MAKING CONSTITUTIONS, FROM THE PERSPECTIVE OF A CONSTITUTIONAL ADVISER

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I LEARNING THE TRADE

I have been asked to present a paper about making constitutions, and, as a tribute to that lawyer of many parts, Sir Ivor Richardson, whose distinguished and varied career we are celebrating at this conference, to do so, from my own perspective as a lawyer. That happens to be the lawyer as constitutional adviser.

I learnt something about the practical operation of a constitution when, as a new graduate, I worked in the Legal Division of the Department of External Affairs, now the Ministry of Foreign Affairs and Trade. In those days, the Department of External Affairs doubled as the Prime Ministers Department and often advised on constitutional, as well as international, issues. In this, the year of the Queen's Golden Jubilee, I remember how, in my early days in my new job, I was asked to do a good deal of research into what New Zealand had to do to recognise the accession to the throne of a new sovereign - an area of expertise that, fortunately, has not had to be called upon since. But as a result of this and other experiences, I have always felt that the two disciplines, international law and constitutional law, inform and enrich one another.

Later in my career, I became a constitutional law teacher for a time at Victoria University of Wellington. For some of that time, Professor Ivor Richardson was Dean of Law. This was one of the many capacities in which he has made such a distinguished contribution to the life of the law in New Zealand, and elsewhere. As one small example of his versatility, I should like to mention that, in discussing with my students the ways in which - before the passing of the

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New Zealand Bill of Rights Act 1990 - effect was given in New Zealand law to human rights and fundamental freedoms, I drew on his 1962 Practice Note, *Religion and the Law*.[1]

I served my apprenticeship in constitution-making, as assistant to my late husband, Quentin,[2] with a recognised role but no official status. In 1970, the New Zealand Government appointed him as Constitutional Adviser to the Niue Island Assembly. Niue was still being administered as a New Zealand dependent territory, but its people had become confident enough at least, to consider eventual self-government, in a relationship of free association with New Zealand. I accompanied Quentin to Niue, took a seat at the Assembly table, and went with him to village and other meetings. His first report recommended that, before deciding to become self-governing, the people of Niue should try out in, practice, the constitutional arrangements they would need as a self-governing State.[3] This they did.[4] Three years later, they were ready to make a decision about their future status through an act of self-determination.

Quentin and I again visited Niue, this time to discuss what might need to go into an Act of the New Zealand Parliament declaring Niue to be self-governing, and an accompanying Constitution of Niue. On our return, he began writing a second report and asked me to produce an outline of what might go into the constitution. By the time Parliamentary Counsel, Jack McVeagh, had turned this document into a draft Bill for a Niue Constitution Act and scheduled Constitution, Quentin and I were in Geneva where he had a number of other responsibilities. The drafting of the Act and Constitution was completed through our joint efforts in providing comments and suggested redrafts, in telexed exchanges with Wellington and Niue. At one point, Quentin returned to New Zealand for consultations. Niue became self-governing on 19 October 1974.

News of this exercise in constitution-making must have travelled to other parts of the Pacific. In 1977, when we were again in Geneva, a letter arrived from the Marshall Islands, then a part of the Trust Territory of the Pacific Islands, administered by the United States. It announced that a Constitutional Convention was shortly to begin in Majuro, the administrative

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1 Rt Hon Sir Ivor Richardson *Religion and the Law, Practice Note No 1* (Sweet & Maxwell (NZ) Ltd, Wellington, 1962).

2 Professor Robert Quentin Quentin-Baxter, Professor of Law at the Victoria University of Wellington.

3 Robert Quentin Quentin-Baxter *Report to the Niue Island Assembly on the Constitutional Development of Niue* (Community Development Office, Niue, 1971). The Report was tabled in the New Zealand House of Representatives as [1971] AJHR A4, and was also published as UN Doc A/AC.109/378.

4 As to the implementation of the recommendations in the Constitutional Adviser's report, see the Niue Amendment Act 1971, s 3 (repealing ss 5-14 of the principal Act and substituting new ss 5-14D), s 4 (amendments consequential on s 3), and ss 5-12 (repealing and substituting or amending ss 30-32, 34, 36, 41, 64, and 664 of the principal Act respectively).

centre. The Marshall Islands Leadership Group was interested in the possible adoption of the parliamentary system, under which a number of South Pacific States had become independent or self-governing. Quentin was asked to be Counsel to the Convention and, if he wished, to bring his wife with him to share in the work. He had to reply that he was unable to spare the time away from the University. I ended up taking on the job alone, though with his full support. I did, however, ask for the assistance of a good American constitutional lawyer on matters such as a Bill of Rights, of which I had no personal experience. In due course, the Convention was able to obtain help from Professor Laurence Tribe, of Harvard University. Again, I learnt a lot from his involvement.

The Constitution of what later became the Republic of the Marshall Islands entered into force on 1 May 1979. Just over 10 years later, I returned to Majuro for another two months to act as Counsel to the 1990 Constitutional Convention which adopted a number of amendments, spelling out some aspects of the original Constitution, but not amending it in any significant way. All the proposed amendments required a two-thirds majority in a referendum. The only one to receive such a majority was the changing of the country's name. I shall come back later to the Marshall Islands model of constitution-making and constitutional amendment.

Another project on which I was engaged in the late 1970s, was the updating of a little-known part of the New Zealand constitution, the Letters Patent constituting the Office of the Governor-General. In April 1980, I completed a review of the existing Letters Patent of 1917.[5] My report was the basis for new Letters Patent, which entered into force on 1 November 1983.[6]

A further large constitutional task came my way in May 1995. I was appointed as one of two Counsel to a Commission of Inquiry set up to review the revolutionary 1990 Constitution of the Republic of Fiji. My colleague as Counsel to the Fiji Constitution Review Commission (FCRC) was Jon Apted, a young Fijian public servant who had already acquired a reputation for his ability and independence as the Supervisor of Elections. The FCRC was chaired by Sir Paul Reeves. Its other members included Mr Tomasi Vakatora, a former Speaker of the House of Representatives, and Dr Brij Lal, Reader in Pacific Islands History at the Australian National University. The FCRC's unanimous report was presented to the President on 6 September 1996.[7] After consideration by a Joint Parliamentary Select Committee, it became the basis, though with some significant changes, for the new Constitution enacted by the Parliament of

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5 Alison Quentin-Baxter and Robert Quentin Quentin-Baxter *Review of the Letters Patent 1917 Constituting the Office of Governor-General of New Zealand: Report* (The Cabinet Office, Wellington, 1980).

6 Letters Patent Constituting the Office of Governor-General of New Zealand 1983. It took effect as at 28 October 1983, SR 1983/225.

7 Fiji Constitution Review Commission *The Fiji Islands: Towards a United Future* (Parliamentary Paper No 34 of 1996, Government Printer, Suva, 1996).

Fiji in 1997.[8] That Constitution entered into force on 27 July 1998. With the help of decisions of the Fiji Court of Appeal, it has survived an attempt to overthrow it by force, and, subsequently, a departure from one of its main provisions, though the consequences of the Court's decision that there has been such a departure are still to unfold.[9]

II THE SUM OF THE EXPERIENCE

I have described my involvement in making constitutions, not just to tell you about some of the highlights in a varied professional life, but to set the scene for a discussion of constitution-making that I hope will have some resonance for a New Zealand audience. In this country, we do not now have a constitution that is supreme law, and therefore, is harder to change than the ordinary law. The reluctance to contemplate such a constitution appears not to be due to the fact that we lived under one from 1840 until 1947. Until then, only the United Kingdom Parliament could amend the New Zealand Constitution Act 1852 (Imp) in major ways, though it was fairly clear that it would do so only at New Zealand's request, and would not do so without such a request. The 1947 patriation of the Constitution was regarded as a logical step, consistent with New Zealand's nationhood.[10] Little, if any thought, was given to the fact that our own Parliament would in future be able to change our constitution in the same way as any other law. It soon did so, by abolishing the Legislative Council, New Zealand's second chamber.[11] That step, however, did not involve a significant shift in the allocation of political power.

In 1986, the New Zealand Parliament replaced the 1852 Act with a more modern statute. It, too, can be amended just as easily as any other Act of Parliament. In the meantime, we have become more conscious that our constitutional arrangements are based on the fundamental constitutional settlement in the Treaty of Waitangi. But there is not yet any widespread support in the community, as a whole, for the idea of giving the status of supreme law to the Treaty guarantees, and the jurisprudence to which they have given rise, or any other aspect of our constitution. Even so, the question of constitution-making in New Zealand is raised from

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8 Constitution Amendment Act 1997 (Fiji). Although this Act was, in form, an Act to alter the 1990 Constitution proclaimed by the interim revolutionary government, it was, in reality, a new, self-contained constitution. Section 195 repealed all provisions of the 1990 Constitution, except Chapter XIV, which conferred immunity from prosecution on all who had taken part in the 1987 military coups. Before its entry into force, the Constitution Amendment Act 1997 was itself amended in minor, and mainly, technical ways by the Constitution (Amendment) Act 1998 (Fiji).

9 See *The Republic of Fiji v Prasad* (11 March 2001) Fiji Court of Appeal, Civil Appeal No ABU0078/2000S, and *Chaudhry v Qarase and Ors*, (15 February 2002) Fiji Court of Appeal, Misc. No 1/2001.

10 See the Statute of Westminster Adoption Act 1947, the New Zealand Constitution (Request and Consent) Act 1947, and the New Zealand Constitution (Amendment) Act 1947 (UK).

11 See the New Zealand Constitution Amendment Act 1950.

time-to-time. For that reason, it seems useful to share with you some perceptions about both substance and process that may be relevant if we ever wish to take seriously the idea of giving ourselves a Constitution with a capital C.

Drawing on my experiences as a constitutional adviser in the contexts earlier described, I therefore propose to discuss the following general issues:

- When do countries make a new constitution?
- The constitution as the rules of the political game.
- How can a country make a constitution?
- How does the method of constitution-making affect the tasks of the constitutional adviser?
- Should the public be involved in constitution-making, and if so, how?
- What goes into a constitution?
- Is the Westminster constitution a satisfactory export model?
- What are the responsibilities of a constitutional adviser?

III WHEN DO COUNTRIES MAKE A NEW CONSTITUTION?

It is a truism that countries make a new constitution when they wish to make a fresh start, usually for compelling political reasons. In my experience, a new constitution, or the amendment of an existing constitution, generally involves a significant re-allocation of political or other powers. Whether or not the new allocation is fairer, and therefore more justifiable than the old one, depends on what is in the old constitution, and also in the new or amended one, how the constitutional change is made, and perhaps on one's point of view.

Constitution-making in Niue was an exercise in de-colonisation. It involved the definitive transfer of executive and legislative power in respect of Niue from officials, Ministers, and Parliament in Wellington to the Niue Cabinet, and a newly constituted Niue Assembly. You might think that there would be ready support for such a shift, but, especially in the beginning, not everyone in Niue was happy about the idea. Some regarded New Zealand's controlling hand as a necessary protection against the power of their own political leaders. Some were fearful that the withdrawal of New Zealand control would mean also the withdrawal of the New Zealand economic and administrative assistance on which Niue depended, and was likely to depend for the foreseeable future. The Constitution contains assurances on both points,[12] but cannot, of itself, determine the kind or the level of continuing New Zealand

12 On the first point, see in particular the Constitution of Niue, Articles 62(2), 67(1) and 69(1), as to the independence of the Niue Public Service, and article 35(1)(b)(i), which provides that Article 69 can be

assistance. Over the years, both have at times been in contention. There is ongoing interest in Niue in the review of the Constitution, but, in my view, this interest mainly reflects a deeply felt desire to improve the working of the relationship with New Zealand.

In the Marshall Islands, too, the objective was decolonisation, but with a twist. The United States, as the administering authority, saw the future of the Marshall Islands as self-government in federation with other groups in the Trust Territory, the Caroline Islands and Palau. Political leaders in the Marshall Islands saw federation as a disadvantage. First, there were no traditional ties between the people of the Marshall Islands and the peoples of the Carolines and Palau, who spoke different languages and were culturally distinct. Secondly, the Marshall Islands had suffered considerable damage as a United States Strategic Trust Territory. Several of its atolls had been made uninhabitable by their use for atmospheric nuclear testing, and the people of neighbouring atolls had been exposed to radioactive fallout.

People felt that, if the Marshall Islands alone had to bear these burdens of United States administration, then they should not be required to share its benefits. The missile-testing range at Kwajalein Atoll provided jobs and brought in substantial land rents. Sharing the revenues from this activity through federation would mean that the Marshall Islands were being asked to provide a subsidy for the other groups in Micronesia, thereby relieving the administering authority, at least in part, of its own duty to provide a full measure of economic assistance to the people of those groups. The first reason for making a constitution for the Marshall Islands was to give credibility to the push for a "No" vote in that district in a referendum on the adoption of the Constitution of the Federated States of Micronesia (FSM) that had already been drawn up. In the event, 61.5% of Marshallese voted against the FSM Constitution, and only 38.5% supported it.

The 1990 initiative to amend the Marshall Islands Constitution was also mainly about the sharing of power, this time the power to make dispositions of land. All land in the Marshall Islands is held under customary law. The Constitution contains a provision preventing any disposition of land by the iroij - the chiefs - unless approval has also been given on behalf of all persons having an interest in the land concerned.[13] Some chiefs proposed the amendment of this provision to prevent the holders of other classes of land rights from blocking a disposition desired by the chiefs. The fight was joined in the elections of persons as delegates to the required Constitutional Convention.[14] Some candidates who favoured the amendment of the

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amended only with the approval of a two-thirds majority at a referendum. On the second point, see the Niue Constitution Act 1974, ss 7 and 8.

13 Constitution of the Republic of the Marshall Islands, Article X, Section 1(2).

14 Constitution of the Republic of the Marshall Islands, Article XII, Sections 2(1) and 4.

relevant article were not elected. When the Convention met, no proposal for its amendment could attract the required majority. The article, therefore, remains in its original form.

In Fiji, the driving force was quite different, but still centred on the allocation of political power. Fiji had become independent in 1970 under a constitution that allocated all seats in the House of Representatives on a communal basis, though with provision for some "cross-voting", which was supposed to give other communities a voice in the election of at least some community representatives. There were an equal number of seats for Fijians and Indians, despite the fact that Indians had outnumbered Fijians since at least 1946. The "general voters", that is those who were neither Fijian nor Indian, were over-represented in proportion to their number, and held the balance of power.[15] Fijians were encouraged to believe that, with the support of the general voters, they could govern indefinitely.

Party splits and floating voters called that supposition into question in 1977. A decade later, in 1987, the predominantly Fijian Alliance Government was defeated at a general election by a coalition of the multiracial Fiji Labour Party, under the leadership of Dr Timoci Bavadra, and the National Federation Party, then the main party of the Indian community. When Parliament met, Dr Bavadra's Government was overthrown in a military coups, led by Colonel Sitiveni Rabuka. In a later, second coups, staged when it looked as though it might be possible to form an interim all-party government under the existing Constitution, thus exposing Rabuka to a charge of treason, he abrogated that instrument, declared Fiji a Republic, and ruled by military decree. Subsequently, an interim civilian administration was installed.

Later still, in 1990, a new Constitution was promulgated, restoring parliamentary government but with an allocation of seats weighted in favour of indigenous Fijians, a requirement that the Prime Minister had to be a Fijian, and other provisions securing preferences for the Fijian community.[16] Remarkably, however, the 1990 Constitution did contain a provision requiring its "review" within seven years of its promulgation.[17] So far as I know, the reason for the inclusion of the provision has never been documented. In any event, all parties were tacitly committed to honouring it.

Although it was understood that the review could result in a decision to maintain the 1990 Constitution in its existing form - an outcome many were to argue for - there appeared also to be an understanding that, if the review led to any amendment of the 1990 Constitution, the amendment itself needed be put in place within the seven-year period. In fact, on the basis of the FCRC's report, a new and radically different "multiracial" Constitution was passed

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15 The Fiji Independence Order 1970, Schedule: The Constitution of Fiji, s 32.

16 Constitution of the Sovereign Democratic Republic of Fiji (Promulgation) Decree 1990, made on 25 July 1990.

17 Fiji Constitution, 1990, above, Schedule, s 161.

unanimously in both Houses of the Fiji Parliament and received the President's assent on 25 July 1977, seven years to the day after the promulgation of the 1990 Constitution.[18] But, as subsequent events graphically showed, there was, in reality, a lack of wide support among the people of the Republic of the Fiji Islands as a whole for the reallocation of political power that the 1997 Constitution brought about.

Contrary to one suggestion, the reformulation of the Letters Patent Constituting the Office of Governor-General of New Zealand did not bring about any substantive change in the extent to which the Queen in right of New Zealand acts on the advice of New Zealand Ministers in constituting the office of Governor-General, and making appointments to it.[19] It did, however, clarify the powers of the holder of the office where they had been in doubt. Among other things, the new Letters Patent established the following points:

- The whole executive authority of New Zealand, including the foreign affairs power, vested in the Queen in right of New Zealand, is delegated to the Governor-General, and through the Governor-General to New Zealand Ministers and officials.[20]
- The self-governing State of the Cook Islands and the self-governing State of Niue remain part of the Realm of New Zealand, but the extent of the Governor-General's powers in those States - meaning the executive authority of the Government of New Zealand as well as the "things that belong to the office of Governor-General" - is governed exclusively by the Constitutions and other laws of those self-governing States.[21]
- The Ross Dependency is part of the Realm of New Zealand.[22] Accordingly, the Governor-General holds office there in that capacity, as well as being, by virtue of holding office as Governor-General of New Zealand, the Governor of the Ross Dependency.[23] In this context, I made good use of the 1957 New Zealand Law Journal article, "New Zealand's Claims in the Antarctic" by the Rt Hon Sir Ivor Richardson.[24]

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18 Constitution Amendment Act 1997 (Fiji). For further information about this Act, see footnote 8 above.

19 Gavin A Wood "New Zealand's Patriated Governor-General" (1986) 38 Political Science 113, 119-120.

20 Letters Patent Constituting the Office of Governor-General of New Zealand 1983, clause III.

21 Letters Patent 1983, above, clauses I and IV(b). See also cl VI(b).

22 Letters Patent 1983, above, clause I.

23 See the Order in Council, made on 30 July 1923, by virtue of the powers vested in His Majesty the King by the British Settlements Act 1887 (Imp) or otherwise: 1923 New Zealand Gazette, 2211.

24 Rt Hon Sir Ivor Richardson "New Zealand's Claims in the Antarctic" (1957) 33 NZLJ 38.

The new Letters Patent leaves the question of the extent to which the Governor-General must act on the advice of his or her New Zealand Ministers, entirely to constitutional convention.

The implication of these examples is that people seldom set out to make or amend a constitution unless they are ready to reconsider the distribution of power within their society.

IV THE CONSTITUTION AS THE RULES OF THE POLITICAL GAME

The report of the FCRC explained that, although the Opposition may disagree with the Government on important matters, both are agreed on the constitution as setting the rules of the political game.[25] For that reason, constitutions need to be generally acceptable to all citizens. This proposition applies generally, but it was especially important in Fiji. Making that point, the FCRC said:[26]

> This does not mean that everyone must agree with every detail. If a constitution is the product of a democratic process, some disagreement is inevitable. But the process by which it is developed and adopted should be generally accepted, and disagreement about its terms should be kept within reasonable limits. Those who would have preferred a different constitution must be able to accept the one actually adopted.

Professor Cheryl Saunders, who also gave a paper at the conference, will recognise the unacknowledged borrowing from the very useful paper on Constitutional Preambles, which she wrote for the Commission's use.[27]

As the FCRC indicated, a constitution should be the product of a democratic process. But if the constitution is to command general support, it is necessary to look beyond the normal rule that a majority, however narrow, may change the law of the land, however strongly its proposals are contested. While, technically, that rule may sometimes apply in constitution-making, there is always a need for all involved in that process to think about how they can meet substantial minority concerns, as well as those of the majority. If that precept is ignored, especially by a majority that represents particular interests or a particular section of the community, there is little hope that the constitution will command the loyalty and respect of all.

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25 Fiji Constitution Review Commission *The Fiji Islands: Towards a United Future* (Parliamentary Paper No 34 of 1996, Government Printer, Suva, 1996). para 9.110.

26 Fiji Constitution Review Commission, above, para 3.5.

27 Cheryl Saunders "The Constitutional Preamble" in Brij V Lal and Tomasi R Vakatora (eds) *Fiji and the World*: *Research Papers of the Fiji Constitution Review Commission* (School of Social and Economic Development, The University of the South Pacific, Suva, 1997) 260.

V HOW CAN A COUNTRY MAKE A CONSTITUTION?

It follows that, if a new constitution or a constitutional amendment is to command general support, there is a need to think carefully about the best process for putting it in place. As it happens, I have been involved in processes that were very different. The one chosen in each case reflected, in large measure, the source of the power to make or amend a constitution on which the new instrument would rest. That, too, differed widely. It is noteworthy that the resulting constitutions are a good deal harder to amend than they were to adopt.

In Niue, it was taken for granted that the Constitution for self-government would be put in place by the mechanism already used in the Cook Islands - that is an Act of the New Zealand Parliament that would be part of the law of both New Zealand and Niue, and would provide that the scheduled Constitution would be the Constitution of Niue. It was accepted, however, that once the Constitution entered into force, the New Zealand Parliament would no longer be able to make laws for Niue, except at the Niue Assembly's request and with its consent.[28] The power to amend the Constitution would vest exclusively in the Niue Assembly, and would require the affirmative votes of not less than two-thirds of its members. All amendments would need to be approved in a referendum. Most amendments would require only a simple majority, but an amendment of an operative provision of the Niue Constitution Act and a few key provisions of the Constitution would require a two-thirds majority among those taking part.[29]

The content of the proposed Niue Constitution Bill and accompanying Constitution was discussed in detail with the Niue Island Assembly. It was agreed that neither would come into force until the people of Niue, voting in a referendum observed by the United Nations, had decided that they wanted self-government on the basis of those documents. As the administering authority, the New Zealand Government saw itself as having a responsibility and a right to contribute to the decision-making. The people of Niue wished to remain New Zealand citizens, and were seeking a relationship of free association with New Zealand. As a term of this relationship, New Zealand would have a continuing responsibility to provide necessary economic and administrative assistance to Niue.[30] It was always clear, however, that the Government and people of Niue would have the last word. When, on 3 September 1974, in the presence of a United Nations observer team, the referendum was held, the vote was 65.4% in favour of Niue's new constitutional arrangements to 34.6% against.

In contrast to what happened in Niue, constitution-making in the Marshall Islands saw the entire process initiated and completed without active participation by the United States, as the

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28 Constitution of Niue, Article 36(1).

29 Constitution of Niue, Article 35.

30 Niue Constitution Act 1974, ss 7 and 8.

administering authority, though some funding was eventually provided. So also were helpful comments. In part, the non-involvement was the result of a philosophy stemming from the United States experience: people should be allowed to give themselves their own constitutions. In part, it was a result of the original anti-establishment character of the constitution-making initiative. From the beginning, the assumption on all sides was that the Constitution would be autochthonous. That is, it would not derive, directly or indirectly, from the law of a foreign country, but exclusively from the acts of the people and their representatives.[31] There was never the slightest suggestion that this method of making a constitution would not be legally effective in all forums where it might be put to the test.[32]

The first step was the convening of a widely representative constitutional convention. Provision for this purpose was made by Act of the Marshall Islands District legislature, the Nitijela. The Convention consisted of forty-eight delegates, including members of the Marshall Islands delegation to the Congress of Micronesia, members of the Nitijela, the iroij (or chiefs), who are the traditional leaders, the "owners" of the atoll of Likiep,[33] and thirty-three delegates specially elected from twenty-four delegate districts, comprising the whole of the Marshall Islands.

The Convention met in three sessions over a seventeen-month period. At the first session, delegates debated the main issue, which was what was to be the form of government that the constitution should embody. Strongly influenced by their neighbours in Nauru, with whom they had long had a close association, and observing the strife between the executive and legislative branches of government, which was then a feature of political life in the United States territory of Guam and the newly-established Commonwealth of the Northern Mariana Islands, the Marshallese political leaders wanted a deliberate choice to be made between a presidential and a parliamentary system of government. Under the first, a directly-elected Head of State and of government would exercise executive authority and would have to work with a separately elected legislature. Under the second, the Head of State and of Government would be a member of the legislature who commanded and retained the support of a majority

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31 This statement is a paraphrase of a decision taken in Samoa (formerly Western Samoa) by the Samoan Working Committee of the Constitutional Convention convened in that country in 1960: see James W Davidson "The Transition to Independence: The Example of Western Samoa" (1961) 3 Aus J Pol & Hist 15, 34.

32 Compare the discussion of autochthony in Western Samoa (now known simply as Samoa) in Sir Kenneth Roberts-Wray *Commonwealth and Colonial Law* (Stevens & Sons, London, 1966) 298-301.

33 "Owners", in relation to Likiep, describes the heads of two families descended from early European settlers who have come to have the status of traditional leaders.

of its members. In the event, the Convention accepted the recommendation of its steering committee that the parliamentary system should be adopted.[34]

At the second session, a more or less complete, though still rather rough draft constitution emerged. The third session made further technical and policy changes, before a final vote. The Convention adopted the final draft of the Constitution with the support of all but two of the forty-eight delegates. The second step in the constitution-making process was the approval of the draft constitution by the majority of the people in a referendum.[35] That referendum was held on 1 March 1979, in the presence of a United Nations visiting mission. The Constitution was adopted by a vote of 63.8% in favour to 36.2% against. Only a simple majority was required.

The successful functioning of the First Marshall Islands Constitutional Convention led that body to decide that all-important amendments to the new Constitution, once in place, would also need to be adopted by a Constitutional Convention. Less important amendments can be made by the Nitijela with the support of two-thirds of its members. A Convention to amend the Constitution may be convened only in accordance with the provisions of an Act of the Nitijela, is to be composed of members fairly representing all the people of the Marshall Islands, is to be specially elected by qualified voters, is to number at least ten more than the total membership of the Nitijela, and is to be organised and to proceed according to its own internal rules. Whether amendments are proposed by a Constitutional Convention, or by the Nitijela, a referendum is required. Amendments proposed by a Constitutional Convention need a two-thirds majority, rather than the simple majority required for amendments proposed by the Nitijela.[36]

In Fiji, the ways of making a constitution have been different again. The original independence Constitution was made by the Queen on the advice of the Privy Council - an exercise of the prerogative constituent power.[37] I shall come back to that power later, in briefly discussing the making of the Letters Patent constituting the Office of the Governor-General of New Zealand. In the run-up to independence, the Fijian political leaders had approved the Constitution's most important provisions, those governing the allocation and filling of the seats in the House of Representatives. The Indian political leaders had given provisional approval on the understanding that a Commission of Inquiry would look again at that question. When the Commission reported, recommending that some seats be filled by voting on a common roll,

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34 This issue is further discussed below. See Part VI.

35 Constitution of the Republic of the Marshall Islands, Article XIV, Section 6.

36 Constitution of the Republic of the Marshall Islands, Article XII.

37 See The Fiji Independence Order 1970, Schedule: The Constitution of Fiji, s 32.

under the single transferable vote system, the Fijian-dominated government took no action on the recommendation.

The 1990 Constitution was made by decree of the Interim Government,[38] an autochthonous initiative reflecting the break in legal continuity resulting from the overthrow of the 1970 Constitution, but one that became the basis of a new legal order. Although the Indian community regarded the 1990 Constitution as having been imposed upon them without their consent, they agreed to take office under it. There was general agreement that any amendment or replacement of the 1990 Constitution should be brought about through the processes it laid down for constitutional amendment. These differed, depending on the nature of the amendment. The most important amendments required the support of two-thirds of the members in both Houses, including those of not less than eighteen of the twenty-four members of the Senate appointed by the President on the advice of the *Bose Levu Vakaturaga*, the Great Council of Chiefs. No Bill amending the provisions for electing the members of the House of Representatives was to proceed until three months after the recommendations of a Commission of Inquiry on that matter had been tabled in Parliament.[39] The review of the 1990 Constitution, required to be undertaken within seven years of its promulgation, implicitly involved the allocation of seats in the lower House. A Commission of Inquiry was appointed by the President on 15 March 1995.[40]

The FCRC's terms of reference had been unanimously approved by both Houses of the Fiji Parliament. They laid down a number of criteria with which its recommendations were to comply.[41] At first sight, it looked as though the Commission was required to reconcile the

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38 Constitution of the Sovereign Democratic Republic of Fiji (Promulgation) Decree 1990, made on 25 July 1990.

39 Constitution of the Sovereign Democratic Republic of Fiji (Promulgation) Decree 1990, Schedule, Article 77.

40 The FCRC's Terms of Appointment are reproduced in the Fiji Constitution Review Commission *The Fiji Islands: Towards a United Future* (Parliamentary Paper No 34 of 1996, Government Printer, Suva, 1996) Appendix B.

41 The Fiji Constitution Review Commission summarised the task given to it by its terms of reference as follows:

> ... to review the Constitution and produce a report ... recommending constitutional arrangements which will meet the present and future needs of the people of Fiji, and promote racial harmony, national unity and the economic and social advancement of all communities.
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> These arrangements must take into account internationally recognised standards of individual and group rights;
>
> guarantee full protection and promotion of the rights, interests and concerns of the indigenous Fijian and Rotuman people; and
>
> have full regard for the rights, interests and concerns of all ethnic groups in Fiji.

irreconcilable. It was directed to work in private under the usual requirement as to non-disclosure, except for evidence or information obtained at a public hearing. Its report was tabled on 10 September 1996, at a special joint sitting of both Houses of Parliament, and was referred to a Joint Select Committee on the Constitution (JPSC). In order to facilitate the Committee's work in an atmosphere free from the cut and thrust of everyday politics, the Government suspended all other Parliamentary business until the JPSC had had time to complete its report.

The JPSC, too, met behind closed doors. A record was kept of the decisions reached, but not of the discussions themselves.[42] The Committee accepted the general thrust of the FCRC's report, though with two major changes of emphasis that I later describe.[43] With a few exceptions, it arrived at its conclusions unanimously.[44] Its report was the basis of a Bill for what became the Constitution Amendment Act 1997. In Parliament, as in the JPSC, the then Prime Minister, Sitiveni Rabuka, took the lead in promoting political agreement, with the support of the then Leader of the Opposition, Jai Ram Reddy. The Leader of the Fijian Labour Party (FLP), Mahendra Chaudhry, who had signed the JPSC report with some reservations, argued for several changes. Some leading Fijian parliamentarians were also critical, voicing their concern that Fijian interests were being short-changed. At their request, Rabuka agreed to a free vote on the Constitution Amendment Bill, but announced that, if the Bill failed, he would go to the polls immediately with the proposed new constitutional arrangements as the central issue in the campaign. This tactic was decisive. As already mentioned, the Bill was passed unanimously in both Houses of the Fiji Parliament. In accordance with its terms, what was in reality a new Constitution entered into force on 27 July 1998.[45] Despite all that has happened since, it remains the Constitution of the Republic of the Fiji Islands.

See Fiji Constitution Review Commission *The Fiji Islands: Towards a United Future* (Parliamentary Paper No 34 of 1996, Government Printer, Suva, 1996) para 1.6.

42 This process had encouraged participants to engage in wide-ranging and uninhibited discussion of contentious issues, enabling them to express the fears and anxieties of the communities they represented. Often the exchanges were heated and emotional as members defended entrenched positions or articulated new approaches.

Brij V Lal *Another Way: The Politics of Constitutional Reform in Post-Coup Fiji* (Asia Pacific Press, National Centre for Development Studies, The Australian National University, Canberra, 1998) 87.

43 These concerned the allocation of seats in the House of Representatives and the membership of the Cabinet. See the discussion later in this paper at Part VIII.

44 *Report of the Joint Parliamentary Select Committee on the Report of the Fiji Constitution Review Commission* (Parliamentary Paper No 17 of 1997, Government Printer, Suva, 1997) paras 8.2 and 8.4.

45 See above Constitution Amendment Act 1997 (Fiji).

Just to complete the story about methods of constitution-making, the 1983 Letters Patent Constituting the Office of the Governor-General of New Zealand,[46] like the 1970 Fiji Constitution, were an exercise of the prerogative constituent power. This is a remnant of the royal prerogative that has been part of the law of New Zealand ever since this country was brought within the Queen's dominions. It allows the Queen to make provision for the country's government, but in New Zealand, a settled colony, legislative authority must be granted only to a legislature with a majority of elected members. To the extent that Parliament, formerly that of the United Kingdom and now that of New Zealand, has made provision for the country's governance, the prerogative power is in abeyance.

In 1983, the Office of Governor-General could have been constituted by an Act of the New Zealand Parliament, but there were legal and policy reasons for continuing to rely on the prerogative, as well as a desire to adhere to tradition. In the United Kingdom, the Queen issues Letters Patent after they have been approved, in draft, by the Privy Council. But, except for its Judicial Committee, the Privy Council is not a New Zealand organ of government. The new Letters Patent were therefore approved in draft by an Order made by the Governor-General in Executive Council, also acting under the prerogative constituent power.[47] Because it was desirable that the new instrument should replace the 1917 Letters Patent in the law of the Cook Islands and of Niue, as well as the law of New Zealand, those self-governing States also approved the new Letters Patent in draft and consented to their taking effect, as part of the law of all parts of the Realm of New Zealand.[48]

It will be obvious that the different ways of making or amending constitutions involve different tasks for the constitutional adviser. They also involve different ways and levels of public participation. I turn now to those issues.

VI HOW DOES THE CHOSEN METHOD OF CONSTITUTION-MAKING AFFECT THE TASKS OF THE CONSTITUTIONAL ADVISER?

In Niue, the Constitutional Adviser to the Niue Island Assembly, on the basis of his discussions with the Assembly and at other meetings with officials and the people, made proposals to the Assembly in the form of reports. The Assemblymen - there were no women then - worked in the Niuean language, but their remarks were translated into English for the benefit of the Constitutional Adviser. Similarly, his explanations and comments, and

46 Letters Patent Constituting the Office of Governor-General of New Zealand 1983. It took effect as at 28 October 1983, SR 1983/225.

47 Order in Council (26 September 1983).

48 Letters Patent, above.

eventually his oral reports, were translated into Niuean. So also was his first written report.[49] The writing of the second report, already presented orally, had to give way to work on the drafting of the Constitution. It remained incomplete, but was supplemented by a long telegram from Geneva.[50]

Once the proposals in the Constitutional Adviser's reports had been accepted by both the Niue Island Assembly and the New Zealand Government as the basis for New Zealand legislation, the Constitutional Adviser took part in discussions with New Zealand officials about their implementation. With a bit of help from his assistant, he scrutinised the drafts prepared by Parliamentary Counsel, provided comments, and suggested redrafts when necessary. New Zealand officials sometimes had opposing views, and, at the end of the day, the Minister of Island Affairs had to take responsibility for the Niue Constitution Bill and the Constitution in the House of Representatives. On occasions, the Constitutional Adviser engaged in advocacy on the Niue Island Assembly's behalf. Although he was sometimes able to reconcile different views by proposing a compromise, he was in no doubt that, in the words of the Secretary of Maori and Island Affairs at the time of his appointment, he was the "Assembly's man". Generally speaking, the end result reflected a meeting of minds.

In the Marshall Islands, the Legal Counsel to a Constitutional Convention was seen as an adviser to delegates or to a Convention Committee who were putting forward their own proposals. On the issue of the form of government that the Marshall Islands should adopt, delegates were convinced, rather alarmingly, that, if only they had a draft outline of a constitution embodying a particular form of government in front of them, and were able to read it, they would understand all its implications. They did not want an explanation of the features of the different systems, by way either of theoretical exposition or of commentary. The steering committee asked me to produce a draft constitution for a parliamentary system of government, and also one for a presidential system. This I did. The Legislative Counsel to the Nitijela, who had been Counsel to a large local government in the United States, produced a third draft combining legislative and executive functions in a single elected body modelled on a typical local government council. After an absence from Majuro, I returned to find that the steering committee had decided to recommend to the Convention that it should draft a Constitution embodying the parliamentary model. This was an act of faith based more on

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49 Robert Quentin Quentin-Baxter *Report to the Niue Island Assembly on the Constitutional Development of Niue* (Community Development Office, Niue, 1971). The Report was tabled in the New Zealand House of Representatives as [1971] AJHR A4, and was also published as UN Doc A/AC.109/378.

50 Robert Quentin Quentin-Baxter *Second Report to the Niue Island Assembly on the Constitutional Development of Niue*, and accompanying message to the Leader of Government (4 March 1974), reproduced in (1999) 30 VUWLR 577. See also, for a background note, Alison Quentin-Baxter "Human Rights and Decolonisation" (1999) 30 VUWLR 563.

instinct than on reason, but I was asked to prepare a draft report setting out the supporting arguments for adoption by the committee and eventually the Convention as a whole.[51]

Apart from this one written report, all proposals made on the Convention floor, though drafted by Legal Counsel, were introduced orally by Committee chairpersons or individual delegates who had to explain them and argue for their adoption. In this way the political leaders absorbed the detail and the nuances of the system of government they had decided to adopt. Legal Counsel took no part in the debate, except to respond to questions put by the delegates when the Convention was meeting in select committee or in committee of the whole, which it did for most of the time. As in Niue, all the discussion was in the local language. An interpreter sat beside me to whisper a translation of each speaker's remarks or questions. I made my replies in English, two sentences at a time. These were then translated into Marshallese. This gave me time to think of the next two sentences.

The steering committee had also given me a pile of small pieces of paper on which delegates had handwritten their own suggestions about what should go into the Constitution. The committee had vetted these, and discarded the ones they did not wish to pursue. I was asked to incorporate the rest in what gradually became a draft Constitution. Later, Professor Tribe, in the role of consultant, presented memorandums to one or other of the Committees, sometimes jointly with me, about the implications of provisions already in the draft text, or others that a delegate wanted to include, but it was a feature of the original constitution-making that very little was committed to writing except the evolving text of the Constitution itself. All documents were presented in the Marshallese language, as well as in English.

The 1990 Constitutional Convention was convened in accordance with a report of a Nitijela-appointed committee that had recommended the calling of a Convention for the purpose of proposing amendments on the matters identified in its report. The Committee had been set up under a constitutional provision requiring the Nitijela to make provision for such a report at least once in every ten years.[52] But in the Convention itself, it was up to the delegates to put forward proposed constitutional amendments. Depending on their subject-matter, these were referred initially to one of the Convention Select Committees, whose Chairperson reported on the proposed amendment to the Convention as a whole.

Legal Counsel's role was twofold. First, I assisted delegates to put their proposed amendments into written form, in a manner that would fit in with the rest of the Constitution, identifying also any consequential amendments that would be required if the main

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51 Substantial excerpts from the report are reproduced in *Report of the UN Visit to Observe the Referendum in the Marshall Islands, Trust Territory of the Pacific Islands* (Official Records of the Trusteeship Council, 46th Session, Supplement No 3) paras 163 - 167.

52 Constitution of the Republic of the Marshall Islands, Article XII, Section 6.

amendment was adopted. It was accepted that this task did not involve any judgment on my part about the merits of the amendment. I would do my best to find a way of giving effect to the delegate's intentions but in a manner that did not involve the writing of legal nonsense. On the most contentious matter, controls over the disposition of land by the chiefs, I helped draft six contradictory proposed amendments. The matter was so controversial that I did not dare to suggest any sort of compromise, until requested to do so by the Convention Chairperson. Even then, neither it nor any other proposal on the issue attracted the required majority from among the Convention delegates. The provision therefore remains in its original form.

Secondly, it was accepted that, if, as an independent adviser, I thought it desirable, I would provide a written memorandum on the implications of a proposed amendment to the Convention Committee considering it, and would attend Committee meetings, on my own initiative or at the Committee's request, to make oral comments or to respond to questions. Occasionally, the Convention sat in Committee of the Whole, so that Counsel could be further questioned by any delegate.

In Fiji, the role of Counsel assisting a Commission of Inquiry was different again. The Commission began its work at the beginning of June 1995. It was clearly intended to act independently and in accordance with the highest professional standards. To begin with, Legal Counsel spent a great deal of time in helping to organise the Commission's work. I was grateful for my Law Commission project-planning experience. It was agreed that the work should be undertaken in three phases.

The first phase, which lasted until early in 1996, focussed on gathering and analysing information. The FCRC made an early decision to hold public hearings in all parts of Fiji, so as to obtain an input from Fiji's citizens in a public and open process. Thanks to the expertise of the Hansard reporters who accompanied us, we had prompt transcripts of the proceedings, as well as copies of the 852 written submissions received. In due course, Legal Counsel provided an analysis of the issues that the submissions raised.

The FCRC also identified the matters on which it would need further information and research. It asked Fiji government departments and agencies to supply factual data and statistics. It also asked a number of academics and other specialists, both in Fiji and overseas, to prepare research papers. I drew heavily on my professional and personal contacts around the world, either to write papers themselves or identify others who might be willing to do so, in return for the very modest honorarium the Commission was able to offer. Knowledgeable people, both in Fiji and overseas, responded generously to the Commission's requests for help. Five experts on voting systems in multi-ethnic societies were found and funded by the Electoral Division of the United Nations Department of Political Affairs. All the papers written for the Commission have since been published by the School of Social and Economic

Development of the University of the South Pacific.[53] The blurb on the back cover commends them as an invaluable resource of information and opinion about contemporary Fiji, and about particular problems posed by multi-ethnicity in any polity and for any constitution-framers.

The FCRC also decided to make overseas visits for the following purposes:

- First, it wished to obtain first-hand experience of how people in a selection of other multi-ethnic countries had tailored their constitutional arrangements to the nature of their societies. It therefore visited Malaysia, Mauritius and South Africa, each of which had something of special relevance to offer. In each case, the FCRC commissioned papers from one or more local experts so that it had good background information and personal as well as official contacts once it got there. These country visits provided insights that it would have been difficult to obtain in any other way.[54]
- Secondly, the Commission wished to find out more about the technicalities of various voting systems, and also the way in which they might operate in a multi-ethnic society. To this end, it visited both the Australian and the New Zealand Electoral Commissions and also met with officers from the Electoral Commissions in Tasmania and the Australian Capital Territory. It also had discussions with the two acknowledged world experts in this area, Professor Arend Lijphart, of the University of California at San Diego, and Professor Donald Horowitz, of Duke University.
- Thirdly, in the course of its travels, the Commission took the opportunity to meet with as many as possible of the experts who were writing papers for it, so that there would be an opportunity for a personal presentation and face-to-face discussions.

On its return to Suva, the FCRC met in private with high officers of State in Fiji and also requested written information from public and private sector bodies in Fiji and overseas.

The second phase of the Commission's work began early in 1996. The focus was on the development of policies that would guide its recommendations. Much of its time was taken up in scrutinising the 1990 Constitution, as required by its terms of reference.[55] These also

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53 Brij V Lal and Tomasi R Vakatora (eds) *Fiji in Transition* and *Fiji and the World*: *Research Papers of the Fiji Constitution Review Commission* (School of Social and Economic Development, The University of the South Pacific, Suva, 1997).

54 See Alison Quentin-Baxter "Ethnic Accommodation in Malaysia, Mauritius and South Africa" in Brij V Lal and Tomasi R Vakatora (eds) *Fiji and the World*: *Research Papers of the Fiji Constitution Review Commission* (School of Social and Economic Development, The University of the South Pacific, Suva, 1997) 137.

55 See the FCRC's Terms of Appointment are reproduced in the Fiji Constitution Review Commission *The Fiji Islands: Towards a United Future* (Parliamentary Paper No 34 of 1996, Government Printer, Suva, 1996) Appendix B.

required the Commission, among other things, to take into account internationally recognised principles and standards of individual and group rights. Legal Counsel wrote Issues Papers, comparing the provisions of the 1990 Constitution with those of the 1974 Constitution and with the relevant international instruments or other sources that had influenced their wording, and posing questions for the Commission's consideration. The outcomes of the Commission's deliberations were recorded in its minutes in the form of provisional decisions that would guide the writing of the report. The FCRC met only for three hours each morning so that, with a struggle, Legal Counsel could just keep up the supply of Issues Papers in time for Commissioners to read them before deliberating. Counsel took personal responsibility for the papers each prepared, but tried to give the other an opportunity of commenting before the paper was put into final form, a most useful form of collaboration.

The third phase was the writing of the Commission's report. The FCRC had decided that this phase would have to begin by 1 May 1996, if it was to meet its deadline for reporting, originally 30 June, but subsequently extended to 30 September. In seeking the extension, the Commission undertook to make every effort to complete its work even before the due date. On that basis, a joint meeting of both Houses of Parliament was arranged for 10 September, at which the report would be tabled. It would be presented to the President on 6 September. We simply had to meet that deadline.

Between them, Legal Counsel were required to prepare a first draft of the Commission's report. A larger share fell to me because Jon was still taking the Commission though the remaining issues. Phases 2 and 3 thus overlapped. As soon as a chapter of the draft report had been completed, the author distributed it to the Commissioners, each of whom made written or oral comments. The author then took these in, reconciling them if necessary, and circulated the revised draft. It was something of a miracle that, with one or two exceptions, the revised drafts were approved by all the Commissioners. Any further changes that were required were fairly easily made. An editor was engaged to co-ordinate the production of the final text.

The 694 recommendations in the Commission's report were, in effect, drafting instructions for the preparation of a new constitution, though, naturally, not all recommendations broke new ground. Many recommended the re-enactment of existing provisions, sometimes with alterations having varying degrees of significance. But some recommendations called for a substantial departure from the existing political culture.[56] The FCRC emphasised that it had taken into account its terms of reference and all available sources of information. It also stressed that its report, long as it was, should be considered as a whole. Every part of the constitution was essential in constructing a framework for the operation of Parliament and the Government.

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56 The need for a change in the existing political culture is further discussed below at Part VIII.

Once the report was presented, the task of Commissioners and Commission officers was over. A Commission of Inquiry has no formal role in the discussion of its recommendations, and, in the case of the FCRC, did not have one in practice either. Those of us from outside Fiji were clearly expected to return home as soon as convenient. The completion of the work of revising the 1990 Constitution had to be left to others, a process that had a profound effect, so far as it concerns Fiji, on the issue I discuss next.

VII SHOULD THE PUBLIC BE INVOLVED IN CONSTITUTION-MAKING, AND IF SO, HOW?

Experience, as well as instinct, make it clear that the answer to the first part of this question must be 'Yes'. A constitution cannot take root in the hearts and minds of the people who live under it unless they are kept fully informed about the process of making it, and take part in that process as much as possible. How this is to be achieved depends in part on the method of constitution-making. The open processes of decision-making and the subsequent referendums in Niue and the Marshall Islands readily allowed public participation. In Fiji, the bulk of the decision-making took place in forums that were not open to the public - the deliberations of a Commission of Inquiry, and intense debate among politicians in closed sessions of a Joint Parliamentary Select Committee. While serious efforts were made to obtain high quality public input beforehand, not nearly enough was done afterwards to educate the public about the reasons for making the kind of constitution that eventuated. It was enacted by Parliament with little public debate and was not put to the people in a referendum.

In my view, the political leaders of each community in Fiji, Sitiveni Rabuka and Jai Ram Reddy, were genuinely committed to the concept of multi-ethnic government on which the 1997 Constitution is based. The parties that each headed went into the subsequent general election in coalition, but the former supporters of those parties deserted them in droves. The National Federation Party, led by Jai Ram Reddy, won no seats. As this, and subsequent events showed, many, not only in the Fijian community but also in the Indian community, had little or no commitment to the constitution that had been made in their name. It would be wrong to attribute the difficulties in getting the 1997 Constitution accepted and making it work entirely, or even mainly, to inadequacies in the constitution-making process. But, in Fiji's multi-ethnic society, there was every reason to do even more to involve the public as fully as possible than was done as a matter of course in the homogeneous societies of Niue and the Marshall Islands.

Although the Constitution of Niue was enacted by the New Zealand Parliament, it was based on a system of government that had been tried out in practice beforehand by Niue's people. To the extent that there were new elements, such as the change in the relationship with New Zealand, from dependent territory to freely associated, self-governing State, the Niue Island Assembly, an elected representative legislature, was made fully aware of the issues and their implications, and approved the basis on which the new Constitution would be made. In

the Marshall Islands an even more widely representative and largely elected body itself made the decisions about what should go into the Constitution.

The Constitution of each country was enacted or adopted in the local language as well as in English.[57] Similarly, the discussions in the Niue Island Assembly and the Marshall Islands Constitutional Convention were in, or were translated into, the Niuean and Marshallese languages respectively. Every word that was uttered was broadcast to the people by radio. People listened closely to what was being said.

At the two key stages of constitutional development in Niue, the Constitutional Adviser held meetings in every village, as well as with other groups such as the local branch of the Public Service Association. His first report[58] was translated into Niuean, and a copy in both languages was distributed to every household. Later, the visit of a Mission from the United Nations Decolonisation Committee provided both stimulus and reassurance that the United Nations was not trying to force Niueans to take decisions against their will. One controversial issue was the extent to which Niueans who had left Niue should be involved in the constitution-making process. Those who remained argued that those who had left Niue had voted with their feet. It was agreed that only those still living on the island should vote in the referendum. But the Niuean community in New Zealand had the opportunity to make submissions on the Niue Constitution Bill and accompanying Constitution at the select committee stage of its passage through Parliament. The select committee also visited Niue.

At both the Constitutional Conventions in the Marshall Islands at which I was Legal Counsel, specially appointed committees of delegates held extensive public hearings in the two main centres of population, Majuro and Kwajalein, and in other atolls or islands, as well as offshore, in places like Honolulu, Los Angeles and Guam, where there were sizeable Marshallese communities. I attended the public hearings in Majuro and Kwajalein, occasionally cross-examined a witness if I felt there was a point that needed to be brought out, but otherwise listened and learned.

As well as attending public hearings, I took part in other meetings with members of the public and interest groups, sometimes with Convention delegates, sometimes on my own. The Women's Group in Majuro was particularly active. After the First Convention had completed its work and before the referendum, it chartered a ship and took the draft Constitution to the outer islands to explain it to their people. To see that kind of initiative was rewarding.

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57 For the version of the Niue Constitution enacted in the Niuean language, see Niue Constitution Act 1974, First Schedule.

58 Robert Quentin Quentin-Baxter *Report to the Niue Island Assembly on the Constitutional Development of Niue* (Community Development Office, Niue, 1971). The Report was tabled in the New Zealand House of Representatives as [1971] AJHR A4, and was also published as UN Doc A/AC.109/378.

In comparison, the interest in constitution-making in Fiji was probably even more intense, but the level of understanding and the sense of active and responsible participation among the people as a whole was considerably less. This probably reflected the following factors:

- The larger size of the country, its social separation into different ethnic communities, and the fact that the first loyalty of many in the Fijian community is to those who share in the ownership of the land, to the traditional Fijian province in which the land lies, and to the leadership of the chiefs;
- The fact that all Fiji's constitutions had been, and continued to be, written in English, without being translated into the country's other languages;
- The fact that the constitution-making processes had been a one-way street, in which there had been opportunities for members of the public and groups to make an input, but virtually no opportunity for feedback, about what decisions were being made and why.

That was a weakness of the process that the FCRC had to follow, although the public hearings that gave its members a first-hand sense of the hopes and fears of members of all communities were the greatest single influence on its subsequent recommendations. In response to its duty to facilitate the widest possible debate throughout Fiji on the terms of the Constitution, the submissions were treated as public documents unless confidentiality had been requested. Many were published by the news media. Unfortunately, the Commission could not go back to the people and explain the reasons for its recommendations, what they meant, and why it had not followed other paths.

The English language media published the FCRC's report in instalments, eventually in full. There was, however, a lack of knowledgeable independent comment. The Government's decision to distribute the report, in English only, to the Fijian Provincial Councils and invite their comments was not a good way of promoting understanding or trying to get a balanced response, except in the one or two provinces where the chiefly leaders were both well-informed and well-intentioned. In the absence of any outside help in working through the report, people turned straight to the recommendations about the distribution of seats in the House of Representatives and condemned them out of hand. Non-governmental organisations like the Citizens' Constitutional Forum did, and continue to do, their best to widen understanding, but they do not have resources adequate to the task. Ironically, it is only in the wake of George Speight's attempt to overthrow the 1997 Constitution that there has been a serious large-scale effort to make it more accessible. I understand that the Constitution has at last been translated into Fijian and Hindi, as required by its terms,[59] and that the Republic of Fiji Military Forces have made themselves responsible for taking copies to the Fijian villages and explaining what

59 Constitution Amendment Act 1997 (Fiji), s 4(2).

it means. A well-informed public debate about what kind of a country Fiji should aim to be, and whether the 1997 Constitution is a suitable means towards that end is yet to take place. That brings me to my next issue.

VIII WHAT GOES INTO A CONSTITUTION?

One purpose of a constitution is to establish the main organs of government and the division of powers among them. It is generally assumed that another is to control the exercise of governmental power, especially as it affects the rights and interests of individual citizens, and, in a multi-ethnic society, those of different communities. For that reason, the Constitution is expected to set standards against which governmental actions can be measured. Accordingly, a constitution usually has the status of supreme law. To a large degree, those assumptions applied to making constitutions for Niue, the Marshall Islands, and Fiji.

But a country's constitution is never written on a clean slate. It is necessary to take account of its geography and history, its legal system, and existing form of government, and the culture of the people. Is the country homogeneous or multi-ethnic? Is it a chiefly society? What are the units of social organisation? Are customary rights important, particularly those to land? How are the rights of individuals to be reconciled with those of groups? I should like to illustrate how, in each of the three countries in which I worked, ways were found to accommodate the most important of their special features.

Here I have to admit to being conservative, in the sense that my first instinct is to maintain the greatest possible continuity between the old regime and the new, in the interests of a smooth transition. I would also say, without the slightest cynicism, that the first principle of constitution-making in the Pacific is that those in paid jobs should continue to have paid jobs. The reason is that paid jobs are scarce. A person who has one is a walking social security system for the whole of his or her extended family.

But after the experience of working in Fiji, I came to appreciate also a perception of Professor Yash Ghai, one of the veteran constitutional advisers in the Pacific region. He has taken the view that the moment of constitution-making, specially one involving a dependent territory's move to independence, may be the only time when the impetus for change is so strong that it is possible to bring about a radical redistribution of power that, at any other time, would be impossible, because of the vested interests involved. So, for example, the Constitution of Vanuatu abolished, with the stroke of a pen, all non-customary titles to land, leaving it to later law-makers to deal with the question of compensation and other resulting issues. I came to appreciate that there is sometimes a need for radical change when I began to understand the consequences, in Fiji, of cementing the existing system of communal representation into the independence constitution, instead of rooting it out, as the Indian community had then desired. Of course, such a radical change would have needed the support of both communities. Ironically, both main communities, rather than just the Fijian

community, have now become wedded to maintaining the system of communal representation more or less intact.

As its first, direction-setting recommendation, the FCRC stated that:[60]

> The primary goal of Fiji's constitutional arrangements should be to encourage the emergence of multiethnic government.

As a means to this end, it further recommended that:[61]

> The people of Fiji should move gradually but decisively away from the communal system of representation. They should adopt electoral arrangements which encourage parties to seek the support of other communities as well as their own.

The FCRC saw each part of the Constitution as load-bearing. All its parts were essential in helping to carry the weight of the structure, as a whole. Accordingly, the Commission recommended that approximately two-thirds of the seats should be open to candidates from any community, elected by the voters of all communities, but, as a transitional measure, approximately one third of the seats should be reserved for particular communities.[62] Neither the Government, nor the Opposition members of Parliament, were ready to contemplate such a large departure from the existing political culture. The 1997 Constitution reverses the FCRC's recommended proportions of communal and open seats,[63] but seeks to compensate for this timidity by introducing, against the FCRC's recommendation, the controversial provision that all parties with ten per cent or more of the seats in the House of Representatives are entitled to be represented in the Cabinet.[64] This retention, and even accentuation, of conflicting electoral incentives threatens the stability of the whole Constitution.

In the homogeneous societies of Niue and the Marshall Islands, it was easier to find solutions to problems of equitable representation in the legislature. In Niue, it was a given that each of the fourteen villages should continue to elect its own member, though some of the villages were little more than rotten boroughs. The Constitution, therefore, provided for an additional six 'common-roll' seats to be filled on an island-wide basis.[65] As a consequence, women have been elected to the Assembly for the first time, and members have more of a

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60 Fiji Constitution Review Commission *The Fiji Islands: Towards a United Future* (Parliamentary Paper No 34 of 1996, Government Printer, Suva, 1996) Recommendation 1.

61 Fiji Constitution Review Commission, above, Recommendation 4.

62 Fiji Constitution Review Commission, above, Recommendations 252 and 253.

63 Constitution Amendment Act 1997 (Fiji), s 51.

64 Constitution Amendment Act 1997 (Fiji), s 99.

65 Constitution of Niue, Article 16(2)(b)(ii).

national outlook. Niue can convincingly argue that, taking account of the permitted margin of appreciation, it meets the commitment to equal suffrage by which it is bound under the International Covenant on Civil and Political Rights.[66]

Similarly, in the Marshall Islands, it was accepted that each of the main inhabited atolls or islands should have at least one member in the Nitijela. The delegates huddled in the traditional smoke-filled room and emerged with agreement on the way in which the thirty-three seats should be spread among twenty-four electoral districts. But some of the districts are very small in both size and population. The Constitution requires the Nitijela to consider the question of a reapportionment at least once in every ten years. Any reapportionment is to be directed to the reasonable equality of the suffrage, and can be effected by the Nitijela itself, without the need to amend the Constitution.[67] Even so, the possibilities for reapportionment are limited. The main factor mitigating the inequality of the suffrage is that a person may vote in either the electoral district in which he or she resides, or any other district in which he or she has land rights.[68] As many Marshallese have land rights in a number of different atolls or islands, the supposition is that some will choose to vote in an electoral district where their votes will count most, thus bringing about a de facto reapportionment. There is provision for the legislative control of re-registration to prevent gerrymandering when an election is imminent.[69]

Another feature of the Marshall Islands Constitution is that the people of every populated atoll, or island that is not part of an atoll, have the right to a system of local government. Such a local government may make laws, impose taxes, and appropriate revenue, except so far as is inconsistent with an Act of the Nitijela or any other instrument having the force of law in the Marshall Islands.[70] The right to a local government was seen as a matter of survival for vulnerable isolated communities. The people do not have to wait for the Nitijela to give them one. If necessary, they may give themselves a local government. Sitting on an atoll myself, and wondering if such a provision was workable, I remembered the argument of a leading authority that the act of the original Wellington settlers in giving themselves a rudimentary form of government, before British sovereignty was proclaimed, was compatible with "the strain of common sense and natural justice running through the common law".[71]

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66 International Covenant on Civil and Political Rights, Article 25.

67 Constitution of the Republic of the Marshall Islands, Article IV, s 2.

68 Constitution of the Republic of the Marshall Islands, Article IV, s 3.

69 Constitution of the Republic of the Marshall Islands, Article IV, s 3.

70 Constitution of the Republic of the Marshall Islands, Article IX, ss 1 and 2.

71 Sir Kenneth Roberts-Wray *Commonwealth and Colonial Law* (London, Stevens & Sons, 1966) 154.

Another question that had to be considered in the circumstances of each country was whether a Bill of Rights should be included in the Constitution, and if so, in what form. Although Samoa had become independent of New Zealand under a Constitution that contained a Bill of Rights, that precedent was not originally followed in the Cook Islands,[72] and has never been followed in Niue. There, the Constitution as enacted sought to fill the gap at least partially by including a novel provision requiring the Chief Justice to be given the opportunity to report on the legal, constitutional, and policy issues raised by a Bill that made provision concerning the constitution or jurisdiction of any court of general jurisdiction, specified aspects of the criminal law and procedure, and the law as to personal status.[73] The purpose of the provision was to ensure that provisions of the ordinary law of Niue protecting fundamental human rights and freedoms were not inadvertently amended or repealed. The provision was, thus, a forerunner of section 7 of the New Zealand Bill of Rights Act 1990. It was repealed in 1992 on the ground that it was no longer necessary, presumably because, by this time, legal advice was more readily available to the Niue Government and Assembly.[74]

Because the Marshall Islands were administered by the United States, its people were familiar with the United States Bill of Rights, and took it for granted that their own constitution would include one. But when I showed them the Samoan Bill of Rights as a possible model, they rejected it out of hand as appearing to qualify the stated rights out of existence. Professor Laurence Tribe produced a much more palatable text that is, in effect, a codification of the United States Bill of Rights in the light of decisions of the Supreme Court, but with his own liberal improvements incorporated.[75] It makes interesting reading.

In Fiji, the people were so little aware of what was in their Constitution that the FCRC received a number of submissions asking for a Bill of Rights to be included. In fact, the 1970 Constitution had contained a long chapter on fundamental rights and freedoms, modelled on

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72 In the Cook Islands, the Constitution was amended in 1981 to include a Bill of Rights.

73 Constitution of Niue, Article 31. Although, on its face, the provision cut across the division of powers between the executive and legislative branches of government on the one hand, and the judicial branch on the other, it was carefully drafted so as to give the Chief Justice the option of deciding that it was not appropriate to make comments on issues that would compromise the independence of the judiciary or disqualify the Chief Justice from taking part in a subsequent case involving the legislation subsequently enacted. The provision was included with the agreement of the then Chief Justice of the High Court of Niue.

74 See the Constitution Amendment (No 1) Act 1992 (Niue), ss 3 and 4. The Constitution Review Committee which recommended the repeal did so with the concurrence of the Chief Justice. See *Report to the Niue Assembly of the Constitution Review Committee; presented to the Niue Assembly by leave, September 1991* (Government Printer, Alofi, 1991) 19.

75 Ten years later, some thought it was too liberal, but an attempt to lower somewhat the level of protection against unreasonable searches and seizures did not secure the necessary majority in the ensuing referendum.

the European Convention on Human Rights, by which Fiji had become bound when still a British colony. The drafter, however, had included every possible qualification of each right, mostly to make it clear, *ex abudante cautela*, that all sorts of unexceptionable legislative initiatives were not to be taken as limiting the right, but every now and again to permit limitations that, by modern standards, were unacceptable. One example was the permitted limitation of the freedom of movement of an individual person, if reasonably required in the interests of defence, public safety, or public order, the device often used to restrict the freedom of movement of an anti-government political leader.[76] The 1974 provisions were reproduced in the 1990 Constitution, though with some amendments permitting positive discrimination in favour of the Fijian community in particular, and to a lesser extent other communities. The FCRC went through the existing provisions carefully, recommended changes that seemed desirable, and sought to dispel the sometimes-voiced notion that the recognition of individual rights in the Constitution was necessarily at the expense of the rights of communities, particularly their group rights arising from the customary law.

The relationship between individual and group rights had earlier been in issue in the Marshall Islands. There, it was important that the hierarchical structure of traditional rights in land should be protected against the possibility of being dismantled by the courts through the application of the guarantee of equal protection of the laws and freedom from discrimination.[77] The Constitution therefore provided that nothing in the Bill of Rights was to be construed so as to invalidate the customary law or any traditional practice concerning land tenure or any related matter.[78] A ratchet provision prevents any codification or development of the customary law by the Nitijela in a manner involving any greater derogation from the Bill of Rights than that arising from the customary law in its unwritten form.[79]

The same approach had been taken in Fiji under both the 1970 and 1990 Constitutions. It is not generally understood, in Fiji or elsewhere, that the Constitution of that country has always protected certain Acts of the colonial legislature recognising the land and other rights of the Fijian community. They cannot be challenged on the ground of inconsistency with the Bill of Rights. Nor can they be amended or repealed by ordinary legislation. In effect, the relevant Acts are made part of the Constitution. They recognise the following rights and obligations:

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76 The Commission considered that such a limitation was not justified, except possibly as a derogation from fundamental freedoms in a time of emergency threatening the life of the nation: Fiji Constitution Review Commission *The Fiji Islands: Towards a United Future* (Parliamentary Paper No 34 of 1996, Government Printer, Suva, 1996) paras 7.261 - 7.262, and Recommendation 163.

77 Constitution of the Republic of the Marshall Islands, Article II, s 12.

78 Constitution of the Republic of the Marshall Islands, Article X, s 1.

79 Constitution of the Republic of the Marshall Islands, Article X, s 2.

- The rights of Fijians to their land under the customary law;[80]
- Fijian chiefly titles;[81]
- Restrictions on the alienation of Fijian land by the land-owning groups; [82]
- The right of the Native Land Trust Board to enter into leases in respect of Fijian land;[83]
- Rights to Rotuman land and chiefly titles;[84]
- The holding of Banaban land in accordance with Banaban custom;[85]
- The rights of landlords and tenants of all agricultural land (most of which is Fijian land);[86]
- The right to a separate system of governance for and by Fijians; and[87]
- The right to separate systems of governance for and by the Rotuman and Banaban communities.[88]

The FCRC found that the recognition of land and fishing rights in accordance with custom did not discriminate against the members of other communities that did not have customary rights, and, if they held land or rights in land, did so under another system of tenure. The only respect in which the legislation was discriminatory was in restricting the alienation of Fijian land and permitting land not required by the Fijian owners for their maintenance or support to be leased out by the Native Lands Trust Board, without any requirement that the ownership group give its consent, or even that it be consulted.[89] The FCRC recommended that, in the national interest in the efficient use of land, the right to equality under the law and not to be discriminated against on the ground of race or ethnic origin should, to this extent, be limited.[90]

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80 The Native Lands Act (Cap 133) (Fiji).

81 The Native Lands Act (Cap 133) (Fiji).

82 The Native Land Trust Act (Cap 134) (Fiji).

83 The Native Land Trust Act (Cap 134) (Fiji).

84 The Rotuma Lands Act (Cap 138) (Fiji).

85 The Banaban Lands Act (Cap 124) (Fiji).

86 The Agricultural Landlord and Tenant Act (Cap 270) (Fiji).

87 The Fijian Affairs Act (Cap 120) (Fiji) and the Fiji Development Fund Act (Cap 21) (Fiji).

88 The Rotuma Act (Cap 122) (Fiji) and the Banaban Settlement Act (Cap 123) (Fiji).

89 Fiji Constitution Review Commission *The Fiji Islands: Towards a United Future* (Parliamentary Paper No 34 of 1996, Government Printer, Suva, 1996) paras 17.6 - 17.8.

90 Fiji Constitution Review Commission, above, Recommendation 630.

That right should also be capable of being limited by laws for the governance of a particular community as long as those laws did not discriminate against any person on any other prohibited ground - gender for example - and did not deny to any person any other human right or fundamental freedom recognised by the Constitution or by law. On this basis, all the relevant legislation should continue to receive constitutional protection.[91]

The FCRC recommended that the chiefly council known as the *Bose Levu Vakaturaga* (BLV) should continue to exist, and that its composition, as well as its powers and functions, should be provided for in the Constitution.[92] Instead of appointing the President, it should nominate candidates, leaving the President to be elected at a joint sitting of the two Houses, acting as an electoral college.[93] These recommendations were not acted upon. The 1997 Constitution recognises the continued existence of the BLV under the Fijian Affairs Act, and provides that the BLV is to appoint persons to the office of President and the newly-created office of Vice-President, after consultation with the Prime Minister.[94]

Niue is not now a chiefly society, but in the Marshall Islands it was essential to find a way of giving the highest-ranking chiefs - the iroijlaplap - a role under the Constitution. The Constitution therefore provides for a Council of Iroij, modelled to some extent on the House of Arikis of the Cook Islands. In addition to the function of advising the Cabinet on any matter of concern to the Marshall Islands, the Council of Iroij may request the reconsideration of any Bill affecting the customary law or any traditional practice, or land tenure or any related matter, which has been adopted on third reading by the Nitijela.[95] The 12 members of the Council of Iroij are selected, essentially by their peers, under provisions formulated by the delegates after discussions that, at both the First Constitutional Convention and again at the 1990 Convention, consumed more time than any other issue.[96] The Council of Iroij has the potential to exercise considerable influence, but my impression is that it has done so only indirectly. Even so, the institution has been a satisfactory way of recognising the important role of the chiefs in Marshallese society.

All these arrangements are seen as compatible with what is otherwise a democratic form of government. That brings me to my next question.

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91 Fiji Constitution Review Commission, above, Recommendation 641.

92 Fiji Constitution Review Commission, above, Recommendation 205.

93 Fiji Constitution Review Commission, above, Recommendations 222 and 224.

94 Constitution Amendment Act 1997 (Fiji), ss 90 and 116.

95 Constitution of the Republic of the Marshall Islands, Article III, s 2.

96 Constitution of the Republic of the Marshall Islands, Article III, s 1.

IX IS THE WESTMINSTER CONSTITUTION A SATISFACTORY EXPORT MODEL?

All the constitutions I have been concerned with have been of the Westminster type - that is the head of the government is chosen from among the members of the legislature on the basis that he or she commands majority support in that body. This system has the advantage of having evolved pragmatically, as the House of Commons gradually established its supremacy over the King, in his executive as well as his legislative capacity. At the time when the political leaders in the Marshall Islands chose such a system in preference to one requiring the separate direct election of the head of the government, it seemed that the Westminster system was working well in the island States of the Pacific region. Since then, that system, or possibly any fully democratic system, has had something of a bad press in that part of the world.

In Fiji, but not only there, the Westminster system is often stigmatised as resulting in a 'winner takes all' outcome, but that statement may simply reflect the absence of a culture which positively sustains the idea of majority rule, especially by recognising that it is the responsibility of any government to govern for the benefit, not just of its political supporters, but of the whole community. In Fiji, where the political parties have so far been ethnically based, it is easy to see why a general election has been seen, essentially, as a contest between the two main communities. It is hard to think of ways of overcoming this situation unless Fiji's people as a whole come to accept that multi-ethnic government is in the interests of all. Multi-ethnic government implies multi-ethnic opposition as well. But there and elsewhere, there is some suggestion that opposition to a government once in power is not acceptable.

In societies that have not previously been divided by political issues, the Westminster system is said to encourage the development of parties, resulting in adversarial politics between those in Government and those who are not. If disagreement about policies is not a reflection of other divisions in the society, I think that what grates is not the disagreement itself, but the idea of voicing it openly, especially if doing so involves a direct challenge to the views of the chiefs or elders who traditionally exercised authority. In the confined physical space available to many Pacific communities, the maintenance of a peaceful society depends on the exercise of the greatest personal self-restraint. In contrast, some aspects of the Westminster system seem to require direct confrontation. Examples are the questioning of ministers by backbenchers, and even more, the moving of motions of no confidence. I sometimes wonder whether the tendency to try to avoid a vote on such a motion by resorting to a boycott that deprives the legislature of a quorum is not just an attempt to head off the consequences of a shift in political support, but the reflection of a deep sense of unease about the explicit challenge involved. Be that as it may, the Westminster system, and perhaps any other form of democracy, may also give a society the opportunity to move away from a tradition found to have serious disadvantages without the disruption that would otherwise be likely. So, for example, in the Republic of the Marshall Islands, the most recent general election led to the choice of a university-educated commoner as President, in preference to a paramount chief,

who had been elected to that office as a matter of course on the death of his predecessor, but was widely regarded as having shown himself unfit for the task.

At this point, I should like to say a little about constitutional mechanisms for choosing the head of the government. In the home of the Westminster system, and also in New Zealand, the Sovereign or her representative, the Governor-General has a formal role, though the real decision is made by the electors. The leader of the winning party or pre-election coalition will be the Prime Minister. If, after a general election, it is not clear which party or group of parties that is willing to work together commands the support of a majority in Parliament, the question may need to be left to Parliament to decide by means of a vote. This system was written into the Constitution of the Cook Islands. In the absence, at the time of self-government, of a party system, the Constitution conferred discretions concerning the appointment and dismissal of a Prime Minister and the grant or refusal of a dissolution of Parliament, originally on the New Zealand High Commissioner, and later on the holder of the separate office of Queen's Representative. The exercise of these discretions, however, must be reconciled with the need for the Prime Minister to have and retain the support of a majority of the members of the legislature, as evidenced by an actual expression of its will in a vote, or in some other unequivocal act. The application of the provisions has not been without its difficulties, though wise guidance from constitutional advisers and the courts has led to a better understanding of their intended effect.[97]

The much smaller society of Niue attached so much importance to the continued presence there of a Representative of the Government of New Zealand that it asked for provision to this effect to be included in the Niue Constitution Act.[98] There was, however, no inclination to try to combine that role, with the role of the representative of the sovereign in Niue, as had originally been done in the Cook Islands.[99] Nor did it seem appropriate for the sovereign to be separately represented there. The constitutional adviser to the Niue Island Assembly sought a simpler solution. The Constitution of the Republic of Nauru provided a model. There, a President elected by the legislature from among its own members serves both as Head of State and head of the executive government. The Constitution is self-regulating, in that the formation or dismissal of a government and the dissolution of the legislature occur exclusively

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97 See *Reference by the Queen's Representative* [1985] LRC (Const) 56. See also Dr Alex Frame *Opinion of 2 July 1999 for His Excellency Sir Apenera Short KBE, Queen's Representative in the Cook Islands*. The Solicitor-General of the Cook Islands has agreed that this opinion be made public. See, Dr Alex Frame "Lawyers and the Making of Constitutions: Making Constitutions in the South Pacific: Architects and Excavators" Roles and Perspectives in the Law, 275.

98 Niue Constitution Act 1974, s 9.

99 This provision was made at the request of the Cook Islands Legislative Assembly, although it had been advised that the dual role was unlikely to work well.

through operation of the constitutional provisions as a matter of law, without the need for the exercise of discretions.

That model was followed in Niue. Governments are formed and may be dismissed, and the Assembly is dissolved, solely by operation of law, usually as a consequence of a vote in the Niue Assembly, though in some cases the relevant provisions may be set in motion by a minority of its members.[100] The Governor-General, who continues to be the representative of Her Majesty the Queen in Niue, is not involved.[101] In the few cases where residual discretions are required, they are vested in the Speaker of the Niue Assembly.[102]

When it came to making a constitution in the Marshall Islands, those of Nauru and Niue provided models for electing or securing the resignation of a President who would serve both as Head of State and as the head of the government only so long as he or she retained the support of a majority in the legislature. There, however, the idea that the President's term of office, or the term of the Nitijela itself, might come to an end prematurely, as a result of a vote of no confidence, was new to the delegates to the Constitutional Convention. They were inclined to insist that both should be allowed to run their full four-year terms. In this context, the invited comments of the United States authorities were helpful. They suggested that there was little point in the people of the Marshall Islands adopting the parliamentary system of government if they did not make use of its main advantage - that is the mechanism for resolving deadlocks between the executive and the legislative branches of government in the period between general elections. With this encouragement, the Convention made provision for what are, in effect, constructive votes of no confidence. Such a vote lapses if a new President is not elected within a fourteen-day time limit.[103] If a vote of no confidence is twice carried and twice lapses without any other President holding office in the interval between the two votes, the President may dissolve the Nitijela. A general election must then be held.[104]

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100 Constitution of Niue, Articles 4(2), 5(4), 6(3), 22(1), and 26.

101 Although the Queen in right of New Zealand is the Head of State and the source of Niue's executive authority, the Constitution delegates the sovereign's executive authority directly to the Cabinet, not to the representative of the Head of State: Constitution of Niue, Article 2(2). In these circumstances, it was possible to provide that the Governor-General of New Zealand would remain the Queen's representative in relation to Niue: Constitution of Niue, Article 1. The Letters Patent constituting the Office of Governor-General of New Zealand are subject to the Niue Constitution Act 1974, and the Constitution and other law of Niue. That proposition is inherent in the status of the Letters Patent as an exercise of the prerogative constituent power, but is also expressly recognised: Letters Patent Constituting the Office of Governor-General of New Zealand 1983, clauses III(b) and IV(b).

102 Constitution of Niue, Articles 22(1) and 26.

103 Constitution of the Republic of the Marshall Islands, Article V, s 7.

104 Constitution of the Republic of the Marshall Islands, Article IV, s 13.

In adapting the Westminster system for use in a republic, another issue was the proper location of the executive power. Apart from the problem that the Head of State was also to be the head of the government, any notion that the executive power should be vested in the President, but that the President should be required to act on the advice of the Cabinet, was outside anything in the experience of the people of the Marshall Islands. Building on the example of the Niue Constitution, the Constitution of the Republic of the Marshall Islands therefore vests the executive authority of the Marshall Islands directly in the Cabinet, whose members are collectively responsible to the Nitijela. Because the Constitution operates in a setting where United States concepts are more familiar than those originating in Westminster, the Constitution spells out the role of the Cabinet under the parliamentary system in the following terms:[105]

> Subject to law, the Cabinet may exercise elements of its executive authority directly, or through its individual members, and through other officers responsible to the Cabinet; but neither the provisions of any such law, nor any delegation of elements of the Cabinet's executive authority shall have the effect of diminishing the responsibility of the Cabinet and of each of its members to the Nitijela for the direction and implementation of executive policies.

If it is ever decided that the executive authority of New Zealand should be vested in the Cabinet, instead of the Queen, as at present, or the holder of a new office of President, that statement may be worth revisiting.

On the basis of this limited experience, my conclusion is that, in a divided society, no democratic system of government can bring about national unity unless majority rule is tempered by measures that protect the special interests of communities and other groups. Subject to the need for that safeguard, it may be easier to achieve harmony between the executive and legislative branches of government under the Westminster system than under a system providing for the separate election of the head of the executive branch.

X WHAT ARE THE RESPONSIBILITIES OF A CONSTITUTIONAL ADVISER?

By now, it will be apparent that a constitutional adviser tries to bring technical expertise and experience to the task of fashioning a constitution suited to the circumstances of the country for which it is designed, and capable of meeting its people's aspirations and concerns. I accept the criticism sometimes voiced that a constitutional adviser's proposals are likely to be circumscribed by his or her own background, knowledge, and personal philosophy. That is inevitable. Constitutional advisers have to work from what they already know, though, so far as possible they should always be open to the idea that there may be a range of responses to the questions that arise, or other questions that ought to be asked. More than most constitution-making exercises, the FCRC drew on comparative constitutional material, in other

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105 Constitution of the Republic of the Marshall Islands, Article V, s 1(2).

Pacific countries and in other multi-ethnic countries, as well as international human rights instruments. But it will seldom, if ever, be practicable for a constitutional adviser to survey all the constitutions of the world in order to come up with an idea that would have been useful if only he or she had known about it.

In this concluding section of the paper, I wish, rather, to discuss the ethical responsibility of the constitutional adviser. Although, as I have suggested, the adviser may sometimes have a role as advocate for a particular point of view or as conciliator among competing views, it is necessary to be mindful always of where his or her responsibility lies. Responding to the news that a ministerial directive had been obtained on a point about the draft Constitution of Niue raised with officials by the Niue Executive Committee (the forerunner of the Cabinet), without consulting the Constitutional Adviser to the Niue Island Assembly, and in the belief that he might not be happy with the decision made, the Adviser had this to say:[106]

> I am happy enough about the decision, but not about the lack of consultation, or the misconception as to what my position would be if I had been invited to express it. ... I am not concerned to reach any conclusions which the Niuean leaders themselves do not freely accept. One of the implications of self-government is that, in matters that are within their own disposition, you must let people do as they like. My first responsibility is to ensure that every decision does reflect their will, arrived at without any outside constraint, and after they have understood the choices and implications.

A message the following day contained a more general statement of the Constitutional Adviser's responsibilities as the work on the draft Bill for a Niue Constitution Act and the Constitution continued:[107]

I would of course like to be able:

(1) to satisfy myself that any change is made with a full grasp of all the issues and implications; and

(2) to continue to give the Niueans independent advice as to the advantages or disadvantages of any proposed change from their point of view.

After that, the exchanges of views continued until the Constitutional Adviser recorded his satisfaction that the draft Constitution was a workable document.[108]

Arriving in Majuro to take up the position of Counsel to the First Marshall Islands Constitutional Convention, I had a different problem. I discovered that the delegates who were opposed to the initiative to draft a separate Constitution for the Marshall Islands, instead

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106 Robert Quentin Quentin-Baxter, Telegram (20 June 1974) from Geneva to Wellington.

107 Robert Quentin Quentin-Baxter, Telegram (21 June 1974) from Geneva to Wellington.

108 Robert Quentin Quentin-Baxter, Telegram (25 July 1974) from Geneva to Wellington.

of leaving them to become part of the Federated States of Micronesia, were boycotting the Convention. I asked to be taken to meet them. In the back of a small cafe in the town centre, I explained that, although I had been invited to act as Counsel by the Marshall Islands Leadership Group, whose policies they opposed, my responsibility was to all delegates to the Convention. If at any stage they did want to take part, or simply to understand what was happening, I was at their service as well as that of the other delegates. My initiative did not have much effect on their subsequent attitude or actions but, at the personal level, it was appreciated.

From then on, it was a matter of learning on the job. I would just say that a constitutional adviser in another country never knows when something will happen that puts the independence of that role to the test. You have to be mentally ready, if necessary, to get on - or be told to get on - the next plane, and not come back. Fortunately, things never got to that point in the Marshall Islands, or later in Fiji, although it sometimes looked as if they might. I am proud of two comments that were made to me as we neared the end of the task in the Marshall Islands. One person told me that I was the only foreigner who had ever come there, and, instead of telling the Marshallese people what they had to do, told them what they could do, and let them choose. Someone else said that I had never wavered in my belief that the people of the Marshall Islands would succeed in giving themselves their own Constitution. To appreciate the significance of that belief in their eyes, you have to realise that they had been part of the sphere of influence of the Spanish (who colonised the Philippines and parts of the Northern Marianas), and had then been governed successively by the Germans, the Japanese, and the Americans.

In Fiji, I needed more than ever to believe in the achievability of the task of recommending a new Constitution that would fulfil the aspirations of the people of Fiji, as enunciated in one of their rare moments of agreement.[109] It remains to be seen whether they will be able to make progress towards the goals of racial harmony, national unity, and the economic and social advancement of all communities through the 1997 Constitution, either in its present form, or as amended through the processes it prescribes.

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109 The FCRC's Terms of Appointment are reproduced in the Fiji Constitution Review Commission *The Fiji Islands: Towards a United Future* (Parliamentary Paper No 34 of 1996, Government Printer, Suva, 1996) Appendix B.