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THE CONSTITUTION AS SUPREME LAW: ITS ALTERATION OR REVIEW ALTERATION OF THE ENTRENCHED LEGISLATION

20.1 In this Chapter, the Commission reviews:

- section 2 of the 1990 Constitution which gives the Constitution the status of 'supreme law';
- section 77 which governs how the Constitution may be altered;
- section 161 which provides for periodic constitutional review; and
- section 78 which requires special legislative procedures to be followed for legislation altering the entrenched Acts which protect recognised special interests and rights of the indigenous Fijian, Rotuman and Banaban communities or which otherwise affects Fijian land, customs and customary rights.

SUPREME LAW

20.2 Section 2 of the 1990 Constitution provides that the Constitution shall be "the supreme law of Fiji". As such, "if any other law is inconsistent with .. [the] ... Constitution that other law shall, to the extent of the inconsistency, be void".

20.3 As indicated in Chapter 3, one purpose of a constitution is to set out the fundamental conditions upon which individuals and groups within a country broadly agree to be governed. Constitutions usually provide limits on government by establishing and distributing powers between different branches, institutions or offices of the government. Constitutional rules limit how each must perform its functions in the governmental process and what each may do. Constitutions also limit government's powers by conferring individual and group rights against certain kinds of governmental action.

20.4 Accordingly, a constitution contains the standards and rules against which all government action, including legislative action, must be judged. If a constitution is to fulfill this purpose, it must override any inconsistent law, whether made before or after the Constitution.

20.5 We propose that the Constitution should continue to be the supreme law of Fiji and that if any other law is inconsistent with it, to the extent of the inconsistency, that law shall be void.

RECOMMENDATIONS

678. The Constitution should continue to provide that it is the supreme law of Fiji and that if any other law is inconsistent with it, to the extent of the inconsistency, that law shall be void.

ALTERATION OF THE CONSTITUTION

Reasons for Entrenchment

20.6 Written constitutions usually provide that their provisions can only be altered following a special procedure. When special procedures are required for alterations, a constitution or a law is said to be 'entrenched'. In part, entrenchment confers a constitution's status as supreme law.

20.7 Because the Constitution is a law, although of a special kind, the power to pass constitutional amendments is usually vested in the legislature. In the Westminster system, the executive controls a majority of seats in the legislature. Unless more stringent procedures than normal are required to be followed, the legislature and, in particular, the executive through its control of the legislature may easily remove the limitations on their own powers. They may do so by removing the checks and balances, the accountability mechanisms or the protected rights contained in the Constitution.

20.8 Furthermore, a constitution exists to provide for an enduring basis for government. Stable rules should exist for deciding how the governmental processes, in particular the democratic process, should work. As we said in Chapter 3, people expect the basic rules of government to outlast the lives of particular parliaments or administrations, just as the rules of a game outlast a particular match.

20.9 People recognise however, that as circumstances change, so some change in the rules may become necessary or desirable. The procedure for constitutional change must strike a balance. It should not make it easy for the legislature or the executive to do away with constitutional limitations on governmental power at their whim. At the same time, it should not impede necessary or desirable change.

20.10 Since a constitution should express the broad agreement of the people of a country, the special procedures for its amendment must be such that cannot be achieved in haste. The procedures must give rise to publicity as well as time for public consideration and debate. They must ensure that all individuals and groups in the community are given the opportunity, either in person or through their representatives, to participate in any discussion and decision on constitutional change. They should also require a significant number of people to consent to any change either individually or through their representatives.

Types of Special Procedures

20.11 Almost all constitutions contain special requirements as to the manner in which an amendment is to be passed. Compared to that required for ordinary legislation, the support of a larger majority of the legislature is usually required for a constitutional amendment. The size of the majority is normally such as to ensure that there is widespread agreement for change among the representatives in the legislature of different groups. Sometimes constitutions also require as part of the amendment process the participation or approval of the public or other existing or special bodies representing the interests of special groups.

20.12 Requirements as to the manner in which a constitutional amendment should be approved are often supplemented by a requirement concerning the form an amendment must take in order to be effective.

20.13 Because different chapters or parts or provisions of a constitution may be considered to be more important than others, or affect particular bodies or groups more than others in the state, different amendment procedures may apply to different parts of the Constitution.

Power of Parliament

20.14 Subsection 77(1) of the 1990 Constitution declares that Parliament may alter the Constitution in accordance with the procedures laid down in that section. The provision repeats section 67(1) of the 1970 Constitution. In part, the 1970 provision reflected the now historical relationship between England and Fiji. The 1970 Constitution was made and brought into force in England by Order of Queen Elizabeth II, acting in Council. The Order established Fiji's Parliament and granted that Parliament its legislative power. Section 67(1) was necessary to make it clear that the Constitution could be amended by the new Parliament instead of by the Queen acting by further Orders-in-Council.

20.15 The section, however, also reflects the two otherwise implicit principles which we referred to earlier. First, alterations to the Constitution must be effected by laws made in exercise of the state's legislative power. That power is at present vested in the three components of Parliament: the House of Representatives (to be re-named the Bose Lawa), the Senate (to be re-named the Bose e Cake) and the President. Secondly, any exercise of the legislative power to alter the Constitution must be in accordance with special rules laid down by the Constitution itself.

20.16 Although it is no longer strictly necessary, we leave to the drafter the question whether it is desirable that the Constitution continue to contain a provision like section 77(1). In principle, however, we agree that the Constitution should continue to invest Parliament with the power to alter its provisions but only in accordance with special procedures contained in the Constitution. We set out our proposals for those procedures below.

Meaning of 'Alteration'

20.17 Although it is customary to speak of "amending the Constitution", subsection 77(8) of the 1990 Constitution uses the wider term 'altering of the Constitution".

20.18 Under paragraph 77(8)(a), the "Constitution" is defined for this purpose to include not just the Constitution itself or any individual provision of it, but also any other subsequent law which "alters" the Constitution or any one of its provisions. The prescribed procedure must therefore be followed in making any law which alters the Constitution, and also in making any subsequent alteration to that law.

20.19 Paragraph (b) defines what is to be considered to be an "alteration" of the Constitution. This is deemed to include:

- any law repealing the Constitution or any particular provision, with or without re-enactment or replacement;
- any modification of a provision;
- any insertion of a new provision;
- any suspension of the Constitution or any provision;
- any termination of that suspension;
- any legal provision that is repugnant to or otherwise inconsistent with the Constitution.

20.20 We consider this an exhaustive list of the ways in which a constitution may be altered. We propose that, in substance, this provision should be retained.

Special Form of Alteration

20.21 The 1990 Constitution introduced a new requirement about the form that any constitutional alteration must take. Subsection 77(2) requires that a provision of the Constitution can only be altered by an Act of Parliament that is expressed to be an Act to alter the Constitution.

20.22 Acts of Parliament may be inconsistent with the Constitution in ways which are not immediately apparent. The new provision ensures that none of the provisions of the Constitution can be overridden by what would otherwise *appear* to be an ordinary law, even if it were passed with the required special majority. In other words, it is intended to ensure that no constitutional provision is altered without clear notice of an intention to alter the Constitution. Proposals for legislation which in any way alter a provision of the Constitution have to be identified to Parliament and the public, and debated in those terms.

20.23 The Commission considers this a desirable safeguard. We propose that the Constitution should continue to provide that it can only be amended by a law made by Parliament which states that it is a law to alter the Constitution.

Special Majority

20.24 Subsections 77(3),(4) and (5) of the 1990 Constitution provide different majority requirements for different Chapters and provisions of the Constitution. Under subsections 77(3) and 77(4), most of what might be called the 'key' provisions of the Constitution can be altered only if the altering law is supported by at least two-thirds of the members of each House. These are the provisions which limit the powers of the executive and the legislature and which establish accountability mechanisms. They include those granting fundamental rights and citizenship. They also include the provisions which establish the judiciary and independent constitutional offices and vest them with powers. The rules by which members of Parliament are elected, and by which governments are chosen and go out of office are also subject to this higher special majority. Under the 1970 Constitution, these provisions were subject to a special majority of at least three-quarters of all of the members of each House.

20.25 Under subsection 77(5), other provisions, which are largely procedural or govern the privileges of the legislature, can at present be amended with the support of a simple majority of all of the members of each House. Previously, the

required majority for the alteration of these provisions was at least two-thirds of all the members of each House.

20.26 At present, the Bose Levu Vakaturaga, has the power to nominate twenty-four members of the Senate. Subsection 77(7) requires the support of at least eighteen of these twenty-four Senators to be included among the special two-third majority for any alteration of sections 55(1) (a), and 78(1) and section 77(7) itself. Subsection 77(3) applies the same requirement for Chapter XV of the 1990 Constitution. This 'veto' power which the Bose Levu Vakaturaga enjoys through its nominated Senators does not extend to any other provision of the Constitution.

20.27 The veto which the Senators enjoy over subsection 77(7) itself, is called a "double entrenchment". Its effect is that none of the veto powers can be withdrawn without the consent of the Senators who enjoy it.

20.28 Subsection 55(1)(a) provides the Bose Levu Vakaturaga with its power to nominate the twenty-four senators. Section 78(1) which we review later in this Chapter, gives eighteen of the Senators the power to veto legislation altering any of the entrenched Acts or otherwise affecting Fijian land, customs and customary rights. Like the veto they enjoy over subsection 77(7), the veto over subsection 78(1) effects a double entrenchment.

20.29 Chapter XV of the Constitution contains the transitional provisions which were necessary to provide for consequential changes brought about by the declaration of Fiji as a republic and by the new Constitution. The provisions are not in any way vital nor do we consider that they in any way affect any special interest of the Fijian people or the Bose Levu Vakaturaga itself. In any event, their effect was limited to the day the Constitution came into force. Their force appears to be now spent.

20.30 The existing alteration requirements for alteration of the 1990 Constitution reflect the present composition of Parliament. At present, the membership of both Houses is presently reserved according to specified ethnic criteria described in earlier chapters. We proposed significant changes to the number and distribution of Parliamentary seats reserved for ethnic groups. We have also recommended a largely elected Bose e Cake in which can be represented the interests of Fiji Islanders as residents of provinces and members of otherwise under-represented groups can be represented. Under our proposals, the Bose Levu Vakaturaga will no longer make any nominations to the Upper House. Instead we have recommended that this leading body should take its rightful place within the Constitution and directly within the constitutional process.

20.31 Clearly, the special majority provisions presently contained in section 77 will no longer be pertinent to a future Parliament constituted in accordance with our recommendations. The Commission therefore has given a great deal of thought to the special amending procedures that should apply to a future Parliament.

Proposed Procedure for Altering the Constitution

20.32 In carrying out this review and in framing our recommendations, this Commission has adopted the general approach that only important fundamental principles, rules, offices and institutions should be provided for in the Constitution. In a number of chapters, we proposed that various matters provided for by the 1990 Constitution which are not fundamental should be provided for by Acts. In view of this approach, we consider that it will no longer be necessary for the Constitution to provide for two different sized majorities for "key" and "non-key" provisions of the Constitution. Apart from the additional veto power of the Bose Levu Vakaturaga over particular sections of the Constitution which we identify below, and a special expedited procedure for urgent amendments, we propose that one special Parliamentary procedure should be followed for any alteration to any provision of the Constitution.

20.33 In considering what the appropriate majority and procedure should be, the Commission has borne in mind:

- the likely future composition of both Houses of Parliament;
- the need to maintain an effective separation of powers and accountability;
- the need for the effective protection of the constitutionally protected rights of the various communities and of individuals;
- the need to allow popular will to be expressed;
- the need for broad support for any change to the Constitution;
- the need for some flexibility.

20.34 We propose that any bill to alter the Constitution should be required to be passed by both the Bose Lawa and the Bose e Cake. It should require the support of at least two-thirds of all of the members of each House. This requirement will ensure that no alteration is passed without the broad support of a significant number of the people of Fiji .

20.35 The Constitution should require that, in accordance with traditional Parliamentary practice, any bill to alter the Constitution shall be read and voted

on at least three times in the Bose Lawa. The Constitution should provide that a bill to alter the Constitution must be supported by the votes of not less than two-thirds of all of the members of the Bose Lawa on the final vote as well as on the vote immediately preceding the final vote . It should require both the final vote, and the vote preceding it, to take place only after an opportunity has been given for full debate in the Bose Lawa.

20.36 In order to allow public opinion to be taken into account, it should provide that the final vote, and the vote immediately preceding it, must take place during different meetings of the Bose Lawa and must be separated in time by at least two months. It should also require that the bill must have been referred to the relevant sector standing committee of the Bose Lawa before the mandatory debate preceding the final vote.

20.37 We believe that two months between the final vote and the vote immediately preceding the final vote is an appropriate period for public discussion and comment.

20.38 We have also proposed that the bill should at some stage be referred to a sector standing committee of the Bose Lawa. We do not propose that the Constitution should require a process of formal public consultation in every case but envisage that this will be a matter for the committee to decide in the circumstances. Following the report of the committee, the bill should be returned to the House.

20.39 In order to allow for expedited passage of an urgent amendment to the Constitution which has wide support, the Constitution should allow the Bose Lawa to waive the requirements that the last two votes must be held in at different meetings separated by at least sixty days and that the bill must be referred to a sector standing committee. It should provide that these requirements may be waived if the Prime Minister certifies that the amendment is so urgent and important that the requirements should not complied with and if the waiver is supported by a resolution supported by the votes of at least three-quarters of the members of the Bose Lawa. It should also provide that a bill to alter the Constitution for which these requirements have been waived shall not be passed by the Bose Lawa unless it is again supported at the final vote by the votes of at least three-quarters of all of the members of the Bose Lawa.

20.40 No additional procedural requirements should be required to apply in the Bose e Cake other than the requirement that a bill to alter the Constitution

shall not be passed by the Bose e Cake unless it is supported at the final voting thereon by the votes of two-thirds of all of the members of that House.

20.41 The Constitution should also provide that the President shall not assent to any bill which alters the Constitution unless it is accompanied by certificates signed by the Speaker and by the President of the Bose e Cake certifying that the procedures required by the Constitution have been followed in their respective Houses.

Veto Power of the Bose Levu Vakaturaga

20.42 Elsewhere we have proposed that the Bose Levu Vakaturaga should no longer nominate Senators to protect the special interests of the Fijian people. We here propose how the veto powers formerly vested in the Senators should be exercised.

20.43 The Constitution should give the Bose Levu Vakaturaga a veto power over any bill to alter:

- the section which provides for the special entrenched legislation;
- the sections which establish the Bose Levu Vakaturaga and set out its composition and constitutional functions;
- the section which gives landowners and owners of customary fishing rights a right to a portion of the royalties from mineral extraction;
- the provision which gives it a veto over alterations to the foregoing sections.

20.44 If a bill to alter any of these provisions of the Constitution is passed with the required majority in the Bose Lawa and the Bose e Cake, the Constitution should require that before the bill is produced to the President for assent, it should first be referred to the Bose Levu Vakaturaga. The Constitution should provide that the President shall not assent to any such bill unless it is approved by consensus of the Bose Levu Vakaturaga, or failing that by the support, at a vote, of at least two-thirds of all the members of that body. It should require the Chairperson of the Bose Levu Vakaturaga to certify to the President that the Bose Levu Vakaturaga has approved the bill in accordance with the constitutional requirements.

20.45 Under these recommendations, the Bose Levu Vakaturaga will exercise a direct veto power over the section of the Constitution which entrenches the

special legislation affecting Fijians, Rotumans and Banabans. In our proposals for the membership of the Bose Levu Vakaturaga, we have made necessary provision for members representing the Rotuman and Banaban communities.

20.46 Since, under our proposals, there will no longer be any need or right to nominate Senators, there is no need to maintain a veto power over the provisions governing membership of the Bose e Cake. Instead we propose that the Bose Levu Vakaturaga will exercise a veto power over the provisions guaranteeing its own existence and constitutional powers.

20.47 We have also given the Bose Levu Vakaturaga a veto over the provision guaranteeing rights to landowners and owners of customary fishing rights to a portion of mineral royalty rights.

20.48 For reasons which we gave earlier, we have not proposed that any special veto exist over Chapter XV.

20.49 We have also proposed that the provisions giving the Bose Levu Vakaturaga power to veto any alteration to the specified sections should continue to be doubly entrenched.

20.50 We envisage that the Bose Levu Vakaturaga will continue to act by consensus. We propose the two-thirds majority only to cater for a situation in which a small number of members, by refusing to support any otherwise popular alteration, may effectively exercise a veto of their own. In all cases, however, the Bose Levu Vakaturaga itself retains the collective ability to decide whether any matter should be put to a vote.

RECOMMENDATIONS

679. In principle, Parliament should be empowered to alter the Constitution in accordance with special procedures which should be contained in the Constitution.

680. The substance of section 77(8) which defines an alteration to the Constitution should be retained.

681. The Constitution should require that any bill to alter the Constitution should state that it is a bill for that purpose.

682. Any bill to alter the Constitution should be required to be passed by both the Bose Lawa and the Bose e Cake.

683. The Constitution should require that no bill to alter the Constitution shall be passed by the Bose Lawa unless it has

been read and voted on at least three times in that House. It should provide that such a bill must be supported by the votes of not less than two-thirds of all of the members of the Bose Lawa on the final vote as well as on the vote immediately prior to the final vote. It should require both these votes to be preceded by a full opportunity for debate in the Bose Lawa.

684. The Constitution should provide that the final vote and the vote immediately preceding it must take place during different meetings of the Bose Lawa and must be separated in time by at least two months.

685. It should also require the bill to be referred to the relevant sector standing committee of the Bose Lawa at some time before the mandatory debate preceding the final vote. It should require that the third and final vote should not take place until the committee has reported back to the House.

686. In order to allow for expedited passage of a widely-supported urgent amendment to the Constitution, the Constitution should allow the Bose Lawa to waive the requirements that the last two votes be held in different meetings and be separated by at least sixty days and that the bill be referred to a sector standing committee. It should provide that these requirements may be waived if the Prime Minister certifies that the amendment is "so urgent and important" that the requirements should not be complied with and if the waiver is supported by a resolution passed by the votes of at least three-quarters of the all members of the Bose Lawa. It should also provide that a bill to alter the Constitution for which the requirements were waived, shall not be passed by the Bose Lawa unless it is again supported at the final vote by the votes of at least three-quarters of all of the members of the Bose Lawa.

687. The Constitution should require that a bill to alter the Constitution shall not be passed by the Bose e Cake unless it is supported at the final voting thereon by the votes of two-thirds of all of the members of that House. No additional constitutional requirements should apply in the Bose e Cake.

688. The Constitution should give the Bose Levu Vakaturaga a veto power over any bill to alter:

- **the section which provides for the special entrenched**

legislation;

- **the sections establishing the Bose Levu Vakaturaga and setting out its composition and constitutional functions;**
- **the section giving landowners and owners of customary fishing rights a right to a portion of the royalties from mineral extraction;**
- **the provisions which gives it a veto power over alterations to the foregoing sections.**

689. **If any bill to alter any of these provisions of the Constitution is passed with the required majority in the Bose Lawa and the Bose e Cake, the Constitution should require that before the bill is produced to the President for assent, it should first be referred to the Bose Levu Vakaturaga. The Constitution should require that the President shall not assent to any such bill unless it is approved by consensus of the Bose Levu Vakaturaga or failing that by the support at a vote of two-thirds of all the members of that body. It should require the Chairperson of the Bose Levu Vakaturaga to certify to the President that the Bose Levu Vakaturaga has approved the bill in accordance with the constitutional requirements and provide that the President may not assent in the absence of that certificate.**

REVIEW OF THE CONSTITUTION

20.51 Section 161 of the 1990 Constitution requires that the whole of the 1990 Constitution (other than section 164) should be reviewed within seven years of its promulgation and every tenth year thereafter. This Commission and this report are responses to the first of those requirements.

20.52 The general rule is that no express constitutional provision is necessary to authorise a review of a country's constitution. As part of its ordinary powers, a government or a legislature can itself review or commission a review of the country's constitution at any time. At any time it can also do the same for only a part of the constitution. The purpose of section 161 is therefore not to authorise a review but to impose an obligation to carry one out at the specified intervals, and to require that every such review should be directed to all of the provisions of the Constitution.

20.53 As said earlier, although a Constitution should have an enduring quality, changing national circumstances may require the re-examination of various provisions. We also recognise that under the Westminster system, those who are

in the best position to initiate review and alteration, that is the executive government who are in majority in the Lower House, may have the least reason to consider whether any review or alteration of the constitution is necessary or desirable. After all, the existing constitutional rules will have brought them to power.

20.54 At the same time, we are aware of the resources and effort involved in a full-scale constitutional review. We are aware that reviews can cause anxiety and uncertainty among the people of a country and so undermine the stability which the constitution's enduring nature is intended to provide.

20.55 If the provisions of the 1990 Constitution are replaced by other provisions broadly acceptable to all of the people of Fiji, we propose that the existing mandatory requirement for full reviews of the Constitution at least once in each ten years, should not continue. Instead the Constitution should place the duty on Parliament to consider, every ten years, whether a review of the Constitution or any part of the Constitution is necessary or desirable. This will ensure that the matter is raised and given due consideration by the people's representatives at regular intervals.

RECOMMENDATIONS

690. If the provisions of the 1990 Constitution are replaced by other provisions which are broadly acceptable to all the people of Fiji, the existing mandatory requirement for full reviews of the Constitution at least once in each ten years, should not be retained. Instead the Constitution should place the duty on Parliament to consider, every ten years, whether a review of the Constitution or any part of the Constitution is necessary or desirable.

SECTION 164: IMMUNITY PROVISIONS

20.56 Section 164 of the 1990 Constitution grants criminal and civil immunity to the persons who led or participated in the two military *coups d' etat* in 1987. Subsection 164(5) provides that the section shall not be reviewed or amended by Parliament. In view of this provision, we have not reviewed the contents of, and make no proposals for changes to, section 164.

20.57 In carrying out our review of all the other provisions of the Constitution, we have made many recommendations on how they should be changed to meet Fiji's present and future needs. We envisage that these recommendations, if broadly acceptable to the people of Fiji and its leaders, will form the basis of a wholly new Constitution. In that event, and in view of the inability of Parliament ever to

amend section 164, we envisage that when all other provisions of the 1990 Constitution are repealed and replaced in a new constitutional document, section 164 will remain the sole remaining section of the 1990 Constitution.

ENTRENCHED LEGISLATION

20.58 Section 78 of the 1990 Constitution sets out special procedures which must be followed before Parliament can pass a law which alters any of the eight Acts listed in subsection (1) or which otherwise "affects Fijian land, custom and customary rights". It also prescribes a special procedure involving a higher special majority for amending the Agricultural Landlord and Tenant Act (Cap. 270).

20.59 Because special procedures are required, these Acts are generally referred to as "the entrenched Acts". For convenience, we deal separately with the requirements which apply to the eight Acts specified in subsection (1) and those which apply generally to any legislation which "affects Fijian law, customs and customary rights". We also deal separately with the procedure for altering the Agricultural Landlord and Tenant Act.

Alteration of Acts Specified in Subsection (1)

20.60 The Acts listed in subsection 78(1) are:

- the Fijian Affairs Act (Cap. 120);
- the Fijian Development Fund Act (Cap. 121);
- the Native Lands Act (Cap. 133);
- the Native Land Trust Act (Cap. 134);
- the Rotuma Act (Cap. 122);
- the Rotuma Lands Act (Cap. 138);
- the Banaban Settlement Act (Cap. 123);
- the Banaban Land Act (Cap. 124).

20.61 The Acts protect the special interests of Fijians, Rotumans and Banabans. The Commission discussed them in Chapter 20 and recommended that they continue to be entrenched. We here propose the procedures under which they may be altered.

20.62 Under subsection 78(1) of the 1990 Constitution an alteration to any of these entrenched Acts requires only a majority of votes of all the members of each House. However, in the Senate, this support must include eighteen of the twenty-

four Senators nominated by the Bose Levu Vakaturaga.

20.63 We propose that the Constitution should continue to provide that these Acts may be altered by a bill supported by a majority of all of the members of each House. Consistently with our proposal for the exercise by the Bose Levu Vakaturaga of a veto power over particular sections of the Constitution, the Commission recommends that if such a bill is passed by both Houses, the Constitution should require that before it is presented to the President for assent, it should first be referred to the Bose Levu Vakaturaga for approval. That approval should be expressed either through consensus or through at least two-thirds votes of all of the members of the Bose Levu Vakaturaga.

20.64 The Constitution should provide that the President shall not assent to any such bill unless the Chairperson of the Bose Levu Vakaturaga has certified that the Bose Levu Vakaturaga has approved the amendment in accordance with the constitutional requirements. It should also require certificates from the Speaker and the President of the Bose e Cake that the bill has been passed by an absolute majority of their respective Houses.

20.65 As proposed earlier, the members of the Bose Levu Vakaturaga representing the Rotuman and Banaban communities should participate in the consideration of bills to amend their respective Acts.

20.66 In proposing that, as now, only an absolute majority of all members of each House should be required for amendments to the entrenched Acts, we are aware that this will mean that amendments may be passed with relative ease. Subject to the safeguarding veto of the Bose Levu Vakaturaga, we believe that the absolute majority requirement will allow the Government a degree of flexibility to bring about necessary changes to the Acts, which it did not enjoy under the 1970 Constitution. We are confident that the Bose Levu Vakaturaga will effectively protect the interests of the communities for whose benefit the Acts exist.

Definition of 'Alteration'

20.67 'Alteration' is defined in the same wide way as in the provision dealing with constitutional amendment. It would therefore include any law which might not be directly related in nature or subject matter, but which is nevertheless inconsistent with, or repugnant to, a provision of one of the entrenched Acts. The definition would also entrench all subsequent alterations to the specified Acts. We propose that in substance the definition should be retained.

Form of Alteration

20.68 Subsection 78(3) attempts to provide a similar requirement to subsection 77(2), as to the form of any alteration to the entrenched Acts. It requires that the entrenched "laws" referred to in the "preceding subsection" may be altered only by an Act expressed to be an Act to alter that law. The preceding subsection (2), however, only refers to the Agricultural Landlord and Tenant Act. The other Acts are referred to in subsection (1). The limited reference appears to be inadvertent.

20.69 For the same reasons we gave in relation to subsection 77(2), we favour the inclusion in the Constitution of a requirement that a bill to alter *any* of the entrenched Acts must contain a statement that it is a bill to alter that Act.

Other Legislation Affecting Fijian Interests

20.70 A significant change made by the 1990 Constitution was that the veto power of the Senators nominated by the Bose Levu Vakaturaga was extended beyond the entrenched Acts and the Fijian interests specifically protected by those Acts to any other bill which "affects Fijian lands, customs or customary rights".

20.71 It is apparent that this extension was motivated by a desire to protect other Fijian interests not already protected by the entrenched Acts. One example is the Fijian customary fishing rights protected under the Fisheries Act.

20.72 Although we agree that the Bose Levu Vakaturaga should continue to have a veto power over any legislation affecting Fijian land, custom and customary rights, we consider that the broad thrust of the present provision and, in particular, the breadth of the word "affects" poses practical problems. Many routine general bills can "affect" Fijian land, customs or customary rights in indirect or non-contentious ways. A general taxation statute or a land-use statute regulating agricultural practices and applying to all land are possible examples.

20.73 One problem with the present provision is that it may allow a person who is being prosecuted for an offence against such an Act to claim that the Act is invalid because it is one which 'affects' Fijian land but did not get the required approval of the Bose Levu Vakaturaga. Such retrospective invalidation may cause great inconvenience and uncertainty, especially in relation to things already done under the Act.

20.74 We consider that the existing difficulties with the provision can be overcome if the constitutional safeguard was expressed in procedural terms. We propose that this general part of section 78(1) be replaced by provisions which empower the Attorney-General to certify that a bill is one affecting Fijian land, custom and customary rights otherwise than by alteration of one of the entrenched

Acts. The Constitution should provide that if the Attorney-General so certifies, that bill shall, after it is passed by the Bose Lawa, and the Bose e Cake be referred to the Bose Levu Vakaturaga for its consideration. The procedures and rules which we propose for alterations to the entrenched Acts will then apply.

20.75 Our proposal represents only a minimum requirement. We envisage that any government will bear in mind the Bose Levu Vakaturaga's ultimate veto and will consult it well before any such bill is introduced into the House. Provision for this initial consultation is at present contained in the Fijian Affairs Act, which we have proposed should remain entrenched.

20.76 The Constitution should make the Attorney-General's certificate conclusive. It should require that bills which affect Fijian land, customs or customary rights but which are not alterations to one of the entrenched Acts should be required to be referred to the Bose Levu Vakaturaga only in cases where the Attorney-General has so certified. The Constitution should not allow any Act, other than one altering one of the entrenched Acts, to be challenged after it has come into effect on the basis that it should have been, but was not, referred to the Bose Levu Vakaturaga.

20.77 Administrative arrangements should be made to ensure that the Chairman and the Secretariat of the Bose Levu Vakaturaga receive copies of all bills. We envisage that in a rare case in which, through inadvertence, a relevant bill is not certified, they will take the necessary steps to bring the matter to the attention of the Attorney-General before it is assented to by the President. We also envisage that in any such case, indigenous Fijian members of both Houses will also point out whether a bill will require reference to the Bose Levu Vakaturaga.

Agricultural Landlord and Tenant Act

20.78 The entrenchment of the Agricultural Landlord and Tenant Act protects the interests of tenants of all agricultural land including native land as well as the interests of the landowners, again including native landowners.

20.79 The duality of interests and the need for broader support for alteration is at present recognised by subsection 78(2) of the 1990 Constitution. Under that subsection, a higher majority is required. Any alteration to the Act requires the support of two-thirds of the members of each House. In the Senate this support must include that of eighteen Senators nominated by the Bose Levu Vakaturaga.

20.80 We recommend that this Act should continue to require the support of at least two-thirds of all of the members of the Bose Lawa and the Bose e Cake. The

Constitution should also require a bill altering this Act to be referred to the Bose Levu Vakaturaga in the same way as a bill to amend any of the other entrenched Acts. It should also require a certificate to be provided by the Speaker, the President of the Senate and by the Chairperson of the Bose Levu Vakaturaga that the constitutional requirements have been complied with before the President may assent to such a bill.

RECOMMENDATIONS:

691. **The Constitution should continue to require that any bill to alter any provision of:**

- **the Fijian Affairs Act (Cap. 120);**
- **the Fijian Development Fund Act (Cap. 121);**
- **the Native Lands Act (Cap. 133);**
- **the Native Land Trust Act (Cap. 134);**
- **the Rotuma Act (Cap. 122);**
- **the Rotuma Lands Act (Cap. 138);**
- **the Banaban Land Act (Cap. 124); and**
- **the Banaban Settlement Act (Cap. 123),**

may be passed by a majority of the votes of all of the members of each House.

692. **The substance of the existing definition of an alteration should be retained.**

693. **The Constitution should contain a requirement that a bill to alter any of the entrenched Acts must contain a statement that it is a bill to alter that Act.**

694. **If any bill to alter one of the specified Acts is passed by both Houses, the Constitution should require that before it is presented to the President for assent, it should first be referred to the Bose Levu Vakaturaga for its approval. That approval should be expressed either through consensus or through a majority of two-thirds of the votes of all of the members of the Bose Levu Vakaturaga. The Constitution should provide that the President shall not assent to any such bill unless the Chairperson of the Bose Levu Vakaturaga has certified that the Bose Levu Vakaturaga has approved the amendment.**

695. **We propose that the general part of section 78(1) which requires any bill otherwise affecting Fijian land, customs and customary practices should be replaced. The new provisions should empower the Attorney-General to certify that a bill is one affecting Fijian land, custom and customary rights otherwise than by alteration of one of the entrenched Acts. The Constitution should provide that if the Attorney-General so certifies, that bill shall, after it is passed by the Bose Lawa and the Bose e Cake be referred to the Bose Levu Vakaturaga for its consideration. The procedures and rules which we propose for alterations to the entrenched Acts will then apply in the Bose Levu Vakaturaga.**

696. **The Constitution should make the Attorney-General's certificate conclusive. It should require that bills which affect Fijian land, customs or customary rights but which are not alterations to one of the entrenched Acts, be referred to the Bose Levu Vakaturaga only in cases where the Attorney-General has so certified. The Constitution should also not allow any Act, which is not an alteration to an entrenched Act, to be challenged on the basis that it should have been referred to the Bose Levu Vakaturaga.**

697. **We recommend that any alteration to the Agricultural Landlord and Tenant Act should continue to require the support of at least two-thirds of all of the members of the Bose Lawa and the Bose e Cake. The Constitution should also require a bill altering this Act, to be referred to the Bose Levu Vakaturaga in the same way as a bill to amend any of the other entrenched Acts. It should also require certificates to be provided by the Speaker, the President of the Senate and by the Chairperson of the Bose Levu Vakaturaga that the constitutional requirements have been complied with, before the President may assent to such a bill.**

Your Excellency:

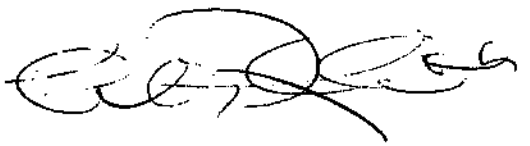
We have now completed the task entrusted to us to the best of our ability and in accordance with our Terms of Reference. We have done so with as much care and sensitivity and thoroughness as we could muster. Our report, like the Constitution we have reviewed, is a seamless document. Each of its component parts is inextricably linked. Its full import will be grasped only if it is read in its totality. Only then will the vision that has informed our work become fully apparent. We trust that the people of the Fiji Islands will receive our report in this spirit.

Your Excellency, it is our hope that this report will be the first essential step in the journey towards a strong and united future for all the people of the Fiji Islands.

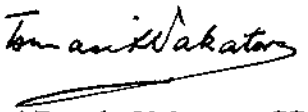
God Bless the Fiji Islands

We have the honour to be

Your Excellency's obedient servants



Sir Paul Reeves, Chairman
GCMG, GCVO, QSO, KSt.J



Tomasi Rayalu Vakatora, CF
Member

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Member