journal 77.

26 As to the meaning of the term "reasonably justifiable" see p. 435, ante.

other requirements of the Constitution as being for the public benefit, public interest, and so on. Once it is admitted, as in the exceptions in the provisions containing the constitutional guarantees, that some discrimination or other derogation from basic human rights is permissible, the Council in Fiji should be given the power to determine whether the derogation is justified. If the Council were merely to label a measure as being in derogation of a constitutional right without commenting on its merits, it would always be possible for the government or other authority initiating the reference[27] to the Council to dismiss the objections of the Council by asserting that the measure was justified under one of the provisions of the Constitution. This would defeat the purpose of having an independent body to advise whether legislation was unconstitutional. The Council should be empowered to examine legislation from all points of view and take account of relevant social and economic factors and conditions prevailing in the country. The powers of the Council should not exclude the right of the courts to pronounce upon the validity or otherwise of legislation. The Council would have to consider the practical effects of the measure, in addition to the actual words. This would preclude the legislature from doing indirectly what it could not do directly.[28] The Council would also examine the purpose and policy of the measure. By so doing, it would be able to determine whether the derogation from fundamental rights had a reasonable relation to the object sought and whether it fell

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27 As to this see p. 532, post.

28 The court will follow the same approach; see Pillai v Mudanayake [1953] A.C. 514.

substantially within the exceptions to the basic rights provisions.

These functions would impose a heavy duty and responsibility on the Council, but it would be a duty which the Council would, as will presently be seen, be well suited to discharge. In many ways the Council would have an advantage over the courts in that it would not be bound by precedents and would be able to consider every measure on its own merits. It would be free from the technical rules of evidence and court procedures. There would be no restrictions on its seeking expert advice or making its own independent enquiries.

(2) The Powers and Particular Functions of the Council.

(a) In the Legislative Process

At the outset it must be made very clear that the Council is not intended to be in effect a third chamber. The powers and functions of the Council would not be such as to impair the legislative authority of the Parliament itself. The Council would act in an advisory capacity, its three main functions being:

(i) to consider and report to either House of Parliament on a Bill referred to it by the House concerned; the Council would be asked whether the Bill contravenes or is likely to contravene any of the fundamental rights provisions;

(ii) to consider and report to the Minister concerned, or the authority or local body concerned and/or the House of Parliament concerned, whether any subordinate legislation contravenes or is likely to contravene any of the fundamental

rights provisions;

(iii) to give assistance to the House of Parliament or a Minister in matters touching the fundamental rights provisions.

(i) Bills

Provision should be made to enable the Council to become seized of a Bill in three ways:

Reference by House of Parliament

Provision should be made for a Member of Parliament to move before the third reading that, because the proposed legislation contravenes or may contravene any provision relating to fundamental rights, it should be referred immediately to the Council. The reference would be made only if the motion were supported by at least twenty-five per cent of the total members of the House. The Council should then meet to scrutinise the measure within such time as may be prescribed by the House, being not less than 21 days. The Council would report to the House of Parliament concerned, stating whether in its opinion and for the reasons set out the measure does or is likely to contravene any provision relating to fundamental rights. Once this statement was laid before Parliament, the House concerned would be unable to proceed to the third reading unless the Council, having scrutinised the measure further, had either withdrawn its previous statement or laid before the House a report embodying its comments upon the Bill or any provision thereof. The report would, if the Council thought fit, contain recommendations for revision of the measure by amendment, deletion, or replacement

of any of its provisions, or by addition of new provisions which would remove the grounds for objection to the measure.

Such a detailed report would need to be made by the Council within two months of lodging its initial objection, but this period could be extended by the House. However, if the House is not in session, the presiding officer of the House, or if Parliament is in dissolution, the Governor-General could extend the period to the next sitting of the House. However, in the case of the consolidated fund or appropriation bills the time prescribed for consideration by the Council would be reduced to one month and any extension granted would not exceed three weeks. If the matter were very urgent and one which pertained to public defence, public order, public security or a period of public emergency within the meaning of section 18 (6) of the Constitution, the House might prescribe a shorter period for the presentation of the initial statement or the detailed report by the Council.

On the presentation of the Council's report, the House concerned would be obliged to consider it and to certify its decision upon it to the Council. If the House did not agree with the opinion of the Council contained in the report, it should within 7 days of its decision thereon remit a copy of the report and its decision thereon to the other House of Parliament. By this method the other House would at least have before it the opinion of the Council and its reasoned report and could make such use of the report as it deemed fit.

However, it is submitted, the matter should not end there. Should both Houses of Parliament pass the measure in the face

of the objections of the Council, the public should be informed of the Council's report. It is therefore suggested that the Speaker of the House of Representatives and the President of the Senate in certifying the enactment of the measure should be required also to certify as to the objection of the Council. After all the whole idea of this institutional safeguard is to prevent, as far as possible, a measure reaching the statute book which may later be found to be unconstitutional for infringing the fundamental rights provisions. If, in spite of all the scrutiny examination and investigations made by the Council, the measure should find its way to the Governor-General for his assent, that measure should be judicially adjudicated upon at an early stage. Accordingly, it is suggested that the Governor-General should be required to refer the "Act" to the Supreme Court for an advisory opinion on its constitutionality. This procedure would be in keeping with democratic principles and would also keep the head of the state out of political controversy. The final decision would be made by normal but early adjuciation by the judicial process.

(b) At the initiative of a Member of Council

The Council might become seized of the matter on the initiative of a member of the Council who was of the view that a particular Bill before either House of Parliament might contravene the fundamental rights provisions. Of necessity, it would be provided that each member of the Council be given a copy of all Bills presented to Parliament within the same period as they are supplied to members of Parliament. If any member felt that a Bill contravened the fundamental rights provisions, he should be able to call a meeting of the Council to scrutinise the

Bill. If the Council decided that the provisions in question were contravened or were likely to be contravened, the Council would follow the same procedure as if the matter had been referred to it by either House of Parliament. The provisions already discussed relating to report and statement would apply. However, there should be nothing to compel the Council to scrutinise any Bill on its own volition,[29] but if at least two members so wished, the Council would be bound to scrutinise the measure.

In this field, it is contended, the powers of the Council should be extended to existing legislation and subordinate legislation of all kinds. The Council should be given the power to scrutinise existing legislation to bring it into harmony with the Constitution as far as it relates to fundamental rights. The Council, after scrutinising existing legislation, would be entitled to make such recommendations as it deemed fit to the appropriate Minister or other relevant authority. If the Minister or other relevant authority ignored the recommendations of the Council and/or did not take active steps to the satisfaction of the Council to comply with the recommendations within three months of the report, the Council would then present a report, together with a copy of its recommendations and its reasons thereon, to Parliament as soon as practicable. However, here again there should be nothing to compel the Council to scrutinise existing laws.

(c) <u>At the Initiative of a Member of the Public</u>

The Council might become seized of the matter on the initiative

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29 If such was the case, many complications would develop. For instance the Council may be subjected to numerous applications for mandamus.

of a member of the public. Any member of the public should be able to write to the Council or to any of its members drawing attention to an alleged breach of fundamental rights provisions in a Bill. Any member of the Council could then call a meeting of the Council to scrutinise the Bill. If the Council agreed that the fundamental rights provisions were likely to be adversely affected, it would follow the same procedure as if the matter had been referred to it by either House of Parliament. Should the Council disagree with the view of the member of public and dismiss the representations so made, its decision would be final and not subject to appeal nor be able to be called in question in any court of law. This is quite reasonable as confidence should be reposed in the members of the Council. If they considered that a "complaint" was without substance or frivolous, the Council should not dwell further on it. In any event, if the member of the public was not satisfied, and he felt that there was validity in his representations, he could air his views through his member of Parliament. If the representation were valid enough to gain the support of the necessary twenty-five per cent of the members of the House, and the House of Parliament referred the matter to the Council, the Council would be bound to scrutinise the measure further.

(ii) Subordinate Legislation

If the Council considered subordinate legislation[30] to violate or be likely to violate the fundamental rights provisions, the

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30 Which includes statutory rules, regulations, and by-laws of all kinds.

Council should have similar powers to those in relation to statutes. The Council should be empowered to send to the authority concerned, and the Minister under whose portfolio such authority came, a report of its views on any subordinate legislation which was thought to contravene the Constitution. The Council could recommend the annulment, if possible, or the amendment of the legislation. If no steps were taken to comply with the recommendations to the satisfaction of the Council within two months of the report, the Council should make a report to Parliament. In the case of subordinate legislation, the Council would be taking action after the law had been passed. As will be seen presently, there would be nothing to prevent the Minister or the local authority or any other authority concerned from approaching the Council for advice before promulgation or even during drafting of legislation.

In the case of subordinate legislation too, the Council might be seised of a matter in one of three ways:

(a) First, if one third of the members of a local authority or such other body having power to make subordinate legislation were to question whether a proposed measure contravened the fundamental rights provisions, the matter should immediately be referred to the Council by the authority concerned. The provisions relating to references by the Houses of Parliament would apply mutatis mutandis.

(b) Secondly, the members of the Council themselves might feel, as in the case of Bills, that certain subordinate legislation needed scrutiny. In such cases too the provisions relating to Bills should apply mutatis mutandis.

(c) Thirdly, a member of the public might make representations. In such cases too the provisions relating to Bills would apply mutatis mutandis.

(iii) General Assistance

It is submitted that the Council should have the general function of giving assistance to the Houses of Parliament or to a Minister in matters touching the fundamental rights provisions generally. This would be a very helpful and practical function of the Council. It would provide an opportunity, before a bill was presented to the House, for the Minister concerned to discuss and consult the Council. Such matters as the reasons for the Bill, its probable effects and the amendments acceptable to the Council and the Minister could be discussed and settled. This would obviate embarrassment and delay, and formal interventions would be fewer. This would be of particular importance in relation to subordinate legislation. Such legislation does not receive the same scrutiny as a Bill does in Parliament. The Council could be of immense assistance to the Minister. But, it would need to be expressly provided that such consultation, advice and assistance would in no way prejudice the Council in its formal consideration of any Bill or subordinate legislation referred to it. The Kenya Council of State reported:[31]

> This growing tendency to consult the Council in the early stages of legislation may well obviate subsequent delays in the passage of legislation and should prove beneficial, provided that the Council is not expected to prejudge any

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31 Annual Report, 1959 at 6, cited in Ghai, loc. cit., 1099.

decision which it may later have to make in the light of grounds for objection put forward by the public when the legislation is published.

(b) In the Enforcement of Fundamental Rights

Fundamental rights are meaningless unless they are protected. The fundamental rights provisions of the Fiji Constitution are intended to be justiciable, not hortatory. They enjoy an entrenched position; they cannot be changed by any ordinary majority of the legislature. But they are meaningless unless the individual is able in fact to enforce them through the legal process. The Constitution of Fiji, enables an aggrieved person to apply to the Supreme Court to have his fundamental rights enforced or to seek redress for their breach. In practice, the effectiveness of this provision may be greatly diminished if the victim is unable to make the necessary application because he is impecunious. Sections 3 and 15 of the Constitution confer equal protection on every individual but only those with superior economic resources will be able to enforce their rights through a solicitor. What of less fortunate individuals who are unable to pay for this service?

In order to make the fundamental rights provisions effective, the state must do its utmost to ensure that all are placed on the same footing in the enforcement and enjoyment of their rights. Because they are rights and freedoms which are intended to be universal as well as fundamental, the principle of equality before the law demands that courts of law should be accessible to all, without discrimination, who wish to enforce their constitutional rights. Having the courts open to all may not in itself be enough. Equality is not achieved if an impecunious person is

at a disadvantage in civil litigation involving his fundamental rights.[32] Though the doors of the courts may be wide open the impecunious person may be unable to enter because of the cost of litigation in the Supreme Court. For him, the courts are not "accessible". Vis-a-vis someone who is well of financially and able to have legal representation, he can hardly be said to have equal access to the courts in the real sense. His inability to employ counsel is a serious handicap. Though he may have a meritorious claim or a valid defence his ignorance of the laws of evidence and procedure preclude it being presented. The indigent may sacrifice his claim or defence. Whatever rights he may have to equality before the law are rendered illusory.

It is submitted that in order to achieve equal justice and protection of the law to all and to give reality to the constitutional guarantees, a legal aid scheme providing help for impoverished litigants may have to be devised. Otherwise justice would become a privilege of the wealthy. Here the Constitutional Council[33] could be usefully employed to determine whether legal aid should be given.

The Council ought not to be directly involved in enforcing the fundamental rights provisions. This would be likely to prejudice the Council as a disinterested body. The Monckton

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32 A legal aid scheme in criminal proceedings operates in Fiji although not to the extent desired. It is difficult to qualify for legal aid assistance in magistrate's court trials and is very seldom granted.

33 See p. 528 , ante.

Commission Minority Report (by Chirwa and Habanyama) said:[34]

> While we are prepared to accept the majority view that the Councils of State should not deal with individual cases we think there is room for the Councils to play a part in enforcing the provisions of the Bill of Rights prohibiting racial discrimination in cases which affect a community or substantial group. For this purpose we think the Councils should be empowered to initiate action in court in the interests of the public. We think this would help to overcome the difficulty that there is no effective scheme for legal aid in the Federation, and the average African, who may be the victim of discrimination, cannot afford to pay for the services of a lawyer.

Such a proposal should not be adopted in Fiji. In view of the suggestions[34] that the Governor-General should be able to apply for an advisory opinion of the Supreme Court, it is not necessary to endow the Council with similar powers which would involve it in legal proceedings prejudicing its impartiality. Other complications would also arise. On what basis and at whose expense would the Council secure legal representation? If the Council were to refuse to assist one group while acceding to the request of another, its decisions might be misunderstood. The Council must be seen as an advisory and independent body and should not become directly involved in litigation.

However, the Council might perform a useful function within a legal aid scheme under which individuals might, in appropriate cases, be given legal aid to apply to the Supreme Court under section 17 of the Constitution. Assistance from the scheme would be limited to persons with less than a specified income. The system would enable all persons to lodge a written application

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34 Cmnd. 1148 (1960), para. 54, cited by Ghai, loc. cit., 1132.

with the Council giving a brief statement of their financial circumstances and the alleged breach of the fundamental rights provisions. The Council would scrutinise the applications and, with the assistance of the two legally qualified members,[35] certify whether there was a substantial cause for complaint. In appropriate cases, the Council would then issue the necessary legal aid certificate. The granting of the certificate or dismissing of the application would be in the absolute discretion of the Council. There would be no right of appeal.

By making a Council certificate a pre-requisite to the granting of legal aid, many frivolous and groundless applications could be excluded and the abuse of the process and the legal aid scheme would be minimised. Once the certificate is granted, the current legal aid scheme as operating in criminal cases, would apply. Should the applicant, supported by legal aid, be successful, any costs awarded must be paid to the legal aid account.

(3) Composition of the Council[36]

As has been said, the nature and functions of the Council would be very important factors in determining its success. Of equal importance is its composition. The Council should not

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35 See the suggested composition of the Council at p.**543**, post.

36 Cf. the Kenya Council of State under the Kenya (Constitution) Order in Council, 1958 (S. I. No. 600) - hereinafter referred to as the 1958 Order.

emerge as a political body. If it did, it would be very susceptible to the influence of the ruling party. It should be formed and act independently of politics as far as humanly possible. Hence there should be no election to such a body but membership should be by appointment.

The members of the Council should be appointed by persons whose positions are such that they are outside politics and who could be expected to command the respect of the country at large. Two who fall into this category are the Governor-General and the Chief Justice. These two officers should be responsible for the appointment of the members of the Council.

The Council should consist of a chairman and four other members. The chairman and at least one other member should be a barrister and solicitor of at least ten years' standing, or a retired judge or a retired magistrate.[37] No person should be eligible for membership of the Council who is a member of Parliament or who has been such a member within twelve months prior to his appointment, and any person so appointed as a member of the Council should not be eligible to be a member of either House of Parliament either during his membership or the Council or within twelve months after the termination of his membership either by resignation, dismissal or expiry of term. No civil

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37 As will be seen later, the powers and functions of the Council will be such that in certain major aspects legal training and experience on the part of some members would be of great importance. Accordingly, it is imperative that at least some members must be lawyers.

servants or other persons employed by Her Majesty's Government should be eligible for membership. This would ensure that members would not be susceptible to the influence of the ruling political party. To maintain continuity, appointments should be for five years.

The Chairman of the Council should be appointed by the Chief Justice and the other four members by the Governor-General.[38] It is most important that these appointments be made without regard to race. For too long - in fact from the beginning of British rule in Fiji - people have been made to think on racial lines. This racial concept has been perpetuated even in the present Constitution. The colonial regime did very little to unite the various races in Fiji into a common sentiment. As has been seen,[39] official encouragement has been given to communal divisions, e.g. by separate representations and separate schools. This has accentuated the gap. British rule, throughout its history has repeatedly encountered the communal problem but it did very little to resolve such problems in Fiji. It is high time that steps were taken to eradicate, albeit gradually, this concept of racialism. People's way of thinking and actions ought to be moulded more on national lines, with the idea of working for the common good of the country, and not on racial distinctions.

Accordingly, it is submitted, the establishment of this Council would provide an opportunity to make a break with the

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38 Appointments by these two officers would reflect the independent nature of the Council.

39 Pp. 436 et seq., ante.

principle of communalism. It should be a non-racial body with the task of safeguarding the interests of all races.

(4) Proceedings of the Council

It is imperative that initially the Council should meet at least three times a year in order to establish itself quickly. To do this, the Council could begin by examining all legislation prior to 1970 to satisfy itself that such legislation is in harmony with the Constitution. This in itself would be not only worthwhile but educative - both of the Council and the people. The constitutional guarantees of fundamental rights are an innovation in Fiji. None of the governmental agencies - the legislature, the executive or the judiciary or the people of Fiji generally have had much experience with them. To have the Council peruse all previous laws and report on them would provide an opportunity for the government and the people to become better informed as to the scope of the constitutional protection now available. The proceedings in the Council should be conducted in committee initially. At those meetings the quorum would be three. If the Council, having met in private, were of the view that a prima facie case had been made out that the provision of a law or proposed law contravened or was likely to contravene any fundamental right provision, a motion to this effect could be debated subsequently at a public meeting. In finding a prima facie case the Council need not be unanimous. A prima facie case could be treated as having been made if at least two members were of that view. If the Council held that a prima facie case had not been made out, it should dismiss the "complaint", and that decision should be final and not subject to any judicial proceedings what-

soever.

Notice of a public hearing together with an indication of the business to be discussed should be given by the Council. This would give all interested parties full opportunity to make representations to it. Submissions could be made orally or in writing. In Kenya, a Minister or Assistant Minister (later called "parliamentary secretary") had a right to attend and take part in the public proceedings of the Council of State[40] but without the right to vote. This course should not be followed in Fiji because it might suggest that the Council was an agency of the government or that it might be unduly influenced by the government of the day. The right of a Minister or Assistant Minister to make representations should be no greater than that of other members of the public. The purpose of such a Council to act as a watch dog over the legislative actions of the state - whether of the legislature itself or of subordinate legislative agencies. It is important that the Council should act as independently of such bodies as possible. No doubt the submissions made by a Minister would be very helpful in evaluating proposed legislation or legislation already in force. But nonetheless any right of representation permitted to the government should be no more than that allowed to other interested parties. The Council should not only act independently but should be seen to do so. The functions and operations of the Council would be greatly undermined if the impression was created that it was an agency of the government and used merely for window dressing.

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40 1958 Order, s. 52 (6).

However, this does not mean that the Council should be prevented from inviting persons to attend its meetings and even participate in the discussions. This, at times, might prove to be a very useful exercise. For instance, a Minister might be invited to explain the reasons for and the probable effect of a measure, or a head of department or other civil servant might be invited to explain the practical operation of certain subordinate legislation.

At the public hearing the Council should be at liberty to receive and hear sworn testimony, or it could conduct the hearing in the form of oral or written submissions. After the public hearing the Council should retire and conduct its own deliberations in private.[41] The decision of the Council should be by majority vote with the chairman having a casting vote only in the case of equality of votes of those present and voting. Voting by proxy should not be allowed. Because of the importance of the subjects discussed only members present at the discussion should be able to vote.

If the Council ultimately decides that a measure does or may infringe a fundamental right provision, it should make a preliminary statement to the House of Parliament concerned.[42]

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41 Cf. the position of the French Constitution Council where there is secrecy of deliberations and of votes. See M. Waline, "The Constitutional Council of the French Republic," (1963) 12 Am. J.C.L. 482, 487.

42 See p. 532, ante.

The Council would then prepare and formally adopt the necessary report, giving its final opinion on the measure with the reasons, and possibly recommending amendments. This report would then be considered by the House concerned.[43] Even if a motion were not adopted after the public meeting but the Council entertained strong doubts about the measure, it could still make a report either to the House or the appropriate Minister or authority concerned.

Needless to say, the Council should be protected from actions for contempt and should enjoy privilege as regards its proceedings, reports and records.[44] Within the statutory provisions, it should be given absolute discretion to make its own rules for its proceedings and procedure.[45] Except for public hearings, all other business of the Council - e.g. consultation with a Minister or other authority and advisory opinions sought by a Minister, should be conducted in private.

Conclusion

The most obvious effect of having such a body as the suggested Council would be to minimise the possibility of having

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43 See p. **533** , ante.

44 Cf. Kenya (Constitution) (Amendment) Order in Council 1959 (S.I. No. 1302), s. 5.

45 The Kenya Council of State adopted the rules of the Legislative Council, with some modification. When in Committee it worked in less formal way; Ghai, loc. cit., 1098.

legislation enacted in derogation of the constitutionally guaranteed fundamental rights. Draft legislation would not only be debated and adopted by Parliament; there would also be scrutiny by an independent body without political motivation. Since the Council would be responsible to the Governor-General, it would not be subject to the influences operating on members of Parliament. The Council should provide standards by which legislation would be judged objectively without political pressure.

The existence of a Council would encourage the government to proceed with care when drafting legislation which might affect fundamental rights. The implications of draft legislation would be closely investigated before the bill was introduced. There would then be less risk of legislation being challenged as unconstitutional. One important consequence of this would be an improved atmosphere for foreign investment, which must be encouraged.

The Council might also assist in settling the terms of legislation which may affect racial issues. Discriminatory legislation could be at least partially removed from politics and particularly party politics by having it considered by the Council which would provide a forum where all interested parties could be represented and make submissions. The Council's procedure would ensure a fair hearing for all. The Council would approach legislation referred to it in a spirit of impartiality and fairness. Its final deliberations would be in private and whatever was said by the members would not then have to be to "satisfy" any section of the community or authority.

The fact that Fiji has constitutionally guaranteed rights should

not be used as an argument against appointing a Council. There may be an overlap of functions between the Council and the Courts, but it is not because of any lack of faith in the judiciary that the appointment of a Council is supported. The role of the judiciary is narrower than that of the Council.[46]

There are further reasons for establishing a Council. First, once a bill has been drafted and when it is enacted, attitudes harden. Members of the government will feel obliged to support and justify the legislation even though they may privately concede that the law should be modified or diluted. Once the Bill becomes law the government become fully committed to it, but before that happens a more flexible position may be taken. Amendments might be accepted if they were put forward by an independent body such as the Council whose obvious impartiality and fairness would be recognised.

Secondly, the courts in Fiji cannot take preventive measures. They cannot offer advisory opinions to the legislature on matters pertaining to fundamental rights. The judiciary can act only when a definite complaint that fundamental rights have been contravened or are likely to be contravened. These limitations would not apply to the Council. The Council would have fact-finding and investigation facilities that the courts do not have. Whereas the courts function is to decide cases according to law, there is no constitutional or doctrinal objection to the Council advising the government on the content of legislation infringing the fundamental rights provisions or even advising the government on the form of

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46 Pp. 528 et seq., ante.

legislation. In its advisory and consultative role the Council's activities would be valuable and beneficiary. Much time and effort would be saved were the government to consult the Council in the early stages of drafting legislation. Moreover, the Council, with its reputation for impartiality and fairness, would be able to give frank and open advice and the government by referring to the Council such matters in the early stages, would be able to demonstrate its good faith and honest intention.[47]

The Council would also reduce or avoid conflict, such as was seen in the United States and India, between the legislature and judiciary. In the United States during the New Deal era, there was constant conflict between the judiciary and the legislature. In India, this problem manifested itself from the beginning of independence and within a year and a half of its commencement, as a result, the Constitution of India was amended in order to nullify the effects of certain judicial decisions and to forestall future judicial action.[48] The Supreme Court, concerned about clashes with the legislatures, felt compelled to state:[49]

> [W]e think it right to point out what is sometimes overlooked, that our Constitution contains express provisions for judicial review of legislation as to its conformity with the Constitution .... If, then, the Courts in this country face up to such an important and none too easy task, it is not out of any desire to tilt at legislative authority in a crusader's spirit, but in discharge of a duty plainly laid upon them by the Constitution.

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47 See Ghai, loc. cit., 1123.

48 The Constitution (First Amendment) Act, 1951.

49 State of Madras v Row, A.I.R. 1952 S.C. 196, 199.

Such a conflict must be prevented in Fiji. But it must also be accepted that, if the validity of legislative or executive action should be questioned in relation to the fundamental rights provisions, the courts would be bound to adjudicate on it. The problem would be most acute in relation to section 15 of the Constitution under which the court must decide whether a discriminatory law is reasonably justifiable in a democratic society. This will certainly call for adjudication on racial, political and social questions. It is not suggested that the courts are unqualified to answer such questions, but there is a real danger of conflict with other branches of government. In this very controversial field, the courts have a difficult task to discharge, as the American and Indian experiences have shown. The Council could be of immeasurable assistance to the courts and the legislature alike by ensuring that as little doubtful legislation as possible is included in the statute book.

Furthermore, the Council would not be bound by technical rules of evidence and procedure in scrutinising a discriminatory bill to see whether it is reasonably justifiable in a democratic society. It would be able to look at the history of the bill and examine its objects and effects in practice. It would be able to receive representations and views from those adversely or favourably affected. It would be able to invite opinions and views from other experienced people. Eventually the Council might be able to strike a compromise between opposing views and recommend the necessary amendments to the Minister or other authority initiating the reference to it. Certainly such a recommendation would carry much weight even though the Minister or the authority, as the case may be, may not accept

it. These are the spheres - and very important and realistic ones - which the courts are not able to enter. If the legislature, despite the Council's objections, passed the measure, the court would feel "bolder" and less hesitant to attack a measure and declare it unconstitutional. The court would feel that it had at least the backing of another independent body. On the other hand, if a measure were approved by the Council, this too would be likely to carry great weight with the courts. It is only where a measure is invalidated that conflict really arises between the court and Parliament. Having an ally in the Council would be of invaluable assistance to the courts. It would encourage and make the courts feel more secure in the performance of their duties in the constitutional field of fundamental rights.

It may be said that because the Council might clash with the expressed wish of the freely elected legislature, it would be inimical to the democratic spirit. But, it is submitted, Fiji is not a pure democracy. It may be correctly asserted that a country like New Zealand is ruled according to the will of the people through their duly elected representatives and one may agree, in relation to New Zealand, with Professor Sir Ivor Jennings when he says that the surest safeguard of a nation is free elections. That safeguard may exist where the society is fairly homogeneous. But in Fiji representation in the House of Representatives is on a communal basis and this is bound to affect the attitude of members of the House. As has been seen elsewhere, this unfortunate state of affairs has been present in the country from the early years of British rule. Also, in the Senate no member is elected by the people in "free elections"; all are nominated. Here too party politics and communal factors are

prominent.[50] No matter how much leaders and people may deny that politics in Fiji are played on a communal basis, in practice the racial element is always present, and significantly so. Communal appeals form the very basis of politics in Fiji. Hence there are permanent communities with separate representation.[51]

In such a context there is need for an independent body like the proposed Council, which may well be seen not to be inimical to the democratic spirit. As proposed, the Council would have no powers to act contrary to the wishes of those representing the people but it could be expected to advise and influence Parliament.

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50 See s. 45 (1) as to the appointments to the Senate.

51 See p. 703, post.

CHAPTER XV

PROPOSED STATUTORY ENFORCEMENTS

One of the shortcomings of the fundamental rights provisions in Fiji is that they do not apply to the conduct of private persons unless their conduct can be classified as State action or as related to a public function. The members of the Commission reporting on the Constitution for Basutoland (now Lesotho) were particularly concerned about the same problem and suggested that the activities of private persons and bodies could present a greater threat to individual liberties than the activities of governmental agencies.[1]

Fiji as a multiracial country was seen to need a Bill of Rights.[2] But the Bill of Rights is not a panacea. It has little or no effect on private relationships in the social, economic and political life of the community.

> An elite- an educated class with knowledge of government - can provide leadership. Controls or checks and balances can be written into the charter so as to curb legislative, executive and judicial power. Yet they have force and

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1 D. V. Cowen, "Human Rights on Contemporary Africa", (1964) Natural Law Forum 1, 7 - 8, where the learned writer quotes what a leading politician said:

> I am aware that an American-style Bill of Rights is designed to place limits upon what organs of government may competently do, but I have some difficulty with this. At the present stage of our development in Basutoland I do not think that our prime need is for protection against governmental organs; the need is rather for protection against powerful private interests .... The real trouble here is that the churches have too much power, and so too, do the Chiefs and so do the white traders ....

2 See p. 431, ante.

> meaning only if the consensus that brought them into being is a consensus that suffers them to be a way of life.[3]

This statement encapsulates the significance of the Bill of Rights in the Fiji Constitution. A Bill of Rights marks a start towards achieving a successful society where diversities in ideas, race, culture and creed can exist and flourish side by side. It enshrines the ideals to which appeals can be made to resolve opposing views and conflicts. It may serve also as a reminder and guideline to officials and governmental agencies generally and that it may not be safe to go beyond certain limits in the exercise of their powers. But the development of tolerance of other viewpoints and the acceptance of racial and cultural differences requires time and patience. This is particularly so in Fiji where thinking and acting on racial lines has been widely accepted for so long.

The true spirit and high ideals of the fundamental rights provisions cannot be attained unless and until the golden thread of the Bill of Rights is made to run through the fabric of private actions, as well as those of government. The more we encourage and cultivate pluralistic tendencies in the private walks of life, the greater will be our ability to manage the critical affairs of the whole nation. In the Fiji Constitution we have enshrined the ideals of a successful community; but regrettably not much has been done to educate the people at large to accept the ideals

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3 William O. Douglas, "The Bill of Rights is not Enough", in The Great Rights edited by E. N. Cahan (1963), 118.

and act accordingly. They have not yet seen the fundamental rights provisions as a means of creating a tolerant society. Only if this is done will the various communities in Fiji become one society.

Accordingly, it is submitted, the fundamental rights provisions should be extended to include private actions of individuals. Perhaps some of the actions of officials in governmental agencies should also be covered. Here, the American experiment has much to offer our new nation. In the United States, the Constitution makes provision for "equal protection of the law" and "due process of law", which have provided great safeguards. But there were also various limitations on private action which resulted in discrimination. Congress dealt with the situation by ordinary legislation in the form of civil rights legislation.[4]

It is of utmost importance that the Fiji Parliament should pass similar legislation. There ought to be legislation prohibiting discriminatory practices in the social and economic spheres in particular. In Fiji there is no race relations legislation,[5] and even the Constitution significantly omitted, except to a very limited extent,[6] provisions prohibiting discrimination by individuals. Such legislation is necessary for the building of a truly

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4 See Gunther and Dowling, op. cit., 871-978.

5 Except perhaps pertaining to sedition under s. 59 (1) (iv) and (1) (v) of the Penal Code (Ch. 11 of the Laws of Fiji) which provide that:

> (1) A 'seditious intention' is an intention - ...
> (iv) to raise discontent or disaffection amongst Her Majesty's subjects or inhabitants of Fiji; or
> (v) to promote feelings of ill-will and hostility between different classes of the population of Fiji.

6 Constitution, s. 15 (6).

harmonious multi-racial society and the consequent prevention of major racial problems such as have occurred in other countries. The need transcends party politics. A Bill of Rights which is limited to state action falls far short of what is required. The relative novelty of the Bill of Rights makes it likely that it will take at least another generation before the people fully understand and accept the principles embodied in it. An attempt should therefore be made now to enact race relations legislation.

In a harmonious society and country like New Zealand, where there has been very little evidence of strictly racial problems, legislative measures have been adopted. The Maoris and the persons of European descent have got along reasonably well.[7] Though there have been isolated incidents of racial discrimination, particularly in the field of housing, it could not be said that a racial problem existed. Nevertheless in 1971 the New Zealand Parliament saw fit to pass the Race Relations Act to control racially discriminatory practices, particularly in the social and economic spheres.

Fiji, by comparison, has a stronger case for legislative action on race relations in addition to the Bill of Rights of the Constitution. It is imperative that any constitutional guarantee of fundamental rights designed to protect the rights of the individual be accompanied by means for their enforcement. Without this, guarantees are doomed to failure no matter how noble

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7 Cf. the Honourable Mr Rata (a Maori) who stated in the New Zealand Parliament (Hansard (1971), p. 1702 col. 2.) :

> Racial discrimination does not happen here in the blatant way it occurs overseas. This country faces what is more of a social problem.

the motives behind them.

In recent years, a sense of insecurity has been created in Fiji by remarks and statements with racial connotations. Protest marches and public meetings with communal appeals and racial divisions cause insecurity, which result in psychological and social depletion which in turn diminishes local initiative and the incentive for improvement. Consequently, the country suffers.

There is an ever-present possibility that at some point the race which has become the target for such activities may tolerate abuses no longer and take counter measures. This would obviously not be in the interests of the country. What has been said is believed to be a realistic assessment of recent trends in Fiji. It is obvious that the existing legislation and the fundamental rights provisions are inadequate for dealing with the situation. There is certainly a continuing demand in the public interest for the easing of social tensions created by the existence of different racial groups in a single society in Fiji. Now is the time to identify that interest and make it a part of public consciousness. Just as a single sugar cane strike in 1961 stimulated a long needed revision of the sugar industry laws in Fiji, the present situation dramatises communal problems.

It is a necessary first step to enact a Race Relations Act for Fiji covering the actions of private individuals and prohibiting discrimination of all kinds, but particularly racial discrimination. The object of such a measure is the provision of a practical remedy for certain defined discriminatory acts and

practices, e.g. in public places, the supply of goods, the provision of facilities and services, employment, accommodation, trade unionism, and public utterance. Such an enactment must include four elements:[8]

(a) First, discriminatory practices must be declared unlawful,

(i) in all places to which the public has access;

(ii) in all public service vehicles or other means of public transport or conveyance;

(iii) by all persons supplying goods, facilities or services to the public or a section of it; or supplying them on less favourable terms or conditions than otherwise by reason of discriminatory practices;

(iv) in employment either by a person, company local authority or other bodies, public or private;[9]

(v) in the disposition of any estate or interest in land or any residential or commercial accommodation;[10]

(vi) in the membership or operation of any trade union or industrial union;

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8 The measures proposed follow very closely the provisions of the United Kingdom Race Relations Act 1968 and the New Zealand Race Relations Act of 1971.

9 This question of employment should include all matters incidental to employment - such as employing, refusing to employ, or omitting to offer or affording any person the same terms of employment, conditions of work etc., dismissal and advertisements. However, such provisions should not be held discriminatory if the employment of a person of a particular ethnic or national origin requires or is commonly found to require a particular qualification or aptitude e.g. for a Fijian or Indian to be required to teach his vernacular language or culture.

10 This will include laying conditions, or strictures, or restrictive covenants on any such disposition or dealing in land. Disposition or dealing should cover sale, mortgage, assignment, lease, sublease, letting or subletting, licence etc.

(vii) in any advertisement pertaining to any of the above.

(b) Secondly, the above prohibitions of discriminatory practices must be subject to the exception where something is done or omitted to be done in good faith for the purpose of assisting or advancing particular persons or groups of persons of a particular race, colour, or ethnic or national origin, and such groups or persons need or may reasonably be supposed to need assistance or advancement in order to achieve an equal place with other members of the community, and nothing is done to degrade or deprive other groups.

(c) Thirdly, it is very important that there should be express prohibitions against persons, who with intent, or who are reasonably likely to intend to excite hostility or ill-will against, or bring into contempt or ridicule, any group of persons in Fiji on the ground of tribe, creed, colour, race or ethnic or national origins, or publish abusive, threatening or insulting matter about such a group. This prohibition should be extended not only to publishing but also to dissemination by radio or otherwise. Also, it is submitted, it should be extended to the use in any public place or within the hearing of persons in any public place, or at any meeting to which the public or a section of the public have access, of any such words having the effect of exciting hostility. However, to avoid frivolous prosecutions and in the public interest, prosecutions of such offences should require the

consent of the Attorney-General of Fiji.

(d) Fourthly, there should not be automatic prosecution of offenders. There ought to be a prior reconciliation procedure. This approach of the measure to unlawful discrimination must be to place a primary and heavy emphasis of conciliation and mediation as a preliminary to any formal legal proceedings. This is a delicate field and litigation must be a last resort. The whole idea of the proposal is to educate and indoctrinate the peoples of Fiji in the multi-racial outlook and having all the races working and living together within a single social unit. Court proceedings in respect of relatively technical and minor breaches could exacerbate race relations and create avoidable animosities. Scope must be given to secure better understanding and the removal of grievances between persons of different races or origins. A conciliator to whom all infringements of the race relations legislation should be referred initially will be required. The appointment should be made by the Governor-General on the advice of the Chief Justice.

The principal functions of the conciliator would be -

(a) To investigate, either on complaint made to him by any person or of his own motion, any act or omission or any practice which may appear to be in breach of the proposed measure;

(b) To act as conciliator in relation to such act or omission or practice;

(c) To take such further action as is referred to above.

The conciliator should have a discretion to refuse investigation or take any other action where he feels the matter is trivial,

frivolous, or not made in good faith, or the complainant has not a sufficient interest in the subject matter of the complaint; or the aggrieved person does not desire any action or continuation of any action; or where under all the circumstances there are other adequate legal remedies available other than a right to make complaint to the Ombudsman or the right to petition Parliament.

The conciliator should function as a judicial body with the right to summon witnesses and the right to hear evidence. The parties should also have a right to representation by counsel.[11]

The conciliator should make an annual report on the work of his office to the Attorney-General and a copy of the report should also be laid before both Houses of Parliament. This would be a source of useful information and provide an opportunity for the Houses of Parliament to examine the operation of the legislation.

The conciliator is intended to use his best endeavours to secure a settlement between the parties concerned and possibly an assurance of non-repetition. This would obviate technical or minor breaches being dealt with in court proceedings. Should the matter be too grave for settlement by conciliation and when the public interest requires that it should not be so resolved, or settlement is not possible, the conciliator would make a report

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11 It is not proposed to deal with all aspects of the proceedings and procedure before the conciliator as they are not important in the present context.

to the Constitutional Council and the Director of Public Prosecutions.

The Constitutional Council would then consider the report and might make one of two recommendations. First, it might recommend to the Attorney-General that civil proceedings[12] be brought by him and the Attorney-General would be bound by such a recommendation. It is just and proper that, as a matter of social justice, the State should intervene on behalf of a person discriminated against on racial or other discriminatory grounds, as defined, rather than place on him the burden and expense of bringing proceedings. Furthermore, if the action were brought in the name of the Attorney-General, it would certainly give the impression of a State-activated proceeding.

Secondly, the Constitutional Council might dismiss the complaint. In such an event, the aggrieved person might bring the action himself at his own expense. However, for the reasons already given, the Attorney-General should be cited as the original party. At least three weeks before the commencement of the proceedings, the Attorney-General should be informed. The Attorney-General would not be liable for costs, these being the responsibility of the aggrieved party.

It is intended that any infringement of the proposed race relations legislation would render the offender liable to criminal proceedings as in the case of the infringement of other statutory

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12 As to "civil proceedings" see p. 566, post.

provisions. Such proceedings call for little comment.

But in addition to criminal proceedings there ought to be a right to bring civil proceedings. All civil proceedings should be brought in the name of the Attorney-General for the reasons given earlier. In such civil proceedings the remedies available to the court should be

(a) a declaration that a breach of the race relations measure has occurred;

(b) an injunction restraining the "offender" from continuing or repeating the breach, or from engaging in, or causing or permitting others to engage in conduct of the same kind as that constituting the breach or conduct of any similar kind specified in the injunction. Such a wide and all embracing power of injunction is required. In substance, the offender ought to be prevented, both personally and by other indirect means, from repeating the breach. It will be an ineffective process if the offender can secure the repetition of such actions, the subject of the proceedings, through other persons.

(c) Damages. Damages would be another positive means of penalising an offender. It is contended that the proposed race relations measure is essentially an extension of the fundamental rights provisions relating to prohibition of discrimination. It creates additional rights not available at common law. Ordinarily individuals do have recourse to a number of remedies against other individuals for invasion of their legal rights and breach of legal duties towards them.

These remedies include injunction and damages. There is no valid reason for not extending the same principle to breaches of the proposed legislation. Damages herein should be available in respect of

(i) pecuniary loss suffered and expenses reasonably incurred by the aggrieved party in the transaction or activity out of which the breach arose;

(ii) loss of any benefit which the aggrieved party may reasonably have been expected to obtain but for the breach; and

(iii) humiliation, loss of dignity, and injury to the feelings of the aggrieved person.

However, if criminal proceedings are instituted, all civil proceedings should be stayed until final determination of the former. The result of the criminal proceedings should in no other way affect the civil proceedings. Moreover, nothing said or done in the report of the conciliator should be admissible in evidence in any legal proceedings. Such matters must be absolutely privileged. Only then will the true intention of having the conciliation proceedings be achieved.

If a person has been convicted of any offence under the proposed legislation or made liable to pay damages in a civil proceeding, this should be made relevant to the grant, renewal, revocation, cancellation or review of any licence or registration in respect of the occupation or activity of the offender.

PART SIX

THE WORKING OF THE CONSTITUTION

Introduction

A study of the origins of modern constitutions will disclose that, as a general rule, they were framed and adopted by people making a fresh start in the form and system of their government. In some countries the desire arose as a result of revolution or war or of throwing off the yoke of foreign domination. In others, there was a desire to form a federation of sovereign states. In Fiji, the achieving of political freedom necessitated the drafting of a constitution. The preamble to the Fiji Constitution states:

> Whereas all the peoples of Fiji ... have become united under a common bond, have progressively advanced economically and politically and have broadened their rights and freedoms in accordance with the dignity of the human person and the position of the family in a society of free man and free institutions ....

These having been achieved, the people of Fiji, desired Fiji to become "a sovereign democratic state"[1] with its own written Constitution which is declared to be the fundamental law of the land.[2]

The 1970 Fiji Constitution contains legal rules and principles for the government of the Dominion. It is not only a solemn document but is also a living framework for the government of the people. All limbs of the government - legislative, executive and judicial - depend upon the Constitution which is the foundation for the institutions of government. However, a constitution, no matter how well and idealistically constructed, cannot function among a people who are at odds with one another. Experience in other countries, particularly the African countries which secured their independence in the Commonwealth era, has shown that the human element is of paramount importance in the success or failure of the working of a constitution. Professor Nwabueze has aptly observed:[3]

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1 Preamble to the Constitution.

2 Constitution, s.1.

3 Constitutionalism in the Emergent States (1973), 139.

> Experience has amply demonstrated that the greatest danger to constitutional government in emergent states arises from the human factor in politics, from the capacity of politicians to distort and vitiate whatever governmental forms may be devised. Institutional forms are of course important, since they can guide for better or for worse the behaviour of the individuals who operate them. Yet, however carefully the institutional forms may have been constructed, in the final analysis, much more will turn upon the actual behaviour of these individuals - upon their willingness to observe the rules, upon a statesmanlike acceptance that the integrity of the whole governmental framework and the regularity of its procedures should transcend any personal aggrandisement. The successful working of any constitution depends upon what has aptly been called the "democratic spirit", that is, a spirit of fair play, of self restraint and of mutual accommodation of differing interests and opinions. There can be no constitutional government unless the wielders of power are prepared to observe the limits upon governmental powers.

The success or failure of the Fiji Constitution will also depend a great deal upon those who wield power under the constitutional framework. To cover all aspects of the working of the Constitution in Fiji would be out of place in this work. However, it is intended to choose three aspects of the working of the Constitution for discussion and, as far as possible, to relate those aspects to the functioning of the executive, the legislature and the judiciary. It is proposed to deal with the executive under the general topic of the place of English constitutional conventions, particularly with reference to the office and functions of the Governor-General, in the framework of the Fiji Constitution. The legislature will be discussed under the heading of the Second Chamber. Finally, the judiciary's role under the Constitution will be discussed in relation to the constitutional crisis which occurred in 1973, called the Speaker Crisis. The incident will be analysed and comment will be offered on the approach of the courts to the incident.

CHAPTER XVI

THE PLACE OF ENGLISH CONSTITUTIONAL CONVENTIONS IN FIJI

A. Introduction

In the United Kingdom, convention was and remains of great importance in constitutional law.[1] The conventions of the constitution have received much emphasis from all modern writers on British constitutional law.[2] In fact, substantially the whole of the constitutional framework in general and parliamentary government in particular is based on convention in English constitutional jurisprudence. As Dicey said, in speaking of the British constitutional rules, there are some rules which are laws in the strict sense, but there are another set of rules which[3]

> ... consist of conventions, understandings, habits or practices which, though they may regulate the conduct of the several members of the sovereign power, of the Ministry, or of other officials, are not in reality laws at all since they are not enforced by the courts. This portion of constitutional law may, for the sake of distinction, be termed the 'conventions of the constitution', or 'constitutional morality'.

In the United Kingdom, it has been rightly said:[4]

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1 As a source of law, custom or convention is not confined to constitutional law, but in that branch of the law it plays a more prominent part and is governed by somewhat different rules from those which prevail elsewhere. For a general discussion of custom as a source of law, see Sir Carleton K. Allen, Law in the Making (7th ed., 1964), 67-160.

2 E.g., A.V. Dicey, Law of the Constitution (10th ed., reprint, 1960), 23-30 and 417 et seq.; Sir Ivor Jennings, The Law and the Constitution (4th ed., 1952), 79 et seq. For a comprehensive and critical analysis of the difference between laws and conventions, see C.R. Munro, "Laws and Conventions Distinguished" (1975) 91 L.Q.R. 218.

3 Dicey, op. cit., 24.

4 Sir Ivor Jennings, Cabinet Government (3rd ed., 1959), 1.

> 'the law' is not an emanation from authorities set up or provided for by a written and formal document. It consists of the legislation of parliament and the rules extracted from the decisions of judicial authorities. The powers of these bodies and relations between them are the product of history.

In the United Kingdom practically all the constitutional features relating to the framework of the government and the legislature, and the relationship between the Monarch and Parliament are based not upon the law in the strict sense but upon convention. Neither Cabinet nor the office of the Prime Minister was established by legislation; nor has either been recognised by the courts of law. Prior to 1937 Cabinet was not even mentioned in any Act of Parliament. In fact, even in 1937 the Ministers of the Crown Act did no more than provide higher salaries for those ministers who were members of the Cabinet. It was because of this fact that it became necessary to define which ministers were members of the Cabinet. Similarly, the same legislation also provided a salary for the Prime Minister and First Lord of the Treasury; hence these two "officers" had to be mentioned.[5] Yet well before 1937 the whole government in the United Kingdom had depended upon the Cabinet system with the Prime Minister presiding.

In the United Kingdom there are various matters of utmost significance in the executive and the legislative fields which do not depend upon express rules of strict enforceable law or legislation. They are governed by rules developed as conventions. Such rules include, and the list is not exhaustive:

(a) the appointment and choice of the Prime Minister and the Cabinet;
(b) the fact that the executive branch of government is parliamentary inasmuch as Ministers must be members of the legislature, where Ministers are collectively and individually responsible for government acts and omissions;
(c) the existence of the Monarch as the titular head of the State and the "rule" that no laws are enforced until assented to by the Monarch;

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5 Ibid. 2. In fact, as pointed out by Sir Ivor Jennings, prior to this there had been only two incidental references to the Prime Minister: idem.

(d) the power of dissolution of Parliament vested in the Monarch and the "rules" relating to dissolution of Parliament;

(e) the position of the Opposition in Parliament;

(f) the relationship between the Monarch and the Cabinet which includes the "rules" that the advice of the Prime Minister must be accepted by the Monarch and that it is the duty of the Prime Minister to keep the latter informed as to the running of the Government.

Those rules which exist in the United Kingdom as conventions have been exported to other British Dominions. This has been done in three ways. First merely by adopting the framework of the Westminster model, the other conventional rules are introduced by implication. Most of the constitutional framework of the older Dominions falls into this category.[6] New Zealand affords a striking example of this type.[7] The New Zealand Constitution Act 1852 which is, as the name suggests, the basic enactment setting up the constitutional framework in New Zealand, makes no mention whatsoever of the position and/or duties of the Prime Minister or the cabinet or the relationship between the Governor-General and the cabinet or the Prime Minister. Yet the Dominion has been governed for one hundred and twenty years on the basis of a cabinet headed by the Prime Minister. Similarly, the Speaker presides over the House of Representatives. His status and method of election are based on English tradition and convention. Also in New Zealand it is accepted, as is the convention in the United Kingdom, that the Crown and the Governor-General must in normal circumstances accept the advice of the ministers.[8]

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6 S.A. de Smith, The New Commonwealth and Its Constitutions (1964), 78.

7 The first Cabinet was introduced in 1856; K.J. Scott, The New Zealand Constitution (1962), 79.

8 Scott, op. cit., 71. The Royal Instructions of 1917 state in clause V:

> In the execution of the powers and authorities vested in him, the Governor-General shall be guided by the advice of the Executive Council ....

The second manner of introducing conventional rules into other countries is by reference, as opposed to implication. The constitutional enactments of these countries make provision for the rules pertaining to their constitutional practice to be similar to those practices applicable in like matters in the United Kingdom. For instance, the 1946 Constitution of Ceylon included specific provisions about matters such as the cabinet government, but the conventions regulating the powers vested in the Governor-General were not spelt out. Instead it was provided in section 4 that:[9]

> All powers, authorities and functions vested in His Majesty or the Governor-General shall, subject to the provisions of this Order [and other laws] be exercised as far as may be in accordance with the constitutional conventions applicable to the exercise of similar powers, authorities and functions in the United Kingdom by His Majesty ....

The third manner in which the conventions of the British constitution were introduced in the newly independent British Dominions was by spelling out in some detail those matters which have traditionally been left to convention and usage in the United Kingdom. Attempts to state specific conventions as rules of law are to be found in the constitutions of most of the countries which achieved independence in the Commonwealth era[10] as opposed to the Empire era - although many of these countries later adopted a republican constitution.[11] This method has been used to give a reasonably full statement of the major rules governing the executive branch and its relationship with the legislature.

B. The Position in Fiji

(1) General:

Fiji has followed the trend of the countries which secured their

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9 Cited in Sir Ivor Jennings and H.W. Tambiah, The Dominion of Ceylon: The Development of its Laws and Constitution (1952), 68.

10 E.g., Nigeria, Sierra Leone and Jamaica. The first attempt seems to have been in the Irish Free State.

11 E.g., Nigeria and Kenya.

independence in the Commonwealth era in that the Fiji Constitution has spelt out in some detail those matters which have traditionally been left to convention and usage in the United Kingdom. Thus the Queen is an essential part of the legislature in Fiji[12] and the executive power is vested in Her Majesty by express provision of the Constitution.[13] Such executive power may be exercised on behalf of the Queen by the Governor-General in accordance with the provisions of the Constitution.[14] The power to summon, prorogue and dissolve Parliament[15] and the power to assent to Bills is also vested in the Governor-General.[16] Similarly, there are specific constitutional provisions relating to practically all other matters governed by conventions in the United Kingdom, namely:

(a) the appointment and dismissal of the Prime Minister, other ministers and the cabinet; the function of the cabinet to advise the Governor-General and the collective responsibility of the cabinet; and the functions and responsibility of ministers;[17]
(b) the election of the Speaker of the House of Representatives and the President of the Senate;[18]
(c) the responsibility of the Prime Minister to keep the Governor-General informed concerning the general conduct of the government of Fiji;[19]
(d) the appointment and dismissal of the Leader of the Opposition;[20]

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12 Constitution, s.30.

13 Ibid., s.72(1).

14 Ibid., s.72(2).

15 Ibid., s.69.

16 Ibid., s.53 (4).

17 Ibid., ss.73-80.

18 Ibid., ss.50 and 57.

19 Ibid., s.79.

20 Ibid., s.86.

(e) the exercise of the prerogative of mercy;[21]

(f) restrictions with respect to money bills;[22]

(g) the dominance of the will of the Lower House (except in relation to matters falling within sections 67 and 68 of the Constitution).[23]

There are certain advantages in having these major English constitutional conventions incorporated in specific constitutional enactments.[24] First, it reduces the area of uncertainty about the conventions particularly where there have been few, if any, precedents. A classic example is the question which arose in relation to the dismissal of the Premier of the Western Region of Nigeria in 1962. This culminated in a court proceeding in Adegbenro v Akintola.[25] By section 33 of the Constitution of Western Nigeria, the Governor could remove the Premier if "it appear(ed) to him that the Premier no longer command(ed) the support of a majority of the members of the House of Assembly". The Governor of the Western Region of Nigeria, following the receipt of a letter signed by sixty-six members of the House of Assembly - which was composed of one hundred and twenty-four members - stating that they no longer supported the Premier, removed him from office and appointed another Premier. There had been no vote adverse to the "deposed" Premier in the House prior to his removal. The deposed Premier argued that as the phrase "the Premier no longer commands the support of a majority of the members" was derived from the "conventions" of the unwritten constitution of the United Kingdom, there was an assumption that the Governor could not constitutionally take account of anything in the way of "support" except the record of votes actually given on the floor of the House of Assembly. However, it was held by the Privy Council that there was nothing in the Constitution which legally precluded the Governor from forming his opinions otherwise than on the basis of votes formally given on the floor of the House.

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21 Ibid., s.88.

22 Ibid., ss.62-64.

23 Ibid., s.64.

24 For a comprehensive analysis of the advantages relating to such provisions in New Zealand see J.F. Northey, The Governor-General of New Zealand, (1950) Doctoral Thesis, University of Toronto, 20-28 and 319-335.

25 [1963] A.C. 614.

By the use of the words "it appears to him" in section 33, the judgment as to the support enjoyed by a Premier was left to the Governor's own assessment and there was no limitation as to the material on which he was to base his judgment or the contacts to which he might resort for the purpose. Viscount Radcliffe pertinently pointed out:[26]

> "It is true that the Western Nigerian Constitution ... does embody much of the constitutional practice and principle of the United Kingdom .... But, accepting that, it must be remembered that, as Lord Bryce once said, the British Constitution 'works by a body of understandings which no writer can formulate'; whereas the Constitution of Western Nigeria is now contained in a written instrument in which it has been sought to formulate with precision the powers and duties of the various agencies that it holds in balance. That instrument now stands in its own right; and, ... it is in the end the wording of the Constitution itself that is to be interpreted and applied, and this wording can never be overriden by the extraneous principles of other Constitutions which are not explicitly incorporated in the formulae that have been chosen as the frame of this Constitution."

However, Viscount Radcliffe made this significant observation:[27]

> The first is that British constitutional history does not offer any but a general negative guide as to the circumstances in which a Sovereign can dismiss a Prime Minister. Since the principles which are accepted today began to take shape with the passing of the Reform Bill of 1832 no British Sovereign has in fact dismissed or removed a Prime Minister .... In this state of affairs it is vain to look to British precedent for guidance upon the circumstances in which or the evidential material upon which a Prime Minister can be dismissed, where dismissal is an actual possibility: and the right of removal which is explicitly recognised in the Nigerian Constitutions must be interpreted according to the wording of its own limitations and not to limitations which that wording does not import.

Accordingly, it is apparent that if the matters pertaining to the powers of the Governor to remove the Premier had not been expressly incorporated in the Constitution, various areas of uncertainty would have been involved, particularly when the English position under the convention was not clear.

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26 Ibid., 631.

27 Idem. (Emphasis added).

A second advantage arising from the first, is that there is no generally recognised or binding rule as to conventions to govern each situation of crises. Professor J.F. Northey, with respect, rightly pointed out:[28]

> [T]he conventions in accordance with which [Her] Majesty exercises [her] functions are by no means clear or immutable. The manner in which [Her] Majesty shall act depends upon the interpretation of a body of precedents which are continually being added to; the older conventions are thereby modified, and it is difficult at any given time to state with certainty the action which [Her] Majesty would take in a given situation.

Moreover, certain conventions of the English practice may be relevant and applicable in the United Kingdom because of its historical development and traditions. But in other countries which have "imported" the Westminster model, there is uncertainty as to what modifications have to be made in the application of the conventions in the local context and circumstances. Professor Northey has, with respect, aptly observed,[29]

> [I]t is both possible and perhaps essential for many of the conventions ... to be reduced to rules, so as to exclude the possibility of controversies as to their scope and application, and for many powers, which, because of the accidents of history, have remained vested in the Governor-General, to be transferred to the responsible Ministers.

There is "uncertainty not only as to what rules should be applied but also as to how in any particular case they should be applied".[30] This is particularly so in regard to the residuary discretions which call for exercise in situations arising out of political crisis. Such a situation could place the representative of the Queen (Governor-General in Fiji) in a very awkward position. However, if the conventions are spelt out in detail, then the position of the Governor-General is relatively easier and less open to criticism than it might otherwise be. As Dr Evatt has observed,[31]

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28 Northey, op. cit., 20 (emphasis added).

29 Ibid., 319.

30 H.V. Evatt, The King and His Dominion Governors (2nd. ed., 1967), 304.

31 Ibid.

> Perhaps the greatest advantage to be derived from defining the extent of the discretion as to the exercise of reserve powers is that the absence of definition may prevent an over-careful Governor-General from acting when he should, just as it may enable an imprudent or over-zealous Governor-General to act where no reasonable ground for intervention exists. In each case an error may be fatal to the best interests of the people, which are committed in the last resort to the care of the Governor-General or Governor.

Thirdly, in the United Kingdom and those countries which have imported the Westminster model without express provisions as to the conventions, no independent tribunal is vested with authority to determine either what the general rule is, or how it should be applied to the particular case. In Fiji, on the other hand, at least some of the conventions which have been expressly spelt out in the Constitution are justiciable although, as will be seen later, most of the functions pertaining to the Governor-General are not.[32] For instance, the right of the Governor-General to remove the Prime Minister is, as will be seen, prima facie a justiciable matter in Fiji although in the United Kingdom it is merely a matter of convention.[33] In Fiji it has been said[34] that the Supreme Court has been given express jurisdiction to grant relief to any person who "alleges that any provision of this Constitution ... has been contravened and that his interests are being or are likely to be affected by such contravention".[35]

The Fiji Constitution seems to contain most of what is conventional in the United Kingdom. Because there are significant residuary discretionary powers vested in the Governor-General, it is imperative that the constitutional functions of the Governor-General and matters allied to such functions be separately treated.

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32 See p.602, post.

33 Adegbenro v Akintola [1963] A.C. 614.

34 See p.183 et seq., ante.

35 Constitution, s.97.

(2) The Constitutional Functions of the Governor-General in Fiji

(a) Appointments:

In those Commonwealth countries where the head of state is a President or an indigenous traditional ruler, there are invariably specific provisions in the Constitution as to how he is to be selected and there are reasonably clear provisions[36] as to his role in the governmental process. For instance, in India the President is elected by an electoral college consisting of the elected members of the two Houses of the Union Parliament and of the State legislative assemblies; in Malaysia the Yang di-Pertuan Agong is a Malay ruler elected for five years by the Conference of Rulers, special weight being given to personal seniority.

However, there are no express provisions in the Fiji Constitution as to how a Governor-General is to be selected. All that the Constitution says is that the Governor-General is to be appointed by Her Majesty the Queen and that he shall hold office during Her Majesty's pleasure and he shall be Her Majesty's representative in Fiji.[37] There is no further guidance as to how such an appointment is to be made.

In early colonial days colonial ministers were not consulted as to the person appointed by the United Kingdom Government as the Governor of the colony concerned.[38]

The matter of the appointment of Governors-General for the Dominions was discussed at the Imperial Conference of 1930. Previously it had been declared by the Report of the Inter-Imperial Relations Committee of the Imperial Conference of 1926 that the Governor-General of a Dominion was[39]

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36 Except perhaps in India.

37 Constitution, s.27.

38 For a comprehensive history and the position of colonial governors and Governors-General prior to 1930 and the appointments of Governors-General generally, see Northey, op. cit., 57-67.

39 Cmd. 2768 (1926), 16.

> the representative of the Crown, holding in all essential respects the same position in relation to the administration of public affairs in the Dominion as is held by His Majesty the King in Great Britain, and that he is not the representative or agent of His Majesty's Government in Great Britain or of any Department of that Government.

The Report did not, however, contain any declaration as to the procedure to be adopted thenceforward in the appointment of a Governor-General. Hence the Imperial Conference of 1930 felt it necessary to consider this aspect. After due consideratin the following conventions were agreed to:[40]

1. The parties interested in the appointment of a Governor-General of a Dominion are the Monarch, whose representative he is and the Dominion concerned.

2. The constitutional practice that the Monarch acts on the advice of responsible Ministers applies also in the appointment of a Governor-General.

3. The Ministers who tender and are responsible for such advice are the Ministers in the Dominion concerned.

4. The Ministers concerned tender their formal advice after informal consultations with the Monarch.

5. The channel of communication between the Monarch and the Government of any Dominion is a matter solely concerning the Monarch and such Government.

6. The manner in which the instrument containing the Governor-General's appointment should reflect the above principles is a matter in regard to which the Monarch is advised by the Ministers in the Dominion concerned.

Accordingly, it is clear that the two Conferences asserted the general principles that the Monarch acts upon the advice of responsible Ministers and this included the appointment of the Governor-General which is a Dominion affair. It is submitted that since there are no express provisions in the Constitution of Fiji as to how the Queen is to select the Governor-General it was tacitly understood that the conventions agreed

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40 Cmd. 3717 (1930), 27.

to by the 1930 Imperial Conference were to apply.[41] Hence the selection of the Governor-General in Fiji will depend upon the views of the government at the time.

Although the appointment of a Governor-General may admit of an easy answer by accepting that the conventions adopted at the 1930 Conference apply, what will be the position as to termination of his appointment? It is submitted that the logical inference from the 1926 Report and the Conventions agreed on at the Imperial Conference in 1930, that the appointment of a Governor-General is exclusively a matter for the Dominion concerned, is that the termination of such an appointment is likewise a matter exclusively for the Dominion concerned.[42] Hence, as Mr Justice Evatt (as he then was) observed:[43]

> It would seem, therefore, that Dominion Ministers must possess sufficient 'constitutional' authority to approach His Majesty directly ... for the purpose of advising the King that the appointment of the Governor-General should be terminated.

This, it is submitted, is the correct view. Otherwise, an anomalous situation would arise whereby the appointment of a Governor-General was the concern of the Dominion but the termination was not. It is submitted that a power to appoint upon recommendation must, unless it is expressly or by necessary implication excluded, include a power to terminate the appointment on like recommendation. This view is fortified by the Interpretation Ordinance of Fiji.[44] Section 45 of that Ordinance provides;

> Where by or under any written law a power or duty is conferred or imposed upon any person or authority to make an appointment ... then, unless a contrary intention appears, the person or authority having such power or duty shall also have the power to remove, suspend, dismiss or revoke the appointment ....

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41 S.A. de Smith, op. cit., 92.

42 Evatt, op. cit., 197.

43 Idem.

44 No. 11 of 1967.

> Provided that where the power or duty of such person or authority so to act is exercisable only upon the recommendation, or is subject to the approval or consent, of some other person or authority, then such power shall, unless a contrary intention appears, be exercisable only upon such recommendation or subject to such approval or consent.

However, the possibility of the dismissal of a Governor-General on the advice of the responsible Ministers is not without its difficulties. If a Governor-General has been appointed by the Queen on the advice of responsible Ministers representing one political party and an election puts the government into the hands of the opposing political party, problems could arise. A dispute might arise between the Governor-General and his responsible Ministers. In such circumstances, the new Ministers would probably ask for the appointment of another Governor-General more in sympathy with the policies of the new government.[45] Such a practice may be repeated by the other political party when it returns to power. The appointment of the Governor-General would then become a political football.

In Fiji, some of the Governor-General's reserve powers are defined by the Constitution and will be capable of immediate enforcement, and in some cases, have been covered by authoritative declaration. But as will be seen, the Governor-General has important discretionary powers and a few very vital reserve powers which though defined, are non-justiciable. Accordingly, it is submitted, this power to terminate the appointment of the Governor-General has special significance.

(b) Exercise of Functions

(i) General

In Fiji, the functions of the Governor-General have been included in the Constitution. Most of these matters which have been described

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45 E.g., in 1932 Mr De Valera, the Prime Minister of the Irish Free State, removed the then Governor-General from office in order to secure the passage of certain Bills, Northey, op. cit., 25-26.

as "reserve powers" of the Crown,[46] for example, the dissolution of Parliament have been defined in the Fiji Constitution. Dicey asserted that such questions as to whether the Ministry is entitled to recommend the dissolution of Parliament belongs to the realm of political understandings or conventions rather than to that of legal rules. According to Dicey[47] those conventions raised great and weighty issues, but "they are not inquiries which will ever be debated in the law courts"; they raised matters "too high for me", a "mere legist". Be that as it may, the Constitution in Fiji does specify the powers of the Governor-General in relation to these questions.

The functions of the Governor-General in Fiji fall into two classes. The first includes those where the Governor-General is expressly required to act on advice; and the second is where he is empowered to act in his discretion or, as the provisions state,[48] "in his own deliberate judgment". Generally, in the exercise of his functions under the Constitution or any other law, the Governor-General has to act in accordance with the advice of the cabinet or of a Minister acting under the general authority of the cabinet. In other cases he is required by the Constitution to act in accordance with the advice of, or after consultations with, any person or authority other than the cabinet or in his own deliberate judgment.[49] The most important functions which the Governor-General is to exercise on advice are:

(a) The appointment of the Constituency Boundaries Commission[50] and the Electoral Commission.[51]

(b) The appointment of the members of the Senate.[52]

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46 For an exposition of the meaning and problems pertaining to the reserve powers of the Crown, see Evatt, op. cit., 252 et seq.

47 Dicey, op. cit., 20-21.

48 See p.592, post.

49 Constitution, s.78(1).

50 Ibid., s.38.

51 Ibid., s.39.

52 Ibid., s.45.

(c) The prorogation and dissolution of Parliament[53] except

(i) Where the House of Representatives passes a resolution that it has no confidence in the Government and the Prime Minister does not within three days either resign from office or advise the Governor-General to dissolve Parliament within seven days or at such later time as the Governor-General considers reasonable; or

(ii) If the office of the Prime Minister is vacant and the Governor-General considers that there is no prospect of his being able within a 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.

In both these exceptional cases just mentioned the Governor-General, acting in his own deliberate judgment, may dissolve Parliament.

(d) The appointment of Ministers[54] (other than the Prime Minister).

(e) The assignment of responsibilities to Ministers.[55]

(f) The assignment to perform the functions of Prime Minister during the latter's illness or absence.[56]

(g) The appointment of the Chief Justice and other puisne judges[57] and the Justices of Appeal.[58]

(h) The appointment of the members of the Judicial and Legal Services Commission.[59]

(i) The appointment of principal representatives of Fiji abroad.[60]

(j) The appointment of the Ombudsman.[61]

On the other hand, the most important functions which the Governor-General may exercise in his own deliberate judgment are:

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53 Ibid., s.70.

54 Ibid., s.73.

55 Ibid., s.76.

56 Ibid., s.77.

57 Ibid., s.90.

58 Ibid., s.94(2).

59 Ibid., s.101.

60 Ibid., s.103.

61 Ibid., s.112.

(a) The appointment and removal of the Prime Minister.[62]

(b) Summoning of Parliament.[63]

(c) Dissolution of Parliament in two specified cases, namely, as has been seen, where a motion of no confidence has been passed by the House of Representatives and the Prime Minister does not resign within three days; secondly if the office of the Prime Minister is vacant and the Governor-General considers that there is no prospect of his being able to appoint to that office a person who can command the support of a majority of the members of the House of Representatives.[64]

(d) The appointments of the Leader of the Opposition,[65] the Commission on the Prerogative of Mercy,[66] the Public Service Commission[67] and Police Service Commission.[68]

(e) The granting or withholding of Royal Assent.[69]

Although the two classes seem to be different, for practical purposes the distinction is without much significance. Where the Governor-General is required by the Constitution to exercise any function after consultation with any person or authority other than the Cabinet, he is not obliged to exercise that function in accordance with the advice of that person or authority.[70] Also, the question whether he has in any matter so acted shall not be called in question in any court of law.[71] Hence the Governor-General, for practical purposes, can do what he likes whether the exercise of power falls

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62 Ibid., s.73(2).

63 Ibid., s.69.

64 Ibid., s.70(1)(a) and (b); see p.588, post.

65 Ibid., s.86.

66 Ibid., s.88.

67 Ibid., s.104.

68 Ibid., s.106.

69 Ibid., s.53(4).

70 Ibid., s.78(2).

71 Ibid., s.78(3).

under the first or the second class referred to above. Of course, whether the Governor-General will do that is another matter.

Of the powers of the Governor-General in Fiji, three call for special comment. They are the appointment (and termination of appointment) of the Prime Minister, the dissolution of Parliament and the power to assent or withhold assent to Bills.

(ii) The Appointment and Removal of the Prime Minister:

In the United Kingdom, the question of the appointment and removal of a Prime Minister is governed by conventional rules.[72] The Monarch exercises her prerogative in choosing the Prime Minister. However, the practice is (and reasonably so) that the person chosen must be one who is capable of forming a government acceptable to the House of Commons, and hence acceptable to the dominant party or combination of parties in that House. According to Sir Ivor Jennings,[73] it is a settled rule that the Prime Minister must be either a peer or a member of the House of Commons. Between 1837 and 1902, no less than six of the Prime Ministers were peers. However objections were raised to a peer being Prime Minister.[74] The fact that since the resignation of Lord Salisbury in 1902 no British Prime Minister held a peerage had led Professor Mitchell to think that it has now become accepted that the Prime Minister must be a member of the House of Commons.[75] This is

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72 For a fuller account of the rules governing the appointment of Prime Minister in the United Kingdom, see Cabinet Government, op. cit., 20 et seq. and J.D.B. Mitchell, Constitutional Law (2nd ed., 1968), 177 and 194. It is acknowledged that much assistance has been derived from Cabinet Government. As to the position in the Commonwealth, generally, see J.F. Northey, "The Prerogative Power of Dissolution", (1951) 27 N.Z.L.J. 204; and J.F. Northey, op. cit., 177 et seq.

73 Jennings, op. cit., 21.

74 For a summary account of such objections see ibid., 22 et seq.

75 Mitchell, op. cit., 194.

why Sir Alec Douglas-Home had to renounce his peerage to become the Prime Minister. His renunciation of the peerage was both a constitutional and a political necessity.

In Fiji, the choice of a Prime Minister remains the prerogative of the Governor-General within the rules contained in the Constitution. The Governor-General appoints as Prime Minister the member of the House of Representatives who appears to him best able to command the support of the members of that House.[76] It is quite clear that the Prime Minister must be a member of the House of Representatives - but other Ministers need not be.[77] In arriving at his decision, the Governor-General acts on "his own deliberate judgement". The Constitution does not prescribe how the Governor-General makes his choice but English practice would be of some assistance.

In the United Kingdom there is little guidance as to how the Queen exercises her prerogative of choosing a Prime Minister. The Queen's choice necessarily depends upon the state of the parties in the House of Commons. In normal circumstances where a party has a clear majority, the Government must be formed from that majority. If the party has a recognised leader, he will invariably be chosen as the Prime Minister. Otherwise embarrassing situations could arise. For instance, such a situation could have arisen after the general election of 1880. Mr Gladstone had resigned as leader of the Liberal Party in 1874. Lord Granville led the Liberals in the House of Lords and Lord Hartington was their leader in the Commons. However, Mr Gladstone had led the opposition to the Government in the country and the election was regarded as a personal contest between Mr Gladstone and Lord Beaconsfield. The Queen sent for Lord Hartington but he and Lord Granville had already agreed that Mr Gladstone must be Prime Minister. The former had recognised that no Government could be formed without Mr Gladstone's support and the latter would not accept subordinate office. Hence the Queen had no option but to ask Mr Gladstone to form the Government.[78]

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76 Constitution, s.73(2).

77 Ibid., s.74.

78 Jennings, op. cit., 25.

Normally a party which succeeds in obtaining a majority at an election will have a recognised leader. The Sovereign has an effective choice where the recognised leader dies, or for certain other reasons is no longer capable of fulfilling his duties[79] and there is no recognised deputy leader to succeed him. For instance in 1923 when Mr Bonar Law resigned as Prime Minister King George V was left with a choice between Lord Curzon and Mr Baldwin - he chose Mr Baldwin.[80]

Similarly, it does not necessarily follow that when a person is appointed as Deputy Prime Minister, he is the obvious person to be the next Prime Minister should occasion arise for such an appointment.[81] Neither does the Leader of the House of Commons necessarily have such a claim.[82]

However, if there is no party in Parliament with an absolute majority, the Queen has an unfettered discretion as to the leader she will invite to form the government. The first general election result in the United Kingdom in 1974 provides a classic example. The general election held on 28 February was one of the most inconclusive in British political history, with no party obtaining an overall majority in the new House of Commons. The Labour Party (headed by Mr Harold Wilson), with three hundred and one seats, emerged as the largest party in the Commons. The Conservative (headed by Mr Edward Heath) was a close second with two hundred and ninety-six seats. The total number of seats were six hundred and thirty-five. Thus neither had an overall majority. Hence the situation created was one of political deadlock, with no party having an overall majority.

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79 For instance the position of Mr Stonehouse if he was a party leader.

80 As to a comprehensive treatment of this subject of choice of a Prime Minister in the United Kingdom see Jennings, op. cit., Ch. II.

81 E.g., Mr Hugh Watt was Deputy Prime Minister in New Zealand in 1974 but he did not become Prime Minister after Mr Norman Kirk's death.

82 Jennings, op. cit., 27.

In such a situation the Queen has three alternatives. The first possibility is the formation of a coalition government and in fact after the February General Elections Mr Heath unsuccessfully tried to form a coalition with the Liberals.[83] Coalition governments have been formed in the past.[84] Secondly, one party may be invited to form a minority government with the intention of advising a dissolution as soon as practicable. Thus after the first elections in February, 1974 Mr Wilson formed a minority government which held office between 4 March 1974 and 30 September 1974 when it was dissolved.[85] A third option is the formation of a minority government which is able to maintain itself in office in spite of its lack of a majority.[86]

It is submitted that in Fiji the position is relatively simple as far as the appointment and "dismissal" of the Prime Minister is concerned. If a Party does not secure an overall majority and there is no likelihood of a coalition Government, there will be no one who can be appointed as Prime Minister. [Section 73(2) of the Constitution makes it clear that the Governor-General must appoint as Prime Minister the member of the House of Representatives who appears "best able to command the support of the majority of all members of that House".] If there is no one able to do this the Governor-General will, it is submitted, be able to dissolve Parliament by virtue of section 70(1)(b) of the Constitution, the office of Prime Minister being vacant.[87] That provision reflects British practice. It is significant to note in relation to the appointment of the Prime Minister that there is no

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83 Keesing's Contemporary Achieves, (March 11-17, 1974), 26397.

84 See Jennings, op. cit., 29 for examples of coalition governments.

85 Keesing's Contemporary Archives, (Sept. 30 - Oct. 6, 1974), 26737.

86 Jennings, op. cit., 30.

87 S.70(1)(b) provides:

> If the office of Prime Minister is vacant and the Governor-General considers that there is no prospect of his being able within a 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 judgment, may dissolve Parliament.

reference to him being the leader of the majority party whereas the Leader of the Opposition is referred to as the leader in the House of the opposition party whose numerical strength in the House of Representatives is greater than the strength of any other opposition party; or if there is no such party, the member of the House whose appointment would, in the judgment of the Governor-General, be most acceptable to the leaders in the House of the opposition parties.[88] Nonetheless, for practical purposes, the Governor-General must take into account whether the proposed Prime Minister is the leader of the majority party because he will have to assess whether the person concerned will have the support of the members of the majority party in the House of Representatives.

Since the English constitutional conventions apply in Fiji not as conventions but by virtue of specific constitutional provisions, it is submitted that there should have been a clearer provision regarding the appointment of Prime Minister. This should not have been left entirely in the hands of the Governor-General to act according to "his own deliberate judgment". There is no legitimate reason for such wide powers being conferred on one person. If a parliamentary party has an overall majority, that party must have some say, even in an advisory capacity, as to who should lead the government. The parliamentary party should be given an opportunity to select its leader and advise the Governor-General of its choice. Only then should the Governor-General appoint as the Prime Minister the person chosen by the popularly elected members. Thus it will be the people acting through their elected representatives who will and should decide such an important issue. The writer endorses, what was said by the Opposition (Labour) Shadow Cabinet in 1957 when Mr MacMillan was commissioned by the Queen;[89]

> The Parliamentary Committee ... considers that, if at any time a Labour Prime Minister resigns or dies while in office and while the Government retains its majority in the House of Commons, the appropriate course to follow would be for the Parliamentary Labour party first to proceed to the election of a new leader who would

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88 Constitution, s.86(2).

89 Cited in Evatt, op. cit., xxviii.

then be ready to accept the invitation of the Crown to become Prime Minister.

This statement was made because Mr MacMillan had been commissioned without there being an election by the parliamentary party; the Queen had nonetheless acted on the advice of Conservative leaders. On the retirement of Mr MacMillan in 1963 Sir Alec Douglas-Home was commissioned by a similar procedure. There was widespread criticism of the Conservative Party processes which it was said should confirm to Labour practice.[90]

It is submitted that the choice of Prime Minister in a popularly elected legislature should not be the direct concern of the Monarch or the Governor-General. The real choice should be left with the elected representatives. But if a situation arises where no party has an overall majority, it is conceded that the choice of Prime Minister ought then to be left with the Governor-General. Needless to say, in such a case the elected representatives will find it difficult, if notimpossible, to come to a decision - unless of course two or more parties agree to a coalition. If a coalition is formed, the Governor-General would of course be advised of it. However, in normal circumstances the elected representatives should make the choice and the Fiji Constitution should so provide.

This is particularly important when, as in Fiji at present, the Governor-General is a local person[91] who before his appointment had been actively engaged in politics.[92] Naturally enough he will have his personal views and prejudices regarding certain individuals; a very embarrassing situation would arise if he appointed as Prime Minister a person, albeit from the majority party, who did not have the support

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90 Idem.

91 Ratu Sir George Kadavulevu Cakobau, G.C.M.G. K.C.V.O.

92 He had been a member of the Legislative Council in the pre-independence days, and had been a member of the Alliance Party (the current government party); and was the Minister For Fijian Affairs and Local Government at the time of his appointment as Governor-General in 1973.

of the majority of individual members and of the party. Even though the Governor-General may have acted without ulterior motives, such a choice would be regarded with suspicion, to say the least. Hence it would be advisable to forestall such an occurrence and include in the Constitution, as has been done with other conventional rules, express provision for the appointment of a Prime Minister. Adegbenro v Akintola[93] provides a classic example of how embarrassing situations can arise where the conventional rules are not clearly incorporated into positive law. Uncertainty and vagueness in the definitions of the constitutional powers of the Crown may lead to inconsistent action and may unavoidably involve the Crown and its representatives in unfortunate political controversy.

(iii) The Dissolution of Parliament:

General:

Under the English "Constitution", the dissolution of Parliament is governed partly by statute and partly by convention. By the Septennial Act, 1715, as amended by section 7 of the Parliament Act, 1911, a Parliament "shall and may ... have continuance for five years and no longer ... unless ... such Parliament ... shall be sooner dissolved by His Majesty, his heirs or successors".[94] There is a prerogative power to dissolve Parliament before the completion of the five year period, and in practice the Queen dissolves Parliament on advice before that period elapses. In the exercise of this prerogative of dissolution before the normal five year period has elapsed, three basic questions have been raised.[95] The first is whether the Queen can dissolve Parliament without advice. The second relates to the advice upon which the prerogative is to be exercised. The third is whether the Queen is bound to accept the advice tendered.

The first question is whether the Queen can dissolve Parliament without advice. Dissolution of Parliament in the United Kingdom

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93 [1963] A.C. 614.

94 However, the Parliament elected in 1910 and 1935 were prolonged to 1918 and 1945 respectively because of world wars.

95 Jennings, op. cit., 412.

requires the acquiescence of ministers. It necessitates an Order in Council and the Lord President must summon the Council; it also necessitates a Proclamation and Writs of Summons under the Great Seal, for which the Lord Chancellor has responsibility. Accordingly, it is clear that the Queen connot secure a dissolution without advice. If the Minister refuse to advise a dissolution, the Queen can dismiss them and appoint others who will tender such advice[96] but no Monarch would take such a step lightly. Lord Salisbury aptly observed;[97]

> A dissolution by the Queen, against the advice of her ministers, would, of course involve their resignation. Their party could hardly help going to the country as the opponents of the royal authority; or, at least, as the severe critics of the mode in which it had been exerted .... There must be some hazard that, in the end, such a step would injure the authority of the Queen. It ought not, therefore, to be taken unless there is an urgent reason for taking it.

The second question is upon whose advice should the prerogative of the Crown be based. At one time it was felt that the advice to dissolve Parliament should be submitted by the Prime Minister as the decision of the Cabinet. Lord Oxford and Mr Asquith laid down the rule that[98] "Such a question as the dissolution of Parliament is always submitted to the Cabinet for ultimate decision". Sir Ivor Jennings points out that so far as can be ascertained, every decision to dissolve, from 1841 to 1910 inclusive, was taken by Cabinet.[99]

However, in 1916 the question arose whether it was not the Prime Minister alone who could advise a dissolution. When Mr Asquith resigned, King George V sent for Mr Bonar Law. As the state of the majorities existed in the House of Commons, the King anticipated that

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96 Ibid., 413.

97 Letters of Queen Victoria, 3rd series, Vol. 11 297-299, cited in Jennings, op. cit., 413.

98 Oxford and Asquith, Fifty Years of Parliament, Vol. II, 195, cited in Jennings, op. cit., 417.

99 Jennings, op. cit., 417.

Mr Bonar Law might insist that a dissolution be granted if he were to accept office. The King consulted Lord Haldane who advised that "the only Minister who can properly give advice as to a dissolution of Parliament is the Prime Minister".[1] It is surprising that such advice should have been given when history and precedents show clearly that except for a doubtful occasion in 1868,[2] all dissolutions prior to 1910 had been advised by the Cabinet.[3]

Nevertheless, Mr Bonar Law seems to have taken the same view as Lord Haldane. On the question being raised in the House of Commons Mr Bonar Law stated categorically:[4]

> Nothing is more clearly recognised by our constitutional practice than that these things are the subjects, not of any written rule, but they are governed by custom, and in my belief there is no custom more clearly defined than that what advice on this matter should be given to the Sovereign is a question not for the Cabinet but for the Prime Minister.

In fact Mr Lloyd George assumed the right to give advice, and since then all Prime Ministers have done so.[5]

The third question, which is related to the second, is whether the Queen is bound to accept the advice so tendered. In theory, she has the right to reject it but for more than a hundred years there has

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1 Nicholson, King George V 289, cited in Jennings, op. cit., 418.

2 In 1868 Mr Disraeli asked for a dissolution without calling the Cabinet. However, the Cabinet had given a general assent some ten days before to a policy of dissolution, and Mr Disraeli probably did not want the Cabinet to change its mind and hence presented them with a fait accompli. Nonetheless, on the following day they endorsed his action albeit reluctantly; Jennings, op. cit., 418.

3 Ibid., 417 et seq.

4 110 H.C. Deb. 55, 2425.

5 Jennings, op. cit., 419.

not been a clear case in which the Sovereign has rejected advice to dissolve.[6] The English position, it is submitted, has been aptly put by Lord Esher thus;[7]

> According to my reading of constitutional usage the King can only accept, upon such a question as an appeal to the people, the advice of a Minister.
>
> Of course His Majesty could dispense with the advice of Ramsay MacDonald, but only if he could find in Baldwin or Asquith another Prime Minister to take the responsibility.
>
> And even then, under present circumstances, with parties balanced as they are in the existing Parliament, and in view of the real issues such as the Russian treaty, I think it would have been unwise to reject Ramsay's advice.

The position of the Crown in the exercise of its prerogative in the Dominions has presented a different picture. Here too a distinction must be drawn between the Dominions which secured their independence in the Empire era[8] and those which secured their independence during the Commonwealth era. As regards the latter, matters seem to have been simplified to a great extent, though some problems remain, by the inclusion of specific provisions governing the powers and rights of the Governor-General in relation to the dissolution of Parliament.[9]

Precedents of grant and refusal of dissolution in the Dominions of the Empire era show that the exercise of the prerogative of the Crown there differed from the position in the United Kingdom. First, the Governors-General (or the Governors, as the case may be) had on various

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6 Ibid., 420-428 for the history and precedents.

7 Esher Papers, Vol. IV 296,cited in Jennings, op. cit., 426.

8 For the position in Australia and New Zealand, see J.F. Northey, "The Dissolution of the Parliaments of Australia and New Zealand", (1951-1952) 9 U.T.L.J. 294; and J.F. Northey, The Prerogative Powers of Dissolution" (1951) 27 N.Z.L.J. 204. As to the Dominions generally see E.A. Forsey, The Royal Powers of Dissolution of Parliament in the British Commonwealth (1943) and H.V. Evatt, The King and His Dominion Governors (2nd. ed., 1967).

9 The position in the Dominions of the Commonwealth era is dealt with sufficiently at p.599, et seq., post.

occasions refused to grant a dissolution when so advised by the Prime Minister (or the Premier of a State or Province as the case may be). For instance in Australia, three requests for dissolution were refused by the Governor-General in the five years between 1904 and 1909.[10] Similarly well known is the refusal of dissolution by Lord Byng which culminated in a constitutional crisis in Canada in 1926.[11]

It has been asserted that a Governor cannot dissolve the legislature without advice from his ministers.[12] Such a question arose in Tasmania in 1914.[13] The Governor of Tasmania offered a commission to Mr Earle, the leader of the Labour Party, upon the condition that an immediate dissolution of Parliament should take place. Previously, a motion of no confidence had been passed against the Liberal Ministry and the latter had sought a dissolution which was refused. However, Mr Earle, after having been sworn as Premier, refrained from advising a dissolution although he accepted office on such a condition. The Governor tried to force a dissolution and the Premier stated on 7 April 1914 that a dissolution was contrary to his advice. The Assembly protested to the Colonial Office about the Governor's action. The Secretary of State (Mr L. Harcourt) ruled that the Governor's action was "not in accordance with constitutional practice"[14] and that[15]

> the observance of the principles of responsible government requires that a Governor must be clothed with ministerial responsibility for all acts in relation to public affairs to which he is a party as head of the Executive.

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10 The requests were made in August 1904, June 1905 and June 1909: Evatt, op. cit., 50.

11 Ibid., 55 et seq.

12 A.B. Keith, Selected Speeches and Documents on British Colonial Policy, (1918) Vol. II, 139 et seq.

13 Idem.

14 Ibid., 137.

15 Idem. The Harcourt dispatch on this point has been supported by Evatt, op. cit., 32-34; but criticised by Keith, op. cit., 157.

The position as to dissolution in Fiji:

Fiji has not been content to leave the question of the prerogative of the Crown as to dissolution to the absolute and unfettered discretion of the Governor-General who was to be expected to exercise such powers according to usage and custom prevailing in the United Kingdom and other Dominions. Dissolution has been made the subject of express provisions in the Constitution. Section 70(1) of the Constitution provides;

> The Governor-General, acting in accordance with the advice of the Prime Minister, may at any time prorogue or dissolve Parliament:
>
> Provided that -
>
> (a) if the House of Representatives passes a resolution that it has no confidence in the Government and the Prime Minister does not within three days either resign from his office or advise the Governor-General to dissolve Parliament within seven days or at such later time as the Governor-General, acting in his own deliberate judgment, may consider reasonable, the Governor-General, acting in his own deliberate judgment, may dissolve Parliament;
>
> (b) if the office of Prime Minister is vacant and the Governor-General considers that there is no prospect of his being able within a 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 judgment, may dissolve Parliament.

Prime facie it appears that, except in two specified cases, the Governor-General cannot dissolve Parliament without the advice of the Prime Minister. This provision for the Governor-General to dissolve only in accordance with the advice of the Prime Minister seems to be in accordance with the custom and usage prevailing in the United Kingdom and other Dominions of the Empire era.[16] However, even if the Prime Minister does advise dissolution, it does not necessarily follow that the Governor-General is bound to accept the advice. He retains a discretion inasmuch as section 70(1) says that the Governor-General "may" dissolve Parliament on receipt of such advice. Moreover that provision names two situations where the Governor-General may dissolve Parliament without the advice of the Prime Minister.[17]

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16 See p.594, ante.

17 Constitution: s.70(1)(a) and (b).

It is submitted that if the intention of the framers of the Constitution was to spell out in some detail those matters pertaining to the dissolution of Parliament which had traditionally been left to convention and usage, such intention has failed. It is clearly apparent that the discretion of the Governor-General in Fiji remains almost unfettered. It seems that conventions and usage prevailing in the United Kingdom in particular and the Dominions generally will continue to be applicable to Fiji. The Constitution is silent as to when the Governor-General must dissolve Parliament. All it does is to say when the Governor-General may dissolve Parliament without advice. Of course, it does confer power to grant a dissolution at the discretion of the Governor-General, should the Prime Minister so advise.

Nonetheless, it is submitted, what remains a convention in the United Kingdom and other Dominions that the Queen (or the Governor-General) will not force a dissolution without advice was intended to be a rule of strict law in Fiji. It cannot be denied that dissolving Parliament is a very important prerogative power. So far as Fiji is concerned, the prerogative is delegated to the Governor-General by section 70(1) of the Constitution. The effect of legislation on the exercise of the prerogative powers was considered by the House of Lords in Attorney General v De Keyser's Royal Hotel Limited.[18] Lord Dunedin said:[19]

> [I]t is equally certain that if the whole ground of something which could be done by the prerogative is covered by the statute, it is the statute that rules. On this point I think the observation of the learned Master of the Rolls is unanswerable. He says: 'What use would there be in imposing limitations, if the Crown could at its pleasure disregard them and fall back on prerogative?'.
>
> The prerogative is defined by a learned constitutional writer as 'The residue of discretionary or arbitrary authority which at any given time is legally left in the hands of the Crown'. Inasmuch as the Crown is a party to every Act of Parliament it is logical enough to consider that when the Act deals with something which before the Act could be effected by the prerogative, and specially empowers the Crown to do the same thing, but subject to conditions, the Crown assents to that, and by that Act, to the prerogative being curtailed.

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18 [1920] A.G. 508.

19 Ibid., 526.

Lord Atkinson, after quoting what he described as a pregnant passage from the judgment of the Master of the Rolls in De Keyser's Royal Hotel, Ltd. v The King[20] said[21]:

> It is quite obvious that it would be useless and menaingless for the Legislature to impose restrictions and limitations upon, and to attach conditions to, the exercise by the Crown of the powers conferred by a statute, if the Crown were free at its pleasure to disregard these provisions, and by virtue of its prerogative do the very thing the statutes empowered it to do. One cannot in the construction of the statute attribute to the Legislature (in the absence of compelling words) an intention so absurd. It was suggested that when a statute is passed empowering the Crown to do a certain thing which it might theretofore have done by virtue of its prerogative, the prerogative is merged in the statute. I confess I do not think the word 'merged' is happily chosen. I should prefer to say that when such a statute, expressing the will and intention of the King and of the three estates of the realm, is passed, it abridges the Royal Prerogative while it is in force to this extent: That the Crown can only do the particular thing under and in accordance with the statutory provisions, and that its prerogative power to do that thing is in abeyance. Whichever mode of expression be used, the result intended to be indicated is, I think, the same - namely, that after the statute has been passed, and while it is in force, the thing it empowers the Crown to do can thenceforth only be done by and under the statute, and subject to all the limitations, restrictions and conditions by it imposed, however unrestricted the Royal Prerogative may theretofore have been.

Section 70(1) states that "The Governor-General, acting in accordance with the advice of the Prime Minister, may at any time ... dissolve Parliament ...." This provision, it is submitted, does impose a limitation or condition upon the exercise of the prerogative. It places a duty on the Governor-General to act in accordance with the advice of the Prime Minister if he is minded to dissolve Parliament. Section 70(1) is a permissive section but within its ambit, it imposes a legal obligation. The exercise of the discretion to dissolve Parliament is not unfettered. An obligation is placed on the Governor-General to act in accordance with the advice of the Prime Minister. The provision, it is submitted, is mandatory and not merely directory.[22] As has been

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20 [1919] 2 Ch. 197.

21 [1920] A.C. 508, 539.

22 Cf. Simpson v Attorney General [1955] N.Z.L.R. 271.

seen, section 70(1)(a) and (b) specifically provide for two circumstances in which the Governor-General may force dissolution without advice. Under the expressio unius exclusio alterius rule such express mention implies exclusion of other circumstances. Hence, it is submitted that only in these two circumstances can the Governor-General act with unfettered discretion. If the circumstances do not fall within their ambit, the Governor-General cannot force a dissolution but must act in accordance with the advice of the Prime Minister. Difficulty is created by section 78(3) of the Constitution, the result of which is that the Governor-General need not take advice before a dissolution because the courts have no power to inquire whether the dissolution was in accordance with the advice of the Prime Minister. Section 78(3) provides:

> Where the Governor-General is required by this Constitution to act in accordance with the advice of, or after consultation with, any person or authority, the question whether he has in any matter so acted shall not be called in question in any court of law.

The effect of this provision is to enable the Governor-General to do what he likes as regards dissolution. If he wishes to dissolve Parliament without advice, there will be nothing to inhibit him from doing so except perhaps popular criticism. Legally, he will be able to do so with impunity. Although section 70(1) seems to require the Governor-General to exercise his powers on the advice of the Prime Minister, section 78(3) renders such a provision or requirement legally ineffective.

It has been pointed out[23] that in the United Kingdom or New Zealand, neither the Queen nor a Governor-General can of their own decision force a dissolution because the Orders in Council authorising a dissolution must be signed by a Minister of the Crown. In Fiji there is no such constitutional, statutory or conventional requirement; nor does the Governor-General require the co-operation of his Ministers. The order

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23 Northey, op. cit., 198.

for dissolution is signed by the Governor-General personally.[24] In fact it is also interesting to note that in New Zealand, in case of a general election, the Governor-General is required, to issue, not later than seven days after the dissolution or expiry of the last Parliament, a warrant in the form prescribed, directing the Clerk of the Writs to proceed with the elections.[25] The prescribed form of warrant is to be signed by the Minister of Justice.[26] On receipt of this warrant, the Clerk of the Writs is required, within three days, to cause writs to be issued to the Returning Officers.

In Fiji on the other hand, in the case of a general election, the Governor-General is required to issue, not later than sixty days after the dissolution of the last Parliament, writs of election under the

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24 E.g., an order for dissolution of Parliament which appeared in Fiji Royal Gazette (1972) 121 reads as follows:

"Fiji Independence Order, 1970

R.S. FOSTER
Governor-General

PROCLAMATION
(No. I of 1972)

BY His Excellency Sir Robert Sidney Foster ... Governor-General and Commander-in-Chief of Fiji.

IN exercise of the powers conferred upon me by subsection (1) of section 70 of the Constitution, I, acting in accordance with the advice of the Prime Minister, do hereby dissolve Parliament with effect from the 13th day of March, 1972.

Given under my hand and the Public Seal of Fiji at Suva this seventh day of March, 1972.

GOD SAVE THE QUEEN."

25 Electoral Act 1956, s.70.

26 Ibid.

public seal of Fiji to the proper returning officers.[27] Such writs of election are in fact also signed by the Governor-General.[28] Accordingly it is submitted that should the Governor-General dissolve Parliament without advice, the courts must have recourse to the provisions of the Constitution and not to the constitutional conventions or usages elsewhere.

British constitutional history offers only a general negative guide as to the restrictions of the powers of the Governor-General in relation to dissolution. It is conceded that the Fiji Constitution does embody much of the constitutional practices and principles of the United Kingdom. Many of its provisions, including those relating to dissolution of Parliament, are similar to the conventional rules. But it must not be forgotten, as Lord Bryce said, that the British Constitution "works by a body of understandings which no writer can formulate".[29] This is not the case in Fiji where the Constitution is a written instrument formulating with relative precision the powers and duties of the various agencies created by the Constitution. As Viscount Radcliffe pointed out,[30] such an instrument stands on its own and the rules it contains are superior to all other laws and practices. Although it may be useful on occasions to draw on British practice or doctrine in interpreting a doubtful or ambiguous phrase, in the final analysis it is the wording of the Constitution itself that is to be interpreted and applied. [The Constitution can never, as Viscount Radcliffe observed, be overridden by the extraneous principles of other Constitutions which have not been explicitly or by necessary implication incorporated in the instrument itself.] The right of the Governor-General to dissolve Parliament, which is explicitly recognised in the Fiji Constitution, must be interpreted according to the wording of its own limitations and not to limitations which that wording does not import.

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27 Constitution, s.69(3) and Electoral Regulations 1971, s.16(1).

28 See (1972) Fiji Royal Gazette 121-138 for particular instances of such writs being signed by the Governor-General.

29 Cited in Adegbenro v Akintola [1963] A.C. 614, 631.

30 Idem.

No doubt the Governor-General is invested with responsibilities that on occasions will require of him a delicate political judgment. The provisions of sections 70(1)(a) and (b) and 78(3) make that clear. These provisions do invest him with powers to force dissolution whenever he chooses and for whatever motives or reasons he may deem fit. He may be ill-advised to exercise such powers arbitrarily and without advice. However, it is one thing to point out the dangers of a Governor-General arriving at any conclusion as to dissolution except upon the advice of the Prime Minister and quite another to say what his constitutional powers are. There would be indeed such dangers in a Governor-General acting alone in relation to a dissolution of Parliament. He may judge the situation wrongly and so discover that he has taken a critical step in a direction which is proved to be contrary to the wishes of the majority of the House or electorate. He would then have placed himself and the constitutional sovereign power he represents in conflict with the will of the elected House of Representatives whose majority is for the time being expressed in the person of the Prime Minister. The impartiality of the constitutional sovereign will have been compromised. These agruments suggest that the Governor-General should confine himself to acting in accordance with the advice of the Prime Minister.

The possibility of a Governor-General exercising such powers arbitrarily must be acknowledged. The risk of a Governor-General acting alone is increased if the office is held by a local man who had previously been active in party politics. There have been various criticisms levelled against appointments of local persons to the office of Governor-General.[31] A local national may incur the risk of charges of political partisanship when exercising his discretionary powers in constitutional crisis.[32] The difficult position of a local Governor-General has been well summed up by Professor Northey:

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31 E.g., see Northey, op. cit., 64; A.B. Keith, Letters on Imperial Relations, Indian Reform, Constitutional and International Law 1916-1935 (1935), 103-106 Halsbury's Laws of England, (3rd. ed., 1953) Vol. V, 466.

32 Halsbury's Laws of England (3rd ed., 1953) Vol. V, 466.

> "The Governor-General, like [Her] Majesty, is expected to remain aloof from politics, and it is almost impossible to expect complete impartiality from local appointees who have, in some instances, been prominent supporters of the Government which secured their appointment."[33]

Expereiences in various countries[34] have shown that impartiality could not be expected from the partisan nominees. Partisanship is much more likely when a local appointment is made.[35] In Canada, for instance, it had been found necessary to remove several Lieutenant-Governors, who were local appointees, from their offices before the expiry of their normal terms, because these officers had failed to perform their duties impartially.[36]

The difficulties of a local Governor-General are accentuated in Fiji by the political climate not present in most of the other Commonwealth countries. Politics in Fiji centres on appeals to communal sentiments. At present, indigenous Fijians have a dominant position in the government of the country. If the National Federation Party, the Opposition party in the House of Representatives, and a predominantly Indian party,[37] were to form the government, an Indian would almost certainly become the Prime Minister. The great majority of native Fijians would find it very difficult to accept this possibility. The present Governor-General may also find himself in a very embarrassing and critical situation.

The present Governor-General of Fiji, Ratu Sir George Cakobau, is the direct descendant of Ratu Cakobau, who was the traditional "King" of Fiji and who ceded Fiji to Great Britain in 1874. Sir George is the Vunivalu of Bau and one of the paramount chiefs of Fiji. He has been a prominent Fijian chief and leader for a long time. He was the Minister for Fijian Affairs and Local Government before he became the Governor-General in 1973.

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33 Northey, op. cit., 64.

34 E.g. Irish Free State, Canada and Australia.

35 Northey, op. cit., 65.

36 Idem.

37 Of the 18 members of the Opposition Party in the House of Representatives only 3 are Fijians and one is Chinese.

Tradition is of paramount importance to Fijians.[38] The present Governor-General is looked upon by the Fijians not only as a political head but also as a traditional head. [If the National Federation Party won an election, the appointment of an Indian as Prime Minister of Fiji would be likely to arise.] Will the Governor-General give his decision as a traditional Fijian leader and "King" of Fiji or as a titular head of state who is expected to exercise his powers as nearly as possible according to English conventions and usages? There is a possibility that a Fijian Governor-General in this predicament might find himself obliged to invoke his powers of dissolution. He need not give any reason for so doing, albeit the reason would be obvious.

It is submitted that the framers of the Fiji Constitution have slavishly followed the provisions of the constitutions of other countries, particularly those of the African states,[39] without sufficient regard for the special circumstances prevailing in Fiji. It is quite apparent that the drafters attempted to spell out in some detail the matters which have traditionally been left to convention and usage; but little attention, if any, seems to have been paid to the problems and difficulties that may arise in Fiji. It is conceded

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38 See G.K. Roth, The Fijian Way of Life (1953).

39 S.86(2) of the 1960 Constitution of the Federation of Nigeria:

The Nigeria (Constitution) Order in Council 1960,(S.I. 1960, No. 1652) provided:

> Where by this Constitution the Governor-General is required to act in accordance with the advice of any person or authority, the question whether he has in any case received, or acted in accordance with, such advice shall not be enquired into in any court of law.

The Malawi Constitution of 1964 had substantially the same provision in s.64(2): The Malawi Independence Order. (S.I. 1964, No. 916); see also s.64(2) of the Sierra Leone 1961 Constitution: The Sierra Leone (Constitution) Order in Council 1961 (S.I. 1961, No. 741); and s.79(2) of the Kenya Constitution of 1963 (before it became a republic).

that at the moment political and personal factors have so far ensured the maintenance of the "understandings" on which the Constitution is based. One may argue, on strong grounds, that because the present Governor-General, the present Prime Minister and the Leader of the Opposition all took a leading part in the formation of the Constitution, they would be fully aware of the "understandings" and "spirit" of the Constitution. However, it must be equally accepted that this "spirit" and "understanding" must give way to new factors, both political and personal. Hence if the framers of the Constitution felt obliged to spell out in detail the powers of the Governor-General in specific constitutional provisions, they should also have properly circumscribed the intended powers of the Governor-General from forcing a dissolution except in the two cases expressly mentioned. After all, this is the conventional rule in the United Kingdom. At least in the United Kingdom with its long tradition, one may safely rely on conventions and usage. But in a country like Fiji, with its short experience and multiracial society, only carefully drawn constitutional provisions explicitly prescribing the powers of the Governor-General would have been acceptable.

It is not suggested that the Governor-General should have no powers to refuse dissolution. The power of refusal is very important because it is undesirable for a Prime Minister to carry a power of dissolution "in his pocket". The power of dissolution should not be in the hands of either the Governor-General or the Prime Minister acting alone. To safeguard and uphold the democratic institution of Parliament the Governor-General should be empowered to dissolve Parliament only when acting in accordance with the advice of the Prime Minister except in the two cases falling within the provisions of section 70(1)(a) and (b) of the Constitution. Whether the Governor-General has acted in accordance with advice should become a justiciable issue and not one beyond the reach of the courts.

(iv) The Royal Assent

One of the personal prerogatives of the Monarch in the United Kingdom has been the right to assent or refuse to assent to Bills passed by Parliament. To use the language of Burke[40]:

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40 Quoted by Professor A.V. Dicey in The Times, 15 September 1913, cited cited in Jennings, op. cit., 545.

> The King's negative to Bills is one of the most undisputed of the Royal prerogatives, and it extends to all cases whatsoever. I am far from certain that if several laws which I know had fallen under the stroke of that sceptre the public would have had a very heavy loss. But it is not the propriety of the exercise which is in question. Its repose may be the preservation of its existence, and its existence may be the means of saving the Constitution itself on an occasion worthy of bringing it forth.

The power to refuse assent to a Bill has not been exercised since the reign of Queen Anne.[41] In English constitutional jurisprudence there are opposing views as to whether at present the Crown can refuse assent. For instance, Sir Ivor Jennings concludes that the Crown cannot refuse assent except on advice.[42] Professor Dicey appears to have disagreed, for he quoted with approval Burke's language on the "veto".[43] This "right" of the Monarch to refuse assent to a Bill had been the subject of contention in relation to the Home Rule Bill of 1914. As a result of the strength, character and persistence of the opposition to home rule for Ireland, King George V eventually raised the issue with his Prime Minister, Mr Asquith. The latter advised that:[44]

> [T]he rights and duties of a constitutional Monarch in this country in regard to legislation are confined within determined and strictly circumscribed limits .... In the end, the Sovereign always acts upon the advice which Ministers, after full deliberation and (if need be) reconsideration, feel it their duty to offer. They give that advice well knowing they can, and probably will, be called to account for it by Parliament.

Assent to the Home Rule Bill in 1914 was not withheld but it is implicit in the King's reply that a Soveriegn can withhold assent in certain circumstances. As far as the Home Rule Bill was concerned, George V declared:[45]

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41 Jennings, op. cit., 395.

42 Ibid., 400.

43 A.V. Dicey in The Times, 15 September 1913, cited in Jennings, op. cit., 545.

44 J.A. Spender and C. Asquith, Life of Herbert Henry Asquith (1932) Vol ii, 30.

45 H. Nicolson, King George V, His Life and Reign (1952), 234.

> The King feels strongly that that extreme course should not be adopted in this case unless there is convincing evidence that it would avert a national disaster, or at least have a tranquillizing effect on the distracting conditions of the time. There is no such evidence.

The implication is clearly that the Sovereign could, if desired, withhold the royal assent.

However, there is a distinction between the position in England, and that of Fiji. In England assent to Bills is an exercise of the royal prerogative which Burke has called "one of the most undisputed of the Royal Prerogatives". In Fiji, the position is different. The office of the Governor-General is constituted by the Constitution.[46] In assenting to Bills the Governor-General is not exercising the royal prerogative but acts as part of Parliament. The granting of the royal assent is an integral and essential constituent of legislative action, as a matter of law. Section 30 of the Constitution which established the Parliament in Fiji states:

> There shall be a Parliament of Fiji which shall consist of Her Majesty, a House of Representatives and a Senate.

Section 53 of the Constitution provides for the mode of exercise of legislative power. Section 53(1) states:

> The power of Parliament to make laws shall be exercised by bills passed by both Houses of Parliament (or, in the cases mentioned in Sections 62, 63, 64 and 65 of this Constitution, by the House of Representatives) and assented to by the Governor-General on behalf of Her Majesty.

It is relevant to point out that in New Zealand the office of the Governor-General is constituted not by the Constitution Act but by the Letters Patent of 11 May, 1917. However, the exercise of the power to assent to a Bill is derived from section 32 of the Constitution Act which is similar to section 30 of the Fiji Constitution. Professor Northey

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46 Cf. the position in New Zealand where the office is constituted by the Letters Patent of 11 May 1917: New Zealand Gazette, (1919) 1213.

has, with respect, rightly pointed out:[47]

> The granting of the Royal Assent by the Sovereign is a prerogative act, whereas the granting of assent by the Governor-General of New Zealand is a legislative act. By virtue of the New Zealand Constitution Act, 1852, s.32, the Governor-General is a part of the General Assembly.

Similarly McGregor J. stated in Simpson v Attorney-General[48]

> It appears to me that there is a distinction between the position in England and that in New Zealand as to the Assent to Bills already passed by the two Houses of Parliament. In England, the Assent to Bills is an exercise of the Royal Prerogative .... But, as I regard it, the position in New Zealand is somewhat different .... In assenting to Bills in New Zealand, the Governor-General is exercising, not the Royal Prerogative, but a function as part of the General Assembly of New Zealand.

Further, it is submitted, the difference between the position of the Royal Assent in the United Kingdom and Fiji is also recognised by the different enacting clauses. In the United Kingdom the normal enacting words of the Statute are:[49]

> "Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled and by the authority of the same as follows."

In Fiji the Constitution[50] provides that the words of enactment shall be as: "Enacted by the Parliament of Fiji".

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47 J.F. Northey, "Constitutional Law: Invalidity of General Elections" (1955) 31 N.Z.L.J. 123, 125.

48 [1955] N.Z.L.R. 271, 285.

49 Erskine May, The Law, Privileges, Proceedings and Usage of Parliament (18th ed., 1971), 476. In Conslidated Fund and Finance Bills, the usual formula is preceded by certain words which define the sole responsibility of the Commons for the grant of money or duties: idem.

50 S.53(7).

It is reasonably clear that the Governor-General is one of the three necessary elements of the Parliament in Fiji and that each component part of Parliament is exercising a legislative function as required by section 53(1) of the Constitution and not by virtue of any prerogative power.

Section 53(4) provides that:

> When a bill is presented to the Governor-General .... he shall signify that he assents or that he withholds assent.

A Bill becomes law when the Governor-General assents to the same.[51] There is no further provision as to what will happen should the Governor-General signify that he withholds assent. In effect, of course, that will amount to a veto in constitutional terms. As Campbell C.J. stated in a Canadian case,[52] "the withholding of the Sovereign's assent is equivalent to a veto, or that it kills the Bill". Certainly, should the Governor-General exercise such a power of "veto", it would compromise and undermine the democratic basis of parliamentary institutions in Fiji. The veto would be, in the words of Mr George Cave (afterwards Lord Cave and Lord Chancellor) a "challenge to democracy".[53]

Nevertheless, the Governor-General would be absolutely within his constitutional powers to exercise his veto. Since the Governor-General exercises his functions of assenting to or withholding assent as a component of Parliament, he has as much right to refuse assent as the House of Representatives or the Senate has to reject any Bill or motion before the House. The powers of the Senate to reject certain Bills have been restricted, but the House of Representatives and the Governor-General are not fettered, at least in theory, from rejecting a Bill. In any event, since the Governor-General in exercising the function of assenting to a bill is acting in a legislative capacity, being a part of Parliament, his withholding of assent would be classed as "proceedings in Parliament" and hence out of reach of judicial enquiry.

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51 Constitution, s.53(5).

52 Gallant v The King [1949] 2 D.L.R. 425, 430.

53 The Times, 6 September, 1913, cited in Jennings, op. cit., 539.

The circumstances which would justify a Governor-General exercising his constitutional right are difficult to state. What is constitutional is not always judicious; but should assent be refused, the courts can not be concerned with expediency, or considerations of policy and propriety of the exercise of power. There are no legal restrictions which a court of law, interpreting the relevant provisions of the Constitution, can import into the written document. The court will be concerned solely with the question whether such a power of refusing assent exists. Lord Selborne explained the position thus:[54]

> 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 powers were created, and by which, negatively, they are restricted. If what has been done is ... 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.

There are no fetters whatsoever on the exercise of the discretion of the Governor-General should he decide to withhold his assent. It seems that should the Governor-General personally dislike a certain measure or if it appears to him that such a measure ought not to have been passed, he has a right of veto. Hence he will be able to override the wishes of the elected majority. He will of course also be able to safeguard minority or special interests. Nevertheless, he would be frustrating the will of the elected majority, a most unfortunate state of affairs. Why should an appointed titular head of state be able to override the wishes of a popularly elected majority? In this respect also the framers of the Constitution have slavishly converted the conventions of the British constitution into rules of strict and paramount law without being aware of the latent dangers.

With these broad powers vested in him a Governor-General can create a constitutional crisis. If a measure is passed by Parliament and the Governor-General, sympathising with the Opposition's views,

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54 R v Burah (1878) 3 A.C. 889, 904.

withholds assent, what can the country do? There are only two choices legally open. First, the country may accept the "veto" and take no further action. If the legislation was important to the majority party acquiesence would be unlikely. The other course of action is for the Prime Minister to advise the Queen to terminate the appointment of the Governor-General and appoint someone who would be unlikely to withhold his assent.[55] There is little likelihood of either the Queen or the Prime Minister terminating the appointment of the present Governor-General. In the unlikely event that the Governor-General has been replaced, it will be necessary for the Bill to be presented to his successor for assent. Once a Governor-General withholds consent he is functus officio, at least until the Bill is presented again to him.[56]

C. Conventions and Justiciability

(1) General

It has been said that incorporation of the rules of conventions in the constitutional instrument,[57]

> "minimises the dangers of uncertainty, that all the principal rules of the constitution will be found conveniently in one document ... that conventions merely incorporated by reference or inference may not be apt to different local conditions, and that incorporation is often in accord with the new State's desire that its constitution should be autochthonous. An additional reason ... is that when changed into legal rules, the conventions 'acquire the greater psychological sanctity attached to legal rules and ... violations of them become cognisable by the courts'. The breach of the convention - if there is one - is clearer and presents a more specific challenge to those who are affected."

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55 E.g., in 1932 Mr De Valera, the Prime Minister of the Irish Free State, removed the then Governor-General from office in order to secure the passage of certain Bills; Northey, op. cit., 25-26. As to this topic of royal assent and the removal of Governors-General generally, see Northey, op. cit., 16-27, 57-68, 134-150 and 190-197.

56 Gallant v The King [1949] 2 D.L.R. 425.

57 Professor K.J. Keith, "The Courts and the Conventions" (1967) 16 I.C.L.Q. 542.

It is submitted that the attempted incorporation in the Constitution of Fiji of the conventional rules has secured little, if any, practical advantage. The most important conventions pertain to the relationship between the Head of State and his Ministers. In fact if one looks back through the centuries of constitutional history, both in the United Kingdom and the Dominions, it will be found that the conventional rules governing that relationship have played a prominent, if not dominant, role in most important constitutional issues. But the attempt to incorporate these conventions in the Fiji Constitution has resulted in greater and not less uncertainty. The only instances where greater certainty has been secured are the powers or rather the restrictions on the powers of the Governor-General to remove a Prime Minister and the power to refuse assent to a measure. In the former case there seem to be only two occasions where the Governor-General can force the removal of a Prime Minister.[58] In the latter, an unqualified discretion has been conferred.[59]

It will be remembered that Dicey[60] divided the rules which make up constitutional law into two distinct classes. The first class deals with laws strictu sensu and which, whether they are enacted as legislation or derived from common law, are justiciable and hence enforced by courts. The second class includes such rules as "consist of conventions, understandings, habits or practice",[61] which are not strictly laws because they are not enforced by the courts. The latter class he called the "conventions of the constitution". Conventions are susceptible to change depending upon the circumstances and are not enforceable by courts. As Anson says:[62]

> It follows from the nature of conventions that they are not absolutely fixed, nor are they enforceable by legal means.

Dicey and Anson assert that the courts in the United Kingdom do not enforce the conventions because they are susceptible to change

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58 Constitution, s.70(1)(a) and (b).

59 See p.612, ante.

60 Dicey, op. cit., 23.

61 Idem.

62 Anson, Law and Custom of the Constitution (4th ed., 1909), Vol. II, Part 1, 15.

and are not derived from the common law. The Privy Council in Adegbenro v Akintola[63] confirmed this view. It seems that constitutional conventions in the United Kingdom can be made legally enforceable only if they are incorporated in legislation, as was done for instance, in the Parliament Act 1911 and the Statute of Westminster 1931. This does not mean that conventions cannot develop in relation to a written constitution. And in the interpretation of a written constitution on the Westminster model, the unwritten English conventions can be used as a "general guide". But it must not be forgotten that "it is in the end the wording of the Constitution itself that is to be interpreted and applied".[64]

Most of the conventional rules of English constitutional jurisprudence have been incorporated into the written Constitution of Fiji. But despite this, most of the important and basic conventions so incorporated remain non-justiciable because of the effect of section 78(3) of the Constitution. Why incorporate conventions in a written instrument when they cannot be enforced by legal means? The only possible advantage is that all the important conventions are incorporated in one document.

(2) Justification for Justiciability

This leads to the important question whether the concept of non-justiciable provisions, particularly those relating to conventions, is justified in Fiji. Essentially three factors have been presented in support of the argument that the conventions should not be made justiciable.[65]

First, it has been argued[66] that matters should not become justiciable if a decision rendered by the court will be ineffective.

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63 [1963] A.C. 614. See also H.H. Marshall, "Interpretation of the Constitution of Western Nigeria: A Privy Council Decision," (1964) 13 I.C.L.Q. 280, 284.

64 [1963] A.C. 614, 631.

65 Keith, loc. cit., 544 et seq.

66 Idem.

Hence the English courts have on numerous occasions refused to make a declaration on the ground that the decision attacked would remain unaffected by the declaration.[67] The argument continues that in cases of high political import it is much more likely that effect will not be given to the decision of the Court. Instead, a constitutional amendment may be promoted to overcome the decision.

The second factor is that matters such as the dismissal of a Prime Minister ought to be resolved politically and by the electorate. As Justice Frankfurter stated in his dissenting judgment in Baker v Carr:[68]

> [T]here is not under our Constitution a judicial remedy for every political mischief .... In [such a] situation ... appeal for relief ... must be to an informed, civically militant electorate. In a democratic society like ours, relief must come through an aroused popular conscience that sears the conscience of the people's representatives. In any event there is nothing judicially more unseemly nor more self-defeating than for this court to make in terrorem pronouncements, to indulge in mere empty rhetoric, sounding a word of promise to the ear, sure to be disappointing to the hope.

The third factor presented in the argument is "the lack of judicially discoverable and manageable standards for resolving"[69] the dispute. A court is not the best equipped body to decide a question where the relevant elements in the decisions are so vague, and where "the 'actual facts', 'good sense' and 'political' considerations are to be balanced and mixed in a way which is no where prescribed".[70]

It is submitted that the above arguments do not sufficiently outweigh the necessity or desirability of making justiciable the conventions specifically incorporated in the Fiji Constitution.

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67 Idem., citing Russian Commercial and Industrial Bank v British Bank for Foreign Trade Ltd. [192]1 2 A.C. 438, 445. For detailed discussion on this subject see I. Zamir, The Declaratory Judgment (1962); see also C.J. Borrie, "The Advantages of the Declaratory Judgment in Administrative Law", (1955) 18 Modern L. Rev. 138.

68 368 U.S. 186, 270 (1962).

69 Ibid., 217.

70 Keith, loc. cit., 547.

English constitutional conventions, so far as they are relevant and applicable in Fiji, have been sufficiently clearly enshrined in the Fiji Constitution. In Fiji it is to be doubted that there is "lack of judicially discoverable and manageable standards". Whereas in the United Kingdom the conventions are not fixed and are capable of being changed, in Fiji practically all the conventional rules have been incorporated in the written Constitution. Hence the courts do have clear rules to apply. Consequently, the areas of uncertainty as to what the conventions are would be of little significance because the courts would be applying and interpreting the conventions, as written, according to the ordinary rules and principles of statutory construction applicable to other written laws.

It is conceded that in some cases "the texture of a rule is too open, its contents too indeterminate, for adjudication to be appropriate".[71] For instance, it will be difficult to adjudicate upon such a matter as responsibility of the Ministers. But in such cases it will hardly be necessary or even possible to invoke such provisions for any useful purpose. Such a conventional rule is merely an understanding amongst the Ministers which is necessary for the proper functioning of the Cabinet system. It is difficult to envisage a situation where any breach of that convention will provide a cause of action or sufficient locus standi for any individual to wish to "enforce" the convention. In any event to use the less significant conventional rules as a ground to justify non-justiciability of all conventional rules is to take a very narrow and academic approach to the problem.

The terms of the Fiji Constitution are such that most, if not all, of the conventional rules could be made justiciable. For instance, section 97 has laid the necessary foundation and pre-requisites for the justiciability of the various provisions in the Constitution, be they related to what are merely conventional rules in the United

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71 S.A. de Smith, op. cit., 86.

Kingdom or otherwise.[72] Section 2 makes the Constitution supreme over "any other law".[73] Where theConstitution has incorporated conventional rules in mandatory terms, so that a breach of any s uch provision would satisfy the requirements of section 97, it can be asserted with reasonable confidence that the matter should be treated as justiciable. There are provisions relating to the exercise of the functions of the Governor-General which would satisfy these requirements but which have been excluded from the jursidiction of the courts by section 78(3) of the Constitution. There the issue will be non-justiciable because of such an express exclusionary section of the Constitution and not becase of general principles.

The jurisdiction of the Courts concerning the exercise of the Governor-General;s powers is greatly undermined by section 78(3) which provides:

> Where the Governor-General is required by this Constitution to act in accordance with the advice of, or after consultation with, any person or authority, the question whether he has in any matter so acted shall not be called in question in any court of law.

The established principle of law upon which a statutory discretion must be exercised was set out by Lord Greene M.R. as follows:[74]

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72 S.97 provides:

> "(1) [I]f any person alleges that any provision of this Constitution ... has been contravened and that his interests are being or are likely to be affected by such contravention, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the Supreme Court for a declaration and for relief ...."

73 This subject has been dealt with elsewhere, see p.213 , ante.

74 Associated Provincial Picture Houses Ltd. v Wednesbury Corporation [1948] 1 K.B. 223, 229.

> [A] person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider.

In relation to regulations passed by a Governor-General the New Zealand Supreme Court has held that[75]

> [A]ny question of law which the Governor-General is required to decide as a basis for his opinion must always be examinable by the Court .... Moreover, the Court may, in my view, always inquire, in any case, whether the Governor-General (or the Minister as the case may be) could reasonably have formed any opinion, on law or on fact, which is set up as a foundation of the regulations.

When a statutory power is conferred on a competent authority, that authority is not necessarily made the sole judge of what its powers are as well as the sole judge of the way in which it may exercise such powers.[76] This principle, it is submitted, ought to apply a fortiori to the wielding of constitutional powers. The Constitution is the fundamental law of the country. In Fiji all the governmental agencies - executive, legislature and judiciary - depend upon the Constitution for the exercise of their powers. It has been seen that the judiciary is the guardian of the Constitution. Acts of Parliament are subjected to judicial review.[77] When the actions of the elected representatives of the people are subject to such a review, there does not seem to be any cogent reason why the actions of an appointed person should not also be so subject, particularly when the latter commands such vital and important powers as dissolving the House of Representatives. There is nothing derogatory in making the exercise of the Governor-General's powers subject to judicial review.[78] After all in the constitutional crisis in other countries[79] involving the Governor-General or the Governor, the prestige of the office suffered "partial eclipse ... by having been brought into the arena of politics".[80]

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75 Reade v Smith [1959] N.Z.L.R. 996, 1000.

76 Commissioners of Customs and Excise v Cure and Deeley Ltd. [1962] 1 Q.B.

77 P.183, et seq., ante.

78 See p.626, et seq., post.

79 E.g., Canada, Australia, Nigeria and Sarawak.

80 Northey, op. cit., 320.

Section 70(1) of the Constitution empowers the Governor-General to dissolve Parliament while "acting in accordance with the advice of the Prime Minister". A distinction has been rightly drawn between a power coupled with a duty and a complete discretion. In the former case enabling words are said to have "compulsory force".[81] In the latter case the only question that remains is whether the person having a complete discretion exercises the power lawfully.[82]

It is reasonably clear from section 70(1) of the Constitution that the Governor-General was intended to act in accordance with the advice of the Prime Minister in proroguing or dissolving Parliament.[83] To allow the Governor-General to so act without advice would be to give him power to ignore the obvious intention of the Constitution. The words of Lord Radcliffe in Nakkuda Ali v Jayaratne[84] are apposite:

> "But if the question whether the condition [for the exercise of power] has been satisfied is to be conclusively decided by the man who wields the power the value of the intended restraint is in effect nothing."

Section 78(3) of the Constitution seems to override a very basic principle. The only justification for such a provision seems to be the reliance on the traditional exercise of such powers by the Sovereign in the United Kingdom. Fiji cannot afford to follow the English conventions without modifications to suit local conditions. The Sovereign in the United Kingdom is guided by centuries of tradition and years of experience. Also, as Professor Northey has rightly pointed out[85]

> "The position occupied by [Her] Majesty and the Governors-General in relation to the affairs of the United Kingdom and the Dominions respectively are not identical; the [Queen] occupies a position far higher and of greater importance than the Governor-General who derives his appointment and prerogative powers from the Crown ....

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81 Julius v Lord Bishop of Oxford (1880) 5 App. Cas. 214, 225, per Lord Cairns.

82 Padfield v Minister of Agriculture, Fisheries and Food [1968] A.C. 997.

83 However he is not bound to accept the advice to dissolve or prorogue Parliament. If he does dissolve or prorogue, then he must act in accordance with the advice, see p.600et seq., ante.

84 [1951] A.C. 66, 77.

85 Northey, op. cit., 20.

> The Governor-General is the representative of the [Queen], a position which itself suggests a difference in status; [Her] Majesty has not conferred on the Governor-General ... all the royal prerogatives."

Furthermore, judicial review of legislation is out of question in the United Kingdom.[86] In Fiji, judicial review of legislation is very much a part of the system and the judiciary has been granted the power to be the guardian of the Constitution generally.[87] Section 97 of the Constitution gives specific powers and a right by which a breach of the Constitution can be ventilated.[88] But section 78(3) seems to take away the powers of the Courts to examine the exercise of the functions by the Governor-General under the Constitution. Yet some of his powers, for example regulations made by the Governor-General in Council, have been made subject to judicial review.[89] It is respectfully but strongly submitted that section 78(3) ought to be repealed and the exercise of all functions of the Governor-General be made subject to judicial review. A lesson must be learnt from the experiences of the constitutional crisis of other countries. Professor Northey has, with respect, aptly observed:[90]

> "It is appreciated that the occasions on which differences have arisen as to the ambit of the powers of Governors-General have been few, but in those cases controversy has raged fiercely as to the propriety of the decision taken by the Governor-General."

If section 78(3) is repealed, the matter will become relatively straightforward and that provision will cease to be a bar to the enforcement of the Constitution. Subsequent consideration of the justiciability of conventions will proceed on the assumption that section 78(3) has been repealed.

(3) Enforceability

The first contention against justiciability, that the courts are

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86 See p.159, et seq., ante.

87 P.183et seq., ante.

88 See p.620, ante.

89 E.g., Reade v Smith [1959] N.Z.L.R. 996.

90 Northey, op. cit., 320.

reluctant to render decisions, particularly those of high political import, which will be ineffective, is not seen as having significant practical importance in Fiji. In the first place, it is contended that political factors should be ignored by the courts. If a case arises where the court in Fiji is asked to rule on the constitutionality of, say, the dissolution of Parliament, it will be the duty of the court to rule on the legality of the actions of the Governor-General. In the words of Sir John Latham C.J.,[91]

> [T]he controversy before the Court is a legal controversy, not a political controversy. It is not for this or any other court to prescribe policy or to seek to give effect to any views or opinions upon policy.

The Privy Council has declared:[92]

> The duty of the court, and its only duty, is to expound the language of the (constitution) in accordance with the settled rules of construction.

The court's functions are limited to interpreting and applying the terms of the relevant provisions of the Constitution. If the provisions of the Constitution do not empower the Governor-General to dissolve Parliament, the courts should not refrain from so ruling. This is confirmed by section 97 of the Constitution which specifically provides that if any person alleges that any provision of the Constitution (not being a provision relating to fundamental rights) has been contravened and that his interests are being or are likely to be affected by such contravention, that person may apply to the Supreme Court for a declaration. And, as will be seen presently, any member of the House of Representatives[93] will have sufficient interest to seek such a declaration.

In granting a declaration, too much should not be made of the

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91 South Australia v The Commonwealth (1942) 65 C.L.R. 373, 409. Cf. Chandler v Director of Public Prosecutions [1964] A.C. 763.

92 Vacher and Sons Ltd. v London Society of Compositors [1913] A.C. 107, 118.

93 On dissolution of Parliament the tenure of the members of the Senate is not affected; s.47(1) of the Constitution.

question of enforceability. The courts do make bare declarations if they are satisfied that the case is, on the merits, a proper one.[94] Admittedly, mandamus will not lie to the Governor of a State to compel him to do an act in his capacity as Governor[95] and it is probable that an injunction or prohibition will not lie against the Governor-General. But a declaration does not convey the element of compulsion inherent in mandamus, injunction or prohibition. Moreover, the Constitution recognises the role of the court in relation to the Constitution. The Supreme Court in Fiji has the power of judicial review of legislation, which enables it not only to examine and declare whether a statute is in conflict with the provisions of the Constitution but also to determine whether a measure is in fact an "Act" of Parliament. It is contended that the Supreme Court in Fiji also has the power to declare whether a purported measure was in fact enacted by "Parliament". Hence, if the Governor-General attempts to dissolve Parliament unconstitutionally and the court declares the dissolution to be unconstitutional, no measure "passed" by a subsequent "Parliament" will be valid because it has not been passed by a legitimate "Parliament".[96] In this way the court will be able to "enforce" its declaration. In such cases the question of paramount importance will be whether the question of the composition of Parliament is justiciable.

There have been a number of decisions which show that matters affecting the composition of legislative bodies are justiciable in certain circumstances. Thus in Taylor v Attorney-General of Queensland,[97] the primary issue was whether the Upper House in Queensland had been lawfully abolished; the court held it had.[98] Similarly the abolition

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94 Har-Shefi v Har Shefi [1953] P. 161, 166 and 172; Louden v Ryder [1953] C.H. 423, 429; Electric Development Co. of Ontario v Attorney-General 1911 1 K.B. 410; Tonkin v Brand [1962] W.A.R. 2.

95 The King v The Governor of the State of South Australia (1907) 4 C.L.R. 1497.

96 However not all subsequent Parliament will be affected; see p.629 et seq., post.

97 (1917) 23 C.L.R. 457.

98 See also Clayton v Heffron (1960) 105 C.L.R. 214.

of the Upper House of New South Wales was subject to specific enquiry in Attorney-General of New South Wales v Trethowan;[99] the court held that the House had not been abolished. In Harris v Donges,[1] the Supreme Court of South Africa examined the composition of a sovereign legislative body to see whether it was "Parliament" for the purposes of the legislation in question. The Privy Council has also had occasion to examine the composition of various legislative bodies.[2]

In the United States too, the Supreme Court has been prepared not only to intervene in electoral redistribution disputes and acknowledge the existence of certain constitutional requirements in that respect, but has also held that the courts are capable of granting appropriate equitable relief to ensure compliance with those requirements.[3]

If the question of the validity of the abolition of an Upper House is justiciable, there cannot be any cogent reason for refusing to treat the validity of the dissolution of a Lower House as a justiciable issue. In the cases dealing with the abolition of an Upper House the courts inquired whether the necessary manner and form requirements prescribed by the Constitutions had been complied with. It is submitted that essentially the same question will arise in the review of the exercise of the power of dissolution for, in deciding whether the Governor-General validly exercised his power of dissolution, it will be necessary to determine whether the new Parliament has a legal standing inasmuch as there cannot be two Houses of Representatives in existence.

Section 37(1) of the Constitution gives specific jurisdiction to the Supreme Court to hear and determine any question whether "any person has been validly elected as a member of the House of Representatives".

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99 (1931) 44 C.L.R. 394. As to fuller treatment of this case see p.200, ante.

1 [1952] T.L.R. 1245. As to fuller treatment of this case see p.196, ante.

2 E.g., Attorney-General for the Province of Prince Edward Island v Attorney-General for Canada [1905] A.C. 37; Attorney-General for Nova Scotia v Legislative Council of Nova Scotia [1928] A.C. 107; Katikiro of Buganda v Attorney-General [1961] 1 W.L.R. 119.

An application can be made by any person registered as a voter for the purpose of electing members of the House of Representatives or by the Attorney-General.[4] It is submitted that at least in such a proceeding the validity of the dissolution of the previous Parliament can be raised. Such a question directly affects the issue whether the present members have been validly elected.

(4) Jurisdiction of the Courts in Fiji

In determining any question of justiciability, the paramount issue is whether the court has jurisdiction to deal with the matter. It is submitted that, should the Governor-General unconstitutionally dissolve Parliament by acting without the advice of the Prime Minister, section 78(3) of the Constitution apart, the jurisdiction of the Supreme Court can be invoked under section 97 of the Constitution.

As far as locus standi is concerned, there seems to be little difficulty. There have been two cases in the State Courts of Australia in which it has been held that the interest of an elector is sufficient for the purpose of bringing actions in connection with electoral redistribution matters. In McDonald v Cain,[5] the plaintiffs sought to challenge the validity of legislation which dealt with the redistribution of electoral districts for the Victorian Legislative Assembly. The plaintiffs were both duly enrolled as electors and also duly elected members of the Legislative Assembly. It was held by the Victorian Full Court that the plaintiffs had sufficient standing to challenge the validity of the legislation principally on the ground that electors had a right to vote in particular electorates. However, there was also some suggestion that they had sufficient standing because of their status as members of the Legislative Assembly.[6]

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3 Baker v Carr 369 U.S. 186 (1962); Reynolds v Sims 377 U.S. 533 (1964); Davis v Mann 377 U.S. 678 (1964).

4 Constitution, s.37(2).

5 [1953] V.L.R. 411.

6 Ibid., 420, 427, and 438-439.

Similarly in Tonkin v Brand[7] the question arose as to the application of the provisions of a certain Act which dealt with the redistribution of electoral boundaries for the Legislative Assembly of Western Australia. The plaintiffs were members of the Legislative Assembly and were also entitled to vote in the electoral divisions they represented. It was held by the Courts that the plaintiffs had sufficient standing to bring the action as electors. Wolff C.J. and Hale J. relied on the plaintiffs standing as electors.[8] Hale J. felt that the interest which the plaintiffs had as electors was not merely an interest which all members of the public had in having the law "ascertained and obeyed". Also he thought that the law not only recognised that an elector had a right to vote but also that he had a right to cast a vote of a "predetermined approximate weight".[9] On the other hand, Jackson S.P.J. expressed the view that the plaintiffs had sufficient standing both as electors and members.

The standing of a member of the Fiji House of Representatives[10] to challenge as unconstitutional a dissolution of Parliament seems even clearer. A sitting Member of the House of Representatives will obviously be a person whose "interests are being or are likely to be affected" by the alleged contravention of the Constitution by the Governor-General. The members cannot, to adopt the words of Gavan Duffy J.,[11]

> use [the] conveniences [of the House], and draw their pay and generally enjoy all the privileges and rights of the House which they would have used and enjoyed but for the premature and unlawful dissolution of Parliament. That their interests would be affected is very much apparent from their very position as Members of the House of Representatives.

The foregoing discussion has been based on the assumption that the action would take the form of a direct challenge to the validity of the action of the Governor-General. The same question can be raised

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7 [1962] W.A.R. 2.

8 Ibid., 14-15 and 21.

9 Ibid., 21.

10 But not so the Senators. See n.93 p.594, ante.

11 McDonald v Cain [1953] V.L.R. 411, 420.

by anyone if the action takes the form of an indirect challenge. The validity of legislation can be challenged on the ground that it was adopted at a time when the House of Representatives was not constituted in accordance with the relevant constitutional provisions. It would be submitted that at the time of the passing of the enactment the House of Representatives was not legally in existence and in consequence the legislation could not have been passed by that House. In this way the Supreme Court could gain a strong position in relation to decisions of Governor-General dissolving Parliament.

The question is reduced to one basic issue: section 78(3) of the Constitution apart, can the Governor-General dissolve Parliament without the advice of the Prime Minister? As a matter of law (and not merely as a matter of convention), apart from the two instances provided for in section 70(1)(a) and (b), the Governor-General cannot dissolve Parliament without the advice of the Prime Minister. Section 70(1) enables the Governor-General to dissolve Parliament only if he is acting on the advice of the Prime Minister. This is seen as a condition precedent to the exercise of the discretion. The requirement is mandatory and not directory, a distinction made by Stanton and Hutchison JJ. in Simpson v Attorney-General,[12] when their Honours stated;

> [W]hen a provision is said to be mandatory, in contrast to directory, it means that, if the provision has not been strictly carried out, the whole proceedings are invalidated, while if the provision is said to be directory, it means that the proceedings are not invalidated by the non-compliance although the person responsible for the failure to comply may in particular cases be punishable.

The fact that the Governor-General has, at least in theory, a discretion to dissolve Parliament does not necessarily mean that he can exercise his discretion arbitrarily and without fetter. He must act on the advice of the Prime Minister except in the two cases specified in section 70(1)(a) and (b). But if the Prime Minister advises dissolution,

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12 [1955] N.Z.L.R. 271,281.

the Governor-General is not bound to accept that advice, at least in theory. Put in another way, the Governor-General is not bound to dissolve Parliament under any circumstances but if he intends to exercise his discretion to dissolve Parliament then, except in the two cases specified, he has to act in accordance with the advice of the Prime Minister. If he does not do so, the dissolution will be null and void. Under the Constitution,[13] Parliament, unless sooner dissolved, continues for five years from the date of the first sitting of Parliament after any general election. Should the Governor-General dissolve Parliament unconstitutionally, all subsequent elections held during the constitutional term of the Parliament so dissolved will be null and void. It will not be possible to constitute a House of Representatives during the balance of the constitutional term of the Parliament so dissolved. Since the Constitution provides for the term of Parliament, the Governor-General cannot shorten the term by an unconstitutional action. However, it is submitted, the new House of Representatives, even after an unlawful dissolution of previous Parliament, can be validly constituted after the expiry of the five year period that would have elapsed if Parliament had not been dissolved. Elections held after the five year period has elapsed result in a House of Representatives which is validly constituted. If this were not accepted, no House of Representatives could be constituted after an unconstitutional dissolution. To hold otherwise would not only cause serious general inconvenience but would not promote the main object of the Constitution which is to sustain, not to destroy, the House of Representatives.[14]

Alternatively, the Courts in Fiji would be forced to adopt the view that the requirement of acting in accordance with the advice of the Prime Minister was not a mandatory but a directory provision. This was the approach adopted in Simpson v Attorney-General.[15] Under the

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13 S.70(2).

14 Simpson v Attorney-General [1955] N.Z.L.R. 271.

15 Ibid. For comments on this case see J.F. Northey, "Constitutional Law: Invalidity of General Elections", (1955) N.Z.L.J. 123; A.G. Davis, "Invalidity of General Election", (1955) N.Z.L.J. 135.

New Zealand Electoral Act, 1927, sections 101 and 102, the Governor-General was required by Warrant to direct the Clerk of the Writs to proceed with the General Elections. The Warrant was to be issued not later than seven days after the dissolution or expiry of the last Parliament. The Clerk, on receiving the Warrant, was required within three days to issue the writs, made returnable in forty days. In 1946 the term of the House of Representatives expired on 11 October, but the Governor-General purported to dissolve it on 4 November. The Governor-General's Warrant was issued on 4 November; and the Writs were issued on 6 November. In fact, they should have been issued in terms of a Warrant to be signed within seven days of 11 October. Consequently, the Writs were made returnable on 16 December, instead of a date some three weeks earlier. It was held by the Supreme Court and the Court of Appeal that the provisions of section 101 relating to time were directory and not mandatory; and that the neglect to take within the specified times the several steps therein directed did not invalidate the election.

(5) Political Issue

The argument that what were hitherto conventional rules should not be made justiciable but left to the electorate to enforce is, in my submission, not very relevant to Fiji where the conventions have been converted into rules of law incorporated in the Constitution. The judgment of the High Court of Malaysia illustrates the difference between a constitutional and a conventional rule. In Stephen Kalong Ningkan v Tun Abang Haji Openg,[16] it was revealed that twenty-five of the forty-two members of Sarawak's Council Negri (Parliament) had indicated that they had no confidence in Dato Ningkan, the Chief Minister. This was done by a letter addressed to the Governor. The Governor dismissed the Chief Minister. The High Court held that the Governor could dismiss his Chief Minister (if indeed he had any power of dismissal at all) only after an unfavourable vote of the legislature; a letter of no confidence was insufficient. The Court suggested that

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16 (1966) 2 M.L.J. 187. See Keith, loc. cit., 543.

even if the Chief Minister ceased to command the support of the majority and had refused to resign the Governor would have no power of dismissal. As the Court said,[17]

> Mr Le Quesne's argument (for the defendants) in effect is: if there is a gap, it must be filled: if there is no express power to enforce the resignation of a Chief Minister, that power must by implication lie with the Governor. I do not agree that stop-gaps can be, as it were, improvised. In Article 1 of the Constitution, a gap would appear to exist whenever the necessary address to remove the Governor is made to the Yang di-Pertuan Agong, and the latter refuses to dismiss him. Just because a Chief Minister or a Governor does not go when he ought to go is not sufficient reason for implying in the Constitution an enforcing power vested in some individual.

The learned judge further said:[18]

> The constitutional way out both for a British Prime Minister and for a Sarawak Chief Minister is not by dismissal but by resignation. We need not speculate on what would happen if occasion arose for a resignation, and a Chief Minister refused to resign. In the instant case, the Chief Minister has not refused to resign, and there is no power to dismiss him. He has already indicated through his counsel that he was prepared to consider a dissolution and presently an election. That political solution may be the only way to avoid a multiplicity of legal complications. Possibly all parties, and the people of this nation, in which sovereignty is supposed to lie, will wish the same solution.

The Sarawak Constitution did not positively specify the power of the Governor and the rights of the Chief Minister. in Fiji, however, the power of the Governor-General and the rights of the Prime Minister and the members of the House of Representatives are specified in sufficient detail. If a vote of no confidence in the Government is passed and the Prime Minister does not resign from his office within three days, the Governor-General can remove the Prime Minister, unless of course Parliament has been dissolved.[19] Hence the constitutional impasse that

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17 Ibid.,194.

18 Ibid.,195.

19 Constitution, s.74(1).

arose in Sarawak can not occur in Fiji because the Fijian Constitution has sufficiently specific provisions. In the Sarawak Constitution as it stood when the crisis arose, section 6(3) provided that:

> The Governor shall appointed as Chief Minister a member of the Council Negri who in his judgment is likely to command the confidence of a majority of the members of the Council Negri ....

This provision states the conditions necessary for the appointment of the Chief Minister but there was no express provision for his dismissal. Section 7(1)[20] required the Chief Minister either to request a dissolution of the Council or tender the resignation of the Supreme Council should he cease to command the confidence of a majority of the members of the Council. But there was no express provision for his dismissal if the Chief Minister failed to act in accordance with section 7(1). In Fiji, however, a recalcitrant Prime Minister cannot act unconstitutionally with the impunity which the Sarawak case seems to suggest.

Moreover, merely because Parliament may render a judicial decision nugatory by amending the Constitution is no cogent reason, it is submitted, for including non-justiciable matters in the Constitution. It is conceded that very soon after the decisions were given in Adegbenro v Akintola[21] and Ningkan,[22] constitutional amendments rendered the decisions nullities. This can happen to any decision of a court. Tax decisions are frequently reversed by legislation but this is no reason for suggesting that tax legislation should be made non-justiciable.

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20 S.7(1) provided:

> If the Chief Minister ceases to command the confidence of a majority of the members of the Council Negri, then, unless at his request the Governor dissolves the Council Negri, the Chief Minister shall tender the resignation of the members of the Supreme Council.

21 [1963] A.C. 614.

22 (1966) 2 M.L.J. 187.

Professor de Smith advances the reason that[23]

> the kind of judicial investigation needed to establish breach of some of the rules would derogate from the dignity of the titular head of government and would generally do more harm than good.

But it will do more harm for the Governor-General to be given unchallengeable powers and for him to become involved in political controversies when those powers are abused. The Ningkan case is a classic example showing how important it is to have the power of the Governor-General justiciable. If proceedings could not have been brought in that case, the Chief Minister would have been dismissed unconstitutionally and without redress. There is no justification for exempting the Governor-General from legal proceedings in respect of his official actions. The principle that the King can do no wrong has been abandoned and should not be available to a Governor-General in whom important constitutional powers have been vested. When he has been given an absolute discretion, its exercise cannot be made the subject of judicial enquiry. An example is section 73(2) which provides:

> The Governor-General, acting in his own deliberate judgment, shall appoint 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 ....

The exercise of this power cannot be reviewed because the court cannot substitute its view for the judgment of the Governor-General. [But where the Governor-General has not been given an absolute and unfettered discretion, the exercise of his discretion should be subject to judicial review.] In such cases the Governor-General will be obliged to consider all aspects of the situation with the utmost care and avoid extraneous matters. The possibility of a judicial review will ensure that the Governor-General exercises his discretionary power carefully.

There have been various occasions in Commonwealth history where there have been divided opinions as to the propriety, or rather the impropriety, of the actions of the Governors or Governors-General.

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23 S.A. de Smith, op. cit., 86.

Adegbenro v Akintola[24] shows that Courts may be sharply divided about the interpretation of a constitutional power. The majority of the Federal Supreme Court in Nigeria held one opinion; one Judge of the Federal Supreme Court and the Privy Council held a different view. It is obviously desirable that such vital matters should be subjected to judicial scrutiny. The courts have frequently rejected the principle that the person who wields the power should be able conclusively to decide whether the circumstances justifying the use of the power have arisen.[25] The same principle requires that decisions of a Governor-General should be subject to thescrutiny of the judiciary.

(6) The Apparent Danger of Impasse

There seems to be a suggestion that on some constitutional issues a court may make an order which is not directly enforceable, compliance with such an order being dependent upon the voluntary actions of the parties concerned. For instance in the Sarawak case of Ningkan v Openg[26] the High Court took the view, possibly obiter, that even if there was a vote of no confidence in the Chief Minister, the Governor had no power to dismiss him; the only possibility was voluntary resignation. Professor Keith, with respect, rightly poses the problem.[27]

> In such a case it is difficult to see what the courts can do; a declaration that the Chief Minister is, in terms of the Constitution, obliged to resign will hardly be effective, for almost ex hypothesi he is intransigent. More generally, in cases of high political import like the present it is relatively much more likely that the decision will not be given effect.

That observation was justified in relation to the position in Sarawak where the Constitution had failed to provide for the event. It should not arise in Fiji because the Constitution incorporates practically all of the conventional rules.

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24 [1963] A.C. 614.

25 See pp.619et seq., ante.

26 (1966) 2 M.L.J. 187.

27 Keith, loc. cit., 544.

The Constitution contains clear and specific provisions as to the duties and responsibilities of the Prime Minister, including circumstances in which a Prime Minister must resign and/or advise the Governor-General to dissolve Parliament.[28] It makes provision for both of the incidents which occurred in Sarawak and Nigeria and indeed appears to make adequate provision for all other eventualities where an impasse might have developed in the relationship between the Governor-General and the Prime Minister. The only possible exception is refusal of assent to a Bill duly passed by the Houses of Parliament. Even there of course, the impasse would be short lived because the Government would have a strong case for the removal of the Governor-General if he withheld his assent unreasonably.

CONCLUSION:

The conventional rules evolved in the United Kingdom have been substantially reproduced, with some insignificant modifications, in the text of the Constitution of Fiji. This is particularly so in relation to the executive and the legislature. The Queen's representative, the Governor-General, is not the effective executive head of government. The executive head of Government is the Prime Minister who presides over the Cabinet composed of Ministers appointed and removed on his advice. The Cabinet is a parliamentary body inasmuch as Ministers must be members of either House of Parliament. The Prime Minister must be a member of House of Representatives. Ministers are collectively responsible to Parliament. Parliament may be dissolved by the Governor-General acting on the advice of the Prime Minister. The Governor-General has a discretion to assent or refuse assent to Bills and has therefore a virtual right of veto. In the United States, which is one of the most democratic countries, the President's veto may be overridden by a two-thirds majority in Congress. There is no such provision in the Constitution of Fiji, where removal of the Governor-General is the only action available to the government.

The framers of the Fiji Constitution, slavishly following what was done in other countries which secured their independence in the

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28 Constitution, ss.70 and 74.

Commonwealth era, have incorporated the English conventional norms without giving sufficient attention to the circumstances of Fiji. In the United Kingdom, as has been noted elsewhere, tradition, usage and custom played prominent roles in the development of constitutional law. The British have had centuries of experience and with a monarchical regime. From the exercise of prerogative powers over this period acceptable conventional rules have developed in relation to the appointment and dismissal of a Prime Minister, dissolution of Parliament, and assent to Bills. In Fiji on the other hand there has been no such tradition.

The experience of many African countries has shown that a slavish adoption and incorporation of English constitutional practices is inappropriate. Fiji is a multiracial society with the traditions and cultures of the major components of the society - the Fijians, the Indians and the Europeans. The traditions of these races differ. For instance, the chiefly system is very important to the Fijians but not to the Indians of Fiji. The attitudes of Fijians and Indians towards the exercise of constitutional powers by a Monarch in the United Kingdom would naturally be quite different. In Fiji, the exercise of constitutional powers in relation to the dissolution of Parliament or assent to a Bill would be likely to have political and racial implications. This is apparent not only from the present Constitution itself but also from the attitude taken by leaders of various ethnic groups throughout the various stages of the constitutional development in Fiji since the turn of the century. Such facts cannot be denied. They are the realities in Fiji and must be lived with. The warning uttered by Sir John Marriott is apt.[29]

> Incidentally, I venture, perhaps superfluously, to express a hope that the English model will not be slavishly, thoughtlessly, or prematurely copied in other countries. Convinced as I am that no better Constitution has ever been devised or evolved for a people politically minded who have had long training from a representative system of local administration, in the difficult art of self-government, I am equally certain that indiscriminate imitation, if flattering to us, has often proved disastrous for the copyists.

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29 Foreward to E.A. Forsey, The Royal Power of Dissolution of Parliament in the British Commonwealth (1943; Second impression 1968), xi.

As many of the constitutional provisions as possible should be subject to review by the courts. Most of the provisions of the Constitution have been made justiciable by sections 17 and 97. But section 78(3) of the Constitution imposes a major limitation on the powers of the court to review the actions of the Governor-General. It has been suggested that no cogent reasons have been shown for the inclusion of section 78(3). Even a slavish adoption of the United Kingdom tradition is not an adequate explanation.

Section 2 of the Constitution declares the supremacy of the Constitution over any other law. The framers of the Constitution found it necessary to incorporate in the Constitution certain conventional rules of the English constitutional jurisprudence. Those rules now have constitutional status. Not only that, they enjoy an entrenched position in the Constitution. Accordingly, it is submitted, those rules are of such importance that they must be subjected to judicial review like other provisions of the Constitution. This can be done, to a significant and satisfactory extent, simply by repealing section 78(3) of the Constitution.

CHAPTER XVII

THE SENATE

A. Introduction

In the history of great states a uni-cameral legislature is a relatively rare phenomenon.[1] Bi-cameralism is characteristic of most important states,[2] particularly in the democratic world. Democratic countries such as New Zealand, Denmark and Finland which have a uni-cameral legislature are exceptions. In New Zealand there was a bi-cameral legislature until 1950. Soon after the abolition of the second chamber, a joint Committee[3] of the members of the Legislative Council and the House of Representatives, appointed to consider the establishment of an alternative chamber, strongly recommended the establishment of a second chamber.

The second chamber is known by different names in different countries: for example, the House of Lords in Britain; the Council of States (Standerat) in Switzerland; the Federal Council (Bundesrat) in the Federal Republic of Germany; and the Senate in most other countries, including the United States, Canada, Australia, Eire, France, Italy and Fiji. The constitution of the chamber also varies. There are three bases for membership of a second chamber - hereditary, nominated and elected (partial or total). The House of Lords is a striking example of the hereditary second chamber.[4] The hereditary

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1 C.F. Strong, Modern Political Constitutions (6th ed., 1963), 194.

2 E.g. United Kingdom, United States of America, France, Australia, Switzerland, Germany, Japan, Turkey and Canada. Cf. U.S.S.R. and China.

3 The report of this joint Constitutional Reform Committee is found in the Appendix to the Journals of the House of Representatives. (1952) Vol. IV, 1-18.

4 For a comprehensive treatment of the hereditary chamber in general and the House of Lords in particular, see Sir John A.R. Marriott, Second Chambers (2nd ed., 1927), 5-35 and 175-227; see also Strong, op. cit., 202 et seq. Significant assistance has been derived from these two sources and the Report of the New Zealand Joint Constitutional Reform Committee.

second chamber was formerly much more common. Mr C.F. Strong, with respect, rightly points out[5] that such a chamber was in most states a survival of the medieval system of government by Estates.

The Canadian Senate is an example of a nominated second chamber. It is wholly nominated by the Crown, through the Governor-General. A nominated Senate survived all the constitutional legislation applied to Canada: Pitts Act 1791, the Canada Act 1840, and the British North America Act 1867. The Senate in Canada was modelled on the House of Lords but nomination for life replaced the hereditary principle. Such a nomination system is distinguished from the hereditary principle in that while a peerage passes from father to son and cannot be resigned,[6] the office of nominated senater terminates at death, or earlier if the holder of the office so desires or if the Constitution lays down some defined period of tenure.

The United States Senate is a classic instance of a fully elected second chamber. At first, senators were chosen by State legislature, but the Seventeenth Amendment 1913 enforced popular election. A Senator in the United States is not in any sense the delegate of the government of his State, but a representative of the people of that State. There are two Senators from each State. Because they are elected at different times the two Senators from a State may come from opposing parties.

The Australian senate is another example of a fully elected second chamber. France provides another example of a fully elected second chamber in a unitary state, but the French Senate is indrectly

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5 Strong, op. cit., 196.

6 Ibid., 201 where the Case of the Reluctant Peer is cited. In 1960 Viscount Stansgate died. His son and heir, Anthony Wedgwood Benn, who had been M.P. for Bristol East since 1950 automatically succeeded to the title and seat in the House of Lords. His seat in the House of Commons was, equally automatically, declared vacant and a by-election ordered. Wedgwood Benn not only refused both the title and the seat in the Lords but stood as a candidate for election to the vacant constituency and was re-elected by an increased majority. Thereupon the defeated candidate presented a petition to the Election Court, and in 1962 the judges declared that the new Lord Stansgate was not duly elected or returned and that they had no option but to declare his defeated opponent elected. However now Peers can resign peerages; see The Peerage Act 1963.

elected. The Constitution of the Fifth Republic of France of 1958 recognised that the Senate should secure the representation of communities in the territorial divisions of the country in their collective capacity (les collectivites teritoriales). Thus 255 seats were alloted to the Departments of Metropolitan France, six to groups of French citizens abroad, and the rest to colonies and territories overseas. The election in each Department is carried out by the traditional method of voting in electoral colleges, made up of the Deputies (that is, Members of the National Assembly) of the Department, the General Councillors of the Department and delegates of the municipal councils, the seats for each Department being allotted on a population basis.[7]

Some second chambers are partly elected and partly nominated. The Italian Senate illustrates both the elective principle and the nominated principle. Most of the members of the Senate are elected on a regional basis. Besides the elected senators there are two other classes: former Presidents of the Republic have the right to become senators for life, unless they renounce their right, and the President of the Republic can appoint as senators for life five citizens of special merit in the social, scientific, artistic or literary fields.[8]

South Africa provides an interesting example of a partially elected Senate. Eight senators are nominated by the President, two from each of the Provinces. In making his nominations the President has regard to the importance of selecting those acquainted with the affairs of their Province, while one at least of the two senators from each Province should be "knowledgeable" in matters concerning the interests of the coloured population.[9] Most of the other senators are elected.

B. The Need or Justification for a Second Chamber:

(1) General:

Different reasons have been advanced for the introduction or

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7 Strong, op. cit. 208.

8 Ibid., 211.

9 Ibid., 205.

continuation of a second chamber.[10] The British House of Lords may have been primarily the result of an accident of history[11] but the Fathers of the American Constitution well versed in political philosophy and constitutional practice, freely adopted the bicameral form of legislature after a brief experience of the unicameral. The United States Senate was included in the constitution,[12] to equalize the states and prevent the large ones from oppressing the smaller ones. This was accomplished by giving each state two Senators, so that large and small were alike.

The American Federal Senate is a very strong second chamber. Its powers are virtually co-extensive with that of the House of Representatives. Its strong position is a result of bargains made and comprises agreed upon by the fathers of the Constitution. They had free choice andopted for a strong chamber.[13]

Canada, on the other hand, does not seem to have had much free choice. The framers of the Canadian constitution appear to have preferred to adhere to the English model. This also seem to have been the preference in Australia and New Zealand (until 1950). Likewise, most of the newly independent countries in the Commonwealth seem to have perpetuated the Westminster model.

The principal functions of a second chamber in the modern democratic world were stated in relation to the House of Lords by the Bryce Committee in 1918.[14] These functions were:

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10 See generally Marriott, op. cit.

11 See n.4 p.639, ante.

12 S.G. Fisher, The Evolution of the Constitution of the United States (1897) - cited in Marriott, op. cit. 68.

13 See Marriott, op. cit., 69-78 for a comprehensive outline of the functions of the United States Senate.

14 Second Chamber Conference on the Reform of the Second Chamber (1918).

(i) The examination and revision of bills.

(ii) The initiation of the less controversial type of legislation which may have an easier passage through the House of Representatives or the Lower House if they have been fully discussed and put into well-considered shape before being submitted to it.

(iii) The discussion and delaying of controversial proposals so that public opinion might have time to form and make itself felt. In other words there may be interposition of as much delay in the passing of a Bill into law as may be needed to enable the opinion of the nation to be adequately expressed. This would be particularly important where the fundamentals of the Constitution or new principles of legislation are involved or where the proposed measure is such that the opinion of the country may be almost equally divided.

(iv) The debating of important questions of policy. That is, a Second Chamber allows full and free discussion of large and important questions, such as foreign policy, at moments when the Lower House may happen to be so much occupied that it cannot find sufficient time for them. Further such discussions may often be all the more useful if conducted by an Assembly whose debates and discussions do not involve the fate of the Executive Government.

The New Zealand Joint Constitutional Reform Committee, set up to consider the establishment of a Second Chamber, recommended the establishment of a chamber with the following functions:[15]

(a) To take over the duties of the Statutes Revision Committee.[16]

(b) To examine all subordinate legislation.

(c) To consider all petitions to Parliament.

(d) To take over the duties of the Local Bills Committee.

(e) To have the power of amendment, but not of veto, in respect of Bills sent up by the House of Representatives. In this field it was recommended that there ought to be a power of delay for not more than two months.

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15 See n. 3, p639, ante. For comments on the establishment of a Second Chamber in New Zealand and/or review of the Committee's recommendations see Professor J.F. Northey, "An Experiment in Unicameralism" (1958) Public Law 265; D.J. Riddiford, "A Suitable Chamber for New Zealand" (1951) 27 N.Z.L.J. 102; D.J. Riddiford, "New Legislative Council for New Zealand". (1950) 26 N.Z.L.J. 329; D.J. Riddiford, "An Effective Second Chamber; Reasons for its Existence", (1950) 26 N.Z.L.J. 313.

16 This Committee examines a Bill of legal character in order to ensure that it achieves its purposes: Northey, loc. cit. 269.

(f) To have the power to initiate legislation. It was proposed, however, that the House of Representatives should have the right to appoint some of the members of the Committees of the Upper House which would perform the first four functions referred to above.

(2) The Position in Fiji

Until 1970 Fiji had a unicameral legislature. The 1970 Constitution created for the first time a second chamber, called the Senate. The Lower House is called the House of Representatives. The idea of a second chamber for Fiji seems to have first arisen during the political bargaining at the pre-constitutional conference talks from October 1969 to January 1970 between the representatives of the National Federation Party (the Opposition in the then Legislative Council) and the Alliance Party (the ruling party). As has been seen,[17] the Federation pressed for independence on the basis of a common electoral roll; the Alliance while agreeable to constitutional changes, was opposed to a common roll. It was in the context of this disagreement that thequestion of an Upper House was raised. An Upper House was seen as a means of allaying the fears of the Fijians. Ironically, the request for a special position for the Fijians in the Upper House together with the special powers of veto, "did not emanate from the Fijian people or its leaders ... (but) from the Opposition".[18] Mr S.M. Koya further stated,[19]

> [W]e have taken the advantage and the opportunity of declaring that there should be an added success for this House and it is this, sir, that the members of the autochthonous race, sir, that is to say the Fijians of this country should play an important and responsible role in the national politics and as has been suggested and recommended in the Report, some members of the Upper House will be nominated or appointed by the Council of Chiefs. I think by doing that, we are going to prove to the country, in particular to the Fijian people, our sincerity that we would like to provide a tangible and effective way of protecting their land, protecting their customs, their culture and their way of life generally. This indeed is a privileged position that they will occupy in the future Legislature of this

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17 See pp. 90 et seq. ante.

18 Mr S.M. Koya, the Leader of the Opposition: Fiji Legislative Council Debates (1970) Vol. II, 56. The Opposition was predominantly an Indian Party.

19 Ibid., 187, (emphasis added).

> country .... We want to see that all their fears about their lands and other matters, as I mentioned, are allayed once and for all. The sword will be in their hands. They can use it on those matters which will be mentioned in the Constitution.

The protection and safeguards provided for the Fijians through the instrumentality of the Senate are contained in sections 67 and 68 of the Constitution, soon to be discussed. Of the twenty-two members of the Senate eight are appointed by the Governor-General upon the advice of the Great Council of Chiefs.[20]

There are certain legislations intended to benefit the Fijians and to protect their lands, customs and customary rights. The most important are the Fijian Affairs Ordinance 1944, the Fijian Development Fund Ordinance 1965, the Native Land Trust Ordinance 1940, the Rotuma Ordinance 1927, the Agricultural (Landlord and Tenant) Ordinance 1966, the Banaban Lands Ordinance 1965 and the Banaban Settlement Ordinance 1945. The framers of the Constitution felt it desirable to safeguard these enactments. Under section 68 of the Constitution none of thoes enactments can be altered, amended or repealed by ordinary majority or legislative process. Any Bill that is intended to alter any of the provisions of those enactments cannot be passed by either House of Parliament unless it is supported at the voting by not less than three quarters of all the members of the House. Moreover, any Bill affecting Fijian land, customs or customary rights, must, in addition to the above majorities, be supported by not less than six of the eight Senators appointed by the Governor-General on the advice of the Great Council of Chiefs.

Section 67 of the Constitution provides that the Constitution cannot be altered unless the Bill is supported by specified majority in each House of Parliament. To amend certain specified provisions[21] of the Constitution the support of at least a three quarters majority is required

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20 Constitution s.45(1)(a). The entrenched position of ss.45(1)(a), 67 and 68 are discussed in some detial at pp.206 et seq., post.

21 See p. 124, ante.

in each House of Parliament. For amending sections 45(1), 67(5) and 68(2) not only at least three quarters majority in each House must support the Bill but also at least six out of the eight senators appointed on the advice of the Great Council of Chiefs must support the measure.[22] For amendments of all other provisions of the Constitution, the measure must be supported by at least two-thirds majority in each House of Parliament. The position of the Fijians is thus well safeguarded and protected by the method of appointment to the Senate and the special majorities required for the amendment of the Constitution and certain specified enactments.

The Senate in Fiji was created as a result of political bargaining. In this respect the position is similar to that in the United States, except that in the United States all the bargaining took place amongst the representatives in open debate and after much consultation with the people. In Fiji, on the otherhand, the people as a whole were virtually ignored by their "representatives", All the meeting - not only during pre-constitutional talks but also at the Conference in London - took place behind closed doors.[23] During the pre-constitutional talks in Fiji all that the people were aware of was what had been agreed upon. Brief announcements were made after agreements had been reached amongst the leaders.

Surprisingly, there appears to have been no consideration of the traditional functions discharged by a second chamber. For instance no public reference was made to the recommendations of the Bryce Committee or the New Zealand Joint Constitutional Reform Committee. Whether they were discussed behind the closed doors of the meeting room is anyone's guess; but no mention is made in the Legislative Council debates or elsewhere of those reports. It has been stated, and would appear to be the case, that the Senate was established solely to allay the fears of the Fijians. Mr S.M. Koya said that the Upper House in Fiji was created,[24]

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22 Constitution s.67(5).

23 See p.108, ante.

24 Report of the Fiji Constitutional Conference 1970; Cmnd. 4389 (1970), 48.

> not necessarily to act as a House of Review like the House of Lords in England, but as a House of Protection for the autochtonous race .... [I]t is interesting to note that the Upper House will give the Fijian people an effective constitutional power to prevent ... any legislation being enacted against their wishes which affects their land, their customs, their culture and their way of life. It is pleasing to note that this aspect of the proposal for the establishment of the Upper House was proposed by my party and graciously accepted by the Fijian people through its leaders and Council of Chiefs.

If the main, if not the sole, reason for creating the Senate was to allay the fears of the Fijians, the same effect could have been achieved by perpetuating the system that existed under the 1966 Constitution. The legislature was then unicameral. Of the unofficial popularly elected members twelve were Indians, twelve Fijians and ten neither Indians nor Fijians. In addition, two Fijian members were elected by the Great Council of Chiefs. This arrangement was unanimously agreed to by the Fijian leaders at the 1965 Conference. It could have been continued, with two, three or even four seats being filled by the representatives of the Great Council of Chiefs in a unicameral legislature. These representatives could have exercised the same powers of veto as are given to the nominees of the Councilof Chiefs in the Senate. It is difficult to understand why it was thought necessary to create another House in order to "allay the fears" of the Fijians. The additional twenty-two members in the Senate are an expensive luxury.[25]

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25 (i) The annual salary of the Senators is:-

(a) President - $1750
(b) Vice President - $1500
(c) Other 20 Senators - $1250

(ii) Each Senator is paid $12.50 per day as an attendance allowance.

(iii) An accommodation allowance of $12 per day is paid to each Senator living more than 25 miles from Suva.

(iv) All actual travelling costs are paid to Senators living more than 25 miles from Suva.

(v) All Senators receive a refund of full rental in respect of one private domestic telephone and 50% of all the local calls. (In Fiji each local call bears a charge).

(vi) The President is entitled to a refund of actual entertainment expenses incurred up to $500 per annum.

It may be argued that in the House of Representatives it would have been difficult for the Opposition to accept such disparity in voting power between the Indians and the Fijians. This attitude was quite apparent in the 1965 Constitutional Conference when all the Indian members objected to the disparity caused by only two more Fijian members.[26] But the problem could have been solved by giving voting rights to the Council of Chiefs representatives only in matters falling within sections 67 and 68 of the present Constitution.

Despite what has been said it is not suggested that a second chamber is not warranted in Fiji. If the sole or primary purpose of creating a second chamber was to allay the fears of the Fijians, this was not the best way to achieve that purpose. But if the traditional functions of a second chamber are considered as well as the protection of Fijian interests, a second chamber has an important role to play. The composition of the second chamber must be related to the functions it is intended to discharge. It is therefore intended that the composition of the Fiji Senate be analysed to determine whether any reforms are needed to make it an effective institution. Membership of the Senate will first be discussed and then its powers and functions.

C. The Composition of the Senate

(1) The Present Membership

The members of the Senate are appointed by the Governor-General on the advice of the Great Council of Chiefs (eight members), the Prime Minister (seven members), the Leader of the Opposition (six members) and the Council of Rotuma (one member). As there are no limits on the appointment of Senators, the appointments are effectively made by those persons or bodies.

The Senate is, at least for two major political parties, an instrument for rewarding political supporters at the expense of the taxpayer. The

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26 See Report of the Fiji Constitutional Conference 1965; Cmnd. 2783 (1965), 12.

Fiji Senate, or at least a substantial part of it, is effectively controlled by two political parties - the ruling party and the opposition. As Professor Stephen Leacock said[27] (in relation to Canada),

> We made our Senate, not a superior council of the nation, but a refuge of place-hunting politicians and a reward for partisan adherence.

The short history of the Fiji Senate tends to show that the remarks are also applicable to Fiji. Mr R.I. Kapadia, who had earlier defected from the Federation Party, was an Alliance Party candidate for the Indian communal seat in a Southern constituency in 1966. He lost the election but when the Senate was established in 1970 he was appointed as a Senator on the advice of the Prime Minister.[28] Similarly Mr M.T. Khan,[29] a defector from the Federation Party in 1967 and an unsuccessful Alliance Party candidate in the 1968 by-election, was appointed as a Senator in 1970 on the advice of the Prime Minister. Ratu (now Sir) Penaia K. Ganilau[30] was also an unsuccessful Alliance Party candidate, in the 1972 general election, and was appointed as a Senator upon the advice of the Prime Minister.

The Opposition appears to have followed the same. For instance Ratu Mosese Varasekete was an unsuccessful Federation Party candidate in the 1972 general election. He was soon after appointed as a Senator upon the advice of the Leader of the Opposition.[31] In similar vein may be seen the appointment of Mr Eqbal Mohammed. Mr Eqbal Mohammed

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27 Cited in Marriott, op. cit., 98.

28 The Prime Minister is also the President of the ruling Alliance Party.

29 He is now the Minister of Commerce, Industries and Co-operatives.

30 He is now the Deputy Prime Minister.

31 The Leader of the Opposition is also the President of the National Federation Party.

was a leading figure amongst the Muslim League members who advocated separate Muslim seats just before the Constitutional Conference delegation left Fiji for the 1970 Constitutional Conference. For various reasons this policy would have greatly embarrassed Mr S.M. Koya. The latter was and still is a leading figure in the Fiji Muslim League.[32] Most important, such a demand for separate Muslim seats would have cut right across the policy of the Federation Party which was pressing for the immediate introduction of a common roll and was opposed to any idea of communal representation. Surprisingly, Mr Eqbal Mohammed kept relatively quiet and does not seem to have pressed for separate Muslim Seats. Not surprisingly, he was eventually appointed to the Senate on the advice of the Leader of the Opposition.

Political affiliation is clearly reflected in the Fiji Senate. Invariably members appointed on the advice of a political leader support the policy of that leader. But the same cannot be said of the persons appointed on the advice of the Great Council of Chiefs and the Council of Rotuma inasmuch as those members would have been indirectly elected.[33] Doubtless these representatives have a definite loyalty to those bodies, but that loyalty is to be expected of them if one consider the main intention in the establishment of the Senate in Fiji.

(2) The Problems of Systems of Membership

The basic essential functions of a second chamber are supervisory and revisionary. It is therefore very important that the persons appointed be individuals of standing and experience who represent a wide cross-section of the community. Party politics must be of secondary importance. A second chamber which merely rubber-stamps the measures passed by the House of Representatives serves no useful purpose. The present method of appointment encourages such 'rubber-stamping'.

There arethree traditional ways of selecting the members of a second chamber; they can be

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32 In fact at present he is the "Speaker" of the Fiji Muslim League.

33 Fiji Constitution Order (Selection of Senators by Great Council of Chiefs): Legal Notice No. 114 of 1970.

(i) the holders of hereditary offices;
(ii) nominated; and
(iii) elected (directly or indirectly).

The hereditary principle calls for little elaboration; even in the United Kingdom it has been subjected to critisism. With the passage of the Life Peerages Act, 1958, it has been struck a considerable blow. This Act permits the creation of barons (other than Law Lords) and baronesses for the term of their lives only. In Fiji there is little room for hereditary principle. In England they were historical reasons for the creation of a hereditary peerage in the House of Lords. They have no application in Fiji. Also, the modern trend is to withdraw from hereditary appointments. Fiji is too small a country to create such a class. Even with the Fijians, who had strong traditional ties with their chiefs, the chiefly system is gradually giving way to equal say given to the commoners. The commoners are also establishing their equality with their chiefs.

A fully nominated chamber would not be in Fiji's best interest. Democratic principles do not allow political power to lie in the hands of a nominated body. Experiences in Canada and New Zealand (before 1950) have shown the shortcomings of a nominated body.[34] It is acknowledged that in those countries nomination was solely in the hands of the government. But even if the power of nomination is shared by government and opposition, the Senate is likely to become a place to which party supporters are appointed. If an absolute discretion is left with the Prime Minister and the Leader of the Opposition, it is too much to hope that "there would also be a tendency for each party to ensure that its representatives in the Upper House were of the highest quality available."[35] Party loyalty and the tendency to reward party supporters would remain of significant, if not paramount, importance. This is inherent in a nominative system.

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34 Northey, loc. cit., 271.

35 Idem.

Direct election appeals to adherents of democratic ideals, but it would not necessarily produce persons of high qualifications, standing or experience. It is very important that the services of such persons be secured by the Senate. Many persons who would otherwise be well qualified to serve on the Senate are not prepared to face the rigorous task of contesting a political election. There are in practically all countries persons who might not be widely known but who would be of incalculable value in the service of the community. Such persons would be very good candidates for a second chamber. They should not be partisan, but of a cast of mind which enables them to judge political questions dispassionately and calmly and with relative freedom from bias or prejudice. It is conceded that any House of Parliament cannot escape the party spirit; but the excesses of that spirit can usually be moderated by the presence of many who do not yield to it.[36] It would be unfortunate if use was not made of the services of such persons when they could contribute so much to society. A second chamber based upon direct election would not necessarily attract members with the skills needed to carry out the special work of the Senate.

If it is accepted that the function of the second chamber is supervisory and revisionary, the elective principle may defeat the whole foundation of a second chamber. A wholly directly elected chamber must reflect party politics. If both Houses were controlled by the same party this would defeat the purpose of a second chamber or at least reduce it's effectiveness. It is difficult to ensure that two elected chambers are not controlled by the same party. If the communal system of voting, operating for elections to the House of Representatives in Fiji, were also adopted for the Senate, the representation of the political parties would be similar in each House.

If the elected principle is adopted there is a danger that the upper house may appear to be just as powerful as the lower house.[37] It could claim also to represent the popular will. All sorts of complications

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36 Report of the New Zealand Constitutional Reform Committee, 25 et seq.

37 Ibid., 27.

could then arise, such as the deadlock in Australia in 1974 which necessitated a dissolution of both Houses of Parliament.[38]

Is indirect election under which certain groups rather than individuals elect representatives to the Senate likely to be more acceptable? Indirect election has been adopted in France.[39] The basic problem is settling the means by which representation of all sections of the community is secured. Further, if there is election by an electoral college, another question arises as to whom would such a body be responsible to.

It is submitted the problem of indirect election can be largely overcome by having a functional chamber. Certain organised sections of the community select and send representatives to the Senate. The groups responsible for selection must be such as have general recognition and acceptance. However, there would still be the problem of choosing which sections of the community should be represented. The inclusion of some organisations would lead to interminable argument as to why others were excluded.

(3) The Proposed System of Membership

The Senate in Fiji should be composed in such a way that the effect of party politics is minimised and no one party is markedly or permanently predominant. Politics in general and party politics in particular may be of some importance but they should certainly not be the controlling feature of membership.

One of the important functions of the Senate must be to ascertain the mind and views of all sections of the society and of the nation as a whole. Hence it is essential that the members of the Senate should be

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38 Not only in Australia but also in the United States the Senate has demonstrated its independence. Also see Cormack v Cope [1974] 48 A.L.J.R. 319.

39 See p. 640 , ante.

persons of experience and special qualifications who represent diverse elements in society. None of the three principles of selection already discussed would secure such members. However a combination of methods might be acceptable. This approach is a compromise which involves a careful balancing of the advantages and disadvantages of each of the principles.

It is submitted that there ought to be twenty-five members in the Senate. This figure is not an arbitrary one; it takes into account the functions and duties of the Senate to be discussed. These members should be selected:

(1) By appointment or nomination. Fifteen members should be appointed by the Governor-General acting on the advice of the Prime Minister (five members), Leader of the Opposition (four members), Great Council of Chiefs (five members) and Council of Rotuma (one member).

(2) By indirect election to represent the elements in a functional chamber. Ten members should be elected by the following:-

(a) trade unions (one member);

(b) chambers of commerce and all unions of employers (one member);

(c) legal profession (one member);

(d) medical and dental professions, chemists, architects, surveyors and engineers and all other allied professions (one member);

(e) sugar cane planters having holdings of not less than ten acres (two members);

(f) copra planters having holdings of note less than ten acres (one member);

(g) members of the House of Representatives (three members).

Question may arise as to the practicability of this method of election, of such a functional chamber. It is submitted that the difficulties would be more apparent than real.

(i) One apparent problem is the entitlement to vote for the members representing the trade unions, chambers of commerce and other unions of the employers. It is proposed that each union or chamber would be entitled to five votes to be cast by five named delegates who would

be registered on the "electoral roll" for the election of the Senators representing the unions and chambers of commerce. These five representatives must be chosen by each union or chamber concerned by means of secret ballot with only the registered (and of course financial) members having the right to vote. To avoid the formation of unions simply for the purpose of the election, it is proposed that the vote should be restricted to those unions and chambers which have been registered for at least five years.

(ii) With the legal profession, only members of the Law Society would be eligible to vote. As membership numbers barely eighty at the moment, election would not be difficult with each member voting individually.

(iii) With the other professions, referred to in paragraph (d) above (that is, medical, engineering, etc.) the total number would be similar to the number of lawyers and hence election would not be difficult with each member voting individually.

(iv) As for the sugar cane and copra planters, it will not be difficult to ascertain the persons eligible to register as a voter and hence they could register individually.

(v) Members of the House of Representatives would be grouped territorially, without regard to political affiliation. A suggested definition of areas is that all the members representing the constituencies in Vanua Levu and other outlying islands should elect one member and the members representing the constituencies in Viti Levu and other islands forming part of any constitutency in Viti Levu should elect two members. The latter "electorate" can be conveniently divided into two "constituencies" by existing constituency boundaries. The dividing line would run roughly from Raki Raki to Navua.[40]

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40 Which will virtually divide Viti Levu from the N.N.E. to S.S.W.

There should be certain qualifications on the entitlement to vote in this indirect election and for membership of the Senate.

(i) No person should be allowed to register as a voter on more than one roll. For instance a person may be a member of a trade union and also a farmer with holdings of more than ten acres. It would be unfair to allow some persons more than one vote. If he qualifies for registration on more than one roll, then he must opt for one or the other.

(ii) Except in the case of election by the members of the House of Representatives, no person should be allowed to offer himself as a candidate for election unless he has been registered as a voter on the particular roll in respect of which he is offering himself as a candidate. If this requirement is not adopted the purpose of having indirect election may be defeated. The main reason for having at least a partial functional chamber is to have persons of diverse elements and various cross sections of the society represented in the Senate. Hence it would affect such a principle if any "outsider" could contest the elections.

(iii) No person should be allowed to be a candidate if within the three years immediately by preceding the Senate elections he had offered himself as a candidate for the House of Representatives. This provision is essential to avoid the impression that the Senate can be used as a reservoir for unsuccessful candidates. It is very important that the dignity and prestige of the Senate should be safeguarded from this sort of criticism if it is to discharge its functions effectively.

This disqualification of three years should also apply to prospective "candidates" for appointment by the Governor-General.

It is pertinent to note that under the existing Constitution, a member of the Senate is at liberty to retain his membership of the Senate while offering himself as a candidate for the House of Representatives.

In fact a few senators[41] did so offer themselves. Such a person is unable to perform the duties of a senator because he is apt to ponder to his constituency. The dignity and prestige of the Senate is affected by this provision. The impression is given that the Senate is a training ground or stepping stone for budding politicians who can always attempt to move from the Senate and if unsuccessful return to it. This is anomolous. Persons should be required to decide whether they have the capacity to serve in the Senate or not. If a senator wishes to be a candidate for the House of Representatives he should be required to resign from the Senate at least six months before filing his nomination as a candidate for the House of Representatives. This of course should apply not only to those senators who it is proposed would be indirectly elected but also to those who are appointed by the Governor-General.

Finally, as regards membership, it is sincerely hoped that senatorship will not be regarded as a way of rewarding a generous subscriber to party funds, or a successful businessman who has been or may be useful to some powerful interest favoured by one of the political parties, or party hack for political services or political complaisance. A successful Senate in Fiji will depend to a great extent on the choice of senators made by the Prime Minister and the Leader of the Opposition because under the proposals advanced and under the present Constitution they effectively have the power to nominate persons of their own choice. Although the Governor-General makes the appointment but the real power lies in the two persons advising him as to the appointment of a substantial number of members.

(4) The Powers and Functions of the Senate:

(a) The Present

The most important function of the Senate in its present form is to act as a watchdog in relation to the safeguards included in sections 67 and 68 of the Constitution.[42] Thus in 1973, the House of Representatives

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41 E.g., M.T. Khan, (now a Minister) and H.C. Sharma in 1972; and Sarwan Singh in 1974 by-election.

42 See pp. 206 et seq., ante.

passed the Land Sales Tax Bill. When this measure was presented to the Senate, it was referred back to the House of Representatives for amendments inasmuch as the provisions affected native land and the prescribed "entrenched" procedure had not been followed.[43]

Apart from those matters which fall within the purview of sections 67 and 68 of the Constitution, the Senate has no powers to resist measures. Essentially, it is expected to revise all bills (except the financial ones) passed by the Lower House but has no direct power of veto. It can, however, delay the passage of a Bill for a period of up to six months, except for certain financial measures[44] and money Bills,[45] appropriation Bills[46] and Bills[47] certified by the Governor-General as urgent. Except for those measures to which sections 67 and 68 apply or those financial and other measures exempted as aforesaid, if any Bill is passed by the House of Representatives in two successive sessions (whether or not Parliament is dissolved between those sessions) and that Bill is sent to the Senate in each of those sessions at least one month before the end of the session, and the Senate rejects the measures in each of those sessions, that Bill, on its rejection for the second time by the Senate, shall be presented to the Governor-General for assent unless the House of Representatives resolves otherwise.[48] However, a period of at least six months must elapse 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.[49]

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43 Parliamentary Debates (1973), 292.

44 Constitution, s.61.

45 Ibid., s.62.

46 Ibid., s.63.

47 Ibid., s.64.

48 Ibid., s.65(2). A bill is deemed to be rejected by the Senate if it is not passed by the Senate without amendment, or it is passed with any amendment which is not agreed to by the House of Representatives; Ibid., s.65(3). See Cormack v Cope [1974] 48 A.L.J.R. 319.

49 Constitution, s.65(2).

This delaying power provides the Senate with a good weapon without making the popularly elected House in any way subservient to the second chamber. The interposition of such a delay will enable the opinion of the nation to be adequately expressed upon the measures concerned. This is especially important as regards Bills which affect some fundamental principle or introduce new principles of legislation. Also a measure may be such that the opinion of the country appears to be almost equally divided. A delay gives all interested bodies or persons sufficient time to consider the proposed measure and make the necessary representations. After such representations and constructive criticisms, the House of Representatives may eventually decide to make certain changes. Even if no changes are made, at least the interposition of this delay will have given time for a critical analysis of important measures before they have been enacted as law.[50]

(b) Proposed Functions

(i) An important function that the Senate in Fiji can play is the staging of free and full discussion of large and important questions that arise at times when the House of Representatives may be so much occupied that it cannot find sufficient time for them.[51] The House of Representatives, preoccupied with legislation, will find itself with insufficient time for a full debate on many important international, economic and social issue. Further, party politics would dominate the debates in the Lower House where the fate of the Government and the Cabinet is determined by the debates and divisions. Party politics might restrain members from commenting as they would wish to. Restraint would be practised by politicians. However, in a Senate composed in the manner suggested, these difficulties would not be present. The Senators selected in the manner suggested would not be directly responsible to the electorate and each would be at greater liberty to investigate and probe into policies than would the members of the House of Representatives. In the Senate, divisions would not have the same significance as in the Lower House. Hence political questions would, more often than not, be judged with calmness and comparative freedom

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50 Cf. Bryce Committee Report.

51 Cf. Ibid.

from prejudice or bias. It is conceded that party spirit cannot be completely excluded, but that spirit will certainly be moderated when Bills and important policies are debated in the Senate composed as proposed.

(ii) Initiation of Bills:

The powers of the Fiji Senate are not as wide as they are in some other countries. For instance it has no power to initiate legislation. It is a matter for regret that this power was not conferred on the Fiji Senate. But if the Senate had been constituted in the manner suggested party politics would not have been active and Billis initiated in the Senate would have been likely to receive objective and dispassionate treatment. Prior debate in Senate would result in a Bill being put into better considered shape before presentation to the House of Representatives.[52] It could be expected to have an easier passage through the Lower House. There does not seem to be any cogent or valid reason for this power not being given to the Senate.

The House of Representatives, and particularly the Government, might find it advantageous to have a measure introduced into and debated by the second chamber. It is always possible that some very useful legislation might originate from the Senate. Party politics being what they are, even a well thought one and useful Bill introduced by an Opposition member, will almost invariably be opposed by the government - unless of course it permits members a free vote. A Senate uncontrolled by political parties might easily initiate measures which find favour with the government.

At present the impression is created that the Senate is merely a rubber-stamp for the Lower House and that it is largely ineffective. It's revisionary functions including the power to delay bills, are seldom exercised or asserted. If the Senate were permitted to initiate legislation this would improve its usefulness and its public image.

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52 Cf. Bryce Committee Report loc. cit.

(iii) Joint Select Committees:[53]

The House of Representatives in Fiji entrusts a great deal of important work to its select committees - either standing or ad hoc select committees. These committees prepare reports after careful deliberation and present them to the House. They are not expected to sit while the House is in session; there are very few "free" hours while Parliament is in session and their responsibilities impose a heavy strain on members. Because there are only fifty-two members in the House (including the Prime Minister and all the other Ministers), members may have to serve on more than one Committee. The work of some Committees requires substantial research and meticulous care in the preparation of their report. One example is the Sugar Select Committee. The dependence of the entire economy on the sugar industry makes the task of this Select Committee onerous and exacting. If joint select committees on which members of both Houses served were established, the members of the Senate could make a valuable contribution and members of the House of Representatives would be able to share their burdens. But this assumes that members of Senate have been chosen for their knowledge and experience in various walks of life. This would not necessarily be so as the Senate is at present constituted. Nonetheless even with the present composition of the Senate joint select committees could be of significant assistance.

The committee work of Parliament is of fundamental importance. The better it is done, the higher will be the esteem in which the legislature is held. The work of the select committee is increasing and at times it is quite complex. If a part of this responsibility could be transferred to the proposed Senate, it would increase the efficiency of the committees concerned because persons of special skill, training and qualification would be available to serve on them. Moreover, because each member would have fewer Committees to serve on, he could devote more time to other matters demanding his attention.

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53 Such committees were discussed in the Report of the New Zealand Constitutional Committee at p.36. Substantial assistance has been derived from the Report.

Joint Select Committees are recommended for at least the following:

(a) Sugar.
(b) Land.
(c) Delegated Legislation.
(d) Public Petitions.

(a) Sugar:

Sugar is the most important commodity exported from Fiji and the industry is literally the backbone of the country. Much time and knowledge is required of the members of this committee. Research and field work are necessary. Members of the Senate chosen for their experience, knowledge and skill could make a valuable contribution. Needless to say, the Select Committee on sugar would not itself be making any policy but a report by a committee with members possessing knowledge and skill would be expected to carry much weight with the House of Representatives.

(b) Land:

Land is one of the most involved and highly controversial topics in Fiji. In fact it is the major problem in Fiji. It is also invariably a political issue.[54]

The Fijians have very strong constitutional safeguards in relation to their land. No law can be passed touching Fijian lands until and unless six out of eight senators appointed by the Governor-General on the advice of the Great Council of Chiefs approve of the Bill.[55] Hence, to discuss and attempt to alter laws pertaining to Fijian land without consulting the Great Council of Chiefs is to attempt the impossible.

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54 See the Report of the Commission of Enquiry into the National Resources and Population Trends of the Colony of Fiji (1959), Council Paper No. 1 of 1960 (commonly known as the Burns Commission Report).

55 However, under the changes proposed by the author, it would be three out of five.

In Fiji about eighty-three per cent of the land is under the control and ownership of indigenous Fijians. Part of this land is leased to non-Fijians. As Indians form the majority of the population and most of the sugar cane and dairy farmers are Indians, the position is anomolous. It cannot be disputed that as a general rule the Fijians have the land and the Indians have the farming expertise. This has caused the land problem. The Indians obviously are in direct need of land which is controlled by the Fijians.

As has been seen Fijian land is not owned by individual Fijians but by the social units. Even such groups do not hold separate legal titles to the land.[56] All Native lands are vested in the Native Land Trust Board.[57] The Board has absolute responsibility for administering Native lands for the benefit of the Fijian owners.

The Native Land Trust Board is effectively controlled by the Council of Chiefs. The Board consists of[58] the Governor-General as President, the Minister responsible for Fijian affairs as Chairman, five Fijian members appointed by the Great Council of Chiefs, three Fijian members appointed by the Fijian Affairs Board from a list of nominees submitted to the Fijian Affairs Board by provincial councils, and not more than two members of any race,[59] appointed by the Governor-General.[60] The Fijian Affairs Board is in fact a body of

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56 See p.14, ante. As to land tenure in Fiji and questions relating to land generally see 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: Journal of the Legislative Council (1959).

57 Created by the Native Land Trust Ordinance, Chap. 115 of the Laws of Fiji; see pp. 14 et seq., ante.

58 Native Land Trust Ordinance, s.3.

59 It is interesting to note since the Native Land Trust Board came into existence in 1945 no Indian has been appointed to the Board. Europeans have been appointed besides the Fijians.

60 As to the history, composition and functions of the Council of Chiefs and Fijian Affairs Board see pp. 21 et seq., ante.

the Great Council of Chiefs. The Fijian Affairs Board and the Council of Chiefs are both created by the Fijian Affairs Ordinance.[61] Section 3 of this Ordinance provides:

> 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 prescribed.

Section 5(1) of the said Ordinance provides:

> There shall be of and for the Council [of Chiefs] a Board called the Fijian Affairs Board which shall consist of such appointed and elected persons as the Minister may by regulation prescribe.

Hence it is clear that the Fijian Affairs Board is in close association with the Council of Chiefs. The Board is "of and for the Council" of Chiefs. Accordingly it can be asserted that the Council of Chiefs' views in the Senate on matters pertaining to land would be the views of Native Land Trust Board in particular and the native Fijians in general.

Past experience has shown that when land issues are raised in Parliament, emotion tinted with racialism prevails. The whole question is surrounded by suspicion and marred by emotional outbursts. As a result land issues cannot fruitfully be debated in open Parliament. For instance, on 26 June 1974, there was a very unfortunate scene created in the House of Representatives when the Opposition Whip, Mr K.C. Ramrakha, called for the abolition of the Native Land Trust Board during a debate which involved the land issue. In reply the Minister for Fijian Affairs and Local Government,[62] Ratu William Toganivalu, said he would refuse to issue leases of Fijian land to Indians, or renew them, as long as he

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61 Chap. 100 of the Laws of Fiji; ss.4 and 5.

62 He is also the chairman of the Native Land Trust Board and also a member of the Council of Chiefs.

remained in office.[63] This incident, particularly the remarks of the Minister, created a stir and caused uncertainty amongst the Indians. Indian farmers have been in constant fear of losing their land on the expiration of their leases. This remains a major problem.[64] The uncertainty and concern created by the Minister's speech was only slightly reduced by the remarks of the Deputy Prime Minister who said that the Minister's views were not those of the government, and the Minister made those remarks as chairman of the Native Land Trust Board and not as a Cabinet Minister.[65] However, such an explanation did not satisfy or allay the fears of the Indians in Fiji.[66] This is quite understandable. Ratu William Tongaivalu was sitting and speaking in Parliament in his capacity as a Minister and not as the chairman of the Native Land Trust Board. How his remarks made in Parliament could be attributed to him as chairman of the Board is difficult to see.

For present purposes, it is pertinent to note that what the Minister said regarding non-renewal of leases is absolutely within the powers of the Native Land Trust Board subject to the statutory protection for two renewals of the minimum period of ten years each, granted by the Agricultural (Landlord and Tenant) Ordinance[67] in respect of agricultural holdings. Beyond that protection, the Board has absolute discretion whether to grant lease or renew a lease of any Native land.[68] As has been seen the protection of Native land is entrenched by the Constitution.[69]

Accordingly, it is submitted that since the Constitution of Fiji gives the Council of Chiefs an effective, in fact a paramount, say in land matters, dialogue and discussions are surer ways of achieving results than confrontations in the Parliament. It is submitted a joint Select

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63 Parliamentary Debates (1974).

64 See the Burns Commission Report and the Spate Report.

65 Fiji Times, 30 June 1974.

66 Fiji Times, 1, 2, & 3 July 1974.

67 Ch. 242 of the Laws of Fiji.

68 83% of all lands in Fiji is Native land.

69 See pp.206 et seq., ante.

Committee on land could provide a workable forum for a frank discussion without making the issue a political football. Perhaps it would be advisable to include at least three of the Council of Chiefs' nominees in the Senate as members of the Select Committee.

In the Select Committee members would be able to speak freely and uncompromisingly without the fear of being answerable to their various constituencies. The discussions would not take place in the same atmosphere as debates in the House of Representatives. At least there is bound to be more objectivity in discussions and the exchange of views because the Committee as a whole will be presenting its report. The composition should be such that the Council of Chiefs in adequately represented. It will provide a good opportunity for dialogue between the representatives of the Prime Minister, the Leader of the Opposition and the Council of Chiefs. Any report presented by this Committee will have the advantage of being prepared after divergent views have been presented without them becoming political issues, at least while the discussions take place. Also the Committee will be able to carry out field work objectively as the Committee as a whole will be responsible for the report.

(c) Delegated Legislation:[70]

Statutory regulations and other orders made pursuant to statutory authority are becoming increasingly significant. Parliament of course is not directly responsible but since these regulations or orders are made on the authority of Parliament, it is imperative that Parliament keep a check on them. They are not the result of debate or public discussion, but may nonetheless often be far-reaching in their scope and consequences. Hence, it is submitted, there ought to be a select committee of both Houses to examine regulations, bylaws, orders and any other type of delegated legislation referred to it. If six members of either House of Parliament request that any such delegated legislation be referred to the Committee for consideration, the matter ought to be

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70 Cf. Report of the New Zealand Constitutional Reform Committee, 35.

considered by the Committee. The purpose of the examination would be to consider the specific matters raised in respect of the delegated legislation in question and also to report when necessary on the merits of the legislation and matters incidental thereto.

(d) Public Petitions:[71]

A petition to Parliament has been the traditional manner, albeit almost as a last resort, of drawing attention to grievances. This may be seen against its historical background in England where Parliament is the highest Court in the land. This cannot be said of the Parliament in Fiji; nevertheless petitions are commonly presented. Such petitions must be treated in a judicial manner by Parliament which is seen as a forum of public opinion and representation. Hence a full and proper enquiry ought to be given to all petitions unless they are frivolous. A strong Joint Select Committee could perform a more useful service here. Members would be expected to be persons of experience with special qualifications. The committee would be able to devote more time to the examination of reports and testimony and would be in a strong position to submit a sound and well reasoned decision. Political considerations would assume less importance, at least to members of the Senate. The House and Cabinet could be expected to consider carefully the report of such a strong Committee.

(e) Composition of the Joint Select Committee:[72]

For members of the Senate to play a successful and effective role in the Joint Select Committees proposed, it is imperative that the majority of the members in these select committees be from the Senate. The House of Representatives must be sufficiently represented so that the House can be made fully conversant with the facts and opinions upon which the Joint Select Committee had based its findings. Except for the Select Committee on land, membership of each of the Committees should total eight, three from the House of Representatives and five from the Senate. Appointments should be made by the respective Houses. At least

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71 Ibid., 34.

72 Ibid., 36.

one of the appointees must be an Opposition member and of the Senators at least one must be fromamongst those appointed on the advice of the Leader of the Opposition and not more than three to be of those appointed on the advice of the Prime Minister. The Chairman must be an appointee of the House of Representatives as the reports of the Committee will be presented to the House of Representatives by the chairman. Three members of that House having sat on the Committee will be in a position to give the House such information as might be required to enable it to arrive at its own conclusions.

As far as the Joint Select Committee on land is concerned, membership should be eleven, eight of these members being appointed in the same way as the members of the other Committees. The additonal three members should be appointed from among the Senators appointed on the advice of the Great Council of Chiefs. The reason for such additional members has been discussed.

Because the Senate does not sit for such long hours and on so many days as does the House of Representatives, the Senators serving on these proposed important committees would be able to do the work more throughly and to the benefit of Parliament and the country at large. Since most of the members of the proposed Committees will be Senators, most of the members of the House of Representatives will be spared more time to devote to other businesses of the House.

E. Conclusion

It is apparent that Fiji should retain its second chamber. Its composition presents problems.

> But to devise a good Second Chamber, to discover for it a basis which shall be at once intelligible and differentiating; to give it powers of revision without powers of control; to make it amenable to permanent public sentiment and yet independent of transient public opinion; to erect a bulwark against revolution without interposing a barrier to reform - this is a task which has tried the ingenuity of constitution - makers from time immemorial.[73]

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73 Marriott, op. cit., 238.

The present Senate fulfils some of these functions but under the present Constitution it has only two major functions. The first is to safeguard the special interests specified in sections 67 and 68 of the Constitution (which includes constitutional amendments). The second is to carry out the detailed revision of "over hasty and ill-considered legislation". So far the Senate in Fiji has not really discharged these functions, having in all but a few cases[74] acted more or less as a rubber stamp for the House of Representatives.

The observations of R.H. Hickling in relation to the Senate of Malaya are equally apposite for Fiji; he said[75] that "the Senate is valuable not for what it does, but for what it could do". The Senate is at present able to resist any legislation falling within sections 67 and 68 of the Constitution. In all other cases it has only a power of delay. If the functions, powers and duties of the Senate were expanded to include the additional duties outlined in this chapter, the Senate would make a more significant contribution to the government of Fiji. Control to the success of the proposal is securing as members of the Senate persons who possess the special qualifications to carry out the functions proposed. The Senate would then be able to make concrete and tangible contributions to the parliamentary process and the nation at large. It would be a powerful body but would still remain the less important chamber. The "will" of the people would not be nullified by a chamber which was not popularly elected. The House of Representatives would still remain the interpeter of the popular will with the Senate a major element in the governmental process. Constituted in the manner suggested the Senate would become an effective deliberative as well as revisionary body.

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74 E.g. Land Sales Tax Bill, discussed on p.657, ante.

75 "The First Five Years of the Federation of Malaya Constitution," (1962) 4 Malaya L. Rev. 183, 190.

CHAPTER XVIII

THE SPEAKER CRISIS

A. Background to the Crisis

The Speaker Crisis arose out of the introduction of anti-strike legislation by the Fiji Government early in 1973. The Trades Disputes Bill was a response to and an attempted solution of the wild-cat strikes which had started in 1972 and were causing serious harm to the national economy. The Bill conferred wider powers on the Minister of Labour to ban strikes, to extend the class of "essential industries", and to subject union leaders to penalties of imprisonment and/or fines for inciting illegal strikes. It was strongly opposed by the Fiji Trades Union Congress and the Parliamentary Opposition Party. Indeed the latter's stated intention was "to use every constitutional means in our power to oppose this bill". [1]

The Bill was introduced in the House of Representatives by the Minister of Labour on 3 April, 1973. The proposed first reading had, however, to be postponed to the next day when the Speaker[2] sustained the objection of the Opposition Whip that it had not been distributed to the members of the House early enough to comply with Standing Orders.

The next day the Bill got its first reading. The Government intended that the Bill should also receive its second reading on the same day. This was again objected to by the Opposition Whip on the ground that the Standing Orders required that it be set down for second reading at some future date. The Speaker accordingly ruled

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1 As was announced by the Opposition Whip, Mr K. C. Ramrakha; Fiji Parl. Deb. (1973), 244.

2 Mr R. D. Patel.

the second reading on 4 April out of order. After the House had dealt with the remaining items on the order paper, the Opposition Whip declared that, as a member of the House Business Committee, he had the right to move and did so move that the House adjourn sine die because it had no more business to attend to. The Deputy Prime Minister's [3] amendment to the motion that the House adjourn only until 9.30 a.m. the following day was carried by twenty eight votes to twelve. The Speaker then pointed out that in view of his earlier ruling that the second reading of the Trades Disputes Bill could not take place that day, the House was sitting with no business on the order paper. In reply to the Attorney-General's contention that there were two messages from the Senate (as well as the second reading of the Trades Disputes Bill) still pending, the Speaker stated that those messages had not proceeded to the stage of inclusion in the order paper and therefore could not be discussed by the House. Amidst protests from the Government members, the Speaker declared the House adjourned sine die.

The Opposition felt it had "won the first round". [4] However, that evening there was a Government announcement over the radio that the House would meet at 9 a.m. on the next day, 5 April. It was immediately followed by the Opposition's statement that it would not be present at the sitting as the Speaker had adjourned the House sine die. On the Speaker's instructions, the chamber had been locked and the staff of the House told not to attend on 5 April. The use of the chamber and/or the removal of the Mace from his office was expressly prohibited by the Speaker.

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3 Ratu Sir Edward Cakobau, the Prime Minister Ratu Sir K.K.T. Mara was not present.

4 In the words of an Opposition Member, Mr Apisai Tora, Pacific Islands Monthly (May, 1973) Vol. 44 No. 5, 5.

Nonetheless at 9.20 a.m. the next day members of the governing party assembled in the House with the Deputy Speaker[5] in the Chair. The "meeting" was adjourned at 9.23 a.m., resumed at 11 a.m. and readjourned at 11.03 a.m. At 2.35 p.m. it was again resumed but despite the passing of a motion that Her Majesty's Mace be brought into the House and that the staff be directed to take up their places, the "meeting" proceeded without the Speaker, Mace or Opposition. With the leave of the Deputy Speaker the Attorney-General successfully moved that the proceedings of the House of that day be valid and effectual notwithstanding that the Mace was not in place and that the previous day's "minutes" be amended from the original "Mr Speaker adjourned the House sine die" to "Notwithstanding that the substantive motion was lost, the Speaker purported to adjourn the House sine die and left the Chamber. The House rose immediately afterwards." The "minutes" as amended were then confirmed and the House adjourned to 9.30 a.m. the next day. In the meantime the Speaker announced outside the House that the "meeting" of 5 April was a nullity. He called an "emergency meeting" of the House for Friday, 6 April.

Both parties attended at the House on that day and an impasse developed. The Speaker refused to accept the legality of the previous day's proceedings whilst the Leader of the House declined to move a confirmation of the "minutes" of 4 April on the ground that it had already been confirmed on 5 April. In an attempt to break the procedural deadlock there were various adjournments for private talks but to no avail. The Speaker then adjourned the House until Monday, 9 April.

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5 Mr Vijay R. Singh.

The stalemate continued unbroken on Monday so the House was again adjourned to Tuesday, 10 April. On Tuesday afternoon, an "arrangement" was reached between the parties. The Speaker took the Chair and the "minutes" of the 4 and 5 April were approved. After announcing that he had been embarrassed by accusations of partiality in the House and found it impossible to remain in the chair "under a cloud of suspicion",[6] he withdrew from the House for a week. During the Speaker's absence the Trades Disputes Bill was quietly passed by both Houses of Parliament with only minor amendments. A motion of no confidence in the Speaker was introduced by the Government and was passed by the House of Representatives but the two-thirds majority necessary[7] for his removal from office was not secured.

B. The Court Proceedings:

Matters did not remain within the walls of the House. Supreme Court proceedings were brought by Mr James Madhavan, an Opposition member of the House of Representatives, against the Attorney-General, three ministers of the Crown who were members of the House of Representatives and the Deputy Speaker.[8] The plaintiff initially claimed four declarations but at the hearing of the defendants' application to strike out the writ, he persisted with only two declarations, viz.,

(a) A declaration that the actions of the Deputy-Speaker in sitting

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6 Fiji Parl. Deb. (1973), 284.

7 Constitution, s 36(3)(d).

8 Madhavan v Falvey (unreported) civil suit No. 119 of 1973 (Supreme Court) and civil appeal No. 34 of 1973 (Court of Appeal).

as Deputy Speaker in the circumstances, and in direct defiance of the Speaker's ruling and directions were ultra vires the Constitution of Fiji, and contrary to all conventions of Parliamentary democracy;

(b) A declaration that the actions of the defendants in physically taking over the House, commandeering the staff of the Speaker, taking over the Mace of Her Majesty the Queen, and purporting to stage a sitting of the House with the Deputy Speaker in the Chair were unconstitutional, illegal and a nullity, and constituted a breach of the Constitution of Fiji and of the doctrine of separation of powers, and conventions of Parliamentary democracy.

In support of his claims the plaintiff alleged in the writ that:

5. On the 4 day of April 1973 at the end of a duly convened sitting of the House of Representatives the ... Speaker adjourned the House sine die under the provisions of the Standing Orders of the said House.

6. The defendants objected to the said adjournment and notwithstanding the direct ruling of the Speaker and his subsequent assertions that the House had been adjourned sine die, the defendants, and each of them, against the consent, and express directions of the Speaker physically took over the House of Representatives, commandeered the staff of the Speaker in the House of Representatives, and physically removed Her Majesty's mace of Parliament from the Chamber of the Speaker and purported to stage a sitting of the House of Representatives on two occasions on the said 5th day of April, 1973 with the fifth defendant purporting to sit as Deputy Speaker of the House.

7. The fifth defendant in purporting to sit as Deputy-Speaker defied the Speaker, and sat against his express directions at a time when the Speaker was neither absent nor unable to sit, and the fifth defendant contravened all conventions of Parliamentary democracy, and the Constitution of Fiji.

8. The plaintiff says that the said sittings of the House were a nullity, and a grave contempt of Parliament, and Her Majesty the Queen, and such demonstration that "might was right", and usurpation of the Parliamentary Chamber by the defendants were a direct contravention of the Constitution of Fiji, and breached the doctrine of separation of powers, and were contrary to all conventions, and traditions of Parliamentary democracy.

The defendants issued a summons to have the writ set aside on the grounds:

(a) that the Supreme Court had no jurisdiction to deal with the issue or to grant the relief sought; and

(b) that the endorsement on the writ and the issue thereof was an abuse of the process of the Court.

The defendants contended that the plaintiff's allegations did not give rise to an action maintainable in Court because:

(1) section 54 of the Constitution[9] empowered the House to regulate the conduct of its own proceedings;

(2) the allegations related exclusively to matters connected with

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9 Section 54 provides:

(1) Subject to the provisions of this Constitution, 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.
(2) Each House of Parliament may act notwithstanding any vacancy in its membership (including in the case of the House of Representatives any vacancy not filled when the House first meets after a general election) and the presence or participation of any person not entitled to be present at or participate in the proceedings of the House shall not invalidate those proceedings.
(3) 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.

the conduct of proceedings in the House; and

(3) such proceedings were not subject to judicial control.

The plaintiff contended, on the other hand, that the real issue was whether or not the defendants had contravened the Constitution. The plaintiff said that the Deputy Speaker in purporting to preside at a time when the Speaker was neither absent nor unable to sit, acted in direct contravention of section 57 (1) of the Constitution which provides:

> The Speaker or in his absence the Deputy Speaker or in their absence a member of the House of Representatives (not being a Minister or Assistant Minister) elected by the House for the sitting shall preside at any sitting of the House.

It was contended that this provision clearly laid down that the Deputy Speaker could only preside in the absence of the Speaker and at the relevant time the Speaker was not absent. In support of the contention that the defendants had acted in breach of the Constitution, attention was drawn to the definitions of "session", "sitting" and "the Speaker" in section 127 of the Constitution and also to section 69 (5) thereof and Order 25 (1) of the Standing Orders of the House made under section 54 (1) of the Constitution.

Section 127 provides:

> In this Constitution, unless the context otherwise requires -
>
> "session" means, in relation to Parliament, the sittings of Parliament commencing when it first meets after this Constitution comes into force or after the prorogation or dissolution of Parliament at any time and terminating when Parliament is prorogued or is dissolved without having been prorogued;

> "sitting" means, in relation to a House of Parliament, a period during which the house is sitting continuously without adjournment, and includes any period during which the House is in committee;

Section 69 (5) provides:

> Subject to the provisions of subsection (1) of this section, the sittings of each House of Parliament shall be held at such time and place as that House may, by its rules of procedure or otherwise, determine.

Standing Order 25 (1) provides:

> Meetings:
>
> Meetings of the House other than the first meeting of any session shall begin on such day and at such hour as the Speaker may determine after consultation with the Prime Minister. Written notice thereof shall be given by the Clerk to Members at least fourteen clear days before the day of the meeting but in cases of emergency the Speaker may after consultation with the Prime Minister dispense with such notice and in that event the longest possible notice shall be given.

The plaintiff claimed that each purported sitting of the House with the Deputy Speaker presiding was not a sitting within the meaning of the word as defined in section 127 and was therefore a nullity. It was submitted that, having regard to the definition of "the Speaker" in section 127, after the Speaker adjourned the House on 4 April 1973 only he, and not a person deputising for him, could, after consultation with the Prime Minister, determine the day and hour when the House would sit again.

The plaintiff further contended that the defendants acted in breach of the doctrine of the separation of powers, inasmuch

as the defendants, being members of the executive, had by their actions attempted to exercise powers which, on the proper construction of the Constitution with its threefold divisions of powers, could only be exercised by the Legislature.

The learned Chief Justice, Sir John Nimmo, in delivering the judgement of the Supreme Court pointed out at the outset that; [10]

> It is not alleged by the plaintiff that the defendants, with or without the support of either members of the House, passed any enactments or did anything else that would affect the rights of persons outside the House.

The learned Chief Justice then held that the conduct of which the plaintiff complained of occured in and formed part of the proceedings of the House. Further, it was held, that [11] "the Constitution did not give the courts the power to adjudicate upon matters which relate to proceedings within the House which do not affect the rights of persons outside the House".

As for the contention that the defendants acted in breach of the doctrine of the separation of powers, the learned Chief Justice held that the defendants were not in breach of the doctrine in "the slightest degree". He said: [12]

> Assuming that all or some of the defendants form part of the executive it is obvious that on these occasions they were not the executive of Fiji nor did they do anything that would suggest that they acted as if they were. Whatever they did in connection with the purported

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10 Unreported judgement of the Supreme Court (1973), 6.

11 Ibid., 11.

12 Idem.

> sittings of the House it is not alleged that they passed or attempted to pass any enactments or did anything else which would amount to an exercise or attempted exercise of the law-making functions of the Legislature ... (T)he plaintiff's allegations, which I am assuming to be true for the purposes of the proceedings before me, do not support to the slightest degree the claim that the defendants have breached the doctrine of separation of powers.

Consequently, the writ was set aside.

The plaintiff appealed against the Supreme Court order. The Court of Appeal held that [13] "so far as local legislation does not provide, the privileges of the English Parliament (of which the sole right of regulating its internal proceedings is one) would attach to the newly created Houses in Fiji."

The court further said:[14]

> The Parliamentary Powers and Privileges Ordinance (Cap. 3) provides for some powers and privileges but does not purport to be an exclusive list and is concerned largely with procedural matters and offences by individuals. It is not in our opinion intended by implication to abolish those established privileges of the House itself, the power to punish for contempt and the exclusive right to control its own internal proceedings.

Also,[15]

> the privilege of the House to control its own internal proceedings ... has, in our opinion, become part of the law of Fiji unless the Constitution otherwise

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13 Unreported judgement of the Court of Appeal (1973), 8.

14 Ibid., 9.

15 Ibid., 10.

requires.

The Court of Appeal held that section 57 (1) of the Constitution was, at least in part, merely a procedural section despite its incorporation in the Constitution. The Court of Appeal adopted the words of the learned Chief Justice when he said:[16]

> Article 57 (1), like Order 10 of the Standing Orders of the House, recognizes the need for someone to preside over the House when it is sitting and makes provision to ensure that there will be someone to perform that function. In my opinion it was inserted in the Constitution to meet that need and for no other reason. It concerns a matter of procedure and I can find nothing whatever in it to even suggest that its intention is to remove or diminish the power of a House of Parliament in this Dominion to manage and control its own internal proceedings .... Assuming that the (Deputy Speaker) acted contrary to the provisions of the Article and the Order it is for the House alone to pass upon his conduct so long as the rights of persons outside the House are not affected.

The Court of Appeal held that the basic requirements of section 57(1) that the Speaker, Deputy Speaker or an elected member shall preside in the House are constitutional matters and a contravention of such requirements may be challengeable by a person so qualified under section 97 of the Constitution. Nevertheless "the decision which of the persons mentioned shall preside is essentially one of internal procedure, which must necessarily be resorted to by the House in deciding the question".[17]

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16 Unreported judgement of the Supreme Court (1973), 10.

17 Unreported judgement of the Court of Appeal (1973), 13.

C. Analysis and Constitutional Implications of the Crisis and the Judicial Decision Thereon:

(1) General

It is submitted that it is rather unfortunate that both the Supreme Court and the Court of Appeal made pronouncements which would not have been necessary if the matter had been decided on the basis of locus standi, as required by section 97 of the Constitution which provides:

> (I)f 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, then ... that person may apply to the Supreme Court for a declaration and for relief under this section.
>
> (2) The Supreme Court ... shall not make a declaration ... unless it is satisfied that the interests of the person by whom the application under the preceding subsection is made or, in the case of other proceedings before the Court, a party to those proceedings, are being or are likely to be affected.

The common law and principles applicable to declaratory judgements apart,[18] this section is quite specific that the party making the application for a declaration of infringement of any constitutional provision must show (and of course prove) that his interests

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18 See I. Zamir, The Declaratory Judgement (1952) et seq. and Guaranty Trust Co. of New York v Hannay [1915] 2K. B. 536 where it was held that the court has power to make a declaration, whether there is a cause of action or not, at the instance of a party interested in the subject-matter.

are being or are likely to be affected by such contravention.

In other jurisdictions too the Courts have acted on the principle that in constitutional cases only a person whose rights have been affected by a statute may challenge its constitutional validity, and that person's rights must be directly or immediately threatened. The general rule in the United States of America was expressed thus:[19]

> The party who invokes the power must be able to show not only that the Statute is invalid, but that he has sustained, or is immediately in danger of sustaining, some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally.

The question of what is sufficient interest was considered in the Australian case of Crouch v The Commonwealth,[20] where it was held that an allegation that the plaintiff's business was hampered by the necessity of obtaining permits under an allegedly invalid law was sufficient to sustain the action.

In United Public Workers of America et. al v Mitchell[21] certain employees of the Executive Branch of the Federal Govern-

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19 Massachusetts v Mellon 262 U.S. 447, 488 (1923). As to the position in India, see Dwarkadas v Sholapur Spinning Co. (1954) S.C.A. 132; A.I.R. (1954) S.C. 119.

20 (1948) 77 C.L.R. 339.

21 330 U.S. 75 (1947).

ment applied for an injunction against members of the Civil Service Commission prohibiting them from enforcing the provisions of a statute which forbade such employees from taking any active part in political management or political campaigns. There was also a claim for a declaration of the unconstitutionality of those provisions. There was no allegation that they had violated the statute or that they were threatened with any disciplinary action, but only that they desired to engage in acts of political management and in political campaigns. It was held by the majority of the Supreme Court that a desire of government employees to engage in the political activities forbidden by the controversial statute did not constitute a sufficient basis for a declaratory suit to determine the constitutionality of the Act. The Court held that the power of courts to pass upon the constitutionality of Acts of Congress arises only when the interests of litigants require the use of such judicial authority for their protection against actual interference. The Court said:[22]

> It would not accord with judicial responsibility to adjudge, in a matter involving constitutionality, ... except when definite rights appear upon the one side and definite prejudicial interferences upon the other .... Should the courts seek to expand their power so as to bring under their jurisdiction ill-defined controversies over constitutional issues, they would become the organ of political theories.

This question as to what is sufficient interest was considered by the Federal Supreme Court of Nigeria in Olawoyin v Attorney-General of Northern Region.[23] Part VIII of Northern

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22 Ibid., 90.

23 (1961) All Nigerian Law Reports 269. The Nigerian provision of "interest" was substantially the same as s. 97 of the Fiji Constitution.

Region, Children's and Young Persons Law 1958, prohibited political activities by juveniles and prescribed penalties for juveniles and others who were parties to certain specified offences. The plaintiff brought proceedings for a declaration that the part of the law in question was unconstitutional in that it contravened the provisions of the Constitution of 1954 protecting fundamental rights relating to private and family life, freedom of conscience and freedom of expression. By consent, pleadings were dispensed with. In the trial court it was stated that the plaintiff's evidence would be that he was the father of children whom he wished to educate politically. As a result there was a danger of his rights being infringed if the law were enforced even though no action of any kind had been taken against him under the law. The High Court dismissed the case upon the ground that no right of the plaintiff was alleged to have been infringed and that it would be contrary to principle to make a declaration in vacuo. The Federal Supreme Court held that only a person who is in imminent danger of coming into conflict with a law, or whose normal business or other activities have been directly interfered with by or under the law has sufficient interest to sustain a claim that the law is unconstitutional. The plaintiff in the instant case failed to allege or establish any such interest.

The above cases deal with circumstances where actual statutes were the subject of attack. However, it is submitted, the principles of locus standi discussed are of equal application in other cases where any infringement of the Constitution is concerned.

It is submitted that the principles applied in the above decisions would have also been applicable in Madhavan v Falvey.[24]

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24 Supra.

Section 97 of the Constitution specifies that the applicant (plaintiff) must show that his interests are being or are likely to be affected by such contraventions of the Constitution. Let it be assumed for present purposes, that the actions of the Deputy Speaker were in breach of section 57 (1) of the Constitution. How this contravention could affect or be likely to affect the interests of a member of the House (other than the Speaker) or an ordinary citizen of Fiji is, with respect, very difficult, if not impossible, to see.

The Court of Appeal, did advent to this subject and it did find that the restrictions of section 97 "would apply to the plaintiff in the present case, but he had made no claim in either the writ or the statement of claim of such prejudice or likely prejudice to his interests".[25] Yet the Court of Appeal did not dismiss the appeal on this most relevant ground. This aspect of the matter affected the very jurisdiction of the court in granting the declaration sought.

It is regrettable that neither the Supreme Court nor the defendants adverted to this vital matter. The jurisdiction of the Court depended on the presence or otherwise of the plaintiff's "interest". The proviso to section 97 (2) of the Constitution expressly prohibits the Supreme Court from making a declaration unless it is satisfied that the interests of the applicant or a party to the proceedings are being or are likely to be affected.

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25 Unreported judgement of the Court of Appeal, (1973), 14.

(2) Avoidance of Constitutional Issues:

In the United States of America it is well established [26] that the Court will avoid considering constitutional questions if there are other avenues open to dispose of the case. The principle has been stated:[27]

> When the validity of an act of the congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.

The American Courts have taken this view in determining questions relating to the interpretation of statutes without answering constitutional questions. In United States v Congress of Industrial Organization [28] the statute in question prohibited expenditures by labour organizations in connection with federal elections. The defendants were charged with having expended Union funds on the publication of a periodical which endorsed a particular candidate for the Congress. The trial judge dismissed the indictment on the ground that the statute was unconstitutional for violations of the First Amendment. The Supreme Court affirmed the order of

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26 See notes, "Supreme Court Interpretation of Statutes to Avoid Constitutional Decisions," (1953) 53 Colum, L. Rev. 633; Notes, "Avoidance of Constitutional Issues in Civil Rights Cases," (1948) 48 Colum. L. Rev. 427.

27 Crowell v Benson, 285 U.S. 22, 62 (1931). The classic formulation of this principle is found in the pronouncements of Mr Justice Brandeis in Ashwander v Tennessee Valley Authority 297 U.S. 288, 346 (1936).

28 335 U.S. 106 (1948).

dismissal on the ground that the circulation of the periodical was confined to the members of the Union to which the defendants belonged and that the statute did not make the distribution of the periodical within the membership of a labour organization an offence, so that a decision on the constitutional issue was not necessary. In fact Mr Justice Frankfurter seems to have thrown an open invitation to more frequent use of these methods suggested when he said, in admonishing counsel,[29]

> Again, the defendants did not urge, below, as is ordinarily the way of defendants, a construction of the statute which would afford them the rights they claim - but would secure those rights not by declaring an Act of Congress unconstitutional but by an appropriate restriction of its scope. On its own motion, this Court now gives a construction to the statute which takes the conduct for which the defendants were indicted out of the scope of the statute without bringing the Court into conflict with Congress ... I cannot escape the conclusion that in natural eagerness to elicit from this Court a decision at the earliest possible moment, each side was at least unwittingly the ally of the other in bringing before this Court far-reaching questions of constitutionality under circumstances which all the best teachings of this Court admonish us not to entertain.

The application of this principle of avoiding constitutional issues seems to have been based on two policy considerations.[30] First, there is the policy of judicial self-restraint whereby the Courts respect the judgement of the legislature in deciding upon the constitutionality of legislation. Secondly, there is a strong desirability of well considered constitutional decisions.

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29 Ibid., 128.

30 Notes "Avoidance of Constitutional Issues in Civil Rights Cases," loc. cit., 429.

> [There is] the fear that hasty opinions given in advance of the necessity for decision or in broader terms than required will tend to be ill-considered ones which, as precedents, will hinder and embarrass the court in subsequent cases. [31]

It was for this reason that in the United States the Supreme Court has generally limited the scope of the constitutional issue to that required by the facts of the particular case.

> To predetermine, even in the limited field,.. the rights of different sovereignties, pregnant with future controversies, is beyond the judicial function. The courts deal with concrete legal issues, presented in actual cases, not abstractions. The possibility of other uses of the coercive power of license, if it is here upheld, is not before us. [32]

Accordingly, it is regarded as desirable for parties in litigation involving constitutional matters to limit the scope of their issues.[33]

It is submitted that the question of avoidance of constitutional questions ought to apply not only in the actual interpretation and application of statutes but ought also to be of general and broad application in constitutional cases generally. In United States v Rumely[34] the House of Representatives adopted a resolution authorizing a committee to investigate all lobbying activities intended to influence legislation. A witness refused to disclose to

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31 Ibid., 430.

32 United States v Appalachian Electric Power Co. 311 U.S 377, 423 (1940).

33 United States v Congress of Industrial Organization 334 U.S. 106 (1948).

34 345 U.S. 41 (1952).

the committee the names of those who made bulk purchases of certain books for further distribution. He was convicted for contempt of the committee. The Supreme Court ordered a dismissal of the charge. The majority of five preferred to rest their decision on the ground that the investigation was limited to narrower issues than that embarked upon by the committee in relation to the witness. However, the majority did hold that:[35]

> Patently, the Court's duty to avoid a constitutional issue, if possible, applies not merely to legislation technically speaking but also to congressional action by way of resolution .... Indeed, this duty of not needlessly projecting delicate issues for judicial pronouncement is even more applicable to resolutions than to formal legislation.

Hence in any case involving a constitutional issue, it must first be seen whether the case can be disposed of without deciding on the constitutional issue. A decision on the constitutional issue ought to be a matter of last resort both because of its importance inasmuch as matters affecting the Constitution are very serious and because of the need wherever possible to avoid conflicts with the legislature.

Hence, it is submitted, in Madhavan v Falvey,[36] the Courts in Fiji could have very conveniently and satisfactorily disposed of the case by dismissing the claim on the ground that the plaintiff did not have sufficient "interest" within the meaning of section 97 of the Constitution. This would certainly have avoided the need

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35 Ibid., 45.

36 Supra.

for the Court's embarking on the constitutional issues. There is no doubt that declaring an act of the legislature unconstitutional is "the gravest and most delicate duty the Court can be called upon to perform".[37] The Fiji Courts not only ruled on the constitutional issues but, with respect, made pronouncements which were irrelevant and were otherwise open to criticism. This could easily have been avoided if the Courts had adopted the principle of United States' constitutional jurisprudence that in constitutional cases the courts must first ascertain whether the case can possibly be decided in such a way that the constitutional issue can be avoided. The Madhavan case could have been decided without reference to the constitutional issues involved.

(3) Judicial Reasoning

It is submitted that the actual reasons for dismissing the action by the Supreme Court and the Court of Appeal are open to criticism. The learned Chief Justice said (and the Court of Appeal agreed) that:[38]

> Assuming that the defendant acted contrary to the provisions of the Article 57 (1) and the Order it is for the House alone to pass upon his conduct so long as the rights of persons outside the House are not affected.

Section 57 (1) of the Constitution seems to have been treated as a

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37 Notes, "Supreme Court Interpretation of Statutes to Avoid Constitutional Decisions," loc. cit., 634.

38 Unreported judgement of the Supreme Court (1973), 10.

non-justiciable provision. The learned Chief Justice said:[39]

> Article 57 (1), like Order 10 of the Standing Orders of the House, recognizes the need for someone to preside over the House .... It concerns a matter of procedure and I can find nothing whatever in it to even suggest that its intention is to remove or diminish the power of a House of Parliament ... to manage and control its own internal proceedings.

Section 2 of the Constitution declares its supremacy over any other law. It states:

> 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.

The Speaker of the House cannot be removed from office, inter alia, unless the House passes a resolution supported by the votes of not less than two-thirds of all the members thereof requiring his removal from office.[40] Also, it has been seen that under the Constitution,[41] it is expressly provided that the Speaker "shall" preside at any sitting of the House. It is only if the Speaker is absent that the Deputy Speaker can preside.[42]

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39 Idem.

40 Constitution, s. 36 (3) (d).

41 Ibid., s. 57 (1).

42 However, it is pertinent to point out that in the actual incident culminating in "the Speaker Crises" whether the Speaker was "absent" within the meaning of s. 57 (1) of the Constitution when he was sitting in his own chamber is not the subject of the present enquiry. The present discussion is confined to the issues involved and matters raised by the Courts.

Section 54 (1) of the Constitution provides,

> Subject to the provisions of this Constitution 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, (emphasis added).

This section gives general powers to the House of Representatives (and the Senate) to regulate its own procedure but these powers must be exercised subject to the other provisions of the Constitution, as the opening words of the section specifically state. Section 57 (1) of the Constitution expressly provides that the Speaker or in his absence the Deputy Speaker shall preside at any sitting of the House. Therefore, it is submitted, the House cannot, without an amendment of the Constitution, regulate its own procedure or make rules for the conduct of its proceedings under section 54 which derogate from the provisions of section 57 (1).

> 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.[43]

If this principle is applied to the proceedings of the Fiji House of Representatives it is clear that, if the Speaker is not "absent", the Deputy Speaker can not preside and the House can not make provision for the Deputy Speaker presiding.[44] This being the case, it is impossible to accept, with respect, the correctness

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43 Bribery Commissioner v Ranasinghe [1965] A.C. 172, 197.

44 See n. 42, ante.

of the statement of the learned Chief Justice:[45]

> I can find nothing whatever in [s. 57 (1)] to even suggest that its intention is to remove or diminish the power of a House of Parliament in this Dominion to manage and control its own internal proceedings.

It is submitted that section 57 (1) was intended to "diminish" the power of the House to control its own internal proceedings at least in relation to the person who shall preside.

Accordingly, it is submitted, with respect, that both the Supreme Court and the Court of Appeal misconceived the justiciability of the breach of the provisions of section 57 (1) of the Constitution. In the instant case an ordinary member of the House had sought a declaration under section 97 but it is clear that his interests were not being and were not likely to be affected. But if the Speaker himself had applied for a declaration, the courts could not have decided that his interests were not affected. Nor could the courts have left the matter for the House itself to resolve. The Speaker would have satisfied the requirements of section 97 of the Constitution inasmuch as his interests would obviously have been affected. At the least his prestige and his privileges as the presiding officer of the House would have been involved. He would therefore have been a person whose interests were or were likely to have been affected within the meaning of section 97 of the Constitution. On the reasoning of the learned Chief Justice, that it was for the House to resolve the matter, the Speaker of the House can effectively be removed from office without the two-thirds majority required by the Constitution.

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45 Unreported judgement of the Supreme Court, 10.

This is obviously unacceptable. In a paradoxical statement, the Court of Appeal did hold that the basic requirements of section 57 (1) [46]

> that the Speaker, Deputy Speaker or elected Member shall preside are constitutional and if material business is transacted at a sitting of the House not so presided over it may be a contravention of the Constitution challengeable (by a person qualified) under Article 97. But the decision which of the persons mentioned shall preside is essentially one of internal procedure, which must necessarily be resorted to by the House in deciding the question. In that sphere the privilege mentioned continues to operate and the Courts may not inquire whether the House has interpreted the law correctly or not .... the rights of persons outside the House being unaffected, it was for the House alone to pass upon the conduct of the Deputy Speaker in assuming the Chair in the circumstances alleged.

The opening portion of the statement that a contravention of section 57 (1) is challengeable by a person qualified under section 97, with respect, is supported by the Constitution. But the latter part cannot be supported either by the Constitution or by logic. How in one breath can it be said that a matter is challengeable under section 97 and in the next breath say that it is a matter to be resolved by the House itself. If the question of the presiding officer is a matter for resolution by the House one might ask what was the necessity of not only providing in the Constitution for the presiding officer to be the Speaker and in his absence the Deputy Speaker but also protecting their tenure by providing that they may not be removed from office without a two-thirds majority.

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46 Unreported judgement of the Court of Appeal, 13.

On the reasoning of the Court of Appeal the Constitution could equally well have left the question of who shall preside in the House to the general powers of the House to regulate its own procedure.

The decisions in Madhavan v Falvey demonstrate how dangerous it can be for the Courts to follow too slavishly English precedents and common law rules without paying regard to the particular circumstances of Fiji. Fiji with its written Constitution is in this respect in a similar position to Western Nigeria of which Viscount Radcliffe stated:[47]

> (I)t must be remembered that, as Lord Bryce once said, the British Constitution 'works by a body of understandings which no writer can formulate'; whereas the Constitution of Western Nigeria is now contained in a written instrument in which it has been sought to formulate with precision the powers and duties of the various agencies that it holds in balance. That instrument now stands in its own right; and while it may be useful on occasions to draw on British practice or doctrine ... it is in the end the wording of the Constitution itself that is to be interpreted and applied, and this wording can never be overridden by the extraneous principles of other Constitutions which are not explicitly incorporated in the formulae that have been chosen as the frame of this Constitution.

It has been seen[48] that the lex et consuetudo parliamenti apply exclusively to the Houses of Lords and Commons in the United Kingdom and do not apply to the supreme legislature of a Dominion by reason of the introduction of the common law there.

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47 Adegbenro v Akintola [1963] A.C. 614, 631. (Emphasis added).

48 Pp. 292 et seq., ante.

Although Commonwealth legislatures resemble the English Parliament in many respects the legislatures of colonies and self-governing states of the Commonwealth have no 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.[49] In particular Dominion legislatures, such as that of Fiji, have no inherent powers to commit for contempt. This has been well established by Privy Council and other decisions.[50] Yet surprisingly, the Court of Appeal in Madhavan v Falvey observed that "the power to punish for contempt" is an "established privilege" of the House of Parliament in Fiji. When there is no statutory provision dealing with such a privilege, how the Court of Appeal could make such an observation in view of clear judicial authorities to the contrary is difficult to explain. The only explanation that may be given is that the Court of Appeal seems to have slavishly followed writings and precedents pertaining to the English Parliament without considering whether they necessarily applied to Fiji.[51]

Be that as it may, the Courts should have heeded Viscount Radcliffe's warning and considered the relevance of English precedents and writings to Fiji where the Constitution must be taken as the primary and fundamental source of authority. English precedents and principles can be taken only as general guides.

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49 Kielly v Carson (1842) 4 Moo. P. C. 63, and see generally pp. 292 et seq., ante.

50 See pp. 292 et seq., ante.

51 For a fuller treatment of this subject see Ch. VIII, ante.

Ultimately, it must be the Constitution which prevails.

D. Conclusion

This crisis and the judicial decisions which followed serve as a grave warning for the future of the Fiji Constitution. The actions of the government members, in physically taking over the control of the legislative chamber, on 5 April leave them open to criticism. On that occasion might was right and the government of the day was able to proceed despite the Standing Orders of the House of Representatives, and, in view of the decision in Madhavan v Falvey, in spite of certain provisions in the Constitution. Rule 41 (1) of the Standing Orders of the House of Representatives provides:

> The Speaker shall be responsible for the observance of the rules of order in the House and in committee of the whole House. His decision on a point of order shall not be open to appeal and shall not be considered by the House except upon a substantive motion made after notice.

It is not contended for a moment that the Speaker acted correctly in adjourning the House sine die in the face of a clear vote to the contrary. However, his ruling should have been challenged by a substantive motion made under the Standing Orders and not by occupying the chamber. The actions of the governing party appear to be undemocratic and leave an impression of intimidation and a threat to the office of the Speaker. In regard to the Speaker of British Parliament Sir Ivor Jennings declared:[52]

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52 Parliament (2nd ed., 1957), 63.

> The House takes great care to maintain and even to enhance his prestige.

And further:[53]

> (T)he ordinary interpretation of the rules and customs of the House is the function of the Speaker himself, and he will allow no debate or criticism of his decision except on a formal motion.

It is sincerely to be hoped that the actions of the government members during the crisis will be taken as an exceptional isolated incident best buried in the ashes of history. Parliamentarians ought to be the champions of law and order and ought to endeavour to enhance the rule of law. Their conduct should not be seen as contributing to anarchy and disorder.

The courts in Fiji, judged by the reasoning adopted in the judgements in Madhavan v Falvey[54] have slavishly copied the English rule without sufficient regard for the nature and express provisions of the Fiji Constitution. In copying the English rule the courts have abdicated all too easily their responsibilities under the Constitution. The courts should be encouraged to eschew a narrow positivist analysis in favour of a more constructive view of their function and thereby make a reality of their guardianship of the Constitution. Because the judiciary was intended to be the guardians of the Constitution judges must be more assertive. No matter how strong or powerful a government is, it will not be able to breach the Constitution if the judiciary

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53 Ibid., 69.

54 Supra.

lives up to expectations by exercising its powers of judicial review and thereby demonstrating the supremacy of the Constitution in Fiji.

Judicial self-restraint in relation to the "proceedings in Parliament" as shown in the United Kingdom cannot be automatically followed in Fiji. The history and traditions of Parliament in the United Kingdom make it unique within the Commonwealth.[55] Fiji's written Constitution and the doctrine of judicial review make the position different in Fiji. The Courts have the responsibility for giving the provisions of the Constitution a construction conducive to the attainment of its intended objects. Judicial self-restraint should not be shown where the Constitution clearly cast the judiciary in an active role of keeping a check on the exercise of the powers and functions of the executive and legislature. This must be done fearlessly by asserting the independence of the judiciary from the other branches of government. It can do this by declaring its responsibility for interpreting the written Constitution and its intention not to be bound by English precedents and traditions.

It must of course be conceded that one case does not furnish evidence from which one can deduce the existence of a pattern of behaviour in constitutional cases. Nevertheless, it does indicate the need for care. The reasoning adopted gives the impression that the judges must make the Constitution a dynamic living institution, to be construed according to the needs of the people of Fiji. If this is done the warning sounded by Viscount Radcliffe in Adegbenro v Akintola[56] will not go unheeded.

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55 See pp.159 et seq., ante.

56 [1963] A.C. 614, 631; see n. 47 p.696, ante.

CHAPTER XIX

CONCLUDING OBSERVATIONS

A. The Communal Question:

Prior to cession on 10 October 1874 there was a period of agitation and chaos with perennial tribal wars and conflicts. After 1874 the significant events were no longer the result of battles but of institutional progressions. The country experienced in turn the various phases of constitutional development culminating in independence on 10 October 1970.

It is apparent that throughout Fijian constitutional history racial consciousness played an influential, if not, decisive, role. At the turn of the century the Europeans successfully demanded the franchise and specifially requested that neither the Fijians nor the Indians be given any representation. In 1905, however, the British Government allowed Fijian representation in the form of two nominees of the Governor. It was not until 1929 that the Indians were first enfranchised.

Soon after 1929 the Indians, relying on the Salisbury Despatch,[1] sought the establishment of a common roll. This sprang not from any desire to dominate the other races or to break links with the Crown but from a wish for equality with the other races, particularly the Europeans. This aim was achieved by the 1937 Letters Patent and the Indian community was, accordingly, content.

In the 1960's the Federation Party, which was pre-dominantly Indian, renewed the demand for a common roll on the basis that an inequitable situation had arisen under colonial rule in that representation of the three major races in the Legislative Council had become quite disproportionate to their actual numbers.[2] It was

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1 The Secretary of State for India, Public (Emigration) No. 39, Despatch to India of 24 March 1875, para 18, which read thus:

> Above all things, we must confidently expect as an indisputable condition of the proposed arrangement, that the Colonial laws and their administration will be such that Indian settlers who have completed the terms of service to which they agreed as the return for the expense of bringing them to the Colonies, will be in all respects free men, with privileges no while inferior to those of any other class of Her Majesty's subjects resident in the Colonies.

2 See Council Debates (1965), 630-642 and (1967), 612-614.

also argued that political integration would be best achieved by a common roll system with "one man, one vote, one value".

From the outset, both the Europeans and the Fijians opposed the introduction of a common roll. The main objection was seemingly the fear of Indian predominance. In the mid-sixties, the Alliance Party's[3] policy was to oppose the immediate introduction of a common electoral roll but to support it in principle as a long term objective. There was no definition of 'long term'.

In Fiji, as in any multiracial society, it is only natural that each race should fear the infringement of its rights or action prejudicial to its interests[1] by government action especially if one race is the ascendant. From the inception of British colonial rule racial consciousness was fostered strongly and it became a fact of life in Fiji. Racial stresses permeated all aspects of education, economics, politics and society. Europeans, Fijians and Indians saw themselves as distinct races with negligible political or social intercourse. Until recently, little thought, if any, was given to the training of political leaders in racial tolerance and multiracialism. It was not until the mid-sixties that political parties traversing racial boundaries came into existence.

Although a generalisation, it is nevertheless true that despite the achievement of statehood, there is little positive feeling of nation hood amongst all the races living in Fiji. The only common factor seems to be their residence in the same country. There is significant diversity and little integration in race, culture and economic interests and other attributes usually associated with the existence of a nation. The indigenous Fijians regard themselves as the true heirs and owners of the country, forced by circumstances to make some concessions to the "aliens" but never relinquishing the conviction that Fiji is properly theirs. Then there are the Indians, Europeans and Chinese who were born in Fiji or have otherwise put down roots there, they too regard Fiji as their homeland. In fact in the case of a great majority of the Indians and some Europeans and Chinese, three or four generations of their ancestors were born and lived in Fiji. These non Fijians are still

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3 It is the party presently in power.

predominant in the industries, trade, business and the professions in the country.

There is however little gain and perhaps positive harm in lamenting the past from which Fiji has emerged as a state. It must now be accepted that Fiji will always have a plural society. The common aim must be the building of Fiji as a multiracial nation in which the identity and culture of each race can be retained.

B. Towards a New Electoral Equilibrium[4]

Constitutions are the product of political forces and reflect, or can be changed to reflect, the feeling, capabilities and aspirations of a particular society at a particular time. A constitution cannot be divorced from the society it governs.

> Representative institutions of the world have reached no final or definite form. Conditions vary from country to country and from continent to continent, exposing each, in their own sphere, special and particular limitations in the parliamentary system. The history of modern constitutional development is one continuous record of attempts to adjust accepted parliamentary practice to the realistic requirements of a social and economic progress. It is no longer enough to criticise a constitution on the debatable grounds of political theory without explaining the peculiarities of its environment.[5]

A constitution is not just a document in solemn form. It is a living framework for the government of a people exhibiting a sufficient

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4 A Royal Commission has been appointed under s.67(4) of the Constitution to make recommendation as to the most appropriate method of electing members of the House of Representatives. The members of the Commission are Professor Harry Street (Chairman), Sir William Hart and Professor Brian Keith-Lucas. The Commission heard submissions from the interested parties in Fiji in August 1975 and has returned to England to prepare the report which is expected to be presented to the Governor-General before the end of 1975: Fiji Times, 5 September 1975.

5 Donoughmore Report of 1928 on Ceylon: Cmd. 3131 (1928), 19.

degree of cohesion. A satisfactory system of government is not the product of a particular constitutional solution but a reflection of the capacity of the people of the country and their political responsibility. As Lord Bryce aptly observed, a people must not be given institutions for which it is unripe in the simple faith that the tool will give skill to the workman's hand.[6]

No constitution can function in any country where people are at odds with one another. "There must be some binding elements of unity in outlook which constitutes the real constitution."[7] National unity is a fundamental requirement for the viability of any constitution. There must be a feeling of common belonging and love for the political community. For most of the newly independent countries today, Fiji included, the basic problem is the creation of this sense of national unity.

Under normal circumstances a common electoral roll with one man, one vote and one value would cut across ethnographic boundaries. Its adoption in Fiji at this stage would, however, not be realistic owing to the absence of a national outlook as opposed to a racial one. Before such a system of national elections can be introduced the peoples of Fiji must learn to think of the country as a whole rather than in terms of racial advantage. The transition can only be gradual and must evolve rather than be imposed by sudden radical changes; the process necessarily involves changes in attitudes. The law is no complete panacea for the ills of society; but where individuals have freedom of choice, the law can influence though not determine their choice.

Attitudes can be effectively conditioned by an electoral system which discourages appeals on communal or racial lines. Any change must not be radical and yet be a progressive step towards the ultimate goal of political integration. Accordingly it is submitted that all

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6 Modern Democracies (1921) Vol. II, 562-563.

7 C.J. Friedrich, Constitutional Government and Democracy (revised, 1949) 164.

communal rolls should be abolished. In their place there ought to be one national roll with a certain number of seats in the House of Representatives reserved for each communal group as in the current system.[8]

1. The Number of Seats

At present the House of Representatives comprises twenty-two Indian seats, twenty-two Fijian seats and eight "others". From the viewpoint of population strengths[9] the number accorded these "others" is seemingly inequitable but in view of their signficant investment in and control of the major industries, any reduction in their representation directly proportionate to their numbers would also be unfair. The number of seats allocated to the Indians and the Fijians is justifiable in that the two races form the bulk of the population and are approximately equal in number.

It is submitted that the Indian and Fijian representation ought to remain at twenty-two each but that of the "others" ought to be reduced from eight to five. The repeated claim that the Fijians should have the greatest representation does not seem to take into account that Fijian interests are more than adequately safeguarded by the entrenched provisions of the Constitution[10] pertaining to their land, customs and culture.

2. National Appeal

If all the voters are on one electoral roll as suggested, the country will have two sets of constituencies - one for the Fijians and Indians and one for the "others". There would be no differences in constituency boundaries of the Indian and Fijian members since their numbers would be the same.

Any incentive to appeal to ethnic sentiments would be kept to a minimum if the communal rolls were abolished since electoral policies

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8 As to the meaning of "communal" and "national" rolls, see p.114 , ante.

9 See p.3, ante, for the population figures of the last census in 1966 and the estimated figures of 1974.

10 Ss.67 and 68.

would necessarily have to attract voters of all races in order to succeed at the polls. Racialism and communalism would be relegated to insignificance, thus allowing the interests of the country and the people as a whole to come to the fore.

The demographic pattern would result in a preponderance of Fijians or Indians, as the case may be, in a few constituencies but such imbalances would be exceptional. Any dangers of these centres becoming bastions of communalism are more apparent than real. Political parties would place a premium on non-racial appeals by their candidates as the parties' success in other constituencies would otherwise be adversely affected. In any case where this inherent check failed and extremist candidates were elected, their numbers would be so few as to be inconsequential.

It is submitted that this suggestion of a national electoral roll would be a good workable compromise between the proponents of the immediate introduction of a common electoral roll with one man, one vote and one value and those who accept the eventual advent of a common roll but only as a long-term objective. More importantly, this interim arrangement would foster, albeit subconsciously, the development of a national outlook amongst the peoples of Fiji.

3. Referendum

The two major constitutional changes that were made in Fiji in 1966 and 1970 were brought about by the British Government after consultations with the country's political leaders. The deliberative sessions both in Fiji and at the constitutional conferences in London were in camera. The people as a whole were given little opportunity, if any, to make a constructive contribution or have any direct say in such vital matters.

In contrast, Western Samoa's progress towards independence included a constitutional convention in 1954 which was followed by the appointment in 1959 of a working committee to draft a Constitution. In 1960 there was a second constitutional convention whose one hundred and seventy-five members included persons who were not members of the Assembly but who nevertheless represented a wide range of interests.

Then in May 1961 a plebiscite was held in which the adult population were asked two questions:

(a) whether it agreed with the Constitution and

(b) whether it agreed that the country should become independent on the basis of that Constitution.

The response was an overwhelming "yes" to both questions. It could therefore be said that it was a Constitution of the people and by the people.

Admittedly the present Fiji Constitution is a fait accompli and we can only look to the future. It is accordingly suggested that any major constitutional change to come, whether in the electoral system or any other sphere, must be referred to the people. The best way to achieve this is to have a referendum on the issue.

> The (constitutional) change should not far outstrip nor should it lag behind public opinion. It should if possible, anticipate by a small margin public demand.[11]

The referendum should be held before the matter is finally debated in Parliament. If the issue involves changes to the electoral system, the views of each community (Fijian, Indian and 'others') should be recorded separately to ensure a proper analysis. Although Parliament will not be bound by the plebiscite, the results would provide a sound measure of public opinion.

C. The Land Issue[12]

Land is possibly Fiji's most pressing problem. At least eighty-three per cent of all land in Fiji is under the direct control of Fijians. The great majority of the Indians depend upon land for their livelihood. Hence the land question has inevitably become a communal and constitutional issue. This was one of the matters which

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11 Mr J.N. Falvey, the present Attorney-General of Fiji, Council Debates (1959), 101.

12 See p.10, ante.

the Fijian leaders have been very cautious about when discussing or agreeing to any constitutional change. As has been seen, the Fijians enjoy entrenched constitutional safeguards in relation to their land, customs, culture and way of life.[13] Unless the Council of Chiefs agrees to a measure affecting Fijian land, no legislation can be passed. Accordingly, it is submitted, it is imperative for any solution to the land question to be found that the leaders generally, and the Indian leaders in particular, must approach the Council of Chiefs in a neutral non political context. An amicable solution is the only answer. It is hoped that the leaders would refrain as far as possible from using the land issue as a political football and recognise the futility of doing so.

There is no doubt that there are thousands of acres of land lying idle or not put to full economic use. The country's economy is suffering tragically. The Fijian land owning units are losing a great deal by not utilising their lands or allowing others to do so. Also those lands which have only a short unexpired term for their lease are being exploited to the maximum by the tenants who are mostly Indians. Because these tenants have no security of tenure, they are understandably not interested in the future fertility of the soil. They see the whole matter on a short term basis.

The whole country is the loser. A solution cannot be found in Parliament or on the political platform. The answer lies in good sense and mutual understanding between the Council of Chiefs representing the Fijians, and Indian leaders representing the Indians.

D. The Judiciary

Since the Constitution is very new to the country, the judiciary has a very important role to play. The judiciary owes the government and the people of Fiji a duty to develop the Constitution and make it effective. There is much to be learnt by the people and the

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13 Constitution, ss.67 and 68. Ironically the National Federation Party, which was predominantly an Indian Party at the time of the 1970 Constitutional Conference, seems to have created the special position of the Fijian people; see p.644, ante.

government alike from the decisions of the courts. If the courts administer justice as expected, both the people and the government would be more conscious of their functional and civic responsibilities. Although the government may in the ultimate have its way through legislative measures to nullify an inconvenient and embarrassing decision, the judiciary must nevertheless assert and demonstrate that they are the guardians of the Constitution and of the liberties of individuals. By upholding the sanctity of the Constitution the judiciary can serve the interests of the governors and the governed alike. It can be asserted with confidence that the linchpin of the Fiji Constitution is and can only be the judiciary.

The area of the Constitution in which the courts will have most opportunity for developing the law is in the field of fundamental human rights under chapter II of the Constitution. These rights are not absolute. Most of the provisions establishing these rights make them subject to certain derogation clauses. A striking example in where derogations are "reasonably justifiable in the democratic society" in the interest of defence, public safety, public order, public morality or public health. This area is a completely new one for the courts in Fiji. It will be one of many areas which will involve the courts in political questions, thereby providing a testing ground for the indispensible qualities of strength and independence in the judiciary. The courts are the citadel of the liberty of man.

The entrenched provisions and the fundamental human rights guaranteed by the Constitution can only be safeguarded by the courts. In a world where pressures have led to guided democracy and to despotism, the courts have traditionally pointed to dangers and protected individuals from arbitrary governmental acts. The courts in Fiji will have to consider the structure and character of the Fiji society in applying rules pertaining to fundamental rights. In providing safeguards for individual liberty the courts should not necessarily transfer traditional concepts of English law. The courts will have to think anew about the structure and character of Fiji society.

The warning of Lord Lugard may be apposite:[14]

> Institutions and methods in order to command success and promote the happiness and welfare of the people, must be deep-rooted in their tradition and prejudices ... a slavish adherence to any particular type however successful it may have proved elsewhere, may, if unadapted to local environment, be as ill suited and as foreign to its conceptions as direct British rule would be.

The Constitution is a permanent and living document which the judiciary must adapt to the needs and problems of an ever evolving, if not ever changing society. The difficulty in amending the Constitution must represent a standing temptation to the courts to make their own contribution and to discover powers, immunities, instrumentalities and ancillary authority which may not always easily be found in the Constitution. In discharging its function of judicial review of legislation, the court forms

> a deliberate check upon democracy through an organ of government not subject to popular will. [But] the judges of the Supreme Court are, in a sense, the embodiment of the reason of the body politic empowered to act as the guardians and final interpreters of the fundamental laws, by the original and supreme will of the people which created them.[15]

Not only in the field of fundamental rights but in other matters also, the courts will have a creative role to play. For instance, what principles of interpretation will the courts follow and develop? Will the courts shift from the emphasis of judicial precedents to a position of pragmaticism?

The political society existing in Fiji is a dynamic and progressive one. It is hoped that the courts will not close their eyes to the realities of life and will not adhere to a legalistic

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14 The Dual Mandate in British Tropical Africa (1922), 211.

15 E. Cahn (editor), Supreme Court and Supreme Law (1954), 81.

approach to matters which require urgent settlement. The courts must administer justice, particularly in the constitutional field, irrespective of the fact that their decisions may be embarrassing to politicians. The courts in Fiji must be careful not to get the reputation of the Nigerian courts of whom it was stated that[16] "in Nigeria the courts seldom ruled against the government and never in election cases." The Courts must be guided by the words of the Constitution and not by English conventional rules.

It is very important that the courts should jealously guard against any attempt to oust judicial review of legislative or executive measures. The courts must tear any facade behind which the legislature and the executive may take refuge to erode slowly the fabric of the Fiji Constitution. Balewa v Doherty[17] provides a striking example.

The Constitution of Fiji is barely five years old. In Fiji the judges and the lawyers alike have been principally bred in the English tradition and jurisprudence of the sovereignty of Parliament. But, as has been seen, in Fiji the written constitution is supreme. Hence the judges have the unenviable but vital task of adapting to the new order and reject the English tradition where judicial review of legislation is unheard of. The duty of the judiciary to infuse the spirit of constitutionalism in the country has been aptly summed up by Henry J. Abraham thus:[18]

> Nonetheless, the Supreme Court ... must play its role as educator and arbiter - it must remain true to its function as teacher in an eternal national constitutional seminar. No other branch can fill that role. It acts, in the words of one commentator, 'as the instrument of national moral values that have not been able to find other governmental expression.' It defines values and proclaims principles, and - as our 'sober second thought' is the natural forum in our society for the individual and for the small group. Thus it is the greatest institutional safeguard we possess .... [It is] our national conscience as well as our institutional common sense.

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16 C. Palley, "Rethinking the Judicial Role" (1969) 1 Zambia L. Journal 1, 4.

17 [1963] 1 W.L.R. 949. See p.270, ante.

18 H.J. Abraham, The Judiciary (2nd. ed., 1969), 117.

D. The Westminster Model

Democracy in Fiji is essentially modern British parliamentarism applied to various social circumstances. Fiji has the Westminster model constitutional system with two Houses of Parliament and where the head of state is not the effective head of government. The effective head of government is the Prime Minister presiding in a Cabinet composed of Ministers over whose appointment and removal he has a substantial measure of control. The government is parliamentary as Ministers must be members of the legislature; and the Ministers are collectively and individually responsible to a freely elected House of Representatives. Despite the adoption of the Westminster model and section 1 of the Constitution which states, "Fiji shall be a sovereign democratic state", there is only limited democracy in the country. The elected representatives of the people cannot pass any legislation they wish even if all (and not merely a majority) of the elected member of the House of Representatives agree. Legislation pertaining to Fijian land, customs and customary rights must secure, inter alia, the approval of six of the eight members of the Senate appointed on the advice of the Great Council of Chiefs. If all the 52 members of the House of Representatives and 19 of the members of the Senate agree to a measure affecting Fijian land, custom or customary rights and the three dissentors in the Senate are nominees of the Council of Chiefs, the measure cannot be adopted.

It has also been seen that the Governor-General has an effective power of veto. A measure cannot become law until it has been assented to by the Governor-General who has the constitutional right to refuse assent. It is submitted that such wide powers ought not to be reposed in one person with the silent hope that they will not be exercised. The English convention seems to have been slavishly incorporated in the Fiji Constitution. It is contended that safeguards ought to be provided in the event of a refusal of assent by the Governor-General. It is submitted that if a measure which is not assented to by the Governor-General is again passed by the two Houses of Parliament by a two-thirds majority,[19] then the measure should become law if the assent is not forthcoming.

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19 Of course otherwise complying with the entrenched provisions of the Constitution.

The exercise of other functions of the Governor-General under the Constitution should also be made subject to judicial review. If the constitutional powers are to be exercised in accordance with democratic principles, then the court, as final arbiter, must be given the powers to adjudicate upon and review all such matters. The Constitution seems to have incorporated certain other conventional rules of the British system which regrettably have not been made subject to judicial review. The actions of the elected legislature have been made subject to judicial review. There does not appear any cogent reason why the actions of an appointed officer should not also be subject to review. However, it must be made clear that although it has been recommended that the Governor-General should be deprived of some of his unchallengeable powers and authorities, it is not the writer's intention to suggest that the office should be abolished.

In the election of the House of Representatives, the Fiji Constitution has followed the English principle of having a general election of all the members of the House at one time. It is submitted that this system should be changed in Fiji. The practise should be the same as is followed in the nomination of the members of the Senate where eleven of the twenty-two members retire every three years.

At present the members of the House of Representatives are elected for a term of five years, the position in the United Kingdom. It is submitted that the term ought to be extended to six years with one third of the members retiring every two years. If we are to have an educated electorate, interest in politics should not be sporadic but continuous. There should be a parliamentary election in seventeen constituencies every second year. If we have about one third of the members retiring every two years the electors would have a better opportunity to make choices and decisions. They would have greater opportunities to appreciate exactly what the election is about.

Such a system as suggested would be more effective test for the propaganda of the political parties. The government and the opposition parties would have beeter opportunities to explain their respective programmes. The electorate would have better opportunities to understand the alternatives. The government party would have to be on its toes all the time. It would have to carry out a policy which it knew would be approved of by the electorate. There would be stronger chances of

"honest" governments. The Minister of Finance would be less in danger of being tempted to introduce vote-catching instead of "honest" budgets. The election promises would have to be geniune and meaningful. The fear of the government being toppled by the electorate in two years time would be a very strong check on the government. The government would not be able to feel that it is secure for five years and forget about the electorate.[20] As Emrys Hughes has said,[21]

> What we need is more alert and more progressively-minded Governments and a better educated and better informed electorate.

As far as the Senate is concerned, it is hoped that it is made a functional chamber rather than a place to reward party stalwarts. The ills and dangers of the present method of appointment to the Senate has been examined.[22] It is also hoped that the Senate will be made of greater use by having its members contribute more effectively and constructively than it is being done today. An instance is the use of joint select committees of both Houses of Parliament.

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20 E. Hughes, Parliament and Mumbo-Jumbo (1966), Chap. 22.

21 Ibid., 193.

22 See pp.650, et seq., ante.

APPENDIX I

EXTRA-TERRITORIAL LEGISLATION

AND THE

STATUTE OF WESTMINSTER

The report of the 1929 Conference on the Operation of Dominion Legislation[1] which was approved by the Imperial Conference of 1930,[2] stated, in relation to legislation having extra-territorial effect;[3]

> The subject is full of obscurity and there is conflict in legal opinion as expressed in the Courts and in the writings of jurists both as to the existence of the limitation itself and as to its extent. There are differences in Dominion Constitutions themselves which are reflected in legal opinion in those Dominions. The doctrine of limitation is the subject of no certain test applicable to all cases, and constitutional power over the same matter may depend on whether the subject is one of a civil remedy or of criminal jurisdiction. The practical inconvenience of the doctrine is by no means to be measured by the number of cases in which legislation has been held to be invalid or inoperative. It introduces a general uncertainty which can be illustrated by questions raised concerning fisheries, taxation, shipping, air navigation, marriage, criminal law, deportation, and the enforcement of laws against smuggling and unlawful immigration. The state of the law has compelled legislatures to resort to indirect methods of reaching conducts which in virtue of the doctrine, might lie beyond their direct power but which they deem it essential to control as part of their self-government. It would not seem to be possible in the present state of the authorities to come to definite conclusions regarding the competence of Dominion Parliaments to give their legislation extra-territorial operation; and, in any case, uncertainty as to the existence and extent of the doctrine renders it desirable that legislation should be passed by the Parliament of the United Kingdom making it clear that this constitutional limitation does not exist.

The uncertainty in the law had arisen from the decision of the Privy Council in Macleod v Attorney General for New South Wales.[4] It is submitted that this was the only semblance of authority[5] for the

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1 Cmd. 3479 (1929).

2 Cmd. 3713 (1930) 18.

3 Cmd. 3479 (1929) paras. 38 and 39 (emphasis added).

4 [1891] A.C. 455.

5 There is of course the case of R v Lander [1919] 38 N.Z.L.R. 405. However, as far as Lander is concerned, the relevant facts were very similar to the case of Macleod which greatly influenced the majority of the New Zealand Court of Appeal, despite a very strong dissenting judgment of Stout C.J. As Edwards J. said at p.189: "In my opinion this case is governed by the decision of the Judicial Committee of the Privy Council in Macleod v Attorney General for New South Wales." Accordingly, it is submitted, that Lander stands or falls with Macleod.

theory that a Dominion Parliament could not make laws with regard to acts done beyond its borders. This decision calls for close examination.

Macleod was charged with and convicted of bigamy under a colonial statute of New South Wales which stated:

> Whosoever being married marries another person during the life of the former husband or wife, wheresoever such second marriage takes place, shall be liable to penal servitude for seven years.

The first marriage had taken place in New South Wales and the "bigamous marriage" in Missouri, United States of America, after a divorce, which the Colonial Court could not recognise. After conviction, Macleod appealed to the Privy Council. The Privy Council held that the words of the above statute must have been intended to apply to persons actually within the jurisdiction of the legislature and consequently the conviction was quashed.

It is submitted that Macleod's case turned on the construction of a statute. Thus Lord Halsbury L.C. after setting out the material terms of the section said,[6] "In the first place, it is necessary to construe the words 'whosoever' .... The next word which has to be construed is 'wheresoever'." His Lordship then continued:[7]

> Therefore, if their Lordships construe the statutes as it stands, and upon the bare words, any person, married to any other person, who marries a second time anywhere in the habitable globe, is amenable to the criminal jurisdiction of New South Wales, if he can be caught in that Colony. That seems to their Lordship to be an impossible construction of the statute.

His Lordship also placed reliance on the principles of construction affecting the principles of international law. Under the general rules of interpretation of statutes, there is a presumption against a violation of international law. Under the general presumption that the legislature does not intend to exceed its jurisdiction, every statute is interpreted, so far as its language permits, so as not to be inconsistent with the

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6 [1891] A.C. 455, 456.

7 Ibid., 457 (emphasis added).

comity of nations or the established rules of international law, and the court will avoid a construction which would give rise to such inconsistency unless compelled to adopt it by plain and unambiguous language.[8] His Lordship stated:[9]

> [T]heir Lordships do not desire to attribute to the Colonial Legislature an effort to enlarge their jurisdiction to such an extent as would be ... indeed, inconsistent with the most familiar principles of international law. It therefore becomes necessary to search for limitations, to see what would be the reasonable limitation to apply to words so general.

It is a well settled law, and it was so settled before the above decision of the Privy Council, that at least in a penal statute, general words will not be given an extra-territorial operation unless an intention to give such an operation to the statute appears expressly or by necessary implication. Thus all references in such statute to persons, acts, or things will prima facie be restricted to persons, acts and things within the territorial limits of the jurisdiction of the legislature.[10] This rule, it is submitted, is applicable to the Imperial Parliament and Colonial or Dominion Parliaments alike.[11] Thus in the Trial of Earl Russell[12] the legislation of the Imperial Parliament expressly provided, "whether the second marriage shall have taken place in England or Ireland or elsewhere."

The Privy Council in the Macleod case held, therefore, that "Whosoever being married" must be read as:[13]

> Whosoever being married, and who is amenable, at the time of the offence committed, to the jurisdiction of the Colony of New South Wales.

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8 Bloxham v Favre (1883) 9 P.D. 101, 103; per Sir James Hannen P.; see also P.B. Maxwell, The Interpretation of Statutes (12th ed., 1969) 183-186.

9 [1891] A.C. 455, 457.

10 Maxwell, op. cit., 173-175.

11 Idem.

12 [1901] A.C. 446.

13 [1891] A.C. 455, 457.

Thence in interpreting the words "Wheresoever" Lord Halsbury L.C. agreed that:[14]

> When it is remembered that in the Colony ... there are subordinate jurisdictions, some of them extending over the whole Colony, and some of them, with respect to certain classes of offences, confined within local limits of venue, it is intelligible that the 54th section may be intended to make the offence of bigamy justiciable all over the Colony, and that no limits of local venue are to be observed in administering the criminal law in that respect. 'Wheresoever', therefore, may be read 'Wheresoever in this Colony the offence is committed'.

It is submitted that the decision of the Privy Council is one based purely on statutory interpretation. After giving the substantive ruling as to the interpretation to be placed on the two vital words "whosoever" and "wheresoever" upon which the case really turned, Lord Halsbury added:[15]

> Their Lordships think it right to add that they are of opinion that if the wider construction had been applied to the statute, and it was supposed that it was intended thereby to comprehend cases so wide as those insisted on at the bar, it would have been beyond the jurisdiction of the Colony to enact such a law. Their jurisdiction is confined within their own territories, and the maxim ... 'Extra territorium jus dicenti impune non paretur', would be applicable to such a case.

Moreover, as his Lordship, stated:[16]

> All crime is local. The jursidction over the crime belongs to the country where the crime is committed, and, except over her own subjects, Her Majesty and the Imperial Legislature have no power whatever. It appears to their Lordships that the effect of giving the wider interpretation to this statute necessary to sustain this indictment would be to comprehend a great deal more than Her Majesty's subjects; more than any persons who may be within the jurisdiction of the Colony by any means whatsoever; and that, therefore, if that construction were given to the statute, it would follow as a necessary result that the statute was ultra vires of the Colonial Legislature to pass. Their Lordships are far from suggesting that the Legislature of the Colony did mean to give to themselves so wide a jursidction.

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14 Idem.

15 Ibid., 458.

16 Idem.

It is submitted that his Lordship equates the position of the Imperial Parliament with that of a Colonial legislature. It seems that the Privy Council felt the Imperial Parliament would have been under a similar disability to the Colonial legislature in matters relating to criminal law. The above passage, it is submitted, is limited to criminal law in as much as the passage begins specifically with the subject of criminal law and the whole judgment was concerned with this subject. His Lordship stated that except over British subjects, the Imperial Legislature had "no power whatever" over crimes committed overseas. It seems his Lordship saw this as a "well known and well considered limitation"[17] which was common to the Imperial Parliament and Colonial Legislature alike. Thus he concluded:[18]

> The more reasonable theory to adopt is that the language was used, subject to the well known and well considered limitation, that they were only legislating for those who were actually within their jurisdiction, and within the limits of the Colony.

It is relevant to look at the English law at that time. At that time it seems to have been reasonably well settled that in criminal law unless the statute expressly provided otherwise crimes committed abroad was not triable in the United Kingdom. Thus it had been held in R v Dubruiel[19] (before the decision in Macleod), that an indictment for larceny in Guernsey was not triable in the United Kingdom. Consequently in relation to bigamy the corresponding English statute specifically provided that only British subjects could be convicted in England (or Ireland) of bigamous marriages contracted outside the Queen's domains.[20]

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17 Ibid., 459.

18 Idem. (emphasis added).

19 (1861) 11 Cox C.C. 207; See also Cox v Army Council [1963] A.C. 48, 67, per Viscount Simonds,"Apart from those exceptional cases in which specific provision is made in regard to acts committed abroad, the whole body of the criminal law of England deals only with the acts committed in England." Debruiel, supra, was followed in R v Smith [1962] 2 Q.B. 317.

20 Thus after providing for the offence of bigamy the statute states:

> Provided that nothing in this section contained shall extend to any second marriage contracted elsewhere than in England and Ireland by any other than a subject of Her Majesty .... (Offences Against the Person Act, 24 and 25 Vict. c. 100, s.57). See also Trial of Earl Russel, supra.

Therefore, it is submitted, the Privy Council, in Macleod, when speaking of the limitations of the Imperial Parliament (and also Colonial Legislatures) must have had the above limitation in mind. It was on the basis of this accepted and well settled limitation on the administration of criminal justice that the concluding paragraphs[21] of the judgment of the Privy Council in Macleod's case must be seen.

In any event, it is submitted, the concluding paragraphs were not strictly necessary for the actual decision of the Macleod case. After giving the substantive and necessary ruling on the actual points in issue, the report continues "their Lordships [thought] it right to add that they [were] of the opinion" on the matters that follow. It is submitted that the passages that follow were in the nature of obiter dicta.[22]

Subsequent judicial history, it is submitted, supports the contention that colonial or Dominion legislatures were competent to enact extra-territorial legislation as long as the subject matter related to matters otherwise within the competence of the legislature. The most obvious test here was whether the legislation related to the peace, order and good government of the country concerned. Thus only two years after the decision in Macleod the question arose in Ashbury v Ellis[23] whether the New Zealand legislature was empowered by the Constitution Act 1852 to subject to the jurisdiction of New Zealand courts persons who were not physically present nor represented by an agent in New Zealand. The Judicial Committee held that the New Zealand legislature was competent to so legislate. Lord Hobhouse in delivering the judgment of the Judicial Committee stated:[24]

> [T]heir Lordships are clear that it is for the peace, order, and good government of New Zealand that the Courts of New Zealand should, in any case of contracts made or to be performed in New Zealand, have the power of judging whether they will or will not proceed in the absence of the Defendant.

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21 See n. 15, p.720, ante.

22 See H.A. Smith, "Extra-Territorial Legislation", (1923) 1 Can. B. Rev. 338, 340-344.

23 [1893] A.C. 339. It is interesting to note that Macleod was cited in argument.

24 Ibid., 344.

His Lordship further stated:[25]

> For trying the validity of the New Zealand laws it is sufficient to say that the peace, order, and good government of New Zealand are promoted by the enforcement of the decrees of their own Courts in New Zealand.

In Attorney-General for Canada v Cain and Gilhula,[26] the question in issue was whether the Alien Labour Acts of 1897 and 1901, passed by the Canadian Parliament, were ultra vires the Dominion Parliament. Section 6 of the 1896 Act authorised the Attorney-General to cause an undesirable alien to be taken into custody and returned to the country whence he came. It also authorised Canadian officials to use physical force beyond the frontier in carrying out the removal. The Court held that the statute was intra vires although the Canadian officials had to exercise extra-territorial constraint. The Privy Council upheld the statute on the broad ground that the power of expulsion and deportation was an essential part of the power to control immigration. Lord Atkinson in delivering the judgment of the Privy Council stated:[27]

> If, therefore, power to expel aliens who had entered Canada against the laws of the Dominion was by this statute given to the Government of the Dominion, as their Lordships think it was, it necessarily follows that the statute has also given them powers to impose that extra-territorial constraint which is necessary to enable them to expel those aliens from their borders to the same extent as the Imperial Government could itself have imposed the constraint for a similar purpose had the statute never been passed.

In New Zealand, the case In the Matter of Awards Affecting the Wellington Cooks' and Stewards' Union, the Australian Federated Seamen's Union, and the New Zealand Federated Seamen's Union[28] turned on the

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25 Idem.

26 [1906] A.C. 542.

27 Ibid., 547, (emphasis added). Macleod was referred to in the judgment; Ibid., 545.

28 (1906-1907) 9 G.L.R. 214. See also Semple v O'Donovan (1917) 19 G.L.R. 137, per Stout C.J. at 140, Denniston J. at 141, Cooper J. at 143; Chapman J. at 145. See also Farey v Burvett (1916) 21 C.L.R. 433 and Sickerdick v Ashton (1918) 25 C.L.R. 506.

issue of the jurisdiction of the Court of Arbitration over the owners of vessels in respect of acts done outside the New Zealand limits. After referring to section 53 of the Constitution Act 1852, Sir Robert Stout C.J. stated:[29]

> The power is given in the widest terms to deal with all New Zealand interests. It is evident that for every act done in New Zealand the New Zealand Legislature can legislate, whether the act be done by a subject of the Crown or note. But the question is .... Can the Legislature of New Zealand deal with what may be termed New Zealand subjects while outside the territory of New Zealand? .... If our Parliament and our Courts cannot control the act of New Zealand subjects which are done outside our territorial limits, then can the peace, order and good government of New Zealand be secured? I do not think so .... In England the jurisdiction over subjects, wherever they may be, enables the Courts to deal with such cases; but if the Legislature of New Zealand has not the power to do so, our peace, order and good government might be seriously impaired.

It was held that since the legislation, inter-alia, came within the peace, order and good government of New Zealand, it was within the competence of the New Zealand Parliament.

In the same year, 1906, the question of extra-territorial operation of legislation controlling fisheries arose before the Supreme Court of Canada in The Ship "North" v The King.[30] An American ship was fishing off the Canadian coast within the three mile limit, which contravened the Fisheries Act. When hailed by an official cruiser, she fled outside the territorial water but was pursued and arrested. The Supreme Court held the legislation intra vires on the broad ground that the general power to regulate fisheries conferred upon the Dominion Parliament by the Constitution was not subject to any territorial limitations. Idington J. stated that Canada possess "as full power in every respect in relation to the sea-coast and inland fisheries of Canada as was possessed by the Imperial Parliament itself."[31]

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29 (1906-1907) 9 G.L.R. 214, 217. Macleod was referred to in the judgment.

30 (1906) 37 S.C.R. 385.

31 Ibid., 391.

Finally, it is submitted, this question of extra-territoriality was settled beyond question by the Judicial Committee in Croft v Dunphy.[32] In 1929 Dunphy's schooner, which was registered in Nova Scotia (and Dunphy was a resident of Nova Scotia), was about eleven and a half miles away from the coast of Nova Scotia when she was boarded by the appellant, a customs officer. The cargo having been found to consist of dutiable goods, the vessel and cargo were seized and taken into the port. Dunphy sued for the return of the schooner on the ground that the statute, in so far as it authorised extra-territorial action by Canadian instrumentalities against persons and things outside Canadian territorial limits, was unconstitutional. Such action, it was argued, was not for the peace, order and good government of Canada. The Privy Council held that the customs legislation was intra vires the Canadian Parliament. Lord Macmillan, in delivering the judgment of the Privy Council stated:[33]

> Once it is found that a particular topic of legislation is among those upon which the Dominion Parliament may competently legislate as being for the peace, order and good government of Canada or as being one of the specific subjects enumerated in S.91 of the British North America Act, their Lordships see no reason to restrict the permitted scope of such legislation by any other consideration than is applicable to the legislation of a fully Sovereign State.

His Lordship then examined the position of the Imperial customs law:[34]

> [I]t is difficult to conceive that the Imperial Parliament in bestowing plenary powers on the Dominion Parliament to legislate in relation to customs should have withheld from it the power to enact provisions similar in scope to those which had long been an integral part of Imperical customs legislation which presumably were regarded as necessary to its efficacy.

It is important to note that the Privy Council equated the powers of the Dominion Parliament to enact customs legislation with that of the Imperial Parliament. It has been seen that a similar reasoning was adopted in Macleod v The Attorney General of New South Wales.[35] In

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32 [1933] A.C. 156.

33 Ibid., 163. See also R v Burah (1878). 3 App. Cas 889, 904; Hodge v R (1883) 9 App. Cas. 117, 132; Reil v The Queen (1884) 10 App. Cas. 675, 678.

34 [1933] A.C. 156, 166.

35 [1891] A.C. 455.

that case too the Privy Council equated the position of the Colonial legislature as regards criminal legislation with that of the Imperial Parliament.

Croft v Dunphy, it is submitted, makes it abundantly clear that the only restriction on the legislative competence of the Dominion Parliament concerns the subject matter (as opposed to the effect) of the legislation, and if the subject matter is one over which the legislature may competently legislate, no question of extra-territoriality arises. Thus once it is found that the subject matter relates to peace, order and good government, there are no further restrictions or limitations such as extra-territoriality. This was made clear by Lord Macmillan who said:[36]

> In the view which their Lordships have taken of the present case ... the question of the validity of extra-territorial legislation by the Dominion cannot at least arise in the future.

It is submitted that this observation is of general application and not confined merely to legislation concerning the particular field subject to the decision. Further, it is important to note that his Lordship did not rely on section 3 of the Statute of Westminster at all, but left undetermined whether the Statute of Westminster had retrospective effect. This fact is of great significance inasmuch as the Judicial Committee has accepted the notion that Dominion Parliament, even prior to the Statute of Westminster, had full capacity to pass legislation having extra-territorial operation. The only restriction was whether the subject matter was one on which the legislature concerned could competently legislate. Thus the test, it is submitted, was not extra or intra territoriality but whether the legislation was for the peace, order and good government of the country in question.

> [T]he test of a Dominion's legislative power is not whether its legislation is intra-territorial. If the topic is within the powers, and requires or justifies a statute having extra-territorial operation, then there may be extra-territorial legislation.[37]

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36 [1933] A.C. 156, 167.

37 Woolworths (N.Z.) Ltd. v Wynne [1952] N.Z.L.R. 496, 519.

Accordingly, it can be asserted with reasonable certainty that at the very latest after the decision in Croft v Dunphy, Macleod's case cannot be regarded as good law even if it was an authority prohibiting extra-territorial legislation and did not rest entirely on a question of statutory interpretation. Also, it seems that on the enactment of the Statute of Westminster it was accepted that the Dominion Parliaments were competent to pass legislation having extra-territorial effect. As has been noted earlier the report of the 1929 Conference on the Operation of Dominion Legislation, which was approved by the Imperial Conference of 1930, stated, with reference to limitations on legislation having extra-territorial operation, "that this constitutional limitation does not exist". When section 3 of the Statute of Westminister was subsequently passed in 1931 it provided that:

> It is hereby declared and enacted that the Parliament of a Dominion has full power to make laws having extra-territorial operation.

It may be argued that the validity of extra-territorial legislation passed before the Statute of Westminster 1931 remains an open question.[38] It is interesting to note that section 2 of the Statute of Westminister 1931, dealing with repugnancy, is expressly limited to laws "made after the commencement of this Act". But section 3, dealing with extra-territorial legislation, is not expressly so limited. It is submitted that the better view is that section 3 did in fact declare the existing law and did not extend the powers of the Dominion Parliament.

After all, it had been accepted long before the Statute of Westminster and certainly in the Balfour Declaration of 1926, that the Dominions were juridically distinguishable from the Colonies. Their nationhood had been formally declared in the most solemn form. In the report of the Inter-Imperial Relations Committee of the Imperial Conference, 1926, the following sentences appear:[39]

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38 Woolworths (N.Z.) Ltd. v Wynne, [1952] N.Z.L.R. 496, 518, per Adams J.

39 Cmd. 2768 (1926) 14. (Original emphasis)

> Their position and mutual relation [that is, of Great Britain and the Dominions] may be readily defined. They are autonomous communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations.

Autonomy in policy making is certainly inconsistent with a limitation on power to enact legislation having extra-territorial effect; that the Statute of Westminster in referring to extra-territorial competence was merely declaratory of the existing position. This is quite clearly borne out by Croft v Dunphy, as mentioned above. The Judicial Committee based that decision on this premise and applied the law as it understood it to be prior to the Statute of Westminster. Evatt J., it is submitted, correctly observed that:[40]

> Croft v Dunphy proceeded upon the basis of the law as existing prior to that Statute [of Westminster].

Conclusion

It is submitted that Macleod's case was an instance of statutory interpretation and not a universally applicable decision that Dominion legislatures could not enact legislation having extra-territorial operation. Subsequent judicial history and the stand taken at the 1929 conference on the Operation of Dominion Legislation bear out this view. Also the provisions of section 3 of the Statute of Westminster were declaratory of the existing position. It is submitted that the only restriction related to subject matter. In most cases the question was whether the legislation was in respect of peace, order and good government. Once it was found to be so related, that was the end of the matter. It did not matter whether the legislation had extra-territorial effect. It

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40 Broken Hill South Ltd. v Commissioner of Taxation (1936-37) 56 C.L.R. 357, 378. See also J.W. Salmond, "The limitations of Colonial Legislative Power", (1917) 33 L.Q.R. 117; H.A. Smith, Loc. cit.; R.G. Menzies, "The Statute of Westminster", (1938) 11 A.L.J. 368; R.O. McGechan, New Zealand and the Statute of Westminster (1944), 86.

is submitted that the Privy Council made this view abundantly clear in Croft v Dunphy[41] and the matter was closed once and for all.

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41 [1933] A.C. 156.

APPENDIX II

ATTORNEY-GENERAL v ANTIGUA TIMES LTD [1975]
3 ALL ER. 81

Legislation of Antigua prohibited the publishing or printing of a newspaper by anyone unless, before publishing or printing the newspaper, the publisher deposited the sum of $10,000 with the Accountant-General (or provided a security for the like amount). This sum was to be drawn against in order to satisfy any judgement for libel against the editor, printer, publisher or proprietor of the newspaper concerned. It was also provided that no person should publish any newspaper unless he had obtained a licence from the Cabinet and had paid the annual fee of $600.00

The respondent challenged the validity of the legislation on the grounds that it infringed section 10 of the Constitution of Antigua relating to the enjoyment of freedom of expression.[1] Section 10

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1 Section 10 provides:

> (1) Except with his own consent, no person shall be hindered in the enjoyment of his freedom of expression, and for the purposes of this section the said freedom includesthe freedom to hold opinions and to receive and impart ideas and information without interference, and freedom from interference with his correspondence and other means of communication.
>
> (2) 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 provision - (a) that is reasonably required - (i) in the interests of defence, public safety, public order, public morality or public health; or (ii) for the purpose of protecting the reputations, rights and freedoms of other persons, or the private lives of persons concerned in legal proceedings, preventing the disclosure of information received in confidence, maintaining the authority and independence of the courts, or regulating telephony, telegraphy, posts,

cont/.

corresponds substantially with section 12 of the Fiji Constitution except that in Fiji derogation from fundamental rights are permitted when they are "reasonably justifiable in a democratic society"[2] while in Antigua if they are "reasonably required".

The Privy Council held that there was a presumption that the provisions of all Acts of the Parliament of Antigua were "reasonably required" for the purposes specified in section 10 (2) of the Constitution. From this it follows that the onus is on the person attacking the legislation to rebut the presumption. Lord Fraser of Tullybelton stated:[3]

> Their Lordships think that the proper approach to the question is to presume, until the contrary appears or is shown, that all Acts passed by the Parliament of Antigua were reasonably required.

It is interesting to note that the conclusion the Privy Council came as to "reasonably required" is that reached by the writer in relation to "reasonably justifiable in a democratic society" both as to the presumption of constitutionality of legislation and as regards the onus of proof.[4] Nevertheless, it is very unfortunate, it is submitted, that the Privy Council came to that conclusion because of the doubts and criticisms concerning it.

The writer's views in relation to the provisions of the Fiji Constitution were reached because of the language used. The Fiji provision states:[5]

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1 cont.

wireless broadcasting, television or other means of communication, public exhibitions or public entertainments; or (b) that imposes restrictions upon public officers.

2 As to this phrase, see chap. XI, especially pp. 453 et seq., ante.

3 [1975] 3 ALL E. R. 81, 90.

4 See pp. 328 et seq., and pp. 465 et seq., ante.

5 Constitution, ss. 8(5), 9(2), 11(6), 12(2), 13(2), 14(3)(h) and 15(3)(e). (Emphasis added).

> Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of the Constitution ... except so far as that provision ... is shown not to be reasonably justifiable.

The presumption emerges from the provision, especially the last seven words.[6]

On the other hand, the provision of the Antigua Constitution is different. It declares:

> Nothing contained ... shall be held to be inconsistent ... to the extent that the law in question makes provision ... that is reasonably required.

It is submitted that this provision allows derogation if the law is "reasonably required". The Fiji provision allows derogation unless it is shown not to be reasonably justifiable in a democratic society. The latter provision clearly presupposes validity but not so the former. The Antigua provision, it is submitted, puts the onus on the party attempting to justify the derogation.

It seems the Privy Council has adopted the view that derogation is the rule and the rights as exceptions.[7] In any event, the Privy Council does not seem to have given very serious consideration to the issues involved. It gave no reason for adopting the reasoning it chose. The Judicial Committee, with respect, seems to have followed too closely the approach of Dicey and the English constitutional jurisprudence, where Parliament is sovereign and supreme

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6 For a fuller discussion on this provision, see pp. 328 et seq., and pp. 465 et seq., ante.

7 See pp. 332 et seq., ante.

without legal fetters. Also, it seems, the conclusion was arrived at as a matter of expediency, Lord Fraser stated:[8]

> In some cases it may be possible for a Court to decide from a mere perusal of an Act whether it was or was not reasonably required. In other cases the Act will not provide the answer to that question. In such cases has evidence to be brought before the court of the reasons for the Act and to show that it was reasonably required? Their Lordships think that the proper approach to the question is to presume, until the contrary appears or is shown, that all Acts passed by the Parliament of Antigua were reasonably required.

As for the question of calling evidence, it is very unfortunate that the Privy Council made no constructive contribution at all. This matter, has been dealt with in some detail by the writer.[9]

The Privy Council also said that, if the statutory provision gives arbitrary powers, it can amount to unconstitutional legislation. Lord Fraser thus said[10] that a law cannot be reasonably required,

> if the statutory provisions in question are ... so arbitrary as to compel the conclusion that it does not involve an exertion of the taxing power but constitutes in substance and effect, the direct execution of a different and forbidden power.

The writer made the same contention in the thesis as regards arbitrary powers.[11]

The conclusion reached by the Privy Council in relation to

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8 [1975] 3 ALL E.R. 81, 90.

9 See pp.364 et seq., ante.

10 [1975] 3 ALL E.R. 81, 90.

11 See pp.462 et seq., ante.

the requirement of the deposit of the $10,000 is regrettable. It was held by the Judicial Committee that such a requirement was reasonably required for the protection of the reputations and rights of others. It is submitted, with respect, that the approach of Lewis C.J. is preferrable. The learned Chief Justice held that the right of action for libel gives the true protection to the injured person's reputation. The Privy Council felt that such a protection was of little avail if the injured person was not able to enforce his judgement by obtaining the damages and costs that might be awarded. "A mere right of action is not likely to be regarded by him as an adequate protection of his reputation."[12] The Privy Council further took the view that the fact that the deposit would be used to satisfy a judgement for libel and that, if it was, it must be replenished by the publishers, is an inducement to the publishers to take care not to libel and to damage unjustifiably the reputation of others.[13]

It seems, it is submitted, that the Privy Council has stretched the matter too far and paid undue regard to the word "required" in the proviso, without considering the word "reasonably" in conjunction with it. The Act said that the money so deposited would be used to satisfy any judgement for libel. On that point it may be conceded that the legislation was "required". But was it reasonably so? It is submitted that there ought to have been some foundation laid for such a legislation to be reasonably required. If there were some evidence, for instance, that there were a sufficient number of cases in which judgement had been secured for libel but enforcement had been difficult, this would have been

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12 [1975] 3 ALL E.R. 81, 91.

13 Idem.

relevant. Alternatively it might have been shown that a number of publishing companies had very few assets, or most of their assets were outside the country, and hence judgement would be difficult to enforce. Under these circumstances it may have been proper to conclude that the legislation was not only required but reasonably so. However, in the absence of any such evidence of reasonableness, it is submitted, the Privy Council decision should not be supported.

In any event, even without such evidence of reasonableness, to uphold the legislation as a means of protecting the reputation of others, is taking the matter too far. If such reasoning is accepted, the authorities can circumvent other parts of the fundamental rights provisions without much difficulty and with impunity. For instance, sections 12 and 13 of the Fiji Constitution protect freedom of expression and those of assembly and association. The legislature could easily circumvent such protections under the reasoning adopted by the Privy Council. Because there is a chance of an individual uttering defamatory wards in a public meeting, the legislature could impose a condition that before holding a public meeting , each speaker must deposit $2,000 with the Accountant-General.

There have been many "illegal" strikes in Fiji. The position of "lightning" strikes became so bad that the Fiji Parliament was obliged to pass the Trade Disputes Act 1973 to prevent these strikes. In spite of this legislation members of several unions continue to strike contrary to the provisions of the Act and cause employers severe losses. Strictly those employers may have a right of action against striking employees and perhaps against the union officials. Whether they will be able to recover any damages

awarded is another matter. This is particularly so where the employees have few assets. On the reasoning of the Privy Council in ANTIGUA TIMES case the Fiji Parliament will have little difficulty in imposing restrictions on union membership. It could impose the condition that every person who becomes a trade union member must deposit the sum of $500.00 with the Accountant-General. Also it could impose a term that on registration every union must deposit the sum of $2,000 with the Accountant-General. Both these deposits are to be drawn against to satisfy any judgement entered for loss occasioned to employers through illegal strikes. Such provisions would be "justifiable" as being for the protection of the rights of the employers. Other examples could be given.

The above examples show the difficulties that can arise in safeguarding the fundamental rights and freedoms in face of the reasoning adopted by the Privy Council. It is hoped the conclusion arrived at by the Privy Council would in future be treated as a "special case" and not of general application. If it is adopted as of general application, serious inroads can be made in the fundamental rights and freedoms of the individual. Regrettably the government could abuse its powers for political reasons. The legislation may have an ostensibly impeccable purpose but the effect of the enactment may have very serious repercussions on the fundamental rights and liberties of the individual. Once again it is reiterated that liberty must be the rule and derogation an exception.