

PROTECTED RIGHTS OF COMMUNITIES AND GROUPS

17.1 In Chapter 3, the Commission discussed the criteria in its Terms of Reference requiring it to consider how constitutional arrangements for the Fiji Islands could guarantee the rights, protect the interests and take account of the concerns of indigenous Fijians and Rotumans and all other ethnic groups. We described, in broad terms, the nature of those rights, interests and concerns.

17.2 In reviewing the 1990 Constitution and making proposals for new constitutional arrangements, we have already identified many ways in which the Constitution protects the rights and promotes the interests of groups. In some cases we have recommended that the provisions should be strengthened, in order to carry out that purpose more effectively. The constitutional protections for group rights and interests go far beyond those dealt with in this chapter.

17.3 Here, our purpose is to discuss a range of matters in which certain communities and groups have rights and interests distinct from those of other members of society: land, fisheries, minerals, chiefly titles, the arrangements for the governance of the community, the customary law and methods of dispute settlement. The communities and groups concerned are Fijians, Rotumans, the Banaban community living on Rabi Island, and landowners, including those who are landlords of agricultural land, and their tenants.

17.4 The chapter is concerned with the substantive rights that should be recognised and protected by the Constitution and the techniques that should be used for this purpose. One of those techniques is the "entrenchment" of the legislation making provision for the matters in question. The Constitution provides that the legislation cannot be amended or repealed by an ordinary Act of Parliament passed by a majority of the members present and voting. A special procedure and a higher majority are required. The entrenched legislation is protected against amendment in much the same way as the Constitution itself. In this chapter we make recommendations about which Acts should continue to be entrenched. The procedures which should be followed to amend either the Constitution or the entrenched legislation are dealt with in Chapter 20.

GROUP RIGHTS AND EQUALITY UNDER THE LAW

17.5 The legislation applying to “Fijians”, “Rotumans” and “the Banaban community” describes the persons to whom it applies by reference to their “race” or “ethnic origin”. In Chapter 7 we proposed that these attributes should be included among the grounds on which discrimination is prohibited. We recommended that “discrimination” should continue to mean the imposition of disabilities or restrictions, or the conferment of privileges or advantages on a prohibited ground. Accordingly, a law is not discriminatory unless, because of their race or ethnicity, it subjects members of a race or ethnic community to disabilities or restrictions to which persons of other races or ethnic communities are not subjected, or accords them privileges or advantages not accorded to persons of other races or communities.

17.6 The Commission found no legislation which gives the Fijian, Rotuman or Banaban communities *privileges or advantages* which are not accorded to members of other races. The statutory regimes, and, to the extent recognized by those regimes, the customary law of those communities, are either neutral in comparison with the way in which the law treats other races and ethnic communities or imposes on the members of the group disabilities or restrictions to which persons of other races and communities are not subjected.

17.7 For example, the legislation recognizing the existence of customary Fijian land and fishing rights, and Rotuman land rights, and vesting freehold land in Rabi Island in trust for the members of the Banaban community, recognizes the property rights of those groups in accordance with Fijian, Rotuman or Banaban custom. The fact that other racial or ethnic communities or groups do not have customary land or fishing rights and that, if they own land, or rights in land, they do so under a different system of tenure does not, in itself, impose burdens on or create privileges for either the indigenous or the non-indigenous communities.

17.8 Therefore, the only question that arises about discrimination on the grounds of race or ethnic origin is whether there is good reason for any disabilities or restrictions to which members of the Fijian, Rotuman or Banaban community are or may be subjected under the legislation applying to those communities. If so, the legislation should be protected against invalidity under the Bill of Rights. If not, provision should be made to ensure that the legislation - and especially regulations made under the legislation - conform with the Bill of Rights.

17.9 No such questions arise in discussing the rights of “landowners”, “landlords” or “tenants”. The issues are primarily ones of policy, though the policy must be determined within the parameters of the law.

RIGHTS IN RESPECT OF LAND AND CHIEFLY TITLES

Fijian land

17.10 Section 3 of the Native Lands Act (Cap. 133) provides that native lands, as defined, shall be held by “native Fijians” according to native custom as evidenced by usage and tradition. The term “native Fijian” is not defined, but the Act does not apply to Rotuma. Subject to the Act and to regulations made by the Fijian Affairs Board, native lands may be cultivated, allotted and dealt with by native Fijians as amongst themselves according to their native customs. All courts of law are to decide any dispute about tenure amongst native Fijians according to those regulations or native custom or usage “which shall be ascertained as a matter of fact by the examination of witnesses”.

17.11 A Native Lands Commission has the duty of ascertaining what lands are the property of mataqali or other divisions or subdivisions of the people and the boundaries of those lands. Details of the names of the owners and the boundaries are to be recorded in a register (the Vola ni Kawa Bula). The Native Lands Commission is also to decide disputes as to ownership. There is a right of appeal against its decisions on ownership to an Appeals Tribunal.

Fijian chiefly titles

17.12 Under the Native Lands Act, the Native Lands Commission is also to decide disputes arising between native Fijians “as to the headship of any division or subdivision of the people having the customary right to occupy and use any native lands”. There is no provision for any appeal from such a decision, but the Act does not state that the decision is final.

Functions of the Native Lands Commission under the 1990 Constitution

17.13 Under the 1990 Constitution, the Native Lands Commission was given the additional functions of

- certifying registration or eligibility for registration in the Vola ni Kawa Bula for constitutional purposes (sections 42, 49 and 156);
- advising the Electoral Commission “where necessary” (section 53(3));
- giving “opinions” or “decisions” on “matters relating to and concerning Fijian customs, traditions and usages or the existence, extent or application of customary laws” (section 100(4)).

17.14 It was provided that the Native Lands Commission's opinions or decisions on the last mentioned matter and on disputes about headship "shall be final and conclusive and shall not be challenged in a court of law". The courts have interpreted this provision as meaning that no opinion or decision of the Native Lands Commission on headship or on any matter concerning custom can be challenged in a court, by way of appeal or judicial review.

17.15 The Commission received submissions seeking some means of reviewing decisions of the Native Lands Commission on headship. That matter is now often contested, at least in part because headship is relevant to the distribution of the rents received in respect of Fijian land. The Commission also received submissions seeking a new, full-scale inquiry into the ownership and boundaries of land to determine which lands are "native lands" and which mataqali or other divisions or subdivisions of the people own particular parcels.

Recognition of Fijian title to land

17.16 The recognition of native title by the Native Lands Act is an important guarantee of the rights of Fijians to their remaining land, which amounts to approximately 83% of the land area of Fiji. It is not the *source* of that title, which is to be found in native custom as evidenced by usage and tradition. Under the doctrine of aboriginal title, recently reinforced by the *Mabo* decision in Australia, the common law recognises the customary land rights of an indigenous people. However, the common law does not protect those rights from legislative interference. That is why it is important that the Native Lands Act should not be capable of amendment by the ordinary law. The provision for its entrenchment should be retained.

17.17 The Native Lands Act is subject to the State Acquisition of Lands Act. In Chapter 7 we recommended that the Constitution should not permit the taking of land under that Act except on a small scale, for a public work, and then subject to stringent safeguards.

The Native Lands Commission

17.18 We consider that the Native Lands Commission's functions of determining the title to land and its boundaries and deciding questions about headship are so important that the Commission should be constituted by the Constitution, instead of by the Native Lands Act. That would give it all the protections conferred on other constitutional commissions. The Constitution should make provision for the following matters:

- The Commission should consist of three members, any two of whom may sit to hear and determine a particular matter.
- Its members should be appointed by the President on the recommendation of the Bose Levu Vakaturaga.
- The current system of using assessors should be retained.
- There should be no provision for ex officio members, and the Minister responsible for Fijian Affairs should no longer have the power to designate a single Commissioner or some other person to hear a dispute.
- The Constitution should provide that, in the exercise of its powers, the Commission shall not be subject to the direction or control of any other person or authority, except by way of appeal or judicial review.
- The rules about disqualification for membership of the Commission or for appointment to public office or eligibility to be a candidate for election to Parliament within three years of ceasing to hold office as a member should be those applying to other constitutional commissions, as described in Chapter 14.
- The Secretary of the Commission should be a public officer.

17.19 The functions given to the Commission by the 1990 Constitution in respect of a person's eligibility to be registered on the Fijian roll or to stand for a Fijian communal seat will no longer be required, in view of our recommendation in Chapter 10 that the right to be registered on a roll for a Fijian reserved seat constituency should not be determined by reference to the Vola ni Kawa Bula. For the reasons explained below, we also consider that the Commission should not have the power to give opinions or decisions on matters relating to custom, except so far as is necessary to determine the matters for which it is responsible under the Native Lands Act.

17.20 Accordingly, the Constitution should confer on the Commission essentially the same functions and powers as it has under the Native Lands Act in relation to the title to land and its boundaries and questions of headship. They should be described in modern language that sets out their nature clearly in a manner that is generally acceptable to indigenous Fijians.

17.21 The Constitution should provide that provision may be made by Act for appeals against decisions of the Native Lands Commission on matters concerning

either the title to land and its boundaries or on questions of headship. The Native Lands Act should be amended to constitute an Appeals Tribunal for this purpose, along the lines of that provided for in section 7 of that Act. The Appeals Tribunal should continue to consist of three members, but the opportunity should be taken to review the method of appointing them.

17.22 Decisions of the Appeals Tribunal should be final in the sense that there should be no right of appeal to the courts on the *merits* of the decision. However, the courts should have the power of judicial review in respect of the decisions both of the Native Lands Commission and of the Appeals Tribunal. Judicial review is a process by which those affected by decisions of a public authority may challenge the legality or the fairness of the procedure followed in hearing the parties and making the decision. If a court finds a defect in the procedure, it sets aside the decision and requires the authority to rehear and redetermine the matter. It would normally be hard to obtain judicial review of a decision of an authority hearing a matter at first instance unless rights of appeal have first been exhausted.

17.23 We believe that, in these ways, the parties to disputes brought before the Native Lands Commission will have access to a system of dispute settlement that meets the public interest in certainty and finality, as well as in ensuring that justice is done to individuals.

17.24 The Commission has considered these competing aspects of the public interest in responding to the desire expressed in some submissions for a wholesale redetermination of what land should be regarded as native land, and the boundaries between the holdings of the different land-owning units. We are of the opinion that the need for certainty and finality outweighs the benefits of reopening what were, in the main, land transactions occurring before cession in 1874. Those transactions were thoroughly investigated by the colonial government. It upheld only freehold titles considered to have been properly acquired with the agreement of the landowners. Fortunately, Fijians have not suffered the loss of their land in the ways inflicted upon the indigenous peoples of other Pacific states by governments whose main aim was to ensure the availability of land for large-scale settlement. The Commission considers that there should be no comprehensive review of what land is native land or of existing titles or boundaries.

The Native Land Trust Act

17.25 The Native Land Trust Act (Cap. 134) vests "the control" of all native land in the Native Land Trust Board established by that Act and requires the Board to administer the land for the benefit of the Fijian owners. As a consequence,

the Fijian owners may not alienate native land except to the State, or charge or encumber it. Subject to the State Acquisition of Lands Act, the Forests Act, the Petroleum (Exploration and Exploitation) Act and the Mining Act, native land may not be leased or sold or otherwise disposed of except by the Board.

17.26 The Board may set aside any portion of land as a “native reserve”. Land within a native reserve may be leased only to native Fijians. Land not included in a native reserve may be leased by the Board only if the Board is satisfied that it “is not being beneficially occupied by the Fijian owners and is not likely during the currency of such lease ... to be required by the Fijian owners for their use, maintenance or support”. There is no requirement that the Fijian owners consent to the lease or its terms, or that they be consulted.

17.27 To meet its expenses, the Board is empowered to retain not more than 25% of rents received. We were informed that the income from this source is not sufficient to meet the Board’s expenses. It is necessary for the Government to appropriate additional funds.

17.28 The Commission received a number of submissions from Fijian landowners that the powers of the Native Land Trust Board were too great. They thought that, in entering into or renewing leases of land, it should be bound by the views of the landowners. The percentage of rents retained to meet the Board’s expenses was also considered excessive. It was suggested that the Native Land Trust Act should be thoroughly examined with a view to its amendment or repeal. On the other hand, the Commission received submissions that, in the interests of the tenants of agricultural land (most, but by no means all, of whom are Indo-Fijians) and of good race relations, there should be security of tenure of agricultural land for a sufficiently long term to encourage good husbandry and land improvement, as well as to meet the need of tenants for reasonable certainty.

17.29 The Commission considers that the existence of the Native Land Trust Board, with its powers to grant leases of land on behalf of the landowners, goes to the heart of land policy in the Fiji Islands. The Act seeks to strike a balance between the fact that the bulk of the land remains in the ownership of indigenous Fijians, and, on the other, the need to ensure its use in the interests of the economy of the whole country, not only by Fijians, but also by members of other communities. The security of tenure that can and should be provided to tenants under leases granted by the Board is vital to any investment involving the use of land.

17.30 The mechanism of allowing alienations of native land only through the Native Land Trust Board does involve the sacrifice of control by the Fijian owners. This has implications for the enjoyment of the right to equality under the law without discrimination, as well as practical consequences. We consider that, at the practical level, there should be ongoing efforts to ensure that the Board, so far as possible, acts in consultation with land owners or at least keeps them informed. The question of the source and level of the funding of its operations should be kept under review, as should its accountability for all aspects of its operations. We discussed the general principle of accountability in Chapter 15.

17.31 The Native Land Trust Act imposes on Fijians “disabilities and restrictions” not applying to the owners of freehold land. (We consider below the similar restrictions placed on Rotumans and members of the Banaban community.) Should it be protected against invalidity on the ground of inconsistency with the right of every one to equality under the law and freedom from discrimination?

17.32 At present the Native Land Trust Act is protected under section 16(5)(a) which is a blanket provision applying to all law which was in force immediately before 23 September 1966 and has continued in force ever since. We have recommended the repeal of this provision on the understanding that, if the entrenched legislation to which it applies requires protection, that protection should be given explicitly.

17.33 A prior question is whether the giving of such protection would be in conformity with the international standards. Those standards do not give extensive recognition to a right to property, because, in some states, all or most property is or was owned by the state, not individuals. However, they do recognise that a right to own property includes the right to dispose of the property. This was acknowledged by the Government of Fiji in declaring its succession to the *Convention on the Elimination of all forms of Racial Discrimination*. In doing so, it affirmed the following reservation:

To the extent, if any, that any law relating to ... land in Fiji which prohibits or restricts the alienation of land by the indigenous inhabitants may not fulfil the obligations referred to in article 5(d)(v), the Government of Fiji reserves the right not to implement the ... provision

17.34 We have considered the restriction on the alienation of Fijian land in the light of the two international instruments dealing with the rights of indigenous peoples: *ILO Convention 169 on Indigenous and Tribal Peoples* and the *Draft Declaration on the Rights of Indigenous Peoples*. The thrust of those instruments

is that restrictions on the right of indigenous peoples to deal with their land, other than in the ways permitted by their own land-tenure systems, may be justified in the interests of protecting their rights to land in the long term. However, land policies should be determined only with the full participation of the indigenous peoples themselves.

17.35 In the light of all these factors, the Commission considers that the Native Land Trust Act should continue to be entrenched by the Constitution. It should be consequentially amended so far as is necessary to take account of the constitution of the Native Land Commission by the Constitution and its status as a constitutional commission. All aspects of the operation in practice of the Act, "for the benefit of the Fijian owners", as well as the country as a whole, should be kept under constant review within the framework proposed below in relation to all matters affecting agricultural land.

17.36 The section of the Bill of Rights affirming the right to equality under the law and freedom from discrimination on prohibited grounds, including those of race and ethnic origin, should permit the limitation of that right for the purpose of imposing, by or under a law, restrictions on the alienation of land held in accordance with Fijian custom, or permitting the temporary alienation of such land without the consent of the owners. A draft provision for this purpose was included in Recommendation 185. For ease of reference it is reproduced below.

Rotuman land and chiefly titles

17.37 The Rotuma Lands Act (Cap. 138) was enacted to bring about the simplification and registration of customary title to land in Rotuma and to prohibit the alienation of land to non-Rotumans, except by way of lease for not more than 21 years. Rotumans may not deal with land without the written consent of the District Officer who is required to be satisfied that the disposition is not at variance with the basis of land tenure specified in the Act. There is a right of appeal from decisions of the District Officer in relation to land to the Commissioner of the Eastern Division, sitting with two assessors appointed by the Rotuma Council. He may hear the parties if he thinks fit. His decision is final.

17.38 Under section 18(1) of the Rotuma Act (Cap. 122), "District Chiefs shall continue to be elected in accordance with Rotuman custom as heretofore". The Minister may in his discretion remove a District Chief from office. A person so removed is not eligible for re-election without the Minister's consent.

17.39 Although the Commission received submissions from the Rotuma Council and other Rotumans, they did not raise any matter concerning land tenure or the

election of District Chiefs. The Rotuma Lands Act should continue to be entrenched. Because it places restrictions on the alienation of Rotuman land, it should be protected against the consequences of inconsistency with the Bill of Rights in the same way as the Native Land Trust Act.

Banaban land

17.40 Prior to independence, the British Government purchased Rabi Island, which was freehold land, for the purpose of establishing a permanent home for the Banaban community formerly living on Banaba (Ocean Island) in Kiribati. Their own island had been rendered infertile by the phosphate mining operations of the British Phosphate Commissioners. The Government of Fiji has honoured the arrangements then made for the holding of the land on Rabi Island for the benefit of the Banaban community and for their governance.

17.41 The Banaban Lands Act (Cap. 124) vests Rabi Island in freehold in the Council of Leaders constituted under the Banaban Settlement Act (Cap. 123) to be held on trust for all members of the Banaban community. The Council may allot portions of land to members of the Banaban community. The land so allotted ("Banaban land") is to vest in the persons registered as the owners "such rights, privileges, powers and obligations in relation to such land as are incidental to Banaban custom" as may from time to time be determined by the Land Court set up under the Act. Banaban land may not be disposed of, by sale, lease or otherwise, to anyone other than a member of the Banaban community. The Council may grant leases of, or licences over, other land on Rabi Island but may not otherwise dispose of it.

17.42 The Banaban Lands Act should continue to be entrenched. Because it places restrictions on the alienation of the land on Rabi Island, it, too, should be protected against the consequences of inconsistency with the Bill of Rights in the same way as the Native Land Trust Act and the Rotuma Lands Act.

The Agricultural Landlord and Tenant Act

17.43 Although the Agricultural Landlord and Tenant Act (Cap. 270) (ALTA) is an important part of the machinery governing the lease of native lands for agricultural purposes, it applies not only to native lands, but, with minor exceptions, to all agricultural land in Fiji. It does not apply in Rabi Island or Rotuma.

17.44 The Act established transitional measures for giving security of tenure to persons in occupation of agricultural land and created statutory terms of either ten

or thirty years, with a right to one further extension of twenty years. It also provided ongoing rules about the form of agricultural leases, the terms and conditions to be implied in such leases by law, including provision for periodic rent reviews, and, on the termination of the lease, the payment of compensation by the landlord for the value of improvements made by the tenant with the landlord's consent. ALTA set up machinery for valuing land and improvements and regulating relations and determining disputes between landlords and tenants. It therefore offers essential protections to both parties.

17.45 As indicated in Chapter 3, some of those most concerned about the expiry of the leases created under the provisions of ALTA assumed that ALTA itself expires, along with the leases to which it relates. That is not the case. While some of its provisions may be in need of review, the statutory regulation of the terms of agricultural leases, and machinery for their implementation, will remain in force and continue to be needed. The Agriculture Landlord and Tenant Act should continue to be entrenched.

The consideration of land issues

17.46 The Commission received a large number of submissions about land issues, many going well beyond matters relevant to a review of the Constitution. It is beyond our Terms of Reference to comment in detail on issues of substance, unless it is proper to deal with them in the Constitution. We should like to emphasize, however, that it will not be possible to achieve racial harmony and national unity, or build the mutual confidence and trust needed to achieve the goal of multi-ethnic government, unless land issues are resolutely addressed in a calm way. All communities must be willing to listen to the concerns of others and respond to them sensitively.

17.47 Many submissions expressed the view that land issues "ought to be taken out of politics". They saw as wholly destructive a perception that Fijian land ownership might be at risk unless Fijians have a dominant position in Parliament and Government. On the other hand, some submissions urged that the full use of land, in ways that preserve its fertility for the benefit of future generations, is vital to Fiji's economic prosperity. At the human level, too, those who are not, and will never be, landowners need to have a sense that reasonable steps will be taken to give them access to suitable land, not perhaps as individuals, but certainly as a community. Those are the kinds of matters that political leaders are expected to solve.

17.48 We make three proposals about ways of reconciling the apparent contradictions between these viewpoints. First, the procedure for amending the

entrenched legislation about land and other matters should make it as clear as possible that it will never be changed without the agreement of the communities and groups it protects. In particular, the Bose Levu Vakaturaga should have power to veto any amendment of the entrenched legislation protecting Fijian rights and interests in land and other matters, or the rights and interests of Rotumans or of the Banaban community. Recommendations for this purpose are made in Chapter 20.

17.49 Secondly, we have the impression that there is not a good flow of accurate information from the Government or the departments and statutory bodies which have the responsibility for general policies about matters affecting land and its application in the particular case. We cannot help feeling that we would not have received the submissions we did about land matters, particularly the policies and procedures for the renewal of leases of agricultural land, if people had been better informed.

17.50 Nothing gives greater opportunity for rumour and mistrust than a lack of accurate information about Government's policies and proposed actions in this area. In responding to people's anxieties, politicians tend to be seen as exploiting the situation for political purposes. Although it is not a matter for inclusion in the Constitution, we wish to emphasise the need for a steady flow of clear, accurate, well-coordinated, up-to-date and reasonably detailed information about what Government and the bodies working under its direction are doing, and planning to do, in the sensitive areas concerning the renewal, termination or grant of new ALTA leases, not only of native land but also of State land.

17.51 That comment leads to our third point. We consider that land policy is a matter on which broad agreement should be reached among all political parties and all communities. There is a need to apply the duty under the recommended *Compact* to take account of the interests of all communities. There should not be a feeling that the Government will implement its own policies, even if they do not reflect general agreement. Once settled by a process of negotiation and agreement, the policies should not be changed without further agreement, even if there is a change of government. In other countries it has been possible for political parties of all persuasions to reach agreement on important long-term policy questions on which people's security depends.

17.52 The policy directions about the use of land in the Fiji Islands cannot be set solely by a Commission of Inquiry or a Committee. They have to be worked out behind closed doors by the political leaders, with the help of knowledgeable

experts and perhaps someone who can act as a facilitator or conciliator in helping the political leaders reach agreement. They will need a mandate from those whom they represent. With goodwill and patience, agreement should be possible. Underlying apparent conflicts between the interests of landowners and those of tenants is a shared interest in the well-being and prosperity of Fiji.

17.53 Accordingly, we suggest that steps should be taken to reach an accord among all political parties and communities in the Fiji Islands on policies relating to the use of land and the renewal or grant of leases for agricultural purposes. The terms of such an accord, once reached, should be given wide publicity.

17.54 The recognition of chiefly title involves the application of custom. We deal with that matter below.

RECOMMENDATIONS

620. **Instead of being constituted by the Native Lands Act, the Native Lands Commission should be constituted by the Constitution, with all the protections conferred on other constitutional commissions.**
621. **The Commission should consist of three members, any two of whom should be permitted to hear and determine a particular matter. They should be appointed by the President on the recommendation of the Bose Levu Vakaturaga. The current system of using assessors should be retained. There should be no provision for ex officio members, and the Minister responsible for Fijian Affairs should no longer have the power to designate a single Commissioner or some other person to hear a dispute.**
622. **The Constitution should provide that, in the exercise of its powers, the Commission shall not be subject to the direction or control of any other person or authority, except by way of appeal or judicial review.**
623. **The rules about disqualification for membership of the Commission, or for appointment to public office, or eligibility to be a candidate for election to Parliament within three years of ceasing to hold office as a member, should be those applying to other constitutional commissions.**
624. **The Secretary of the Commission should be a public officer.**

625. **The Commission's functions should be those of determining the ownership of native land and the boundaries of parcels, as well as questions of headship. It should not have the power to give opinions or decisions on matters relating to custom, except so far as is necessary to determine those matters.**
626. **The Constitution should provide that provision for appeals against decisions of the Native Lands Commission on matters concerning either the title to land and its boundaries or on questions of headship may be made by Act. The Native Lands Act should be amended to constitute an Appeals Tribunal for this purpose along the lines of that provided for in section 7. The Appeals Tribunal should continue to consist of three members, but the opportunity should be taken to review the method of appointing them.**
627. **There should be no right of appeal to the courts on the *merits* of decisions of the Appeals Tribunal. However, the courts should have the power of judicial review in respect of the decisions both of the Native Lands Commission and of the Appeals Tribunal.**
628. **The Native Lands Act should be consequentially amended so far as is necessary to take account of the constitution of the Native Lands Commission by the Constitution and its status as a constitutional commission.**
629. **All aspects of the operation in practice of the Native Land Trust Act, "for the benefit of the Fijian owners", as well as the country as a whole, should be kept under constant review within the framework proposed below in relation to all matters affecting agricultural land.**
630. **The section of the Bill of Rights affirming the right to equality under the law and freedom from discrimination on prohibited grounds, including those of race and ethnic origin, should permit the limitation of that right, by or under a law, for the purpose of imposing restrictions on the alienation of land held in accordance with Fijian custom, or permitting the temporary alienation of such land without the consent of the owners.**
631. **There should be no comprehensive review of what land is native land or of existing titles or boundaries.**

632. **The Rotuma Lands Act and the Banaban Lands Act should be protected against the consequences of inconsistency with the Bill of Rights in the same way as the Native Land Trust Act.**
633. **The following Acts should continue to be protected against amendment by ordinary Act of Parliament, by means of constitutional entrenchment:**
- the Fijian Affairs Act;**
 - the Fijian Development Fund Act;**
 - the Native Lands Act;**
 - the Native Land Trust Act;**
 - the Rotuma Act;**
 - the Rotuma Lands Act;**
 - the Banaban Lands Act;**
 - the Banaban Settlement Act; and**
 - the Agricultural Landlord and Tenant Act.**
634. **The Bose Levu Vakaturaga should have a power to veto any amendment of the entrenched legislation protecting Fijian rights and interests, or the rights and interests of Rotumans or the Banaban community.**
635. **There should be a steady flow of clear, accurate, well-coordinated, up-to-date and reasonably detailed public information about what Government and the bodies working under its direction are doing, and planning to do, in the sensitive areas concerning the renewal, termination or grant of new ALTA leases of native and State land.**
636. **Steps should be taken to reach an accord among all political parties and communities in the Fiji Islands on policies relating to the use of land and the renewal or grant of leases for agricultural purposes.**

FISHING RIGHTS

17.55 Only the customary fishing rights of indigenous Fijians have been recognised explicitly by statute. The Fisheries Act (Cap. 158) authorises the Minister for Fijian Affairs to set up a Native Fisheries Commission to inquire into and record the existence and boundaries of customary fishing rights “in each province of Fiji” which “are the rightful and hereditary property of native owners”, whether mataqali or other divisions or subdivisions of the people. It is an offence

for any person to take fish in any registered area unless that person is a member of the ownership group and is fishing otherwise than by way of trade or business. There is an exception for recreational fishing by any person, and licences to fish may be granted to any person by the Commissioner of the relevant Division in his discretion, after consulting the owners of fishing rights which may be affected.

17.56 By its terms, the provision does not apply to Rotuma, but it does apply to Rabi Island. For their subsistence fishing, the Banaban community have to get the permission of the chiefs of Cakaudrove who control the fishing rights there.

17.57 The Fisheries Act is not expressly entrenched by the Constitution, but is one which would come within the reference in section 78 of the 1990 Constitution to “a bill ... which affects Fijian land, customs or customary rights”. It is therefore protected against amendment by an ordinary Act of Parliament. Customary fishing rights should continue to be protected by a constitutional provision to this effect, as proposed in Chapter 20.

RECOMMENDATION

- 637. The provisions of the Fisheries Act which recognise and protect Fijian customary fishing rights should continue to be protected against amendment by ordinary Act of Parliament under constitutional provisions which give a veto power to the Bose Levu Vakaturaga in respect of Bills affecting Fijian land or customary rights.**

MINERALS

17.58 Section 9(7) of the 1990 Constitution created a new right of landowners and owners of customary fishing rights to the royalties or proceeds from minerals extracted from the subsoil. The provision allows the state to keep a proportion of the royalties, as well as to recover the costs of administering “exploration and extraction”. The proportion to be retained by the State is to be “as may be approved by the Cabinet from time to time”. This arrangement allows the State, as owner of the mineral resources, to control extraction, but at the same time ensures that the landowners and owners of fishing rights receive income from this activity. The Commission received a number of submissions urging the retention of the provision. Some people wanted it to be made even more favourable to the owners of affected land or fishing rights.

17.59 In most countries, the state asserts rights of ownership over minerals in the subsoil. It controls exploration and exploitation and earns revenue through the payment of royalties. Most people making submissions accepted the legitimacy of such arrangements as they apply in Fiji. The Commission considers that the interests of the owners of the surface of the land or of fishing rights should continue to be recognised. However, there are other important interests which should also be taken into account.

17.60 One is the need to make sure that the state does not grant any person the right to exploit minerals in the subsoil without taking approved measures to prevent environmental damage. There needs to be careful monitoring to ensure that the measures are put in place and maintained, and that they are adequate for the purpose. Consideration should be given to setting up a contingencies fund so that, if environmental damage should occur despite all precautions, money will be available to repair the damage or pay compensation to those who suffer loss.

17.61 The Commission considers that the Constitution should recognise the right of landowners or the owners of customary fishing rights to an equitable share of the royalties received by the state in respect of minerals extracted from the subsoil. The share that is considered "equitable" from time to time should be fixed by law. It should not be a matter for the Cabinet. The Constitution should set out the matters to be taken into account in determining what is an equitable share. They should include the following:

- other benefits which the owners are likely to receive as a result of the exploitation;
- the risks of environmental damage to the land or fishing rights of the owners;
- the risks of environmental damage to the land or fishing rights of persons other than the owners;
- any legal obligation of the state to contribute to a fund to meet the cost of preventing or repairing any environmental damage caused by the exploitation, or of compensating any person who has suffered loss as a result of such damage;
- the cost of administering the exploitation right; and
- the need for the benefits of the exploitation to contribute to general revenue.

17.62 The Commission also received submissions seeking to extend the rights of the owners of native land to minerals, or the royalties from minerals, in the continental shelf. Interest was also expressed in sharing the revenue from the exploitation of the fish and other living resources in the 200 mile exclusive economic zone. The Commission considers that there is not the same justification for sharing the revenues from the resources of these areas as there is in the case of resources in the subsoil of the land, and those parts of the seabed over which there are customary fishing rights. Historically, the Fijian people confined their subsistence fishing to the waters enclosed within the protective reefs. The revenue from resources beyond those limits should belong exclusively to the state.

RECOMMENDATIONS

- 638. The Constitution should not permit the state to grant any right to extract minerals from the subsoil unless, as a condition of that right,**
- (a) approved measures are taken to prevent environmental damage, and**
 - (b) consideration has been given to establishing a fund for the purpose of meeting the cost of further measures necessary to prevent, repair or compensate for any environmental damage that may nevertheless occur.**
- 639. The owners of land or of a registered customary fishing right should be entitled to an equitable share, fixed by law, of royalties received by the state in respect of minerals extracted from the subsoil of their land or the seabed in the area covered by their customary fishing rights. In determining what is an equitable share, account should be taken of**
- (a) other benefits which the owners are likely to receive as a result of the exploitation;**
 - (b) the risks of environmental damage to the land or fishing rights of the owners;**
 - (c) the risks of environmental damage to the land or fishing rights of persons other than the owners;**
 - (d) any legal obligation of the state to contribute to a fund to meet the cost of preventing, repairing or compensating for any environmental damage;**

- (e) **the cost of administering the exploitation right; and**
- (f) **the need for the benefits of the exploitation to contribute to general revenue.**

THE GOVERNANCE OF COMMUNITIES

Indigenous Fijians

17.63 The Fijian Affairs Act (Cap. 120) creates a number of institutions and a detailed system for the governance of Fijians. Under section 2

“Fijian” includes every member of an aboriginal race indigenous to Fiji and also includes every member of an aboriginal race indigenous to Melanesia, Micronesia or Polynesia living in Fiji who has elected to live in a Fijian village.

17.64 The Fijian Affairs Act constitutes the Great Council of Chiefs. In Chapter 9 we recommended the constitution of the Bose Levu Vakaturaga under the Constitution, and made proposals about its future role.

17.65 The Act also creates the Fijian Affairs Board. It, too, has an advisory role, but in addition,

may, subject to the approval of the Minister, make regulations to be obeyed by all Fijians, providing for the peace, order, welfare and good government of Fijians.

The only such regulations in force at the present time appear to be the Fijian Affairs (Safety at Sea) Regulations.

17.66 Without prejudice to the generality of this plenary power of governance over Fijians, the Board, subject to the approval of the Minister, has the express power, among others, to constitute Provincial Councils and other councils and provide for their powers, duties and functions, including the imposition of rates and fees.

17.67 The Fijian Affairs Act constitutes Provincial Councils for each province. Subject to the approval of the Board, a Provincial Council may make by-laws for the health, welfare and good government of Fijians residing in or being members of the community of a province, and, subject to the approval of the Minister, may impose rates on such Fijians. Most, if not all, provinces have made what appear to be fairly uniform Public Health (Villages) By-laws.

17.68 The Fijian Affairs (Provincial Council) Regulations allow provinces that so wish to levy a land rate on all land "of whatsoever tenure, including freehold land but excluding all land within a town, owned by Fijians within the province". Pending the adoption of a land rate, a Provincial Council may, by resolution, impose a provincial rate upon every male Fijian between the ages of 21 and 60 registered as a land owner of the province. The fact that the bulk of the members of Provincial Councils are elected appears to be closely linked with the creation of this power to tax.

17.69 The Fijian Affairs Board may establish councils for any area in any province. Those councils may, subject to the approval of the Provincial Council, make orders for the good government of Fijians in, or being members of the community of, that area. The powers of the Board, the Provincial Councils and other councils to create offences punishable by fines or imprisonment, or both, is laid down on a carefully graded scale.

Fijian Development Fund Act

17.70 The Fijian Development Fund Act (Cap. 21) sets up a fund created by a levy on sales of copra or coconuts. Producers remain the beneficial owners of the amount standing to their credit in the fund and may borrow from it for approved purposes.

Rotumans

17.71 The Rotuma Act (Cap. 122) sets up the Council of Rotuma. It consists of the chiefs of the seven districts and one elected member from each of the districts, together with the District Officer. The most senior medical and agricultural officers are to be advisory members unless the Council resolves otherwise. The Council has advisory functions in relation to Rotuma and administers the Rotuma Development Fund.

17.72 The main income of this fund is a levy of up to 10% which the Council may impose on the sale price of all primary produce produced by Rotuman producers in Rotuma. The whole of the fund, less administration expenses, is required to be directed exclusively towards the promotion of the development, welfare and advancement of Rotumans. It may be spent outside as well as inside Rotuma. Up to \$20,000 in total may be paid into a Rotuma Agricultural and Industrial Loan Fund which the Council may establish, and from which loans may be made to Rotumans for agricultural and industrial purposes.

17.73 The Rotuma Council has the power to make Rotuma Regulations relating to the peace, order and good government of the Rotuma community and to be obeyed by “all members of the Rotuman community in Rotuma”. “Rotuman community” means the indigenous inhabitants of Rotuma and also any Fijian resident on Rotuma. Regulations made by the Rotuma Council become law only if approved by resolution of Parliament.

The Banaban community

17.74 The Banaban Settlement Act establishes a Council of Leaders with the power, subject to the prior approval of the Minister, to make regulations to provide for the peace, order and good government of the Banaban community. With the approval of the Minister of Finance, the Council may borrow money secured on the property and revenues of the Council, including the royalties and other moneys accruing to the Banaban community in respect of minerals mined by the British Phosphate Commissioners on Banaba.

17.75 The Act establishes a Banaban Trust Fund to be administered by a Board consisting of the members of the Council. The Board is to invest the capital consisting of \$A10 million. The income is to be transmitted to the Council to be expended in promoting the social and economic welfare of the Banaban community. There is also a Rabi Island Fund into which is paid the other income of the Council.

17.76 By the Rabi Islands Regulations (Application) Order, the regulations specified in the schedule to the Order are to be obeyed by Fijians while on Rabi Island. It seems doubtful, however, whether the Council has the power to make regulations applying to anyone other than a member of the Banaban community as defined. The purported application of regulations to Fijians may therefore be ultra vires and void.

17.77 A Banaban Settlement (Amendment) Bill has recently been passed by Parliament. (At the time of writing it had not received the President’s assent.) The purpose of the Bill is to overcome problems arising out of divisions within the Council of Leaders and to strengthen the administration of the Banaban Trust Fund. The Senate refused to pass an earlier version of the Bill on the ground that it was inconsistent with the prohibition in the Constitution of discrimination on the ground of sex. That version had provided that only men over the age of sixty could be members of the Council of Leaders.

17.78 The final version of the Bill also omitted words which would have extended the meaning of “Banaban community” to include persons not descended from a former indigenous inhabitant of Banaba but who were “accepted as members

of the Banaban community in accordance with Banaban custom". This development means that, apparently without realising the implications, Parliament failed to take the opportunity of authorising the Council of Leaders to make regulations applying to persons not of Banaban descent who have been absorbed into the community. It strengthens the view expressed above that the Rabi Islands Regulations (Application) Order, purporting to apply to Fijians on Rabi Island the regulations made by the Council, is ultra vires and void.

The effect of making laws for communities

17.79 The regulations, rules or by-laws which may be made under the Fijian Affairs Act, the Rotuma Act or the Banaban Settlement Act apply to persons described by reference to their race. The law is to be "obeyed" by "Fijians" or by "all members of the Rotuman community resident in Rotuma" or to be "made for the peace, order and good government of the Banaban community". In substance, the laws made for the persons to whom they apply may take two forms. They may create offences and impose a fine or imprisonment for their breach, or impose a tax, either on land or produce or on a per capita basis.

17.80 The laws creating offences serve, or are capable of serving, four distinct purposes:

- First, they are for the local government of the area where the particular community is living. They are a substitute for local authority by-laws applying on a territorial basis. Thus they set standards for the construction of buildings, sanitation and other local matters and for the use of small boats beyond the protective reefs. The taxing laws raise revenue for what is, in effect, regional or local authority administration.
- Secondly, because neither Fijian magistrates nor the Rabi Island Court are empowered to apply the ordinary criminal law, the laws can set up a mini-criminal justice system which duplicates the ordinary law and can be enforced through local courts.
- Thirdly, they can enforce values which, if infringed, are disruptive in a small community, for example, by making adultery a criminal offence.
- Fourthly, they can be a vehicle for enforcing the communal allocation of tasks within a village, for example those required to produce crops for subsistence or sale.

The actual or potential creation of these four kinds of laws applying to persons on the basis of their race gives rise to practical and policy questions as well as issues of principle.

17.81 First, the provision for systems of law based on race assumed that the communities in question would remain isolated and homogeneous. People of other races would not be involved. However, this assumption is ceasing to be true. Increasingly, members of other races are taking up residence within local communities. The Banaban community has tried to deal with this problem, though probably ineffectively. The Rotuma Act goes a certain distance by providing that a member of the Rotuman community includes any Fijian resident on Rotuma. However, it does not cater for members of other ethnic communities. As more people belonging to other ethnic communities take up residence in Fijian villages, Rotuma or on Rabi Island, either through intermarriage or because they have been permitted to reside there, the application of laws on a personal, rather than a territorial, basis will become increasingly problematic.

17.82 Secondly, the law relating to "Fijians" is capable of applying to Fijians wherever they may reside. To what extent can and should Fijians be forced to remain within, or return to, the traditional communal system of the village or be free to live elsewhere as individuals, with good results or bad? The provisions of the Bill of Rights recognising the right to freedom of movement of all citizens within Fiji bears on this question.

17.83 Thirdly, the system of law created under the authority of the Fijian Affairs Act, the Rotuma Act and the Banaban Settlement Act is regulatory. It is enforced by provisions making it a criminal offence not to obey the regulation concerned. To the extent that the laws applying to particular communities are similar in content to local authority by-laws, they raise no issues of principle. If, however, the separate laws are there solely to facilitate their enforcement by special courts, they raise a fundamental question about whether there is good reason to set up separate systems of law and separate courts for particular communities. We come back to this question below, in considering the provision made in the Constitution for Fijian courts.

17.84 Fourthly, to the extent that the separate systems of law impose on particular individuals, by reference to and by reason of their race, disabilities or restrictions not applying to members of other races, they are inconsistent with the constitutional right to equality under the law and freedom from discrimination on the grounds of race or ethnic origin. To the extent that the separate systems impose disabilities or restrictions, or confer privileges or benefits on another prohibited ground, for example, a person's sex or gender, they are discriminatory on that ground also.

17.85 It would be wrong to give the impression that Fijians, Rotumans and members of the Banaban community are at present weighed down by a network of *particular* laws that are discriminatory, though a few examples can be found. The concerns are more

- the perpetuation of a system of separate laws based on the race of those to whom they apply, with little or no option, at least in law, for members of the affected group to “opt out”;
- the increasing likelihood that the members of the group to whom race-based laws apply will no longer live apart from members of other races; and
- a possible move to counter these and other problems arising from the impact of the money economy, and other social and cultural changes, by attempting to “put back the clock” to the days when communal living, in isolation from others and in accordance with traditional values, was the accepted pattern.

17.86 For the time being, however, the Fijian Affairs Act, the Rotuma Act and the Banaban Settlement Act are needed in their present form to recognise the identity of the community concerned and set up machinery for their governance. Those Acts should continue to be entrenched. The Fijian Affairs Act should be consequentially amended to reflect our recommendation for the constitution of the Bose Levu Vakaturaga in the Constitution instead of in the Act.

17.87 Provision should also be made for protecting regulations made under the three entrenched Acts from being void on the ground of inconsistency with the right to freedom from discrimination. To deal with this need in relation to Fijians, section 16 of the 1990 Constitution contained a new subsection (6) providing as follows:

Nothing contained in or done under the authority of any regulations made under the Fijian Affairs Act shall be held to be inconsistent with or in contravention of this section to the extent that the regulation in question makes provision for the peace, order, welfare and good government of Fijians.

This provision gives blanket protection to any regulations which may be made under the Fijian Affairs Act after 25 July 1990, not only so far as they may be discriminatory on the ground of race, but also so far as they may discriminate on the ground of sex or any other ground prohibited by section 16(2). As yet, no new regulations have been made.

The international standards concerning the governance of groups

17.88 The Commission considered the approach taken in section 16(6) in the light of the international human rights standards. These standards do not prohibit group differentiations as such. However, they do state very clearly that no one may be discriminated against on the ground of race. They also make it clear that indigenous peoples are entitled to a full measure of human rights and fundamental freedoms.

17.89 Article 5 of the *Convention on the Elimination of All Forms of Racial Discrimination*, to which, as already mentioned, Fiji is a party, requires States Parties to

guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

- (a) The right to equal treatment before the tribunals and all other organs administering justice;
- ...
- (d) Other civil rights, in particular:
 - (I) the right to freedom of movement and of residence within the border of the State;
- ...
- (e) Economic and social and cultural rights, in particular:
 - (I) the rights to work, free choice of employment, just and favourable conditions of work, just and favourable remuneration;

The Government of Fiji accepted these provisions without reservation.

17.90 As the international focus has shifted from the prevention of large-scale racial discrimination to the protection of vulnerable groups, including indigenous peoples, there is more emphasis on the duty of the State to respond to their different needs. Nevertheless, Article 3 of *ILO Convention 169 on Indigenous and Tribal Peoples* provides:

1. Indigenous and tribal peoples shall enjoy the full measure of human rights and fundamental freedoms without hindrance or discrimination. The provisions of the convention shall be applied without discrimination to male and female members of these peoples.
2. No form of force or coercion shall be used in violation of the human rights and fundamental freedoms of the peoples concerned including the rights contained in this Convention.

17.91 Article 2 of the Convention stresses the importance of the self-identification of the group as indigenous or tribal. The provision seems aimed

primarily at preventing states from denying to a group its indigenous or tribal status, but it also has implications for the right of an individual to identify himself or herself as a member of the group, or to refrain from doing so, in the exercise of the right to freedom of association.

17.92 Both these ideas appear again in the draft *Declaration on the Rights of Indigenous Peoples*, Article 8 of which provides:

Indigenous peoples have the *collective and individual* right to maintain and develop their distinct identities and characteristics, including the right to identify themselves as indigenous and to be recognized as such.

Similarly, Article 9 provides:

Indigenous *peoples and individuals* have the right to belong to an indigenous community or nation, in accordance with the customs of the community or nation concerned. No disadvantage of any kind may arise from the exercise of such a right.

(Emphasis added in each case)

17.93 As a pointer to the way in which indigenous identity is to be reconciled with the enjoyment of other rights, the draft Declaration states in Article 1: Indigenous peoples have the right to the full and effective enjoyment of all human rights and fundamental freedoms recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law. Other significant rights of indigenous peoples include those to maintain and strengthen their legal systems (Article 4), and the individual rights to life, physical and mental integrity, liberty and security of the person (Article 6).

17.94 The *Convention on the Elimination of All Forms of Discrimination Against Women*, to which Fiji is a party, defines discrimination against women as meaning any distinction, exclusion or restriction made on the basis of sex which denies women human rights and fundamental freedoms on a basis of equality with men. (Article 1). The Government of Fiji entered a reservation to Article 2(a) of the Convention which would have required it to take all appropriate measures

to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.

17.95 Even so, Fiji is bound by other provisions of the Convention which require it, among other things, to

- take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women (Article 2(f)); and to
- take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men (Article 3);
- take all appropriate measures to eliminate discrimination against women in rural areas ... (Article 14).

The Beattie Commission recommendation

17.96 The *Beattie Commission* was required by its Terms of Reference to inquire into the structure and operation of the judicial system of Fiji, including “the Fijian Courts”. As we have shown in Chapter 13, a court does not exist in isolation. It is given jurisdiction in respect of certain matters, and over certain persons. Often, it is required to apply a particular body of law. The *Beattie Commission* therefore devoted a section of its report to the content of the draft Fijian Affairs (Court) Regulations then under consideration by the Government. Those Regulations are intended to create a body of law to be enforced by the proposed Fijian courts. The Beattie Commission recommended:

The Fijian Affairs (Courts) Regulations should be critically examined to consider which of those in draft form do not contravene the provisions of the Constitution. Those that do so contravene or otherwise conflict with the tenets of human rights should not be introduced; they should be deleted from any proposed regulations (Recommendation 79(e)).

This Commission endorses that recommendation, but notes that it did not take account of the fact that section 16(6) of the Constitution denies to indigenous Fijians affected by regulations made under the Fijian Affairs Act the protection of the right to freedom from discrimination on the grounds prohibited by section 16(2).

17.97 We consider that section 16(6) should be repealed. In its place, the Constitution should provide that the right to equality under the law and freedom from discrimination on a prohibited ground may be limited by laws providing for the governance of Fijians, the Rotuman community or the Banaban community, and of other persons living as members of a Fijian community, the Rotuman community or the Banaban community, only if those laws comply with certain

further conditions. They must not discriminate against a person on any other prohibited ground, such as sex, gender or age, and they must not deny to any person any other human right or fundamental freedom recognised by law.

17.98 The draft provision for this purpose recommended in Chapter 7 is reproduced below. We return to the question of the law applying to Fijians, particularly law creating criminal offences, in considering section 122 of the Constitution establishing Fijian courts.

17.99 We described above the conceptual and policy problems involved in maintaining a body of law applying to a group of persons identified by reference to their race or ethnic origin. In essence, they raise the question whether the governance of Fijian villages, Rotuma and Rabi Island should, in the longer term, continue to be based on a body of law applying to persons identified by their race or ethnicity, or should instead be based on the concept of local government legislation applying to all persons living within a particular area. Such a radically different approach would obviously need very careful consideration. However, we believe it is one that should be borne in mind in making decisions in the meantime about the exercise of the existing powers to make laws applying to Fijians, Rotumans and the Banaban community.

RECOMMENDATIONS

- 640. The Fijian Affairs Act should be consequentially amended to reflect the recommendation for the constitution of the Bose Levu Vakaturaga in the Constitution instead of in the Act.**
- 641. The Constitution should provide that the right to equality under the law and freedom from discrimination on a prohibited ground may be limited by laws providing for the governance of Fijians, the Rotuman community or the Banaban community, and of other persons living as members of a Fijian community, the Rotuman community or the Banaban community, if those laws**
- (a) do not discriminate against any person on any prohibited ground other than race or ethnic origin, and**
 - (b) do not deny to any person any other human right or fundamental freedom recognised by the Constitution or by law.**

Section 16(6) of the 1990 Constitution, validating all regulations made under the Fijian Affairs Act, should be repealed.

- 642. Consideration should be given to the question whether the governance of Fijian villages, Rotuma and Rabi Island should, in the longer term, continue to be based on a body of law applying to persons identified by their race or ethnic origin, or should instead be based on the concept of local government legislation applying to all persons living within a particular area. That possibility should be borne in mind in making decisions in the meantime about the exercise of the existing powers to make laws applying to Fijians, Rotumans and the Banaban community.**

THE CUSTOMARY LAW

17.100 The Native Lands Act, the Rotuma Lands Act, the Banaban Land Act and the Fisheries Act recognize and give the force of law to the customs of the Fijian, Rotuman and Banaban peoples governing the holding and use of land, fishing rights and chiefly titles. Indirect effect is also given to custom in the provisions of the Native Land Trust (Leases and Licences) Regulations dealing with the distribution of the net proceeds from the lease or sale of native lands.

17.101 Section 100 of the 1990 Constitution made additional provision for the application of the customary law. Subsection (1) takes the form of an instruction to Parliament, in the exercise of its power to make laws for the peace, order and good government of Fiji (section 61), to “make provision for the application of laws, including customary laws”. Subsection (2) contains further directions to Parliament about legislating for that purpose. Subsection (3) provides:

Until such time as an Act of Parliament otherwise provides, Fijian customary law shall have effect as part of the laws of Fiji:

Provided that this subsection shall not apply in respect of any custom, tradition, usage or values [sic] that is, and to the extent that it is, inconsistent with a provision of this Constitution or a statute, or repugnant to the general principles of humanity.

17.102 The purpose of the section was clearly to give a higher status to the customs and values of Fijians in the country’s legal system, but its actual effect, especially of subsection (3), is problematic. The contexts in which people making submissions saw custom as important concerned matters to do with respect for

chiefly leadership, the conduct of ceremonies and other protocol, rather than those affecting legal rights and duties.

17.103 The application of Fijian custom concerning holding and use of land, fishing rights and chiefly titles and the sharing of the proceeds from the use of those resources is already clearly established by entrenched legislation. We consider that this approach should continue to be followed if it is desired to apply custom as a matter of law to other aspects of the lives of Fijians, Rotumans or the Banaban Island community. The substance of section 100(1) and (2) allowing for the application of custom by Act should be retained, but section 100(3) should be repealed.

17.104 The application of custom by Act would provide certainty about the matters which are to be governed by custom. However, care needs to be taken to allow sufficient flexibility, so that it is possible to apply the customs of different communities, or different territorial areas. There is also a need to avoid freezing custom at a particular time. It should be allowed to retain its capacity to adjust to changing circumstances, as it invariably does over time.

17.105 Another way of applying the values reflected in custom is by absorbing them into the general law applying to all citizens. That has already been done in the case of reconcilable offences, a matter to which we return below in discussing the provision made in the 1990 Constitution for Fijian courts. There may be room to incorporate customary values in other areas as well. For example, in Chapter 7, we suggested that, in some cases, a requirement that an offender live in his or her village or at some other fixed address for a period may be a more suitable penalty than a custodial sentence.

17.106 Finally, an important issue in providing for the application of custom is how far its application should be made subject to the Bill of Rights. In making the customary law part of the law of Fiji, section 100(3) provides that the customary law is subject to the Constitution. Like its predecessor in the 1970 Constitution, the Bill of Rights in the 1990 Constitution accommodates custom in several ways.

17.107 Section 7(3)(e) makes it clear that any labour reasonably required as part of reasonable and normal communal or other civic obligations is not caught by the constitutional prohibition of forced labour. We have recommended that this provision be retained.

17.108 Section 16(3)(d) protects the customary law against possible invalidity on the ground that it is inconsistent with the right to freedom from discrimination.

It validates any law

for the application of the customary law with respect to any matter in the case of persons who, under that law, are subject to that law.

That provision gives comprehensive protection to the customary law, even if it discriminates on the ground of race, sex or any other ground prohibited by section 16(2). We consider that this protection is too wide.

The international standards concerning the application of customary law

17.109 *ILO Convention 169 on Indigenous and Tribal Peoples* provides as follows:

Article 8

1. In applying national laws and regulations to the peoples concerned, due regard shall be had to their customs or customary laws.
2. These peoples shall have the right to retain their own customs and institutions, *where these are not incompatible with fundamental rights defined by the national legal system and with internationally recognized human rights*. Procedures shall be established, whenever necessary, to resolve conflicts which may arise in the application of this principle.

...

Article 9

1. *To the extent compatible with the national legal system and internationally recognized human rights*, the methods customarily practised by the peoples concerned for dealing with offences committed by their members shall be respected.
2. The customs of these peoples in regard to penal matters shall be taken into consideration by the authorities and courts dealing with such cases.
(Emphasis added)

17.110 The draft *Declaration on the Rights of Indigenous Peoples* is much less specific. The relevant provisions have already been referred to in paragraphs 92 and 93.

17.111 We consider that, in general, the customary law should continue to be subject to the Bill of Rights. However, an exception should be made if the customary law is inconsistent with the right to equality under the law and freedom from discrimination. In that context, a distinction should be made among the matters to which the customary law relates. Even if the customary law relating to

- the holding, use or transmission of land or fishing rights; or
- the distribution of the produce or proceeds of land, fishing rights or minerals; or
- the entitlement of any person to a chiefly rank or title

is discriminatory on a prohibited ground, it should not be open to challenge. It is generally accepted that custom in these matters should not be disturbed. The customary law applying to other matters should be protected against challenge, but only if it does not deny to any person to whom it applies any other fundamental right or freedom, including the right to freedom from discrimination on any prohibited ground other than race or ethnic origin.

17.112 The practical effect is that the entrenched Acts providing for the application of custom to land, fishing rights or chiefly titles would not be regarded as inconsistent with the right to freedom from discrimination even if that custom could be regarded as discriminatory on a prohibited ground, for example, sex or gender. However, laws providing for the application of custom to other matters would not be protected if the custom discriminated on such a ground.

RECOMMENDATIONS

- 643. The substance of section 100(1) and (2) of the 1990 Constitution, allowing for the application of custom by Act, should be retained, but section 100(3), providing that, until such time as an Act of Parliament otherwise provides, Fijian customary law shall have effect as part of the laws of Fiji, should be repealed.**
- 644. The customary law relating to**
- (a) the holding, use or transmission of land or fishing rights, or
 - (b) the distribution of the produce or proceeds of land, fishing rights or minerals, or
 - (c) the entitlement of any person to a chiefly rank or title

should not be open to challenge, even if it is discriminatory on a prohibited ground. The customary law applying to other matters should be protected against challenge by reason of discrimination on the ground of race or ethnic origin, as long as it does not deny to any person to whom it applies any other fundamental right or freedom, including the right to freedom from discrimination on any other prohibited ground.

- 645. Section 16(3)(d), protecting all customary law against possible invalidity on the ground that it is inconsistent with the right to freedom from discrimination, should be repealed.**

DRAFT CONSTITUTIONAL PROVISIONS

17.113 In Chapter 7, we put forward, for inclusion in the Bill of Rights, a redrafted provision affirming the right to equality under the law and freedom from discrimination. For ease of reference we reproduce here the subsections allowing the limitation of that right by laws restricting the alienation of land by Fijians, Rotumans and members of the Banaban community, providing for their governance, and for the application of their customs:

- (8) A law, or an administrative action under the authority of a law, may limit the right affirmed in this section, for the purpose of
 - (a) providing for the application of the customs of Fijians, Rotumans or the Banaban community to the holding, use, transmission, or distribution of the produce or proceeds of land, fishing rights or minerals, or to the entitlement of any person to any chiefly title or rank; or
 - (b) imposing any restriction on the alienation of land or fishing rights held in accordance with Fijian, Rotuman or Banaban custom, or permitting the temporary alienation of such land or fishing rights without the consent of the owners;
- (9) To the extent permitted by subsection (10), a law, or an administrative action under the authority of a law, may limit the right affirmed in this section, for the purpose of providing for
 - (a) the governance of Fijians, the Rotuman community or the Banaban community and of other persons living as members of a Fijian community, the Rotuman community or the Banaban community, or
 - (b) the application to persons referred to in paragraph (a) of Fijian, Rotuman or Banaban custom respectively, in respect of any matter other than those referred to in subsection (8)(a) or (b).
- (10) A limitation for a purpose referred to in subsection (9) is valid only if it

- (a) accords to every person to whom it applies the right to equality before the law without discrimination on any prohibited ground, other than the race or ethnic origin of that person or members of that community, and
- (b) does not deny to any such person any other human right or fundamental freedom recognised by law.

THE ADMINISTRATION OF JUSTICE

17.114 Just as there is provision in the law for the governance of Fijians, Rotumans and members of the Rabi Island community, so also there is provision for applying the laws made for their governance - and in some cases, all or part of the ordinary law as well - through special courts. The assumption behind the creation of special courts for a particular community is that they will give its members better access to the administration of justice. However, that assumption needs to be tested by reference to the following questions:

- Have modern means of transport had the effect of enabling the people of once physically remote places to obtain access to the ordinary courts?
- What special laws are required for the governance of the community?
- Are there factors which make the ordinary courts unsuitable to administer justice to the community concerned, through the application of either the special law or the ordinary law?
- If so, could something be done to make them more suitable for that purpose?
- Are there ways of resolving disputes within the community other than by bringing them before a court?

We look at those questions in examining the current arrangements for courts for Fijians, and for Rotuma and Rabi Island.

Fijian courts

17.115 Under the Fijian Affairs Act, the Minister responsible for Fijian Affairs has the power to appoint fit and proper persons to be Fijian magistrates with the jurisdiction and powers conferred upon them by or under the Act. There are no restrictions on the extent to which civil jurisdiction may be so conferred, but criminal jurisdiction is limited to offences against regulations, by-laws and orders made under the Act.

17.116 The Act constitutes tikina courts for every tikina, consisting of a Fijian magistrate sitting alone. It also constitutes provincial courts for each province. These "shall be composed of three members, of whom two shall be Fijian magistrates and the third either a Fijian magistrate or a District Officer". There is a right of appeal from tikina courts to the provincial court in all but trivial cases. There is a further right of appeal from provincial courts to what is now the High Court in civil and criminal matters. The powers and procedure of tikina and provincial courts are laid down in the Fijian Affairs (Courts) Regulations. The conduct of appeals is governed by the Fijian Affairs (Appeals) Regulations. In addition, the Legal Adviser to the Fijian Affairs Board may revise the findings, sentences or orders of a Fijian court, subject to safeguards for the accused person.

17.117 We mention these matters to show that, although the courts which could be constituted under the Fijian Affairs Act were separate, and did not administer the ordinary criminal law, they could be empowered to administer the civil law. They were also fully integrated into the general court system. The inability of the courts concerned to administer the ordinary criminal law was in effect overcome by making regulations under that Act a Criminal Offences Code. The Code duplicated a number of the provisions of the ordinary law contained in the Penal Code.

17.118 In 1967, it was decided to repeal the Criminal Offences Code and bring justice to Fijians through the ordinary courts. The move reflected the fact that the 1966 Constitution had, for the first time, made provision for a Bill of Rights in Fiji. As has been seen, Fijians, like everyone else, are entitled to the protections afforded by a Bill of Rights, specially against deprivation of liberty and in the trial of criminal offences. Because the whole system of Fijian administration was enforced through offence provisions, it too, was dismantled.

17.119 Clearly, the new arrangements have not been wholly satisfactory from a Fijian viewpoint. This dissatisfaction accounted for the inclusion in the 1990 Constitution of specific provision for Fijian courts. Section 122 provides that there shall be Fijian courts having such jurisdiction and powers as may be prescribed by Parliament, which is also to make provision for the presiding officers of Fijian courts, their qualifications and tenure of office. Clearly, these courts were intended to be quite different from the courts provided for in Fijian Affairs Act. However, the constitutional provision has proved difficult to implement, principally because there has been no clear policy about the body of law that Fijian courts are to administer.

17.120 The *Beattie Commission* discussed at length the submissions received on the question of Fijian courts and the minimum safeguards required to ensure that they operate fairly. However, that Commission clearly regarded itself as bound by section 122 of the Constitution providing for Fijian Courts.

17.121 This Commission fully accepts that there are problems at present in ensuring that Fijians, particularly in the remoter rural areas, have access to an adequate and “user-friendly” system of administering justice. However, we have considerable reservations about the idea of creating a separate body of law applying to Fijians, so that it can be administered in Fijian courts. We think it would be undesirable to duplicate offences already punishable under the Penal Code. Conversely, we think that, with the exceptions we discuss below, offences under the Penal Code should be tried in the ordinary courts.

17.122 Like everyone else, Fijians charged with the commission of criminal offences are entitled to all the protections afforded by the Bill of Rights. We think that this would be hard to achieve if a separate system for trying criminal offences were to be established. Similar considerations apply to the exercise of civil jurisdiction. The *Beattie Commission* made a number of recommendations aimed at improving the quality of the Magistrates’ Courts, particularly in dealing with family law matters. Fijians are entitled to the benefits of the improved system.

17.123 We therefore propose a two-pronged approach:

strenuous efforts should be made to improve the way in which the Magistrates’ Courts deliver justice in the outer islands and other remote parts of Fiji; and

a new system of voluntary dispute settlement should be set up under which people should be permitted to settle their disputes and make appropriate reparation in accordance with Fijian traditional practices.

We deal with each of these approaches in turn.

Improving the accessibility of the Magistrates’ Courts

17.124 We consider that arrangements should be made for Magistrates to hold courts more frequently in the outer islands and other remote areas, and in a wider range of places. Courts do not need to be held only in courthouses or other official buildings. Experience elsewhere has shown that, without affecting the dignity or efficiency of a court, it is possible for it to hold hearings in places where people feel more at home than they do in an unfamiliar setting.

17.125 Section 51 of the Magistrates' Courts Act should be amended to provide that hearings may be held in languages other than English, but, to facilitate appeals, the record should continue to be kept in English. There is no reason why Magistrates serving predominantly Fijian areas should not be required to be fluent speakers of the Fijian language.

17.126 The tradition of circuit courts is an old and honourable one. We consider that it should be adapted so that Magistrates in the main centres regularly go on circuit, in order to bring prompt and accessible justice to Fijians wherever they live, if the matter is one that ought to be dealt with by a court. Fijians should be able to feel that the Magistrates' Courts are as much their courts as any "Fijian" court.

Traditional methods of dispute settlement

17.127 On the other hand, we think that there is a lot to be said for the idea that many comparatively minor matters do not need to be dealt with by a court, but can be settled in other ways. This has been recognised in the Fiji Islands by requiring both civil and criminal matters to be settled by reconciliation if possible, and by the recent establishment of Small Claims Tribunals. We think this approach should be encouraged by recognising explicitly that, if people voluntarily settle their dispute in accordance with traditional Fijian practices, the settlement will be a bar to criminal or civil proceedings in the courts.

17.128 Naturally, safeguards will be required. Such settlements should be a bar only to prosecution for offences coming within section 163 of the Criminal Procedure Code. That section provides, that, in the case of the offences to which it applies, and if the case is "substantially of a personal or private nature and ... not aggravated in degree", the court may promote reconciliation and encourage and facilitate its settlement in an amicable manner, on terms approved by the court. It may then order the proceedings to be stayed or terminated.

The offences to which the section applies are entry upon property with intent to commit an offence, wilful and unlawful destruction of, or damage to, property, common assault and assault causing actual bodily harm.

17.129 This list may need some modification. We accept the recommendation of the *Beattie Commission* that domestic violence cases should be dealt with in the ordinary courts. Traditional processes tend to put undue pressure on women to withdraw criminal charges and leave them in situations of continually being subjected to domestic violence. This point was made to us in submissions. On the

other hand, there seems no need to limit the type of civil claim that may be settled through the traditional processes.

17.130 However, even if the parties agree to settle a claim, there needs to be provision for setting aside settlements on the grounds of public policy. That would enable the courts to release a person from a settlement that was manifestly onerous or involved some act contrary to basic principles of humanity, such as agreement to submit to an act that would itself be a criminal offence, such as mutilation. The analogy is with the recognition of an award made by an arbitral tribunal set up by agreement among the parties. Legislation provides that such an award is a bar to civil proceedings on the same facts and between the same parties, unless the terms of the award are contrary to public policy or the law provides that the dispute is not one which may be settled by private arbitration.

17.131 We envisage the appointment of Fijian conciliators in all the larger villages, to whom people can turn if they desire to take advantage of the traditional dispute settlement process. They should be persons of standing in the community, should receive training in their duties, especially about the type of case suitable for settlement in this way, should be required to make a record both of the facts and the terms of the settlement, and should be paid a suitable honorarium for carrying out their duties. All parties would need to agree voluntarily to take part in and be bound by the traditional process. The facilitator, to be called by an appropriate Fijian name, should have a role both in facilitating agreement to submit to the traditional process and also agreement on the settlement itself.

17.132 Initially, the system should apply only to disputes involving Fijians, but, if it is successful, persons who are not Fijians should be permitted to agree to the application of the traditional process, in disputes with Fijians, or with one another. For that reason, the scheme should be set up by Act of Parliament, not by regulations under the Fijian Affairs Act.

17.133 If the settlement reached involves the payment of money, the performance of work or other ongoing obligation, it should not be directly enforceable in the courts, but a party who claims that the settlement has not been honoured should be able to pursue in the courts, or by complaint to the police, the remedy that would have been available if there had been no traditional settlement. If the other party claims that the terms of the settlement were fulfilled, and that the court action is therefore barred, the court will have to make a finding as to whether or not that is the case. If it is not, reparation already made should be taken into account in the sentence or award of the court.

17.134 If the parties do not agree to use the traditional method of dispute settlement, the matter will, if necessary, have to be the subject of criminal or civil proceedings in the ordinary courts.

17.135 No doubt there are other details which will need thinking through, but we believe that the proposed arrangements will enable full use to be made of the traditional Fijian ways of settling disputes and achieving reconciliation between the parties. They should go some way towards meeting the needs that prompted the provision for reintroducing Fijian courts.

17.136 In summary, we think there are better alternatives than setting up Fijian courts enforcing law applying only to Fijians, under a system parallel to the ordinary law and the regular courts. The existing court system should be made more responsive to the needs of Fijians. Section 122 of the 1990 Constitution, establishing Fijian courts, should be replaced by a provision that the settlement of disputes in accordance with traditional Fijian processes of dispute settlement should be recognised, under conditions prescribed by Act.

RECOMMENDATIONS

- 646. Strenuous efforts should be made to improve the way in which the Magistrates' Courts deliver justice in the outer islands and other remote parts of Fiji. Courts should be held more frequently and in a wider range of places.**
- 647. Section 51 of the Magistrates' Courts Act should be amended to provide that hearings may be held in languages other than English, but, to facilitate appeals, the record should continue to be kept in English. Magistrates serving predominantly Fijian areas should be required to be fluent speakers of the Fijian language.**
- 648. Section 122 of the 1990 Constitution, establishing Fijian courts, should be replaced by a provision that the settlement of disputes in accordance with traditional Fijian processes of dispute settlement should be recognised, under conditions prescribed by Act. Such an Act should provide for the following matters:**

- (a) **Settlements should be a bar only to prosecution for reconcilable offences coming within section 163 of the Criminal Procedure Code, with the exception of domestic violence, as recommended by the *Beattie Commission*.**
 - (b) **There should be provision for setting aside settlements on the grounds of public policy.**
 - (c) **Fijian conciliators should be appointed in all the larger villages, to facilitate agreements to use the traditional processes and the settlement itself. They should be persons of standing in the community, should receive training in their duties, should be required to make a record both of the facts and the terms of the settlement, and should be paid a suitable honorarium**
 - (d) **Initially, the system should apply only to disputes involving Fijians, but, if it is successful, persons who are not Fijians should be permitted to use it. The scheme should be set up by Act of Parliament, not by regulations under the Fijian Affairs Act.**
 - (e) **The settlement reached should not be directly enforceable in the courts, but a party who claims that it has not been honoured should be able to pursue in the courts, or by complaint to the police, the remedy that would have been available if there had been no traditional settlement. It should be a defence that the terms of the settlement were fulfilled, and that the court action is therefore barred. Even if the action is not barred, reparation already made should be taken into account in the sentence or award of the court.**
649. **If the parties do not agree to use the traditional method of dispute settlement, the matter should, if necessary, be the subject of criminal or civil proceedings in the ordinary courts.**

Courts in Rotuma

17.137 The Rotuma Act establishes a District Officer's Court of which the District Officer (DO) is, *ex officio*, a magistrate with the same jurisdiction in civil and criminal cases as a second class magistrate. The DO may also try charges of indictable offences unless punishable by death. He is required to do so as nearly as possible in the same manner as if the trial were before a judge sitting alone in the High Court. After the conclusion of the evidence and the address if any of the accused, he remits the case, with notes of the evidence, to the Chief Justice who considers the case and decides on the verdict. If that is "guilty" the Chief Justice decides on the sentence. The verdict and sentence are then transmitted to the DO who reads it to the accused in open court. If necessary it is translated to the accused and that fact certified on the record.

17.138 That system of bringing justice to Rotuma was justifiable when the only transport between that island and the rest of Fiji was by schooner, but it is not adequate now that there is a regular air service to Rotuma. The *Beattie Commission* expressed the view that the District Officer's Court, combining in the one person executive and judicial functions, is undesirable in legal principle. That Commission suggested that it would be in the interests of the people of Rotuma to have the same access to the regular court system as other people in Fiji. They should be consulted about such a change.

17.139 This Commission agrees with that approach. It would not be surprising, however, if the people of Rotuma wished to keep open the possibility of holding a court on that island at any time, without waiting for a Magistrate to come from Fiji. There seems no need to take an "either ... or" approach. But more serious cases, and certainly indictable offences, should be dealt with in the regular courts. The people of Rotuma should also be invited to consider whether there is a traditional system of dispute settlement which could be given recognition, along the lines of our proposals about the recognition of traditional Fijian processes for settling disputes and achieving reconciliation.

RECOMMENDATIONS

650. As suggested by the *Beattie Commission*, the people of Rotuma should have the same access to the regular court system as other

people in Fiji, specially in more serious cases including the trial of indictable offences. They should be consulted about such a change.

- 651. In addition, ways should be explored of enabling a court to be held in Rotuma at any time, to deal with minor matters, without waiting for a Magistrate to come from Fiji. The people of Rotuma should also be invited to consider whether there is a traditional system of dispute settlement which could be given recognition, along the lines of the recommended system for recognising traditional Fijian processes for settling disputes.**

Courts for the Banaban community

17.140 The Banaban Lands Act makes provision for Banaban custom concerning land tenure to be determined by the Land Court set up under that Act. The Land Court is to consist of the person appointed by the Minister to be the tribunal under the Banaban Settlement Act and four assessors appointed by the Council.

17.141 Under the Banaban Settlement Act, the responsible Minister, with the prior approval of the Council, may appoint a fit and proper person to be the Rabi Island Tribunal. A Rabi Island Court is constituted, consisting of the tribunal and such other person or persons as the Minister may appoint. An appeal, without leave, lies from the Rabi Island Court to a resident Magistrate who has the same powers as the High Court when hearing an appeal from a Magistrate's court. The decision of a Magistrate's court in relation to appeals is final and conclusive.

17.142 Under the Banaban (Rabi Island Court) Regulations, the jurisdiction of the Court, which may be exercised by the Tribunal, is limited to the enforcement of the regulations made by the Council and the power to bind persons over to keep the peace. It appears that any more serious matters would be dealt with by the ordinary courts. We were not told of any dissatisfaction with these arrangements and do not propose any change.

RECOMMENDATION

- 652. The existing arrangements for a Rabi Island Court and a Banaban Land Court should not be changed.**

THE FUTURE RELATIONSHIP BETWEEN ROTUMA AND FIJI

17.143 The Commission received several submissions from Rotumans, both in Rotuma and in Suva. Some raised the question of possible independence for Rotuma, or self-government in free association with Fiji, along the lines of the relationship between the Cook Islands and New Zealand. There should be no question of Rotuma being forced to remain an integral part of the Republic of the Fiji Islands if that is contrary to the freely expressed wish of a majority of the Rotuman people. However, we are satisfied that, as one submission put it, any change of status would be "premature and unrealistic". The option is one that the Government should be willing to discuss with the people of Rotuma if they wish to pursue it.

17.144 We believe that, without moving to a new constitutional relationship, much could be done to give Rotuma greater autonomy in matters of local concern. The law-making power under the Rotuma Act should be enlarged, so that it is not necessary for all Rotuma Regulations to be confirmed by resolution of Parliament before they become law. A main concern for small islands, whether an integral part of a larger state as Rotuma is now, or in a looser form of association, is the extent to which they can count on financial support from the "mainland" for the infrastructure and services that, on their own, they could not afford. This issue was raised in a number of submissions.

17.145 One submission suggested the allocation to Rotuma of the resources, or the revenue from the resources, of that part of Fiji's exclusive economic zone measured from the outer limits of the territorial sea surrounding Rotuma. While we acknowledge that small islands should obtain some benefit from the fact that their very existence is of advantage to the state because it extends the exclusive fishing zone, we see difficulties in allocating the resources of the zone among the people of all islands and coastal areas that could make a similar claim on the basis of their geographic position.

17.146 It seems better that the question of funding should be dealt with more simply, applying the recommended constitutional principle that the interests of all communities must be taken into account and any differences settled by negotiations in good faith. We think there is scope for some grant funding for Rotuma which leaves the Rotuma Council the freedom to settle its own priorities in deciding how the funds should be used.

17.147 One submission sought the creation of a special section of a Department to deal with Rotuman affairs. That would enable the Government to focus more sharply on Rotuman concerns. It is not a matter that can be dealt with in the

Constitution but we mention it so that the Government may consider it.

17.148 The Commission has proposed that the Constitution should provide for Rotuma and Rotumans in the following ways:

- the Bose Levu Vakaturaga should include one member elected by the Rotuma Council;
- voters registered as Rotumans should elect one member to fill a reserved seat in the Bose Lawa;
- voters resident in Rotuma should elect one member to the Bose e Cake; and
- provision should be made for the entrenchment of the Rotuma Act and the Rotuma Lands Act, for the protection of laws recognising Rotuman custom, and for the improvement of access to the regular courts, in the manner proposed in this chapter.

17.149 Rotumans are estimated to be about 2% of the total population of the Fiji Islands. We have recommended the allocation to Rotumans of one reserved seat in the Bose Lawa, despite the fact that, on a population basis, no community would be entitled to a reserved seat unless its members amount to 4% of the population. Nevertheless, we consider the allocation justified because Rotumans are at present separately represented in the House of Representatives. The fact that only the people living in Rotuma will be eligible to elect a member to the Bose e Cake will recognise the special interests of the inhabitants of that island, as distinct from those of Rotumans living in other parts of the Fiji Islands.

RECOMMENDATIONS

- 653. There should be no change in Rotuma's status as an integral part of the Republic of the Fiji Islands as long as that coincides with the freely expressed wish of a majority of the Rotuman people.**
- 654. Rotuma should be given greater autonomy in matters of local concern. The law-making power under the Rotuma Act should be enlarged, so that it is not necessary for all Rotuma Regulations to be confirmed by resolution of Parliament before they become law.**

- 655. In settling the level of funding for Rotuma, the recommended constitutional principle that the interests of all communities must be taken into account and any differences settled by negotiations in good faith should be applied.**

- 656. Consideration should be given to some grant funding on a basis which gives the Rotuma Council the freedom to use the funds in accordance with its own priorities.**