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THE CONSTITUTION OF FIJI

Muhammad Shamsud-Dean Sahu Khan LL.M.

A thesis submitted for
the degree of Doctor of
Philosophy of the University
of Auckland.

Auckland
October 1975
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APPENDIX I Extra-Territorial Legislation and The Statute of Westminster 716

APPENDIX II Attorney-General of Antigua v Antigua Times Ltd. 730
The Constitution of Fiji though similar to many others adopted within the Commonwealth since the end of the Second World War departs in many respects from the Constitution of the United Kingdom and that of New Zealand. The Constitution of the United Kingdom is wholly unwritten and that of New Zealand is only partly written as contained in the Constitution Act of 1852. Fiji not only has a written Constitution; the Constitution also incorporates the rules or principles which are accepted as constitutional conventions in the United Kingdom and New Zealand. In this thesis attention has been given to the position of the Governor-General as the representative of the Queen and the powers conferred upon him. The fact that he is a local appointee makes his position even more delicate. The problem is accentuated in that the exercise of some of his powers are made nonjusticiable by the Constitution.

It is also suggested in this work that the fact that the Constitution of Fiji has an entirely different basis from that of the United Kingdom or New Zealand renders many of the principles adopted in those countries inapplicable. The notion of parliamentary sovereignty propounded by Dicey and others does not apply. The Constitution, not Parliament, is supreme. Judicial review of legislation is inevitable and the courts are intended as guardians of the Constitution. There are other important differences many of which are the result of the political decisions made on behalf of the three main races in Fiji before the Constitution was drafted. The separate Fijian administration and the powers of the Council of Chiefs are illustrations of these provisions. The fact the indigenous Fijians enjoy a privileged position through
the separate Fijian Administration and the Council of Chiefs is discussed.

The system of representation in the House of Representatives with a combination of the communal and multiracial electorates provides an unusual, perhaps questionable, experiment towards a solution of the tensions and problems associated with a heterogeneous society. Likewise the fundamental rights provisions have special significance in a multi-racial society like that of Fiji. As a background to the above matters a comprehensive survey of the constitutional history of the country is attempted.

The role of the judiciary has been given significant emphasis throughout the thesis as it is felt that the judiciary is the linchpin of the Constitution of Fiji.

Concluding observations have been offered on ways of making the spirit of the Constitution, as enshrined in the preamble to the Constitution, a reality; and to engender a national outlook amongst the people of all ethnic groups.
PREFACE

Fiji became an independent Dominion within the British Commonwealth on 10 October 1970. There has not been any study dealing with the Constitution of the Dominion. I present this thesis on the Constitution of Fiji in recognition of the importance of that demand and as a small service which I could render my country. It is hoped that students of government as well as of law will derive assistance from it.

My intention was to deal with the Constitution as a whole. The impracticability of providing detailed studies of all aspects of the Constitution in a work of this size manifested itself at the outset. Whilst conceding, for instance, that Chapter II of the Constitution dealing with fundamental rights and freedoms merits a thesis in itself, I have nonetheless been forced to adopt a more general approach, detailing only those facets which I felt to be essential to the framework and operation of the Constitution. At the same time I have found it necessary to delve into matters which may ex facie seem unrelated or unwarranted but on closer examination it will be seen that their understanding is a prerequisite to a fuller appreciation of the constitutional provisions. The composition, history and tensions of Fiji's multiracial society, the land issue and the separate Fijian Administration are cases in point.

Independence was sought and granted on the basis of a compromise reached between the country's two main political parties. Hence it is important to remember that the transition to independence was by agreement and not complicated by the
communal factors which are endemic in any multiracial society. Nonetheless the problems associated with a heterogeneous society remain. The fundamental rights provisions of the Constitution provide inadequate protection in view of the fact that such provisions basically affect public bodies and governmental agencies and not the private actions of individuals. Communalism is further exacerbated by the system of parliamentary representation. In an attempt to obviate appeals to communal sentiments and to build a national outlook amongst the diverse ethnic groups, I have made several proposals including that of a new electoral equilibrium.

As the guardian of the Constitution, the judiciary has a vital role to play. If the new order established by the Fiji Constitution is to be given the maximum effect, the Courts will have to discharge their function with independence and integrity. Because the judiciary is the linchpin of the Constitution of Fiji, I have emphasised its role throughout this thesis. I have found the approach of the Supreme Courts of the United States and India of great assistance. This is particularly so in the area relating to the fundamental rights and freedoms and the interpretation of the Constitution. The Supreme Court of the United States, in particular, has proved its independence and strength. There is much to be gained from its decisions and from its experience of almost two centuries in the field of judicial review of legislation. This will be of particular relevance to Fiji as the Courts in Fiji have the unenviable, but vital, task of adjusting to the new order. It will have to reject the English traditions where judicial review of legislation is a foreign concept.

The final chapter is headed "Concluding Observations" rather than "General Conclusions". This has been done because the
sheer variety of subjects that have been discussed do not lend themselves to the latter and yet something approaching the former is clearly warranted. Nevertheless, wherever necessary, conclusions are given in particular sections of the study.

In this thesis I have attempted to deal with constitutional issues, eschewing politics as far as possible. At times the boundary may be blurred. I have endeavoured to approach the work with an objective and open mind. In places where my views may perhaps have been stated rather strongly, I hope and believe that it was done objectively with a view to making constructive criticism. Where the reference to personalities by name was unavoidable, I disclaim any desire or intention on my part to be other than purely informative.

After this dissertation was completed and it was about to go to the Bindery, the Privy Council delivered its very recent decision in Attorney-General v Antigua Times \(^1\) (reported on 19 August 1975) dealing with issues upon which I had already made my observations and came to my own conclusions. Happily there seems to be little conflict, if any, between the views expressed in this thesis and those of the Privy Council. In view of its importance, I include a discussion of the decision as Appendix II.

I am indebted to the New Zealand University Grants Committee for the New Zealand Government Fellowship without which this work would not have been possible.

---

\(^1\) [1975] 3 ALL E.R. 81.
But for the inspiration, guidance and encouragement of Professor J. F. Northey, Dean of the Faculty of Law, this work would not have been undertaken or completed. It is my privilege to acknowledge the debt I owe to my supervisors - Professor J. F. Northey, who sacrificed much of his few leisure hours to enable me to complete this thesis in the minimum time, and Dr F. M. Auburn, Senior Lecturer in Law for his much needed assistance.

To Miss Julia McMahon, Librarian of the Davis Law Library at Auckland and all her assistants, my special thanks for the assistance rendered during my research, particularly with regard to inter-loan applications. I am very grateful to Miss Gracie M. Fong and Miss Eily M. Lawton for undertaking the very boring and onerous task of proof-reading.

Special tributes are due to my wife, Zohra, for her unstinted support during the preparation of this work and to my father, A. H. Sahu Khan, who held fort for me in our legal practice during my absence from Fiji.

To all who have helped I record my sincere thanks. For any shortcomings or errors I alone am responsible. I have endeavoured to state the law as at 30 September, 1975. To facilitate easy reference I have included a copy of the Constitution in the pocket of the back cover.

Auckland
30 September 1975

M. S. Sahu Khan
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