

THE FIJI CONSTITUTION OF 1970

J. F. Hookey*

Readers of the Fiji Constitution,¹ who come to it in the firm belief that colonial independence movements are wedded to the common roll, are likely to be disillusioned. They are likely to be disillusioned because the Constitution, far from enshrining the common roll principle, provides for three separate communal rolls, one for Fijians, another for Indians, and yet another for voters who are neither Fijians nor Indians, together with a national roll on which all voters' names are registered.²

Richard Hooker said:

“He that goeth about to persuade a multitude that they are not so well governed as they ought to be shall never want attentive and favourable hearers.”³

But before one succumbs to the temptation to pillory the Fiji Constitution for failing to attain some paternalistic ideal of what is constitutionally right and proper for a colony on independence, one must remember that Fiji's Independence Constitution is a consensus constitution. By this I mean that the parliamentary members of both the ruling Alliance and opposition National Federation parties agreed to it.⁴ It was not imposed by the British Government on a reluctant Indian majority in a last fling of colonial autocracy. And so if at first sight it appears to discriminate somewhat against Fiji citizens of Indian descent, one must bear in mind that their leaders, in a spirit of compromise, agreed to it. Indeed, the institution of the communal roll in Fiji was by no means an innovation at independence. No general election was held immediately before independence and the legislature established under the pre-independence constitution continued to function as the lower house after independence, with the same composition as before.⁵ It is to be enlarged following the first elections after independence.⁶

On 10th October 1874 the Fijian chiefs ceded sovereignty of their islands to Queen Victoria, and the archipelago was subsequently annexed.⁷ Accordingly, until its independence in 1970 Fiji was ruled under the prerogative.⁸ It is of some interest that Fiji attained its independence some ninety-six years later to the day, on 10th October 1970. There would appear to be some

* Senior Lecturer in Law, Australian National University

¹ Schedule to the *Fiji Independence Order* 1970, see also the *Fiji Independence Act* 1970, all of which are to be found in the *Fiji Royal Gazette Supplement*, No. 40, 6 October 1970.

² *The Constitution of Fiji*, 1970, s 32(2).

³ Quoted in Kenyon, J. P., *The Stuart Constitution*, Cambridge, 1966, p 5

⁴ *The Fiji Nation Newsmagazine*, Vol II, No 24, May 1970, pp 2 21, *Pacific Review*, 8 October 1970, p. 1.

⁵ *The Fiji Independence Order* 1970, s. 6.

⁶ *The Constitution of Fiji*, 1970, s 32

⁷ An account of the cession is to be found in C O. 83/5.

⁸ *Campbell v Hall* (1774), 1 Cowp. 204

significance in the choice of this Independence Day and, indeed, there is no suggestion that in attaining independence the Fijian people have sought a traumatic break with the colonial past. Rather, the Preamble to the Constitution recites the making of the Deed of Cession in 1874 and the subsequent Deed of Cession in 1879 in which the chiefs of Rotuma ceded their island to the Crown.⁹ Although instruments of cession of this type are notoriously difficult to enforce in colonial courts¹⁰ the Deed of Cession in Fiji has been traditionally regarded as something of a constitution for colonial Fiji. It has been seen by Fijians as an instrument involving both the recognition of their paramountcy in their own country, and their customary rights to their land.¹¹ This reliance on the recognition of Fijian rights in the Deed of Cession, which was, happily, apparently never tested in the courts, relates in political terms to the relationship between Fijians and the majority of Indian descent. One of the difficult facts of life in Fiji has been the position of the Fijians as a minority race in their own country: by no means a small minority, but the minority nevertheless. And the Deed of Cession has traditionally been regarded by them as a recognition of their paramountcy, despite their position as a minority race and despite the absence, at least until recent times, of their really effective participation in the economy of Fiji. And so the reciting of the Treaty of Cession at the beginning of the Preamble to the 1970 Constitution is by no means an anachronistic reference to the colonial past, but a subtle affirmation of the paramountcy of the Fijian people in their own country. This is stressed by the subsequent words of the Preamble, which go on to recite that:

“many persons of all races and creeds have come from divers countries and have desired peace and prosperity under the precepts and principles of such Cessions.”¹²

The franchise seems to reflect the doctrine of Fijian political supremacy. It is here that the position of the Senate, the upper house in the bicameral legislature, is of great significance. The Senate, which consists of twenty-two members, is a nominated legislature.¹³ All members are nominated by the Governor-General, acting on the advice of various persons or bodies. Thus, the Prime Minister controls the appointment of seven senators,¹⁴ and the Leader of the Opposition controls the appointment of six.¹⁵ However, eight of the twenty-two members are appointed “in accordance with the advice of the Great Council of Chiefs”.¹⁶ To describe the Great Council of Chiefs as akin to a Fijian House of Lords would be inaccurate, although it would be not unkind to describe its proceedings as having something of the traditional flavour of the upper house of the British legislature. However, the Great Council of Chiefs nowadays has a substantially elective element.¹⁷ Like the House of Lords, it is not entirely composed of the nobility. But it is an essentially Fijian, rather than a national, institution. Set up by statute¹⁸ it is seized with the responsibility of considering “. . . questions relating to

⁹ Rotuma is part of independent Fiji.

¹⁰ *Hoani v. Aotea Land Board*, [1941] 2 All E.R. 93.

¹¹ France, P., *The Charter of The Land*, Melbourne, 1969, at pp. 158 *et seq.* traces the antiquity of this latter view.

¹² *The Constitution of Fiji*, 1970, Preamble.

¹³ *Ibid.*, s. 45.

¹⁴ *Ibid.*, s. 45(1)(b).

¹⁵ *Ibid.*, s. 45(1)(c).

¹⁶ *Ibid.*, s. 45(1)(a).

¹⁷ *The Fijian Affairs (Great Council of Chiefs) Regulations*.

¹⁸ *The Fijian Affairs Ordinance*, s. 4.

the good government and wellbeing of the Fijian people".¹⁹ It is thus an essentially communal body, and it would be not unreasonable to assume that its advice to the Governor-General in respect of the eight senators within its gift would normally involve the appointment of Fijians. If one can assume the continued existence for some time of political parties based essentially, though not exclusively, on racial groupings, then it would seem that Fijians must be able to hold the balance of power in the Senate quite irrespective of which party is in power in the lower house.

When one turns to the franchise for the lower house, the House of Representatives, one sees that the racial composition of the lower house is largely predetermined by the Constitution.²⁰ No election took place immediately prior to independence. The Fiji Independence Order 1970 provides that the former colonial legislature is to be deemed to be the House of Representatives until the first dissolution after independence.²¹ The Constitution of pre-independence Fiji,²² like its successor, embodied the principle of the three communal rolls.²³ There was no national roll, but provision was made for some members of each race to be elected on a cross voting basis. The Fiji Independence Order envisages the first dissolution of the parliament taking place no later than May 1972,²⁴ and following an election the lower house then being enlarged.²⁵ The 1970 Constitution provides that at the first elections held after independence, twenty-two members of the lower house "shall be elected from among persons who are registered on the roll of voters who are Fijians", and a similar number from persons registered on the Indian roll.²⁶ Eight members are elected from persons registered on the other communal roll, in which presumably Europeans and Chinese will be the most significant racial groups.²⁷

Although the racial composition of the legislature, at least as far as the Fijian and Indian voters are concerned, is largely predetermined, it is not the case that voting at elections proceeds on an entirely communal basis. The fourth electoral roll, the national roll, comprises the voters on the various communal rolls.²⁸ Turning to the election of the twenty-two Fijian members, only twelve are elected by voters on the Fijian roll, the balance of ten being elected by voters on the national roll.²⁹ A similar position operates in respect of the Indian members,³⁰ while only three of the eight members elected from the persons registered on the third communal roll are elected solely by voters on that roll.³¹ These cross voting provisions may well have the effect of stimulating the growth of parties which cut across racial barriers, and it would be quite misleading to suggest that there were, as yet, no tendencies in this direction. The ruling Alliance party is itself a coalition, mainly, but not exclusively, of Fijian and European politicians.

But it would be hard indeed to rebut the suggestion that the nature of the franchise is essentially communal, designed to ensure Fijian paramountcy in the upper house and in the lower house, while the present Fijian-European coalition exists. It must also be apparent that the upper house of the legislature is by no means an otiose and anachronistic importation of the

¹⁹ *Ibid.*, s. 4(2).

²¹ *The Fiji Independence Order* 1970, s. 6.

²³ *Ibid.*, s. 47.

²⁵ *The Fiji Independence Order* 1970, s. 6(1). *The Constitution of Fiji*, 1970, s. 32.

²⁶ s. 32(3) and (4).

²⁸ s. 32(2).

³⁰ s. 32(4).

²⁰ *The Constitution of Fiji*, 1970, s. 32.

²² *The Fiji (Constitution) Order* 1966-1970.

²⁴ s. 6(7).

²⁷ s. 32(5).

²⁹ s. 32(3).

³¹ s. 32(5)(a).

Westminster system into the Pacific Islands. The Senate has a very clear political function.

Given the apparent desire of the fathers of the Fiji Constitution to preserve the distinctions between the major communities in Fiji in respect of the franchise, citizenship must have been a peculiarly difficult problem to deal with. But the creation of different categories of citizen has, very properly, been avoided. There is one basic category, the status of "a citizen of Fiji".³² There is no racial or communal test for citizenship. Every person born in Fiji who on the day prior to independence was a citizen of the United Kingdom and colonies automatically became a citizen of Fiji the following day.³³ People born after the 9th October 1970 in Fiji become citizens at birth.³⁴ Procedures of a more or less predictable nature are provided for the acquisition of citizenship by those people who were not born in Fiji.³⁵

As might be expected of a people who have traditionally venerated their links with the Crown since the time when the chiefs of Fiji ceded their sovereignty to the widow at Windsor,³⁶ Fiji has not adopted a republican constitution on attaining independence. The people of Fiji have stayed within the Commonwealth and retain the monarchical system. The Queen's representative in Fiji is the Governor-General. His role is not entirely honorific, but is essentially that of a constitutional head of state.³⁷ Nor are his discretionary powers insignificant. Normally he is required to dissolve parliament on the advice of the Prime Minister,³⁸ but should the Prime Minister lose the confidence of the House, decline to recommend the dissolution of parliament, and also resist resignation, then the Governor-General "acting in his own deliberate judgment, may dissolve Parliament".³⁹ He may also, at his own discretion, dissolve parliament if the office of Prime Minister becomes vacant and

"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".⁴⁰

The Governor-General also has an area of independent discretion in respect of the summoning of parliament. Where he considers that the ruling government has lost majority support in the lower house he may summon parliament when it is necessary for it to consider quickly a matter of public importance, although before this particular discretion can be exercised he must receive a request to call parliament from not less than a quarter of the members of the lower house.⁴¹ In the appointment of Prime Minister the Governor General again has a significant discretion to appoint the member of the lower house "who appears to him best able to command the support of the majority".⁴² In the appointment of ministers other than the Prime Minister he acts on the advice of the Prime Minister.⁴³

The independence of the judiciary is reaffirmed by the 1970 Constitution.⁴⁴ Although judges are not appointed for life, but only until they reach a statutory retiring age, they cannot be removed from office except for

³² *The Constitution of Fiji*, 1970, s 19.

³⁴ *Ibid*, s 21

³⁶ *Ibid*, Preamble.

³⁸ *Ibid*, s 70(1)

⁴⁰ *Ibid*, s 70(1)(b)

⁴² *Ibid*, s 73(2).

⁴⁴ *Ibid*, ss 89 and 91.

³³ *Ibid*, s 19(1)

³⁵ *Ibid*, ss 20, 23 and 25

³⁷ *Ibid*, ss 27 and 72.

³⁹ *Ibid*, s 70(1)(a)

⁴¹ *Ibid*, s 69(4)

⁴³ *Ibid*, s 73(1) and (3)

inability or misbehaviour, and then only with the concurrence of the Judicial Committee of the Privy Council.⁴⁵ A judge cannot be removed from office for any other cause. The Constitution provides that “the office of a judge shall not be abolished while any person is holding that office unless he consents to its abolition”.⁴⁶

Provision is made for a Court of Appeal within Fiji⁴⁷ and for appeals to be heard by the Judicial Committee of the Privy Council.⁴⁸ In these respects the 1970 Constitution essentially continues the pre-independence judicial system.⁴⁹ The Supreme Court has an original, but apparently not an exclusive jurisdiction in constitutional matters, and may give declaratory and other relief when individual interests are infringed by the breach of provisions of the Constitution.⁵⁰

The 1970 Constitution can be changed, but only by parliament.⁵¹ A simple majority of both Houses is not enough for constitutional change. A number of important provisions, such as those dealing with the protection of fundamental rights and freedoms, citizenship, the judicial system and the composition of the Senate, require the approval at the final voting of at least three-quarters of the members of each of the Houses of Parliament.⁵² Those provisions of the Constitution which do not require three-quarters majority at the final vote, nevertheless cannot be changed unless two-thirds of all the members of each House support the proposed variation at the final vote.⁵³

A number of statutes dealing with Fijian, Rotuman, and Banaban affairs and land tenure are also entrenched, requiring not only a three-quarter majority in each House, but also the support of six of the eight members of the Senate appointed on the advice of the Great Council of Chiefs should the proposed amendment be such that it “affects Fijian land, customs or customary rights”.⁵⁴

The Constitution contains a generally admirable Bill of Rights.⁵⁵ Detailed provisions exist preserving the fundamental rights and freedoms of the individual and his right to his property and privacy.⁵⁶ The provisions dealing with the compulsory acquisition of property are particularly interesting.⁵⁷ Before compulsory acquisition can take place it is necessary for a Supreme Court order to this effect to be obtained.⁵⁸ The Supreme Court has a discretion not to grant such an order

“unless it is satisfied that the taking of possession or acquisition is necessary or expedient in the interests of defence, public safety, public order, public morality, public health, town and country planning or utilisation of any property in such a manner as to promote the public benefit”.⁵⁹

⁴⁵ *Ibid*, s 91

⁴⁶ *Ibid*, s 89(2)

⁴⁷ *Ibid*, ss 93 96, 99.

⁴⁸ *Ibid*, s 100 *The Fiji (Procedure in Appeals to Privy Council) Order 1970, Fiji Royal Gazette Supplement, No 40, 6 October 1970*

⁴⁹ 1966 Constitution, Chapter VI This constitution did not, however, deal specifically with the Judicial Committee as the ultimate Court of Appeal.

⁵⁰ *The Constitution of Fiji, 1970, ss 17 and 97*

⁵¹ *Ibid*, s 67

⁵³ *Ibid*, s 67(3)

⁵⁵ *Ibid*, Chapter II.

⁵⁷ *Ibid.*, s. 8.

⁵⁹ *Ibid*, s 8(d) And, of course, the acquisition can only take place under a statutory power conforming to s 8

⁵² *Ibid*, s 67(2), (4) and (5)

⁵⁴ *Ibid*, s 68 And cf. s 67(4)

⁵⁶ *Ibid.*, ss 3 16

⁵⁸ *Ibid*, s 8(1)(b)-(f)

Even then, "the prompt payment of adequate compensation for the taking of possession or acquisition" is required, and the acquiring authority must pay the proprietor's costs in connection with these Supreme Court proceedings.⁶⁰ Even in a state of emergency the Constitution requires that adequate compensation be paid in respect of the temporary taking of possession of property.⁶¹

It is unfortunate that the chapter dealing with the preservation of the freedom of the individual nevertheless contains a section recognizing the legality of preventive detention in times of emergency.⁶² It is true that the Constitution requires the review of such cases by an independent and impartial tribunal, but this tribunal is not entrusted with the power to free a person detained. It can only make recommendations "concerning the necessity or expediency of continuing his detention", but these recommendations can be rejected.⁶³

This particular chapter of the Constitution is not an innovation. It is to a great extent a re-enactment of the provisions dealing with individual rights which were contained in the 1966 Constitution.⁶⁴

But one innovation in the Independence Constitution is the establishment of the office of ombudsman.⁶⁵ If the recommendations of the ombudsman in a particular case are not followed he is entitled to publicize the matter by reporting the case to parliament.⁶⁶ His independence is guaranteed by the Constitution.⁶⁷

In resisting the temptation to adopt a constitution that might be more fashionable in other former colonial territories, Fiji's leaders have taken advantage of their political and geographical isolation, and have been essentially pragmatic. No doubt, like Halifax, they realize that a constitution ". . . without suiting itself to differing times and circumstances, . . . could not live".⁶⁸

⁶⁰ *Ibid.*, s. 8(d) and (f).

⁶¹ *Ibid.*, s. 8(2).

⁶² *Ibid.*, s. 16.

⁶³ *Ibid.*, s. 16(2). Unless, of course, the statute authorizes the tribunal to free detainees.

⁶⁴ Chapter I. Some interesting variations nevertheless have been introduced into the 1970 Constitution.

⁶⁵ Chapter IX, ss. 112-18.

⁶⁶ *The Constitution of Fiji*, 1970, s. 16(3).

⁶⁷ *Ibid.*, ss. 112-17.

⁶⁸ Quoted in Kenyon, J. P., *op. cit.*, p. 359.