

A tale of three constitutions: Ethnicity and politics in Fiji

Yash Ghai* and Jill Cottrell**

There have been sharp divisions of opinion throughout Fiji's modern history between those advocating an integrated, nonracial state, based on individual rights, and those in favor of a political order based on ethnic communities. Integration and consociation, perhaps, are not apt terms to categorize this division, but, certainly, they have some resonance. Many features associated with consociation have been present in the colonial and the postcolonial constitutions, such as separate communal representation, group rights, asymmetrical autonomy, power sharing, separate educational systems, and entrenchment of rights to culture and land. Norms regarding indigenous peoples' rights have been invoked, as well, adding an extra twist to the integration-consociation polarity. But there have also been strong tendencies toward political integration and broad-based, nonethnic social justice policies. Fiji's experience shows that this polarity has limited intellectual or policy value. Consociation easily and, in Fiji's case, seamlessly slides into hegemony.

The experience of Fiji provides valuable insights into the debates regarding the dynamics of politics and the appropriate ways of structuring the state in multiethnic societies. Fiji's multiethnic origins lie in colonialism, which, globally, has not only been the greatest creator of multiethnic political entities but has also fashioned policies and institutions tailored to such societies. In contemporary studies of multiethnic states, too little attention is paid to colonial origins and policies. The constitutional framework for the organization of the state and state power in Fiji, since independence, has been of greater critical importance than economic or social frameworks because of ethnic fragmentation and the dominance of the public sphere. Our view—not universally shared in Fiji—is that the country would have done better to pursue its destiny through integrative policies. However, given Fiji's colonial history, which bred distrust and discord between the two major communities as a matter of policy and a

*Constitutional Advisory Support Unit, United Nations Development Programme, Nepal, recently retired from Sir Y. K. Pao Chair of Public Law, University of Hong Kong. Email: ypghai@hku.hk

**Constitutional Advisory Support Unit, United Nations Development Programme, Nepal, recently retired from Faculty of Law, University of Hong Kong. Email: cottrell@hku.hk

syndrome of perceived vulnerability on the part of indigenous Fijians, integration would have required considerable sensitivity and sympathy, qualities that have been in short supply.

The focus of our study is Fiji's constitutions. Constitutions can play a particularly important role in multiethnic societies, making up for a deficit of common social bonds and solidarity. Relations between communities are often negotiated as part of constitution making in such societies, where there is a greater need to define the boundary between the public and private spheres; constitutions seek to establish rather than reflect the nation's identity and values. This is not to say that constitutions are generally effective in such settings. Indeed, our conclusion is that, over the years, the artifacts of the successive constitutions in Fiji have borne less and less relationship to the reality and structures of society and have tended, in fact, to produce tension and conflict.

Since independence in 1970, Fiji has had three constitutions. The independence constitution, which lasted until a coup nineteen years later, hovered uneasily between integration and consociation.¹ The coup makers then imposed their own constitution in 1990, proclaiming the unambiguous paramountcy of indigenous Fijian interests and institutions.² As a result of international pressure and the contradictions contained in that constitution, it was replaced by the 1997 Constitution, which, in essence, was negotiated between the leaders of the indigenous Fijians and the Indo-Fijians; its aim was to strengthen the multiracial foundations of Fiji. This Constitution was challenged in two coups. It survived the first in 2000, thanks to a decision by the Court of Appeal that it must be reinstated.³ The fate of the second coup in December 2006 and the fortunes of the Constitution are still uncertain at the time of writing; the coup maker's justification was that he wanted to protect the spirit of the Constitution.⁴

In what follows, we will examine these constitutions in order to uncover their underlying assumptions, aspirations, and dynamics, and to offer some reflections on the Fijian experience as it relates to the theme of this symposium.

¹ FIJI CONST. 1970, available at http://www.itc.gov.fj/lawnet/fiji_act/cap1.pdf.

² FIJI CONST. 1990, available at <http://www.unhcr.org/cgi-bin/texis/vtx/rsd/rsddocview.html?tbl=RSDLEGAL&id=3ae6b57d8> (last visited Jul. 24, 2007).

³ Chandrika Prasad v. Republic of the Fiji Islands, [2001] 2 L.R.C. 743. See text accompanying *infra* note 80.

⁴ See text accompanying *infra* notes 82–84.

1. Background

Fiji became a British colony in 1874, when its principal chiefs signed the Deed of Cession giving their islands to the British Crown in the hope of securing, in their own words, “civilisation and Christianity.”⁵ For several years before the handover to the British, Europeans and Australians were settling in Fiji, and some trade in sandalwood and sea cucumber was underway. The settlers were appropriating land, and some Fijian chiefs had run up debts they could not easily repay. On one view, at least, insecurity threatened. Britain, which viewed Fiji with interest, seemed capable of restoring order and financial stability. Thus the fortunes of Fijians were taken out of their hands. However, in contrast to the practice in other British colonies with outside settlement,⁶ the colonial authorities adopted relatively benign policies toward the indigenous people. By maintaining their traditional political, social, and economic structures, the British sought to protect them from the kind of exploitation that other indigenous peoples had experienced. At the same time, however, Britain was anxious to develop the resources of the colony so that it could become self-sufficient and meet the costs of administration. For this purpose, it invited external investment, principally by a sugar company from Australia, and secured cheap indentured labor from India, thus sowing the seeds of a market economy, albeit one carefully administered, and laying the basis for an ethnically divided society.

The dual policies of both protecting indigenous Fijians⁷ through the preservation of their traditional system and promoting economic development by importing capital, management, and labor posed a profound contradiction. The traditional system was incompatible with a market economy, although it could not be isolated from it entirely. To develop sugar plantations, land was required. But land was owned collectively by indigenous clans and held under rules that did not allow easy alienation.⁸ In any case, alienation would have

⁵ THE DEED OF CESSION OF FIJI TO GREAT BRITAIN, Oct. 10, 1874, available at <http://www.vanuatu.usp.ac.fj/library/Paclaw/Fiji/DEED%20OF%20CESSION%20%20FIJI.htm>. A facsimile of the Deed can be found at http://www.vanuatu.usp.ac.fj/library/Online/Texts/Pacific_archive/Fiji/DeedOfCession.pdf (last visited June 4, 2007).

⁶ *E.g.*, countries such as Kenya, or South Africa, not to mention Australia, where indigenous populations were marginalized and discriminated against, if not, as with Tasmanian aborigines, exterminated.

⁷ We use the term “Fijians” to refer to the indigenous peoples of the islands. Under the 1997 Constitution the official name of the state is now the “Fiji Islands.”

⁸ It suffices for our purposes to note that the British view (that the land was held communally with the superior rights of chiefs) prevailed, with far-reaching consequences both for the indigenous communities, internally, and for their relations with others. See Peter France, *The Founding of an Orthodoxy: Sir Arthur Gordon and the Doctrine of the Fijian Way of Life*, 77 J. POLYNESIAN SOC’Y 6 (1968); PETER FRANCE, *THE CHARTER OF THE LAND: CUSTOM AND COLONISATION IN FIJI* (Oxford Univ. Press 1969).

deeply disrupted traditional political and social orders, for which land—as with any feudalistic arrangement—was central.

To this conflict between tradition and modernity was added the conflict of interests among the three major racial communities, itself fueled by colonial policies. Land was provided to the sugar industry on terms that were conducive neither to sound economic development nor to harmonious relations among the communities. For the most part, the communities lived physically separate from each other and continued to do so when the formerly indentured laborers began to lease land for cane farming from Fijian owners or to move into the towns. The separation of these communities and the isolation of the indigenous people from the market meant that relations among them were largely determined by administrative policies—and this underscored the importance of the political. As a consequence, colonial history is to be understood largely in terms of the administrative regulation of racial claims and relations.⁹

The effect of these policies was to treat each community as a corporate entity and, thus, to obscure the differences internal to each. This was most serious with respect to the Fijians; the effect of Britain's rule was not so much to preserve traditional customs and institutions as to transform them. Ideas of chieftaincy, land tenure, and relations among different local communities were altered significantly for the convenience of administration.¹⁰ Differences in the nature of authority and organization among various local communities were ignored and a homogeneity (crystallized in rules and regulations) was imposed, drawing inspiration from the practices in eastern Fiji. On the whole, the western parts of the islands tended to be less hierarchical than those to the east. Yet the eastern structures of chieftaincy, for example, with their accompanying ideology, became the dominant mode through which Britain recognized and dealt with Fijians.¹¹ Consequently, the status of the chief and the ideology built

⁹ See generally BRIJ V. LAL, *BROKEN WAVES: A HISTORY OF THE FIJI ISLANDS IN THE TWENTIETH CENTURY* (Univ. Hawaii Press 1992).

¹⁰ For example, according to R. Gerald Ward, claims of the emotional attachment to land (and its centrality to Fijian social structure) have been much overdone. As people moved freely and frequently from settlement to settlement, clans were split, new associations formed, and fresh acquisitions of land took place. Nor has evidence been found of the rule sanctified by the British that land was traditionally inalienable. See R. Gerald Ward, *Land, Law and Customs: Diverging Realities in Fiji*, in *LAND, CUSTOM AND PRACTICE IN THE SOUTH PACIFIC 198* (R. Gerald Ward & Elizabeth Kingdon eds., Cambridge Univ. Press 1995).

¹¹ There is considerable literature on the role of chiefs and associated traditional systems. The ideology surrounding them has been a critical factor in the designing and justifying of constitutions and coups. However, it has long been recognized that this system of chieftaincy has been a major cause of the economic discrimination against and backwardness of the indigenous community and of the country's political problems. See, e.g., LAL, *supra* note 9; ROBERT E. NORTON, *RACE AND POLITICS IN FIJI* (Univ. Queensland 1977); STEPHANIE LAWSON, *THE FAILURE OF DEMOCRATIC POLITICS IN FIJI* (Clarendon Press 1991); TIMOTHY MACNAUGHT, *THE FIJI COLONIAL EXPERIENCE* (Austl. Nat'l Univ. Press 1982); FRANCE, *supra* note 8.

around the office was consolidated, becoming increasingly rigid. The chiefs were then in a position to mobilize traditional symbols, real and invented, to maintain their authority, with an emphasis on the cohesion of the community, both to preserve culture and to prevail over competitors for the scarce resources from other communities.

Nor was the Indian community entirely homogenous. There were distinctions based on region of origin, language, religion, and occupation. And the absurdity and the unfairness of grouping all the other communities (some partly European, the Chinese, Polynesians, and Melanesians) as “Others” (later as “General”) need little comment. Some subgroups within the community of “others,” including the Chinese and later other Pacific islanders, were subordinated to others, their identity scarcely acknowledged.

The politics of Fiji have been closely tied to its constitutions. The origins of the contemporary social, political, and economic organization of Fiji lie in the policies pursued by the colonial power when it acquired control over the country. As already noted, the centerpiece of these policies was the preservation of traditional institutions, particularly, chieftaincy, land usage, and customary practices, which served both moral objectives (protection of the vulnerable) and administrative convenience (indirect rule). Economic development was based on foreign capital, principally Australian and largely invested in the sugar industry, and indentured labor recruited from India. The various communities of colonial Fiji—Fijians, “Europeans,” Indians, Chinese, and the “part-Europeans”—were segregated by race, which determined their entitlements, political rights, and economic situations, and there was no sense of a common political community or identity. It could not even be said, to use John S. Furnivall’s phrasing, that the various races met only in the marketplace,¹² while the market itself was highly regulated by means of legal rules ascribing different roles in, and differential access to, the market, with indigenous Fijians embedded more in customary practices than market transactions. Prior to independence in 1970, many of these policies were based on administrative practice, although there were some laws that protected indigenous institutions, land, and customary practices.

2. The 1970 constitution

The first constitution in this story is the 1970 independence constitution, which contained the various compromises necessary to make independence

¹² JOHN SYDENHAM FURNIVALL, *COLONIAL POLICY AND PRACTICE: A COMPARATIVE STUDY OF BURMA AND NETHERLANDS INDIA* 311 (Cambridge Univ. Press 1948): “The foreign elements live in the towns, the natives in rural areas; commerce and industry are in foreign hands and the natives are mainly occupied in agriculture; foreign capital employs native labour or imported coolies. The various people meet only in the market, as competitors or as opponents, as buyers and sellers.”

acceptable to Fijians. Britain was anxious to shed her colonies, but independence was contested because, of the two major communities in Fiji, the Indo-Fijians wanted independence whereas the Fijians wanted to maintain British sovereignty, under which they believed Fiji had prospered and would continue to be protected. The Fijians feared that independence would usher in a period of Indo-Fijian dominance. By the 1960s, Indians outnumbered Fijians (240,960 to 202,176).¹³ There were small numbers of other settler communities: 6,590 designated as European; 9,687 “part Europeans”; and 17,314 “others,” a category that included Chinese and other Pacific islanders, including Rotumans, whose island, Rotuma, some 288 miles (about 465 kilometers) to the north, was administered as part of Fiji.¹⁴ These communities could be counted on to provide political support to indigenous Fijians. It was on this assumption that the systems of elections and government then in effect were incorporated into the independence constitution.

The independence constitution, for the most part, adopted the colonial framework, which had set up a system similar to that in most colonies, with a governor, and an appointed executive council and partially elected legislative council. Under the old system, there were four Europeans, four Fijians and four Indians elected to the latter council by the communities to which they belonged.¹⁵ The constitution was basically a codification of the system of segregation, and thus it devoted considerable space to the status of the racial communities and their differing relationships to the state.¹⁶ A portion was also devoted to the constitutionalization of the social, political, and economic systems of indigenous Fijians.¹⁷ The constitution effectively ensured their political dominance and control of the state.

The constitution of 1970 provided for separate representation of the principal communities in the House of Representatives. However, to meet the Indo-Fijian insistence on a nonracial electoral system, a minority of the seats were racially allocated but voted for by electors of all races; this was to be a first step toward a fully nonracial system. Out of a total membership of fifty-two, twenty-seven seats were distributed for ethnic voting (twelve each for Fijians and

¹³ POPULATION OF FIJI BY ETHNICITY (Fiji Islands Bureau of Statistics, June 2007), available at <http://www.statsfiji.gov.fj/Key%20Stats/Population/2.2%20pop%20by%20ethnicity.pdf>.

¹⁴ *Id.*

¹⁵ THE FIJI (CONSTITUTIONAL) ORDER IN COUNCIL 1963, § 30, available at [http://www.vanuatu.usp.ac.fj/library/Online/Texts/Pacific_archive/Fiji/1.%20Fiji%20\(Consolidated\)%20Order%20in%20Council,%201963.pdf](http://www.vanuatu.usp.ac.fj/library/Online/Texts/Pacific_archive/Fiji/1.%20Fiji%20(Consolidated)%20Order%20in%20Council,%201963.pdf) (last visited July 22, 2007).

¹⁶ See, e.g., FIJI CONST. of 1970 §§ 38 (Constituency Boundaries Commission) and 39 (Constituencies).

¹⁷ See FIJI CONST. of 1970 § 45 (providing that Great Council of Chiefs appoints eight members of Senate); FIJI CONST. of 1970 § 68 (protecting various laws, especially relating to the system of Fijian administration and land, from normal amendment processes).

Indo-Fijians and three for Others) and twenty-five were allocated for voting on a common roll (ten each for Fijians and Indo-Fijians, and five for Others).¹⁸ The upper house of Parliament, the Senate, established principally to safeguard Fijian interests, had twenty-two members, of whom eight were nominees of the Great Council of Chiefs (GCC),¹⁹ seven were appointed by the prime minister, six by the leader of the opposition, and one by the Council of Rotuma.

These consociational elements were not reflected in the composition of the executive, modeled on the Westminster parliamentary system of majoritarianism and “winner takes all.” The allocation of seats in the House of Representatives was such that, with a little support from their traditional allies—Europeans, part Europeans, and Pacific Islanders—Fijians would dominate the executive.

The 1970 constitution also contained various other provisions to protect the interests of Fijians, by insulating the legal framework for that protection from normal processes of amendment.²⁰ Their land holdings (comprising about 83 percent of all land in the country) were protected against alienation to non-Fijians. Traditional social and political structures (operating at the clan, provincial, and national levels and culminating in the GCC) were retained and woven into the apparatus of the state. The Fijian administration, as it was called, consisted of the Great Council of Chiefs, with largely advisory functions, and the Fijian Affairs Board, composed of senior bureaucrats, and the Fijian members of the legislature. This administration was endowed with the power to review legislative bills before their introduction for their effect on Fijians and to make regulations for Fijian social and economic life. Provincial and district councils were established exclusively for Fijians, in which a key role was reserved for the chiefs. Fijian courts were established to administer customary laws and regulations pertaining to Fijians (although the 1990 constitution did not make provision for these). Appropriate laws and the Fijian Native Land Trust Board were established to deal with customary land, particularly with regard to leases to non-Fijians (mainly, Indo-Fijian cane farmers). All these institutions and laws were the responsibility of the Ministry of Fijian Affairs.

Finally, the constitution introduced the Senate, in which Fijians dominated and which had veto powers over certain legislation. A bill of rights protected all citizens; however, individual rights were qualified by the collective rights of Fijians and were characterized by numerous restrictions and rules for their suspension—clearly, it failed to establish a culture of rights. The constitution,

¹⁸ FIJI CONST. of 1970 § 32.

¹⁹ The Great Council of Chiefs (GCC), although a colonial invention, is still in existence and often referred to by its Fijian name, *Bose Levu Vakaturaga*.

²⁰ See FIJI CONST. of 1970 § 68, and the laws listed therein, namely the Fijian Affairs Act, Fijian Development Fund Act, Native Lands Act, Native Land Trust Act, Rotuma Act, Rotuma Lands Act, Agricultural Landlord and Tenant Act, Banaban Land Act, and Banaban Settlement Act.

thus, not only paved the way for Fijian political hegemony. It also reinforced the “traditional” Fijian political and social system, maintaining both the dominance of senior chiefs and the distinctions between them and the commoners. In other words, the system the British had partly inherited and partly invented was constitutionally consolidated a hundred years later.

The 1970 settlement thus embodied a mix of the democratic and the oligarchic; liberalism and ethnic separatism; equality of all and paramountcy of Fijians; a market economy and restrictions on land and labor; a unitary state and significant autonomy for one community only; and freedom of religion and the close relationship of one religion, Christianity, to the state. The whole system depended on maintaining the separation of races or, more accurately, on keeping Indo-Fijians outside the alliance of others.

However, in one regard at least, the constitution could be considered deliberately transitional, since it contemplated the review—by an independent commission—of its most critical provision, dealing with the electoral system.²¹ Already the 1970 constitution marked an advance on the colonial electoral system when it instituted cross-voting or national seats. These seats, allocated to different races while the voting for them was based on a common roll, were established in order to begin moving the country toward nonracial or interracial politics, the assumption being that candidates would have an incentive to appeal to voters of other races. Moreover, the final settlement of the electoral system was postponed until the report of the independent commission was received and adopted, following the next general elections. This was a concession to the Indo-Fijians. In 1975, a royal commission consisting of three members, all of them British, was appointed to evaluate the electoral system.²² It recommended a partial move away from ethnic representation, removing all ethnic restrictions on national seats and, at the same time, introducing an element of proportionality (through the single transferable vote), in an otherwise first-past-the-post system.²³ Although the original understanding²⁴ had been that the proposals of the royal commission would be final, Ratu Mara and his party had no interest in a further move in the direction of nonracial voting and simply shelved the report, not even giving Parliament an opportunity to debate it. And although the Indo-Fijian National Federation Party (NFP) accused the

²¹ The section in question was FIJI CONST. of 1970 § 32, and the 1970 constitution provided for a report by a commission to be laid before Parliament before this could be amended. See FIJI CONST. of 1970 § 67(4).

²² Fiji Parliamentary Paper No. 24/1975 (report of what is known as the Street Commission, chaired by British academic lawyer Sir Harry Street).

²³ For views on the various electoral systems, see *id.*

²⁴ But see KAMISESE MARA, *THE PACIFIC WAY: A MEMOIR* 126 (Univ. Hawaii Press 1997) (in which the former prime minister denies that this was the understanding).

government of breach of faith, it has also been suggested that the NFP cynically thought that retaining the existing system would be in the interests of the Indo-Fijians because they had declined in numbers to perhaps fewer than the indigenous Fijians.²⁵

Notwithstanding the provision for national seats, the logic of the political system was dictated by communal interests. Political parties were racially organized to compete for the communal seats, with one dominant party for each community. The need to contest national seats compelled each of the major parties to extend its appeal beyond the community it principally represented. For the most part this was not successful—each party was content to field only a few candidates of other races. National seats were decided principally by communal votes, so that, for example, Fijian candidates sponsored by the predominantly Indo-Fijian NFP were successful on account of Indo-Fijian votes, and so on. This was possible because of the relative concentrations of Indo-Fijians and Fijians in different parts of the country. Consequently, national seats won by candidates who relied on the votes of the other sponsoring community had little support in their own, while those who relied on votes from their own community had little support in the others. In this way cross-voting seats became an extension of communal seats.

In the years immediately following independence, the Alliance Party was a partial exception to this trend. It attracted a much greater percentage of Indo-Fijian votes, especially for the cross-voting seats (more than 20 percent), than the NFP did of the Fijian votes (barely 5 percent). But the Alliance Party had to maintain its support among Fijians if it was to remain a serious political contender, particularly with militant Fijian parties outbidding it for their support. The logic of the system compelled the Alliance Party to champion Fijian interests ever more exclusively. Its increasing disregard of Indo-Fijian interests led gradually to the erosion of Indo-Fijian support; by 1977, it had lost most of this support, and the parties settled back to their old racial constituencies.

Election results were unpredictable since small swings in voting patterns could result in substantial changes in the number of seats won. Consequently, election periods were tense, fraught with great intercommunal bitterness. The “first past the post” (or winner-takes-all) election rules put a premium on the two-party system, which introduced extreme rigidity into the political system by discouraging factions and coalitions. Since members of Parliament (MPs) represented only the voters of their own community, they had no opportunity, much less incentive, to acquaint themselves with the interests and problems of other communities. These factors merely aggravated ethnic tensions and bitterness.

The racial organization of the political parties reinforced another aspect of the system’s inner logic—Fijian dominance of the executive. Consistent with

²⁵ LAL, *supra* note 9, at 224.

the Westminster system, the constitution did not provide any formal mechanism for power sharing; at most, it allowed for what may be called sequential power sharing in normal situations, where the major parties could alternate in government. However, in the Fiji context that possibility was remote. Although Fijians and Indo-Fijians had an equal number of seats, the balance was held by the “general” electors (that is to say, those who occupied the racial category “general”) who had historically sided with Fijians. Consequently the Alliance Party, with the support of the general electors, was able to form a government after each general election with such regularity that Alliance rule appeared the natural condition for Fiji.

Thus, assumptions about how the constitution would ensure the political dominance of the Fijians proved correct. Every government after independence was formed by the Alliance Party, with Ratu Mara as prime minister, until 1977, when the constitution came under some stress because the main Indian party won the elections. The NFP was the largest party in the House of Representatives with precisely half the seats. However, this novel turn of affairs proved temporary because the party failed to act promptly in forming a government, thereby enabling the governor-general to withdraw the invitation he had extended and, following his natural inclination, ask Ratu Mara to do so instead, pending a second election. This new election was won by the dominant Fijian party, the Alliance, and Fijian rule continued for another ten years.

The coherence of the constitution, with its inherent pro-Fijian bias, found itself under strain even as the fundamental policy assumptions for the protection of Fijians seemed progressively shakier. The contradictions of the constitution—torn between the market and insulation from the market, between universal franchise and racial hegemony—had surfaced in the early 1980s. However, in 1987 the Fijians came to realize that the 1970 constitution could no longer be counted on to guarantee them political control.

For the 1987 election the dominant Indo-Fijian party, the NFP, formed a coalition with the new Fiji Labour Party (FLP). The latter had emerged in the mid-1980s as a party based not on ethnicity but, rather more, on class interests. It was headed by a Fijian retired civil servant, Dr. Timothy Bavadra, who led the coalition into the 1987 election. The party’s secretary was an Indo-Fijian.

Within the Fijian community the new alignment reflected the emergent distinction between the traditionalists, who were happy to uphold communal traditions and the role of chiefs in politics, and those who saw the communal lifestyle as holding back the development of the Fijian community and saw no place for chieftaincy in modern politics. It also reflected the gap between Fijians of the western division—who were more modern, less bound to clan and chief, and felt marginalized by the dominant east—and the rest. The Alliance Party countered by entering into its own coalition agreement with the general electors.

The FLP-NFP coalition won the April 1987 elections by 28 to 24, although voting was still largely along ethnic lines.²⁶ Bavadra was invited to form government, which consisted of seven Fijian (Home Affairs, Primary Industry, Lands and Minerals, Labor and Immigration, Education, Youth and Sports, Rural Development and Rehabilitation) and seven Indo-Fijian cabinet ministers—these were to hold the portfolios that had gone, typically, to Indo-Fijians in past Alliance governments. One month later Lieutenant-Colonel. Sitiveni Rabuka led a military takeover.

The roots of the crisis that led in 1987 to the overthrow of an elected government and the repudiation of the constitution lie deep within the colonial system. Major societal changes, coming about through education, the economy, physical and social mobility, urbanization, and integration into the world economy, undermined many of the assumptions of the 1970 constitution. None of the racial communities remained—if they ever were—monolithic or unified by common interests. None could be isolated from the mainstream of the economy or state administration. Common interests had developed that cut across racial divides. Economic incentives and efficiency could not be maintained in the face of the conflicting interaction of ancient rules and market economy. Thus, the traditional system came under great stress. Yet the maintenance of that system was critical to the logic of the political settlement embedded in the 1970 constitution. In the end, the steady undermining of the assumptions underlying that settlement greatly reduced its ability to handle Fiji's intricate problems and racial relations.

Another factor, insufficiently considered throughout the postcoup period, was the rise of a faction of educated commoners, who had ambitions for high public office and sought the use of state resources for their own advancement. Indeed this factor was obscured by the constant reiteration of Rabuka, a commoner, that he had staged the coup to preserve the Fijian traditional system and maintain the authority of the chiefs (he accorded great deference, but little obedience, to his own high chief, Sir Penaia Ganilau, then governor-general). In many important respects, the 1987 coup marks the beginnings of a shift in power from the chiefs to the commoners, although this is certainly not evident from the constitution with which Rabuka replaced the independence constitution. What was needed, of course, was a new dispensation, broadly fair and acceptable to all the communities, to restore stability, revive the economy, and produce a modicum of national consensus. However, the coup makers and their supporters still thought in terms of adjusting, rather than transcending, racial claims and entitlements. The constitution-making process became a surrogate for pursuing racial strife, resulting in the militarily imposed constitution of 1990.

²⁶ For an account of the election, see Brij Lal, *Before the Storm: An Analysis of the Fiji General Election of 1987*, 12 PAC. STUD. 71 (1988).

3. The 1990 constitution

Space does not allow for a detailed examination of the 1990 constitution, which functioned as a bridge between the 1970 and 1997 constitutions—a reaction to the former, it triggered a crisis that gave rise to a search for new values that find expression in the latter. Unlike the independence constitution, which was a negotiated document, the 1990 constitution was basically imposed on the people and in the face of the unanimous opposition of one major community, the Indo-Fijians, along with considerable opposition from others. The new constitution rejected multiracialism in favor of Fijian dominance and attempted to close constitutional loopholes that might have frustrated the goal of ensuring Fijian supremacy for all time. It reinforced the segregation of races and the political subordination of Indo-Fijians. Finally, it aimed at the enhanced dominance of purely Fijian institutions over the state. In what follows we summarize some of the features of this constitution.

The new constitution retained the parliamentary system of government and a bicameral legislature, though with significant changes meant to guarantee Fijian dominance. No cross-voting seats were provided for, so all representation became communal. In the seventy-member House of Representatives, thirty-seven seats were reserved for Fijians; this meant that they would not need to make alliances with any other community in order to form a government.²⁷ Other Pacific islanders, who previously had appeared in the electoral roll of Fijians, were reclassified as so-called “general” electors. The registration of all Fijian voters was now tied to the traditional rules of descent for each subordinate communal group within Fijian society; final decisions were left to the Native Land Commission (which also affected land rights).²⁸ This led to some separation of traditional groups within the Fijian community, a tendency that was further reinforced by making the provinces the basis for Fijian constituencies. In the allocation of seats, there was also discrimination against urban Fijians,²⁹ who were assumed to be less strongly bound by communal ties than rural people.

The Senate consisted of twenty-four members nominated by the GCC, one by the Rotuman Council, and nine members nominated by the president of Fiji to represent other communities (without any requirement for consultations).³⁰ The president himself was to be appointed by the GCC and would presumably be a Fijian, although this was not specified in the text as a qualification.³¹

²⁷ FIJI CONST. of 1990 § 41.

²⁸ *Id.* at § 49(6).

²⁹ *See id.* at § 48(2)(b).

³⁰ *Id.* at §§ 54 and 55.

³¹ *Id.* at § 31.

This overrepresentation of Fijians, when they also had an absolute majority in the other house, belied the justification for the second chamber.

In addition, the 1990 constitution enhanced the entrenchment of legislation protecting Fijian land and other interests. And the protection given to these specific acts was now extended to any bill “which affects land, customs or customary rights.”³² Amendments required the support of not less than eighteen of the twenty-four Senate members appointed by the GCC. The 1990 constitution also changed the rule whereby minerals belonged to the state. Now minerals were vested in the owners of the land where they were found—potentially, a major shift of resources from the state to the one community that owned most of the land.³³

Provision was made to guarantee a Fijian administration: only a Fijian could be prime minister. Because the president had to appoint to this office a person who commanded the support of a majority in the House, the implicit assumption was that there would always be a clear Fijian majority bloc. This constitution gave even more power to the executive than the 1970 text had, since the moderating role of the leader of the opposition (a post traditionally held by an Indo-Fijian) was much diminished,³⁴ and the prime minister was given a direct and decisive say in appointments to various offices.³⁵ The chairman and one other member of the three-member Police Service Commission had to be Fijian³⁶—an arrangement clearly designed to establish dominance over the police, in which institution there had previously been racial parity. Further, the legislature and the executive were given unlimited powers to establish programs and policies for “promoting and safeguarding the economic, social, educational, cultural, traditional and other interests of the Fijian and Rotuman people.”³⁷

The 1990 constitution enhanced the role of indigenous institutions. It gave special status to Fijian customary law, which also increased the separation of Fijians from the other communities. In its proceedings, Parliament had to take into account the application of this customary law and had to have a “particular regard to the customs, traditions, usages, values and aspirations of the

³² *Id.* at § 78.

³³ Law could vest minerals in the state, but even then there was a presumption that royalties ultimately benefited customary land owners. *Id.* at § 9(7).

³⁴ *E.g.*, this officer was no longer to be consulted on various appointments such as to the Constituency Boundaries Commission. *Id.* at § 47.

³⁵ *E.g.*, members of the Public Service Commission. *Id.* at § 126(1).

³⁶ *Id.* at § 128.

³⁷ *Id.* at § 21.

Fijian people.”³⁸ Native Fijian courts had to be revived. The interpretation of native customs, traditions, and usages (including land rights) and the determination as to the existence, extent, or application of customary laws were to be made by the Native Lands Commission. Customary laws were freed from the application of the right to equality.³⁹

While native institutions intruded upon the constitutional scheme, the 1990 constitution was not allowed to impose its discipline over them. For example, the acts of the GCC were excluded from the purview of the ombudsman, an office established by the 1970 Constitution. Not accountable to any institution or process, the GCC was now effectively above the law.⁴⁰ It was also placed beyond criticism, as Parliament was authorized to curb freedom of expression in order to protect “the reputation, dignity and esteem of institutions and values of the Fijian people, in particular the Bose Levu Vakaturaga [Great Council of Chiefs] and the traditional Fijian system and titles or reputation, dignity and esteem of other races in Fiji, in particular their traditional systems.”⁴¹ The ombudsman was also prevented from reviewing the actions of the Native Land Commission, the Native Fisheries Commission, and the Native Lands Trust Board.⁴² Similarly, many of these decisions, especially those made by the Native Lands Commission,⁴³ were removed from the jurisdiction of the courts.

On the one hand, the indigenous institutions had been largely freed of constitutional supervision; on the other, however, many of the native institutions had been so recomposed and manipulated they could no longer be regarded as indigenous but, rather, as instruments of those Fijians who controlled the state. This is evident in the way in which the leaders of the coup changed the membership of the GCC to exclude the supporters of the democratically elected government they overthrew, thereby increasing their own power to nominate members. Another consequence was that the close control of the state by the native institutions prevented other races from influencing the state’s policies and undermined the capacity or willingness of the state to promote interethnic bargaining and accommodation.

Predictably, the weakening of institutions of accountability facilitated corruption and impropriety in public life and produced an inefficient government. This state of affairs led to a major crisis of confidence in the future of Fiji and to the emigration of a substantial number of talented citizens. The situation that

³⁸ *Id.* at § 100(2).

³⁹ *Id.* at § 16(3)(d).

⁴⁰ *Id.* at § 135(2)(v).

⁴¹ *Id.* at § 13(2)(d).

⁴² *Id.* at § 135(2)(vi), (vii), and (viii).

⁴³ *Id.* at § 100(4).

emerged was perceived as a principal cause of the stagnation of the economy, retarding the social and economic advancement of all the communities; was much criticized abroad; and, finally, secured Fiji's expulsion from the Commonwealth.

Most importantly, the new constitution reinforced internal divisions among Fijians. Once Indo-Fijians were sidelined, there was little to maintain the political unity of Fijians. The passing of power to commoners undermined the chiefly class, which had sedulously cultivated both the ideology of traditionalism and a sort of unity under eastern hegemony. Given the resultant multiplicity of parties among Fijians, no one party could form a government without the support of an Indian party. Needing that support, Rabuka agreed to a speedy review of the constitution, in accordance with a provision for a review at the end of seven years.⁴⁴

4. The 1997 Constitution

The failures of the 1970 and 1990 constitutions prompted the search for a new basis for the state and for intercommunity relations, with an emphasis on the need for national harmony and respect for the rights of all communities. The 1997 Constitution was constructed through a process, insisted upon by the Indo-Fijians, that distinguished it from any previous practice in Fiji. A three-person commission—consisting of the chairman (Sir Paul Reeves, a former Anglican archbishop and governor-general of New Zealand, and by whose name the commission came to be known) and one Fijian (Tomasi Vakatora) and one Indo-Fijian (Brij Lal)—reviewed the 1990 constitution. It made recommendations for “promoting racial harmony and national unity and the economic and social advancement of all communities and bearing in mind internationally recognized principles and standards of individual and group rights” as required by its terms of reference.⁴⁵

The third constitution of our narrative was the product of the recommendations of the Reeves commission as amended and approved by a parliamentary select committee.⁴⁶ In what follows, we outline the approach of the commission and discuss the fate of two issues that were central to its work and subsequent negotiations—the electoral system and power-sharing arrangements.

⁴⁴ *Id.* at § 161.

⁴⁵ Terms of Reference of the Fiji Constitution Review Commission, issued by the President of the Republic of Fiji, Mar. 15, 1995.

⁴⁶ THE FIJI ISLANDS: TOWARDS A UNITED FUTURE, REPORT OF THE FIJI CONSTITUTION REVIEW, Fiji Parliamentary Paper No. 34/1996, [hereinafter *The Reeves report*]. A detailed analysis of the process of constitution making by the present authors will be published in a forthcoming publication of the United States Institute of Peace.

4.1. The approach of the commission

The main concern of the commission was to encourage and facilitate the formation of multiethnic governments, asserting that “progress towards the sharing of executive power among all ethnic communities is the only solution to Fiji’s constitutional problems.”⁴⁷ The key to this goal was the electoral system. However, the establishment of multiethnic government would also involve removal or adjustment of the four principal problems that the commission had identified: communal representation, the ethnic base of political parties, majority government, and the paramountcy principle.

The commission dealt with the principle of Fijian paramountcy by highlighting its role in the protection of the rights and interests of Fijians rather than in the domination of other communities. It made a series of recommendations under this principle: to give the GCC constitutional status; to retain the constitutional entrenchment of laws protecting Fijian interests; to transfer the veto from the Senate to the GCC; and to elect the president, who would be a Fijian, at a joint meeting of the two chambers on the nomination of the GCC.

On power sharing, the commission rejected proposals for a requirement either that the prime minister should appoint a specified number of ministers from the different communities or for the constitution to entitle every political party that secured at least 20 percent of the parliamentary seats to a proportionate share in the cabinet.⁴⁸ These suggestions would not, in its view, have fundamentally altered the nature of politics, parties, or modes of representation or reduce the salience of the ethnic factor.⁴⁹ Nor was there any guarantee that a multiethnic government in these conditions would provide a sufficient degree of goodwill and trust for fair and effective government. Instead, electoral and other incentives were needed for parties to cooperate, merge, and broaden their appeal for support.⁵⁰

The commission believed that the overriding goals of multiethnic government, racial harmony, and national unity could not be achieved until the electoral system moved away from communal seats (“reserved” seats) to non-racial seats (“open” seats). It proposed a House of Representatives of seventy members divided into forty-five open seats (without ethnically based restrictions on candidates or voters) and twenty-five reserved seats (twelve for indigenous Fijians and Pacific Islanders, ten for Indo-Fijians, one for Rotumans and two for general voters), thus reversing the proportion between the two types of seats in the 1970 constitution. Otherwise, the demands of the racial

⁴⁷ *The Reeves report*, *supra* note 46, at para. 2.69.

⁴⁸ *Id.* at 18.

⁴⁹ *Id.* at para. 9.87.

⁵⁰ *Id.* at paras. 2.76, 9.96.

community would dominate, and “parties would have little inducement to become multiethnic in their membership and policies.”⁵¹

The commission proposed removing any criteria from the membership of the Senate. Each province would return two senators, without any racial restriction on candidates or voters (in addition to limited representation, by way of presidential nomination, for small communities that did not make it to the lower house). This proposal built on the “distinctive identity” of provinces. “... [M]embers of all communities share a sense of belonging to the provinces with which they have their closest links.”⁵² This would enhance identities within provinces and integrate provinces with the nation, especially as political parties would play a key role in elections.⁵³

In order to facilitate racial integration, the commission opted for the alternative-voting (AV) system⁵⁴ for both the House of Representatives and the Senate,⁵⁵ rejecting the first-past-the-post system (as undemocratic) and the proportional system (as encouraging voting by ethnicity). The main attraction of alternative voting was the incentive it provided for moderation and cooperation across ethnic lines. As the winning candidate must secure at least 50 percent of the votes plus one, which few candidates or parties would be able to muster from their own community, each party would have an incentive to enter into arrangements with another party to trade their second-place preferences. In due course, this type of cooperation would lead to multiethnic or nonethnic parties, and facilitate national unity and a broader national agenda.

The commission made several other recommendations not just to ease ethnic tensions but to provide for the strong protection of human rights and to ensure social justice, especially by means of affirmative action for the genuinely disadvantaged and rules requiring that the composition of national institutions, such as the civil service and judiciary, reflect the national makeup. The commission also sought to reinforce what it hoped would be a less confrontational style in Parliament by providing for a committee system to carry out much of the work of government scrutiny. The commission was anxious that all its proposals be seen as part of a coherent and interdependent scheme. For example, the reconceptualization of the Senate would complement and

⁵¹ *Id.* at para. 9.155.

⁵² *Id.* at para. 9.177.

⁵³ *Id.* at para. 9.179.

⁵⁴ Under alternative voting (sometimes known as majority-preference, or instant-runoff, voting), voters rank the candidates in order of preference. If no candidate receives a majority of votes on the first count, then the candidate with the smallest number of votes is eliminated, and his/her first-choice votes are transferred to the second-choice candidate on each of those ballots. This process of elimination and reallocation continues until one candidate has netted a majority of the votes and is the winner.

⁵⁵ *The Reeves report*, *supra* note 46, at ch. 10.

reinforce changes in the composition of and voting for the House of Representatives. The rules proposed for the election of the president were intended to bring the issue before the more inclusive chamber and to afford the executive greater legitimacy (notwithstanding that only an indigenous Fijian qualified for office).

4.2. Modifications by the Joint Parliamentary Select Committee

While not without some internal inconsistencies, the commission's proposals displayed a clear logic in their approach to achieving gradual change to a fundamentally different system as well as in the confrontation with the difficulties surrounding the sacred cow of Fijian interests in land, customs, and chieftaincy. The decisions of the bipartisan Parliamentary Select Committee set up to review the Reeves commission recommendations, whose members had probably not fully absorbed the closely reasoned justifications of the commission, introduced serious contradictions.

Many politicians were not happy with the commission's emphasis on national identity at the expense of communal affiliations and institutions. A great number of them had become accustomed to and were comfortable with racially oriented electorates and politics. Others, who had not looked approvingly on the commission's interest in comparative constitutions and experiences, emphasized the uniqueness of Fiji's circumstances. President Ratu Mara cautioned that, with all the talk about multiracial harmony, it was important to "recognise the existence of our different races, cultures and customs. Only so can we fully respond to the challenge of achieving this harmony we all desire, and which will be the richer for being structured in an honest, realistic and disciplined way."⁵⁶ Rabuka reminded the select committee of the diversity of ethnic groups, cultures, and faiths in Fiji, which give "identity, solace and confidence to our citizens as individuals and distinct groups."⁵⁷ If the select committee proved unable to work out an agreement on a particular issue they would turn it over to Prime Minister Rabuka and Leader of the Opposition Jai Ram Reddy, who had achieved a remarkable working relationship.

The main amendments of the select committee pertained to the system of government. The committee reversed the proportion between open and reserved seats. Out of a House of seventy-one members, only twenty-five seats would be open; the balance would be divided among indigenous Fijians, with twenty-three, Indo-Fijians with nineteen, general electors, with three, and

⁵⁶ Report of the Joint Parliamentary Select Committee on the Report of the Fiji Constitution Review Commission [hereinafter Select Committee report], Parl. Paper No. 17, Annex II (2) (1997).

⁵⁷ See Select Committee report, Annex IV(4). He went on to say, "Coercing what cannot be understood or what is not desired at times results in disenchantments and resistance. We are not embarked upon some experimental academic exercise and we cannot be determined upon social engineering in a haste and with concepts and values that could arouse uncertainty, anxiety and suspicion."

Rotumans, with one (representing slight overrepresentation of indigenous Fijians and the general voters). This change would reduce the incentives to form multiethnic parties or mergers, since both Fijians and Indo-Fijians, if each was fully united, could expect to win elections or be in a position to enter the cabinet. Although the alternative-voting system was accepted, its significance from a nonracial perspective was diminished not only by reducing the number of open seats but also by specifying that those seats be contested in single-member constituencies, thus restricting the extent of ethnic heterogeneity.

The proposal for an elected Senate was rejected. This eliminated the prospect of further elections on an open-seat basis and thus foreclosed opportunities for cooperation among parties of different ethnic communities. Moreover, the identity of nominees proposed for membership on the GCC retained a distinct ethnic element, as did the veto vested in certain members, ethnically defined. The appointment of the president by the GCC, rather than by the more representative Parliament, likewise continued to evince a strong ethnic element.

Rejecting opportunities to move toward a more multiracial or nonracial ordering of the legislative system, and perhaps realizing that this would reduce the prospect of power sharing through the electoral process, the select committee opted for a mandatory coalition government. But here, too, its approach differed from that of the commission.⁵⁸ It decided that any party that obtained at least 10 percent of the seats in the House of Representatives would be entitled to a proportionate number of ministerial positions. The commission had complained, previously, that in the submissions by political parties on coalition national government, few had given any details or appeared to have thought through how such a design would work. It seems that in agreeing on a system against which the commission had set its face, the politicians paid even less attention to its implications.⁵⁹ For example, the commission had recommended that the maximum number of ministers should be fifteen; this was to prevent the appointment of a larger cabinet as a means of discouraging scrutiny of the government's conduct or averting votes of no confidence.

⁵⁸ One member of the Select Committee, from the Fiji Labour Party, has explained why the commission approach was rejected. His party, committed to nonracial distinctions, could not accept the notion of multiethnic government, while multiparty government, which the Select Committee adopted, was more congenial: Krishna Datt, Speech at the University of the South Pacific Conference on Democracy and Good Governance (Sept. 30, 2003). The explanation is puzzling, since the vehicle for representation in the cabinet in the commission proposal was parties, not ethnic groups as such.

⁵⁹ No doubt in the rush of events, the select committee (or the drafter) did not have time to iron out internal inconsistencies. A glaring one is the inconsistency of section 99 on the compulsory multiparty cabinet with the Compact: see Select Committee report, *supra* note 56, at § 6(g) (referring to coalitions only of the willing).

The committee ignored this limit, even though in coalitions the tendency may be to increase the number to please coalition partners.

We now turn briefly to the consequences of the 1997 constitution, by examining the operation of its critical provisions with regard to elections, power sharing, and the Fijian administration, as it is called, which refers to a set of laws and institutions designed both to protect the interests of Fijians and to grant them autonomy in customary matters as well as in local government.

4.3. The operation of the Constitution: The electoral system

The electoral system was envisaged by the Reeves commission as a way of encouraging moderation by offering incentives to parties, on one side, to cooperate across the racial divide with moderate parties on the other, by trading preferences—that is, having their supporters agree to put the other party to the agreement in second place on their ballots. In fact, we find a picture of increasing polarization. In 1999, the more “radically Indian” Fiji Labour Party won outright,⁶⁰ while, in 2001, the Soqosoqo Duavata ni Lewenivanua (SDL, or United Fiji Party) of Prime Minister Laisenia Qarase was able to form a government with a conservative Fijian party ally. In 2006, the SDL gained an absolute majority, winning every Fijian communal seat while the FLP won every Indian communal seat. In all elections, the parties with the greatest cross-cultural claims have been left out in the cold. In 1999, these were the two parties that tried to work together in the spirit of the Reeves commission, much as they had done in the Joint Parliamentary Select Committee—Rabuka’s Soqosoqo ni Vakavulewa ni Taukei (SVT) and the Indo-Fijian NFP. In 2006, the NFP ran forty-five candidates, none of whom came anywhere near to winning, while none of the fifty candidates of a new multiracial party (National Alliance Party of Fiji, or NAPF) won a seat.⁶¹ To a limited extent, this is a result of the alternative-voting system, which tends to exaggerate differences even more than the winner-takes-all system. The other smaller parties simply have not obtained sufficient votes. The NFP obtained only 6.35 percent of first preferences in 2006, which would have entitled it to four seats on a strictly proportional basis. The NAPF would have won two seats on that basis. In other words, moderation is apparently not appealing to the voters at present.

Since the 1999 election, Jon Fraenkel and Bernard Grofman have been engaged in a controversy with Donald Horowitz as to whether the Fiji electoral experiment has been a failure from the standpoint of encouraging

⁶⁰ It is a bit misleading to characterize the FLP as radical Indian, though they may be so viewed by many Fijians. But for purposes of analyzing the 1999 election, especially, it tends to be regarded as such because the NFP was behaving moderately by virtue of its alliance with the SVT.

⁶¹ For detailed election results see the website of the Election Commission of Fiji at <http://www.elections.gov.fj/results2006.html>.

moderation.⁶² Fraenkel points out that while the Reeves commission assumed that “[o]nly moderate parties with conciliatory policies will agree to trade preferences,” in fact, all the parties did so, and most voters left the ranking to their parties, as the ballot permitted them to do.⁶³ Furthermore, one would expect a Fijian voter or party either to give first preference to an extreme Fijian party, followed by a more moderate one, or the other way round, followed by a progression through a more moderate Indian party with the more extreme Indian party at the bottom. Instead, there were instances of very different rankings. In certain open constituencies, some parties had the following pattern of preferences: “radical” Fijian party, “radical” Indian party, “moderate” Fijian party, “moderate” Indian party. In twelve open constituencies, the order of preference among FLP’s electors was as follows: “radical” Indian (FLP), “moderate” Fijian, “radical” Fijian, “moderate” Indian. Fraenkel and Grofman attribute counterintuitive patterns like these to the overwhelming emphasis placed by the FLP and its allies on excluding the SVT and NPF. There was even one Fijian party—Veitokani ni Lewenivanua Vakarisito (VLV, or Christian Democrat Alliance) whose policy objective was to make the country a Christian state—that entered into agreements with the FLP for precisely those reasons—and in six constituencies assisted the FLP to win.⁶⁴

Elsewhere Fraenkel has written:

... party preference transfers were not, to any significant degree, associated with political deals on ethnically divisive issues. More important motives included negative ranking of parties that posed the greatest electoral threat, elevation higher up the rankings of no-hope candidates or independents who were likely to pose little political threat inside Parliament, personality-specific deals and efforts to make arrangements in the hope of securing political office.⁶⁵

⁶² See, e.g., Jon Fraenkel & Bernard Grofman, *A Neo-Downsian Model of the Alternative Vote as a Mechanism for Mitigating Ethnic Conflict in Plural Societies*, 121 PUB. CHOICE 487 (2004); Jon Fraenkel & Bernard Grofman, *Does the Alternative Vote Foster Moderation in Ethnically Divided Societies?: The Case of Fiji*, 39 COMP. POL. STUD. 663 (2006); Donald L. Horowitz, *The Alternative Vote and Interethnic Moderation: A Reply to Fraenkel and Grofman*, 121 PUB. CHOICE 507 (2004) [hereinafter *The Alternative Vote*]; Donald L. Horowitz, *Strategy Takes a Holiday: Fraenkel and Grofman on the Alternative Vote*, 39 COMP. POL. STUD. 652 (2006) [hereinafter *Strategy Takes a Holiday*].

⁶³ ELECTION WATCH II: A CITIZENS’ REVIEW OF THE FIJI ISLANDS GENERAL ELECTIONS 2001 89 (Arlene Griffen ed., Citizens’ Constitutional Forum 2001).

⁶⁴ Horowitz has replied to the analysis of Fraenkel and Grofman, arguing that the evidence from Fiji still supports the thesis that alternate voting generally offers an incentive to moderation. See Horowitz, *The Alternative Vote*, and Horowitz, *Strategy Takes a Holiday*, *supra* note 62. Arguably, the 2006 election offers some evidence against this view.

⁶⁵ Jon Fraenkel, *Electoral Engineering and the Politicisation of Ethnic Friction in Fiji*, in CAN DEMOCRACY BE DESIGNED? 200, 248 (Sunil Bastian & Robin Luckham eds., Zed Press 2003).

In this emphasis on the desire to exclude the other coalition we see a pattern not uncommon in developing countries, where politics is so often concerned with obtaining power, as an end in its own right, rather than with what is to be done with power once acquired (other than feathering one's own nest).

It seems that in 1999 the Labour Party understood this system and made it work to its advantage to a far greater extent than other parties. In the 1999 election, the result for one half of the contested seats involved counting second or other preferences. Of the thirty-six seats at stake, the result in twenty-one was the same in terms of individuals elected as if the first-past-the-post system had been in operation, but in fifteen instances the result was different, and the Labour Party was the winner in most of these.

In 2001, only twenty-eight seats were decided on preferences, and, of these, only ten were won by a party other than the one that had obtained a majority of first preferences. But, of these, nine were won by the SDL by virtue of a transfer of votes, usually from a more "moderate" party. So the SDL, too, seems to have learned to play the electoral game.

In 2006, all but eleven seats were decided on first ballot (of these, nine were in open seats). In other words, in communal constituencies the alternative-voting system has become largely irrelevant, and was relevant in only a minority of open seats. The FLP and the NFP had an agreement for trading preferences, though not a watertight one. The NFP's preferences led to the SDL's winning in a few instances, and to the FLP's winning in a few others; the same is true of the NAPF's preferences. All the open seats were won by one or the other party (SDL, thirteen; FLP, twelve). The results in the open seats broke down along lines that approximated the ethnic makeup of the electorate: more Fijian constituencies voted for SDL, and more Indo-Fijian constituencies for FLP; and, at either end of this racial spectrum, candidates also mirrored the local position.

Fraenkel also suggests that the results in 1999 are not explained by the decision to have fewer open seats than those proposed by the Reeves commission. Indeed, he suggests that more open seats would have led to an even greater swing to Labour in 1999—and to the SDL in 2001.⁶⁶ He also suggests that more ethnically heterogeneous constituencies would have had a similar effect.

Preferential voting is an appealing idea. But it is not surprising that the alternative-voting system has been received skeptically by many in the Fiji Islands.⁶⁷ The system, being so strongly majoritarian, makes it very difficult for a new party (like the NAPF) or a party trying to recover from a serious decline (like the NFP) to enter Parliament. Fiji politics actually do involve some issues of policy—unlike many developing countries. But there is no evidence, so far,

⁶⁶ Jon Fraenkel, *Redistricting Via Coups and Constituencies: The Construction of Ethnically-Mixed Constituencies in Fiji 1970–2001*, 28 J. PAC. STUD. 23 (2005).

⁶⁷ See, e.g., ELECTION WATCH II: A CITIZENS' REVIEW OF THE FIJI ISLANDS GENERAL ELECTIONS 2001 (Arlene Griffen ed., Citizen's Constitutional Forum 2002).

that benefiting from a moderate party's support has had any moderating influence on party politics. The SDL would fear losing the 80 percent of Fijian voter support that it enjoys were it to move in that direction. Actually, having the support of a moderate member in Parliament is likely to have more impact; but, unless and until the FLP and SDL splinter, the existing system may prevent any other mono- or multiethnic party obtaining a toehold in the government. Indeed, the power-sharing executive may have a more significant impact on the two main parties.

4.4. Power sharing

Any party that receives 10 percent of the seats in Parliament is entitled to seats in the cabinet, although it is not required to accept them. In 1999, the SVT had the necessary number of seats, but when the then prime minister, Mahendra Chaudhry, whose FLP had the largest number of parliamentary seats, offered SVT seats in the cabinet, the party responded with a number of conditions, which the prime minister interpreted as a rejection. The Supreme Court held that these conditions were such that the prime minister was not bound to accept them.⁶⁸ Thus, although the courts endorsed Chaudhry's position, he did seem to construe the SVT response as a rejection with almost indecent haste, and this was not in accordance with the Compact—the nonjusticiable part of the Constitution that calls on parties to try to resolve disagreements through good faith negotiation.

After the 2001 election, the shoe was on the other foot. Qarase invited the FLP to join the cabinet—it was the only other party that met the constitutional criterion—but did so in the most unwelcoming terms:

Our policies and your policies on a number of key issues of vital concern to the long-term stability of our country are diametrically opposed. Given this, I genuinely do not think there is sufficient basis for a workable partnership with your party in my Cabinet.⁶⁹

When Chaudhry replied, accepting the invitation but indicating that he thought the policies should be negotiated, the prime minister tried to treat this as a rejection, and the dispute again came before the courts. This time the Court decided that Qarase was obliged to offer seats and that Chaudhry's letter, in this instance, did not amount to a rejection. The Supreme Court observed that the development of conventions, governing this sort of situation, would call for "a degree of give and take and good faith on all sides."⁷⁰

⁶⁸ *President of Fiji Islands v. Kubuabola*, [1999] F.J.S.C. 8, Misc. Case No. 1 of 1999 (Sept. 3, 1999).

⁶⁹ *Qarase v. Chaudhry*, [2003] F.J.S.C. 1, CBV0004.2002S (July 18, 2003). The correspondence between the party leaders is appended to the decision.

⁷⁰ *Id.*

The issue went back to the courts over the number of cabinet members that the FLP was entitled to. The Supreme Court held that if the prime minister wanted to give cabinet posts to other parties in his coalition these had to come from the share that was rightly that of his party.⁷¹ After months of wrangling, Chaudhry decided not to occupy any ministries.

The power-sharing rules could produce, potentially, a very odd situation where one party does not win the election outright. For example, suppose one party obtains 35 percent of the seats and is able to form an alliance (either before or after the election) with several small parties, none of which has the eight seats that would constitute 10 percent but which, among them all, would have 20 percent. Each of these is likely to demand at least one seat in cabinet. Another party has perhaps 30 percent of the parliamentary seats and is thus entitled under the Constitution to 30 percent of the seats in cabinet. In that scenario, only 15 percent of the members remain in opposition, and the party that won may end up with fewer seats in cabinet than the one that came in second.

The first multiparty cabinet was inaugurated after the 2006 elections. The government consisted of twelve SDL cabinet ministers, plus two Fijian senators and one independent (all essentially SDL supporters), and nine FLP ministers, and twelve ministers of state (none FLP). Twelve ministers and nine ministers of state were Fijian, and eight ministers and one minister of state were Indo-Fijians. The result was hardly proportionate to the party makeup in the House or to its ethnic composition (thirty-seven Fijians, thirty Indo-Fijians, one Rotuman, and three “others”). Chaudhry remained outside the cabinet, although the two parties’ leaders agreed to form a joint party committee to lay down ground rules for the operation of the multiparty cabinet.⁷²

Ethnic diversity and party diversity in the cabinet are not necessarily the same thing. In 1999, Chaudhry’s cabinet had a majority of Fijian members, including his deputy prime minister. While for most of 2001–2006 there were no Indo-Fijian cabinet members,⁷³ there were two “others.”⁷⁴ In 2006, one SDL minister was an Indo-Fijian, and two FLP Ministers were Fijian. Fraenkel has suggested that multiethnic innovations may come from within the major

⁷¹ In *re the President’s Reference, Qarase v. Chaudhry*, [2004] F.J.S.C. 1, Misc. 001.2003 (July 9, 2004).

⁷² Fiji Gov’t Press Release, Prime Minister and FLP leader make further progress (Oct. 18, 2006), available at http://www.fiji.gov.fj/publish/page_7649.shtml.

⁷³ There was one on the ticket of the SDL, but he had to resign due to allegations of financial impropriety.

⁷⁴ This assigning of ethnicity is distasteful and may be a bit haphazard; we base the ethnicity on names and photos on the Parliament website if there is any uncertainty. See <http://www.parliament.gov.fj/mp/hr.aspx>.

parties rather than as a result of constitutional engineering.⁷⁵ If so, these may nevertheless take some time. In 1999, six FLP MPs were Fijians, in 2006 only four, while there are two Indo-Fijian SDL MPs. Although each party put forward candidates in the “opposite” communal seats (FLP having fifteen candidates in Fijian communal seats, and the SDL occupying all but one of the Indo-Fijian seats), the number of votes received were derisory, and one assumes that the motive is to give some electoral experience to candidates rather than any expectation of winning.

The 1997 Constitution provides for another sharing arrangement. The leader of the opposition appoints eight members of the Senate (as compared with the nine appointed by the prime minister)—a provision carried over, essentially, from the non-power-sharing model in the 1970 constitution. The current Constitution requires that the leader of the opposition’s nominees must be from the parties entitled to sit in the cabinet.⁷⁶ In other words, the notion that some Senate members would represent a nongovernment view is completely lost. This was clearly a matter of drafting oversight and has led to litigation.⁷⁷ The Supreme Court found itself compelled to decide along these lines, though there was a dissenting judgment from Sir Arnold Amet from Papua New Guinea who tried to make the provision work in a way that realized his view of the objective, namely, broadening the membership of the Senate.

A power-sharing government seemed to offer a glimmer of hope for consociational approaches after the formation of a SDL-FLP government, following the 2006 election. This was especially the case, as the FLP team was led not by the difficult Chaudhry but by the widely respected teacher, trade unionist, and labor minister Krishna Dutt, who favored conciliation and wanted to make power sharing work (and, in fact, had tried to ensure that parliamentary committees worked in that spirit). However, once again, the government was overthrown by the military, in December 2006.⁷⁸

4.5. Fijian administration

The system of Fijian administration, entrenched in the 1970 constitution, was strengthened in the 1990 constitution, with a commitment to the reintroduction of Fijian customary courts. The Reeves commission had reservations about this but felt unable to recommend repeal or radical modification. It did recommend the constitutional recognition of the GCC and giving it the power

⁷⁵ Jon Fraenkel, *The Perils of Majoritarianism in Fiji: The 2006 Polls in Perspective*, (unpublished manuscript, available at http://www.usp.ac.fj/fileadmin/files/Institutes/piasdg/governance_papers/The_Perils_of_Majoritarianism_in_Fiji_the_2006_elections_in_Perspective.pdf).

⁷⁶ FIJI CONST. § 64(2).

⁷⁷ In re the Constitution, Reference by HE the President [2002] F.J.S.C. 1, Misc. 001.2001S (Mar. 15 2002).

⁷⁸ See *infra* text in § 5.

to veto changes to protective Fijian legislation as well as to nominate (but not appoint) the president. This was done in order to open up opportunities for the reform of the Senate and to make it less racially oriented. The commission also sought to deemphasize the link between Fijians and provinces by making the provinces multiracial electorates for the Senate. None of these recommendations were accepted (apart from the constitutionalization of the GCC).

Conceived by colonial authorities as a means of indirect rule, Fijian administration was used for maintaining the authority of the chiefs and the cohesion of the community. The GCC acquired great political authority (even though its legal powers were not significantly increased), and provincial administration became a device to develop Fijian consensus, particularly on matters connected with relations to Indo-Fijians. It became increasingly a system that, from a communal base, affected and shaped the policies of the state, representing a reversal of the original purpose; it came to dominate the state, rather than being an adjunct to it. At the same time, Fijian administration has proved discriminatory and exclusionary. Indeed, the GCC has been mobilized by those Fijian politicians wanting indigenous political supremacy and used in attempts to legitimize all the coups that are widely perceived as anti-Indo-Fijian. The Fijian administration has prevented the full integration of the indigenous people into the modern economy—itsself a primary reason for the coups. Thus, it has retarded fair and amicable interracial relations and a more integrated political system. In the end, the use of the GCC to justify coups greatly politicized it, and ultimately it lost legitimacy.

5. Coups and overthrow of the Constitution

The tale of the 1997 Constitution would not be complete without some mention of the two coups aimed at its overthrow. The first coup, executed by a businessman cum adventurer, George Speight, took place on May 19, 2000, about a year after the first government under the new Constitution assumed office. Brij Lal has said that Prime Minister Chaudhry had antagonized many people with his abrasive and confrontational style, but far more significant was the opposition orchestrated by defeated politicians, some of whose colleagues were in the government. According to Lal, “Speight was the front man for an assortment of institutions and individuals aggrieved by the People’s Coalition government: defeated politicians seeking revenge, those who had amassed enormous wealth during the Rabuka years in the 1980s, the unemployed and the unemployable, the human casualties of globalization.”⁷⁹ The military government to which Speight handed over power, in return for amnesty, abrogated the Constitution and declared its intention to install a new constitution

⁷⁹ Brij V. Lal, *Constitutional Engineering in Post-Conflict Fiji*, in *THE ARCHITECTURE OF DEMOCRACY: CONSTITUTIONAL DESIGN, CONFLICT MANAGEMENT, AND DEMOCRACY* 267 (Andrew Reynolds ed., Oxford Univ. Press 2002).

entrenching Fijian supremacy. However, its efforts were thwarted by a Supreme Court decision that, quite rightly in our view, declared the coup unconstitutional and decreed the restoration of the 1997 constitution.⁸⁰

The second coup occurred on December 5, 2006, five years after the Constitution had been fully restored and was led by the commander of the Fiji Military Forces at the time, Frank Bainimarama. He insisted he had intervened to protect the Constitution and its spirit against the policies of the Prime Minister Qarase, who was intending to pass controversial legislation that would benefit Fijians at the expense of others and grant amnesty to the perpetrators of the Speight coup—all of which would “divide the nation and will have very serious consequences to our future generations.”⁸¹ He declared his firm commitment to the Constitution; the military force “not only adheres to the rule of law and the Constitution but more importantly believes in the adherence to the spirit of law and the Constitution.”⁸² Accordingly, the Constitution would remain in force except for those parts “necessitated under the doctrine of necessity,”⁸³ and elections under the Constitution would be held in due course.⁸⁴ And that is where things rest.

6. Conclusion

Neither the alternative-voting electoral system nor power sharing has eased Fiji’s ethnic competition and tensions. This resulted from the seemingly cynical manipulation of the systems by some key political parties. They were more concerned, for partisan reasons, with defeating parties whose policies were closer to their own than parties firmly opposed to them. Those espousing extremist racial positions garnered more votes from their community. As a result, alternative voting did not produce coalitions of moderates; instead, the moderates were wholly marginalized. As matters stand, coalition governments are unlikely to work, at least to the extent that they might bring together the extremists from the two major communities.⁸⁵ In this respect, Fiji’s experience is not so different from that of other consociational states (as seen, for example, in the 2007 elections in Northern Ireland, which were won by the extremist parties of the Catholics and Protestants).

⁸⁰ *Chandrika Prasad v. Republic of the Fiji Islands*, [2001] 2 L.R.C. 743.

⁸¹ Fiji Gov’t Press Release, *Commander RFMF—Public Declaration of Military Takeover*, 2 (Dec. 5, 2006), available at http://www.fiji.gov.fj/publish/page_8092.shtml.

⁸² *Id.* at 3.

⁸³ *Id.* at 6.

⁸⁴ *Id.* at 7–8.

⁸⁵ As mentioned earlier, the only power-sharing government to come into being was sworn in only a few months before the most recent coup; so far, it seems to have been working without tearing itself apart.

The complicated and confusing rules governing the formation and operation of coalitions enabled parties to involve the courts in their disputes, not so much to secure a place in the cabinet as to frustrate government administration.⁸⁶ Fraenkel comments that “[i]nstead of fostering compromise, the power sharing provisions in the constitution had become the principal focus of inter-ethnic antagonism, serving to sustain and entrench the polarisation of 1999–2000.”⁸⁷ Fraenkel notes, as well, another problem, namely, that the consociation-oriented power-sharing arrangements were at odds with and under threat from the majoritarian electoral system.⁸⁸ With their varying versions of consociation, neither the 1990 nor the 1997 constitutions were able to promote ethnic understanding and amity.

The political order of Fiji has always been organized on a basis of treating the communities as corporate entities. Many important rights depend on membership in a community. For Fijians, certain powers are exercised on an exclusive communal foundation, which assumes some form of group autonomy. Representation in the legislature has always been secured primarily or exclusively through communal electorates. At times, the view that the composition of the cabinet and the public services should reflect ethnic diversity has prevailed and was given constitutional force in 1997. Successive constitutions have provided for communal vetoes on important legislation. So what insight does the Fiji experience give into the dynamics of consociation?

It should be noted that the purportedly consociational arrangements in Fiji were not the result of consociation (that is, of free association). They were a colonial imposition. In this respect, Fiji’s consociation is not so different from some other countries, which is or was the result of external pressure (for example, Cyprus, Bosnia-Herzegovina, and Northern Ireland—and, in the last two, it is the constant intervention of external factors which sustains the governance system). The arrangements in Fiji were sustained, after the British left, by a constitutional compromise between Fijians and Indo-Fijians brokered or, more accurately imposed, by the British. More to the point, these arrangements were sustained by the self-interest of the Fijian elite, which acceded to power at independence and became their principal beneficiaries.

The consociational measures were not devised to resolve a conflict; rather, the British imposed them as part of its divide-and-rule policy. The colonial pioneers of these arrangements wished to preserve the traditional Fijian hierarchy because of their own preference for indirect rule. It is not surprising, therefore,

⁸⁶ There were serious structural faults with the power-sharing system. See Jon Fraenkel, *Power Sharing in Fiji and New Caledonia*, (presented at Australian National University conference “Globalisation, Governance and the Pacific Islands,” Oct. 25–27, 2005), available at http://www.usp.com.fj/fileadmin/files/Institutes/piasdg/governance_papers/fraenkel_power_sharing.pdf.

⁸⁷ *Id.* at 16.

⁸⁸ *Id.* at 24.

that what they preserved was not traditional but invented to suit administrative convenience. Far from trying to promote harmony between the races, the colonial authorities and settlers repeatedly criticized the Indo-Fijians and persuaded Fijians that their interests were under threat from the ambitions of former. As a result, it is possible to see the consequences of consociation-type arrangements in a society that did not start with ethnic conflicts and could have been organized in a different manner.

We have already referred to the consequences of these arrangements. From early times, they led to the separation of races and, along with it, racial suspicions and animosity. Everyone seems to have fallen into the habit of viewing issues through the racial prism rather than, say, the national interest. Classifying people by racial categories produced false stereotypes that then became hard to overcome. Differences *within* racial groups were obscured or disregarded for purposes of hegemony (thus, effectively, reducing diversity), while differences *between* them were exaggerated (thus, making diversity more problematic than it need be). Meanwhile, the constitutions have focused on the larger community, to the disadvantage of smaller minorities.

The constitutions have been based on the assumptions (a) that there are distinct communities separated by their race (thus privileging this identity over all else); (b) that these communities are homogenous, sharing common interests (thus ignoring the many divisions within each of the communities); and (c) that their interests are antagonistic (thus subverting the aspirations of the many people of all communities who yearn for integration and common identity). The rules for access to state power have given some reality to the ideology implicit in the foregoing. Rules for elections and the formation of governments have helped those politicians who have set themselves up as the so-called protectors of ethnic and communal interests against the ostensible designs or conspiracies of other communities. Politicians have become comfortable with racial politics, having had little opportunity and even less incentive to learn of the problems facing other communities. So strong has this become the political tradition that even constitutional devices to promote accommodation and integration have been turned to adversarial uses.

Given the trappings of consociation, community representation, vetoes, proportionality, and communal autonomy, it is easy to overlook the tendency toward the hegemony of a community—or that there has been a massive degrading of human rights. Citizenship rights are downgraded in favor of group rights, with an emphasis of community and custom prevailing over the rights of the individual. The consciousness of human rights is dulled, leading to a ready acquiescence in the violation of the rights of members of other communities.

Thus, the acceptance of rights has become conditional and selective, as in the manipulation of indigenous rights by a faction of Fijians. Until about the mid-1990s Fijians showed no interest in the international movement of indigenous rights and, as far as we can tell, did not participate in any of the meetings

of the international working committee on indigenous rights—and scrupulously ignored the underlying principle of group-rights treaties, namely, that the rights of others must not be violated in pursuit of group advancement. Social justice has become a matter of ethnic negotiation, not the elimination of disadvantage wherever poverty or discrimination strikes.⁸⁹

It is, of course, difficult to tell how Fiji would have fared under a different kind of dispensation, one emphasizing a nonracial approach and providing incentives for cooperation across racial boundaries. It would be naïve to assume that relations among communities would have been better or more harmonious. However, it is not our purpose to speculate on this, or to suggest arrangements that might have been more favorable and acceptable.

We end with some comments on the dichotomy between integration and consociation. Fiji's experience shows that it not always easy to analyze constitutions and politics in terms of integration versus consociation. We have tried to show that consociation is a problematic concept. Fiji's constitutions display some of the features of consociation, such the division of society into ethnic fragments and the conferral of corporate status on communities, requiring that important kinds of individual rights be exercised through membership of a community. But these constitutions have fallen well short of the consociational elements of power sharing and symmetrical self-government as well as proportionality. Fiji's politics and constitutions may be seen as characteristic of "plural societies," which acknowledge but do not celebrate diversity and which are based on the hegemony and control of one community over another. Any rights non-Fijians can enjoy must come from their submission to Fijian paramountcy. Sometimes, in more generous moments, the relationship is defined as that of hosts and guests—but guests without rights, dependent on the goodwill of the hosts.

This Fijian hegemony is based, not on any civilizing mission or moral or intellectual superiority, but purely on difference and on being indigenous. In fact, Fijian claims to hegemony have varied over time—first, based on their vulnerability, then, on the terms of the surrender of their sovereignty to the British in the nineteenth century, and, more recently, on international norms regarding the rights of indigenous people.⁹⁰ Thus, there is consistency of purpose with flexibility of rationalization.

⁸⁹ It is worth noting that the 2000 coup took place on the same day and in the same place as the introduction of the Social Justice Bill, aimed at ensuring benefits to the most disadvantaged of all communities, amid Fijian fears that their previous, exclusive entitlements were under threat. Concerning issues around affirmative action, see Jill Cottrell & Yash Ghai, *Constitutionalising Affirmative Action in the Fiji Islands*, 11 INT'L J. HUM. RTS. 227 (2007).

⁹⁰ See U.N. HIGH COMM'R FOR HUM. RTS., DRAFT UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES, available at [http://www.unhchr.ch/huridocda/huridoca.nsf/\(Symbol\)/E.CN.4.SUB.2.RES.1994.45.en](http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.SUB.2.RES.1994.45.en) (approved by the Human Rights Council in 2006 but not yet adopted by the General Assembly).

Of particular interest has been the way in which constitutions have made Fijian traditions, institutions, resources, and symbols the source of authority and legitimacy and central to the political and administrative system. In 1970, all this apparatus was massively constitutionalized; the 1990 constitution increased its scope and depth; and the 1997 Constitution, inspired by the wish to move away from racialism, could only tentatively step back from it. While the tendency in the 1997 Constitution is toward change, it is caught uneasily between consociation and the political integration of different communities.

The self-proclaimed mission of the 2006 coup maker is to resolve this ambiguity in favor of integration. In a recent statement⁹¹ by the new government, which calls itself the interim government, it announced plans for the review of the 1997 Constitution with the goal of “rid[ding] the Constitution of provisions that facilitate and exacerbate the politics of race [in] such areas as the registration of voters and the election of representatives to the House of Representatives through separate racial electoral rolls.” The government claims to advocate the abolition of voting in “terms of racial classifications,” so that “each voter should vote for a candidate of his/her choice in a common roll, with each vote having equal value.” If this is achieved, the pendulum will have swung to the opposite extreme from past preoccupations with race. And Fiji’s fortunes may then tell us something more about the relative merits of consociation and integration.

⁹¹ FIJI MINISTRY OF INFORMATION, *MOVING IN THE RIGHT DIRECTION* (Apr. 2007), http://www.fiji.gov.fj/uploads/Roadmap_2007.pdf (last visited June 4, 2006).