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Enforced consociationalism and deeply divided societies: some reflections on recent developments in Fiji

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Abstract

Consociationalism is seen as a useful tool in dealing with intractable ethnic, religious, linguistic and other tensions in deeply divided societies and is often preferred over federalism, partition, secession, assimilation or other forms of conflict management in such societies. This article examines the validity of many of the assumptions which underlie the concept of consociationalism by looking at the experience of its use in the Pacific island state of Fiji, which has had a long record of strife between the country's two main ethnic groups, the indigenous Fijians and the Indo-Fijians. It argues that the consociational model – particularly one which is highly prescriptive and involves strong mandatory power-sharing – has certain structural shortcomings which make it unsuitable for adoption in societies (like Fiji) where the ethnic or other cleavages run deep. In such cases, says the author, the society concerned would do well to explore other options such as a looser form of power-sharing, proportional representation, or outright majoritarian rule but with strong minority protections. The article also examines the limitations of judicial intervention in the enforcement of consociational agreements.

I. Introduction

Consociationalism, or power-sharing, has had a strong appeal as a form of government in divided societies for some time now. It is seen as a valuable tool in dealing with intractable ethnic, religious, linguistic and other tensions in multi-cultural nation-states, and has been preferred, in certain circumstances, to other conflict-management techniques such as federalism, partition, secession, assimilation, or affirmative action programmes. The consociational model has been particularly attractive to transitional societies, i.e. societies which have emerged from a period of illiberal rule, during which ethnic and other tensions within the population have been either suppressed or ignored by the rulers and where, with the collapse or dismissal of such a regime, the tensions are prone to resurfacing, often with an intensity that threatens to undermine any moves towards democratic liberalisation or, in the case of societies emerging from colonialism, towards self-government.

The record of consociationalism in practice has been a mixed one: obvious success stories include Switzerland,[1] Belgium, Austria, The Netherlands and, to a lesser extent, Lebanon,[2] but the concept is

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1 Though the Swiss model has strong federal characteristics as well.

2 Between 1943 and 1975.

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seen to have produced less impressive results in a number of other jurisdictions, including Northern Ireland, Cyprus and Malaysia.[3] One country where consociationalism has thrown up a number of interesting and far-reaching questions, including those concerning its viability, enforceability and manageability, is Fiji where an experiment involving power-sharing between the island-nation's indigenous people and its substantial long-settled immigrant population (most of them of Indian origin) has been underway for some years now. The Fijian situation is worthy of study for several reasons: it highlights the tensions that are inherent between consociationalism and democracy, exposes the limits of the law in forging unity within a deeply divided society, and raises important questions about the capacity of domestic courts in enforcing power-sharing agreements in the absence of the requisite political will to honour such agreements.

This article will address two central issues, which it will attempt to discuss in the light of the lessons that can be gleaned from the Fijian experience so far. First, the article will seek to evaluate whether measures of constitutional engineering or institutional design can of themselves bring about peace, stability and democratic government in societies which are riven by deep ethnic, cultural and other divisions – a question which will necessitate an enquiry into, among other things, the validity of 'the cognitive assumptions of constitution-makers – their beliefs about what institutional arrangements will bring about which results' (Elster, 1995, p. 365). Secondly, it will discuss the role of the courts in policing and enforcing power-sharing agreements contained in constitutional settlements – an investigation which will look, inter alia, at both the legitimacy and the viability of judicial review in highly charged situations of political contestation. The Fijian experience, it is submitted, offers some useful insights on both these questions. Finally, an attempt will be made to outline possible legal and policy options for a way forward in Fiji, consistently with respect for democratic ideals and the protection, preservation and promotion of human rights and the rule of law.

In the opinion of this author, what emerges from a study of the Fijian experience is that, while measures of constitutional engineering can go a long way in helping to bring about peace and harmony in divided societies, at least as a transitional technique, they are unlikely to succeed where there is an acute shortage of political will on the part of community leaders to reach across ethnic or other divides. Consociational policies also suffer from some structural shortcomings, not least of which is their tendency to stifle credible oppositional forces within democracies.

As for the role of the courts, there is much to be said for principled judicial activism in support of consociational measures, particularly when such measures are embodied in a constitutional settlement that has met with widespread popular approval. However, where the measures in question are unworkable in practice, there is a risk that judges who seek to enforce them regardless may become handy scapegoats for the failure of consociationalism. The Fijian experience also highlights the need for some caution in involving judges in the micro-management of power-sharing schemes.

Before we embark on an examination of the events in Fiji, it may be useful to cast an eye on some conceptual issues relevant to the current investigation. Of particular interest here will be, first, the nature of consociational regimes and their implications for deeply divided societies, and, second, the opportunities and challenges which confront judiciaries that are called upon to enforce and police power-sharing arrangements in the face of sustained political intransigence.

3 In addition, there are a few societies where the jury is still out on the success of the consociational solution, e.g. Malaysia and South Africa. The latest country to embark on the consociational road is Iraq whose recently approved new Constitution envisages power-sharing between the country's majority Shia population and the minority Sunni and Kurdish peoples.

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II. Theoretical considerations

1. Consociationalism and divided societies

In the armoury of techniques available to regulate ethnic or other similar conflicts, consociationalism occupies a prominent place. It is seen as especially useful in *managing*, as opposed to *eliminating* ethnic differences (see, e.g. McGarry and O'Leary, 1993, p. 4) in plural societies, which have been defined as societies which 'compris[e] two or more elements or social orders which live side by side, yet without mingling, in one political unit' (J. S. Furnivall, cited in Lal, 1990, p. 1).

Consociational politics do not have particularly deep origins: they became prominent largely in the post-Second World War period (although Lebanon had begun an experiment with consociationalism in 1943), and acquired a degree of popularity since about the mid-1950s. The concept was promoted by a number of academics, of whom the Dutch political scientist, Arend Lijphart, is clearly the most celebrated.[4] The idea has been received warmly in a number of countries, though not all of them have experienced beneficial results.[5]

The consociational model has been seen as a more acceptable alternative to forced assimilation of minority ethnic groups in plural societies (see, e.g. Reynolds, 2002; Guelke, 2004; Walter and Snyder, 1999). It is preferred to cultural hegemony by dominant groups, as Wolf Linder, an expert on Swiss politics, explains (Linder, 1994, p. 171):

> 'Consensus democracy and the use of the institutional mechanisms of power-sharing are possible as long as society values social integration and peaceful co-existence between different cultures more highly than cultural hegemony. Preference for social integration is more likely if the costs of cultural conflicts and disintegration are high, if there is pressure from outside, and if co-operation offers more advantages to all than political hegemony by one cultural group.'

Although there are variations in consociational structures, the model itself shares certain common characteristics, including an electoral system based on proportional representation, a 'cartel of elites' (Lijphart, 1969, p. 222) providing political leadership, institutional mechanisms for power-sharing, and a matrix of mutual vetoes for the constituent parts of the coalition. Where the minorities in a state are concentrated in territorially segmented areas, the system also often makes provision for federal structures.

Research suggests that consociational systems are likely to work best in states where there is a high degree of elite co-operation (see, e.g., Nordlinger, 1972). This has sometimes invited accusations of mutual 'logrolling', but that, it is said, is a comparativly small price to pay in societies where politics are dangerously fractious.

The importance of elite accommodation, as opposed to accommodation at the level of the masses, does enjoy some support in academic opinion. Claude Ake, for example, sees a modification of the political behaviour of the elites – leaders of 'the major social, religious, professional and ethnic groups' – as the 'ultimate cure' for the problem of instability in plural developing societies. Consensus should be sought, he says, 'not at the grass-roots level but at the leadership level' if real progress is to be achieved in reducing conflict and strife (Ake, 1967, pp. 112–3).

4 Lijphart has written extensively on the subject – see, e.g. Lijphart (1968); Lijphart (1977); Lijphart (1985) – as well as a number of journal articles. Other academics who have developed the consociational idea include Daalder (1974); McRae (1974); and Steiner (1974).

5 As noted above, consociational systems have been successful in countries such as Austria and Belgium, and failures in states such as Cyprus, Malaysia and, as this article will demonstrate, Fiji.

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2. Drawbacks of consociationalism

Most political scientists are agreed that consociationalism only works as a transitional and short-term solution to the problems of divided societies (see, e.g., Mauzy, 1993, p. 106). Where the experiment succeeds, the fault-lines of the conflict gradually disappear and the society moves on to more durable forms of competitive politics that are characterised by peace and stability.[6] Where consociationalism fails to work, the society usually falls apart, to be followed by civil war[7] or authoritarian rule.[8] Given this danger, and given the mixed record of consociationalism in practice, it is hardly surprising that the concept has not always received a ringing endorsement (McGarry and O'Leary, 1993, p. 36):

> 'The best normative case for consociational arrangements is that they involve the self-government of the relevant communities, and they are better than the alternatives: majority domination, bloody partition, secessionist warfare and the unthinkable options of forced population transfers and genocide.'

One of the marked manifestations of consociationalism in recent times is the idea of a Government of National Unity. This idea has proved attractive to many of the newer democracies where the compulsions of a negotiated settlement with the previous, usually authoritarian, rulers make a direct transition to majoritarian rule difficult, if not impossible.[9] The idea has also served to defuse tensions emanating from rival claimants for power in highly fragmented societies. But it only succeeds where it is used as a temporary measure, and cannot be relied upon as a long-term arrangement (Pinto-Duschinsky, 1997:90).

In terms of pre-requisites for the success of consociationalism, the presence of consensus democracy is often mentioned as paramount. The failure of consociational experiments has been attributed to an absence of this vital ingredient. But sceptics have argued that this may not always be so. Pippa Norris of Harvard University, for instance, cites the example of newer democracies in plural societies with majoritarian electoral systems, such as Mali and Botswana, which are considered to enjoy a reasonable level of political rights when compared to equivalent African states (Norris, 2005).[10]

A more fundamental objection to consociational politics is that there is, inevitably, a tension, indeed a trade-off, between consociationalism and democracy, and this tension is often seen as too high a price even for transitional societies to pay. The trade-off has been demonstrated time and again in practice, in societies as geographically far apart as South Africa and Fiji (as will be explained below). Diane Mauzy, a Canadian academic, has illustrated its effects on Malaysian politics at some length (Mauzy, 1993, pp. 106–27), and she has poured scorn on the claim – advanced, among others, by Lijphart – that consociationalism and democracy are complementary (Mauzy, 1993, p. 123):

> 'There may be some practical, as opposed to strictly analytical, link between consociation and democracy in terms of providing legitimacy for the political elites, providing the citizens the security offered by adherence to the rule of law, and also through the open articulation of interests providing the government feedback on the condition of non-elite support. But the two can be analytically separated. Consociationalism can be described strictly as a formula for the management of political conflict in divided societies.'

6 E.g. Austria.

7 E.g. Lebanon.

8 E.g. Malaysia (in the post-1969 period).

9 The most prominent example of this process is provided by South Africa as it emerged from apartheid rule in 1994.

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Another aspect of consociationalism which is also inimical to democratic politics is its tendency to prevent the emergence of a principled opposition to the government of the day. This aspect has been discussed at considerable length and with much passion by political scientists such as Ian Shapiro, who has used the experience of South Africa under that country's interim Constitution (1994–99) to illustrate his point. Under that Constitution, which marked a high point in coercive power-sharing, any party which won 20 or more seats in the National Assembly was automatically entitled to be represented in the Cabinet in proportion to its holding of parliamentary seats. As a result, most parties, including those with moderate electoral support, found themselves in government, leaving hardly any credible opposition in Parliament. A particularly striking feature of this arrangement was that parties with diametrically opposing views on grave national issues were forced to work together – which, in practice, meant that they had to endorse the policies of the largest party in Parliament, the African National Congress, which held 18 of the 27 Cabinet seats and could easily ride roughshod over the wishes of the other ministers.

The stifling of oppositional forces can hardly be healthy for any democracy. Not only does it prevent the possibility of periodic changes to the composition of the government (through allowing political parties to alternate in power), but it promotes the undesirable practices of 'logrolling' and pork-barrel politics under which a fixed coterie of elite politicians share the spoils of power. Shapiro and Jung point out another not insignificant danger:

> '[B]ecause consociational arrangements ensure that every major political player is part of the government, there is little basis for the disaffected to differentiate the government from the regime. It is hard for an ethos of loyal opposition to develop when there is no institutional outlet. Those who are not in government are removed from politics altogether, making it more likely that they will turn to extra-institutional politics if they can.' (Jung and Shapiro, 1996, p. 181)

Not surprisingly, the consociational experiment in South Africa did not last very long. The Government of National Unity, as the coalition was called, fell apart in 1996 when F.W. De Klerk pulled out his National Party from the government, citing unreconcilable differences with the African National Congress and high-handedness of its leaders (De Klerk, 1998). The concept of coercive power-sharing was given a quiet burial in the permanent Constitution which was promulgated in 1999 and which provided for majoritarian government, albeit with some safeguards for minorities.[11]

It is worth noting, too, that consociational systems can place severe constraints on participating elites as well. Not only do they have to gain maximum leverage in their negotiations with the leaders of other parties, but they also have to keep their own grass roots supporters on side. This can often result in messy compromises and undesirable fudges in relation to key areas of national policy.

Much store has, traditionally, been set on the obvious ability of consociational systems to ensure inclusiveness in political participation. But even this is by no means guaranteed, as Samuel Issacharoff has noted after examining the record of consociational politics in Bosnia and Herzegovina:

> 'The allure of consociationalism was its understanding that state authority could not achieve legitimacy without inclusiveness. At the same time, formal state entrenchment of racial or ethnic power appeared historically to perpetuate – and in some instances exacerbate – the underlying societal division.'

11 Interestingly, Nelson Mandela, the leader of the African National Congress, was himself quite sceptical of the idea of coercive power-sharing, although he did buy into the concept as a result of political compulsions in the run-up to the end of apartheid. He had insisted, in 1994, that 'there will never be any peace and stability in this country until [the principle of majority rule] is fully applied' (Mandela, 1994, p. 536).

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This point is not without relevance in relation to Fiji, where the system of separate racial representation which has been in place since independence has been seen by many as intensifying, rather than reducing, divisions between the indigenous population and Indo-Fijians (see, e.g., Lal, 2003).

3. Unsuitability as a universal model

These potential shortcomings notwithstanding, the idea of consociationalism still commands considerable attention, both among academic analysts and constitutional architects in emerging democracies. It is, clearly, a system that is not without merits, particularly as a transitional measure for societies where the prevailing political and social conditions are supportive of elite co-operation. But whether the model can be replicated between societies of widely differing backgrounds and cultures is arguable. As the author of a recent paper on the subject notes:

> '[T]here remains considerable debate about how far we can extend generalisations about the workings of electoral systems in plural societies in established democracies to the resolution of ethnic tensions in transitional and consolidating democracies. Much existing research on consociational democracies is based on the experience of Western political systems that, by virtue of their very persistence, have come to a shared consensus about many of the basic constitutional rules of the game and a democratic culture . . . But it may prove difficult to generalise from the context of stable and affluent post-industrial societies, with institutional arrangements and a liberal-democratic culture of tolerance which has evolved during the course of the twentieth century, to the process of conflict-management in transitional democracies struggling with the triple burden of socio-economic development, the consolidation of the political system, and the global pressures of the world market.' (Norris, 2006)[12]

III. The consociational experiment in Fiji

1. The factual background

At the root of the problem in Fiji lies a deep and long-festering divide between the country's indigenous population (descendants of the islands' original inhabitants, viz. Christians of Melanesian and Polynesian origin) and its significant Indian immigrant community (the 'Indo-Fijians', who first came in as indentured labourers during British colonial rule and whose numbers were later augmented by fresh waves of voluntary immigration). The two communities are marked by distinct cultural, religious and linguistic traditions, and these, coupled with differential rates of economic progress (the Indo-Fijians, despite their humble origins, achieved substantial success as sugarcane farmers and traders and thus became more prosperous over the years), has led to constant tensions between the groups. The indigenous Fijians have frequently expressed fears about Indo-Fijian 'domination' and have consequently sought special privileges for themselves, especially in government and the public sector. The Indo-Fijians, on the other hand, have argued vigorously against special treatment for the indigenous community, demanding political and economic equality on the strength of a long record of whole-hearted loyalty and unstinting contributions to the Fijian nation.

Although an uneasy truce prevailed between the communities in the years immediately following independence from British rule in 1970, the country's electoral system, which was based on separate rolls for indigenous Fijians and Indo-Fijians (with a third roll for 'general' voters, which included a small number of Europeans and other population groups), proved to be a source of much

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friction. This system, introduced by the colonial rulers and later endorsed by the chiefly elite on the indigenous side, has been seen to produce serious inequities, including entrenched disadvantages for the Indian community (e.g., Hagan, 1978, p. 12). It was originally intended as a transitional arrangement, meant to last for no more than 30 years (Spate, 1959, p. 32), but successive Fijian governments have shown a marked reluctance to move towards a common electoral roll. The 1970 Constitution nonetheless guaranteed basic parity of esteem and human rights for all communities.

The years immediately following independence saw a degree of co-operation between the two main racial groups, and this ensured a stable government, albeit one in which the indigenous Fijians had the upper hand. However, when an Indian-dominated government was voted into power in the general elections held in 1987, there was widespread unease among indigenous Fijians, and this sentiment was exploited by an ambitious army officer, Col Sitiveni Rabuka, to mount a *coup d'etat* and to abrogate the 1970 Constitution. A brief period of military rule followed before a civilian government, headed by Col Rabuka himself, was brought into power under a new, blatantly racialist Constitution promulgated in 1990.[13] This Constitution entrenched a number of privileges for the indigenous Fijians, including a majority of seats in Parliament and an exclusive claim to the office of Prime Minister.

2. The beginnings of power-sharing

The 1990 Constitution was subjected to a thorough-going review five years later,[14] and that review recommended its replacement by a new Constitution which would be more equitable in its treatment of the Indo-Fijians. The most important, and most controversial, feature of the proposed Constitution was a power-sharing government in which all parties which have won more than 10% of the seats in Parliament would be entitled to join the Cabinet.[15] Interestingly, the thrust of the Commission's recommendation was to have in place constitutional provisions that would facilitate the emergence of a coalition government of like-minded parties (which would also be multi-ethnic in character), but a Joint Parliamentary Select Committee which was charged with the actual writing of the Constitution went a step further and put in provisions that required mandatory power-sharing, regardless of whether the parties which were entitled to sit in the Cabinet were like-minded or not.[16] This aspect of constitutional engineering has, unsurprisingly, been the subject of much criticism, and has even been blamed for the subsequent failure of consociational government in Fiji.

The system of government embodied in the 1997 Constitution of Fiji accords with the views of Sir Arthur Lewis, whose antipathy to western-style democracy – and in particular to the concept of a government and an opposition – in Third World countries has been well-articulated in his writings based on long years of study of post-colonial West African countries (see, e.g. Lewis, 1965). Lewis's strongly held belief that majority rule – the linchpin of Westminster-style democracy – is utterly unsuited to deeply divided societies,[17] led him to argue in favour of a constitutional dispensation under which every party which received more than 20% of votes in a general election would be

13 The incompatibility of the 1990 Constitution with well-recognised international human rights norms is described in Reisman (1997), pp. 224–5.

14 The review, triggered by a clause within the Constitution itself, was undertaken by a three-member panel consisting of a former Governor-General of New Zealand and one representative each from the indigenous Fijian and Indo-Fijian communities.

15 This recommendation subsequently found expression in s. 99 of the 1997 Constitution. The number of Cabinet places to which each of the qualifying parties would be entitled was to be in strict proportion to the number of seats held by it in Parliament.

16 For a detailed analysis of this issue, see Lal (2003a).

17 He went so far as to characterise majority rule as 'totally immoral, inconsistent with the primary meaning of democracy, and destructive of any prospect of building a nation in which different peoples might live together in harmony' (Lewis, 1965, pp. 64–6).

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entitled to be represented in the federal Cabinet – a formula which found favour with the draftsmen of the 1997 Fijian Constitution.[18]

The 1997 Constitution also represented the preferences of the American political scientist Donald Horowitz, who favoured a power-sharing model involving 'centripetal, integrative or incentive-based techniques' which were likely to encourage moderation and conciliation on the part of all concerned (see, e.g., Horowitz, 1991). Crucially, Horowitz's model relied on the alternative vote system rather than the list proportional system favoured by Lijphart. The Lijphartian model, argued Horowitz, was calculated to reinforce ethnic divisions instead of underplaying or dissolving them, and this, according to Horowitz, was harmful in the long run.

Whatever the merits of those arguments, the views of Horowitz clearly found favour with the constitutional draftsmen. However, the choice was not apparently made on merits alone. Some commentators have detected a more partisan, political motive – but one with a not unworthy objective – as well. In the words of Jonathan Fraenkel, an academic from the University of the South Pacific:

> 'The new system had been virtually tailor-made to deliver former prime minister Rabuka back into office, although this time around in alliance with Indo-Fijian opposition leader, Jai Ram Reddy. The two leaders developed a close relationship in the run up to the polls. Rabuka invited Reddy to address Fiji's Great Council of Chiefs – the first time an Indo-Fijian had ever appeared before the highest institution in the indigenous Fijian hierarchy. Reddy appealed to the Indo-Fijian electorate to forgive Rabuka for having led a coup back in 1987. Both leaders were determined together to take the 'race question' out of Fiji politics. The electoral system was designed to give great rewards to this kind of political co-operation.' (Fraenkel, 2000)[19]

The first parliamentary elections held under the 1997 Constitution produced dramatic results which belied any expectations of cross-ethnic voting or success for the two 'moderate' parties on either side of the communal divide. With Indo-Fijians throwing in their lot *en masse* with a coalition headed by the Fijian Labour Party (FLP) and the ethnic Fijian vote being split among five competing parties and a few independents, the stage was set for the ascent to power of Fiji's first Indian-led government. This government, led by Prime Minister Mahendra Chaudhry of the FLP, was duly installed, but it did not last long. In May 2000 George Speight, a failed businessman of mixed European-Fijian descent mounted a *coup d'etat* claiming vast support from the indigenous community who, he said, had been marginalised by the Chaudhry government.[20]

3. The 2000 coup and its aftermath

The coup was brought to an end fairly swiftly and the primacy of the 1997 Constitution restored, thanks partly to decisive action by the Commander of the Fijian Armed Forces (who set his face against giving Speight and his supporters any succour), and partly to a series of decisions of the superior courts of Fiji which affirmed the continuing validity of the pre-coup constitutional order.[21] The deposed government of Mr Chaudhry was not, however, returned to power; instead, fresh

18 The only modification that the constitutional draftsmen made to the Lewis formula was to reduce the threshold requirement for entry into government to 10%.

19 Pinpoint reference not available.

20 For an account of the background to, and effects of, this coup, see Lal and Pretes (2001).

21 The main decisions are: *Prasad v. Republic of Fiji* [2001] NZAR 21; *Republic of Fiji v. Prasad* [2001] NZAR 385; *Jokapeci Koroi and others v. Commissioner of Inland Revenue and Attorney-General and Republic of Fiji* [2003] NZAR 18; *Jokapeci Koroi and others v. Asesela Ravuvu and others* (unreported judgment of the High Court, 24 August 2001). For a discussion of these cases, and more generally of the role played by the Fijian courts in restoring the rule of law in the immediate aftermath of the May 2000 coup, see Iyer (2005).

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parliamentary elections were ordered by a caretaker civilian government that had been appointed by the President of the Republic.

In those elections, held in September 2001, the predominantly Fijian Soqusoqo Duavata ni Lewinvanua (SDL) party of the caretaker Prime Minister, Mr Laisenia Qarase, won the largest number of seats (31 in a Parliament of 71), with the Fijian Labour Party coming a close second with 27 seats (the rest of the seats were won by four comparatively small parties and two independents, with one seat being kept vacant owing to the death of a candidate). In these elections as well there was strong evidence of voting along ethnic lines, including in the 25 'open' seats which were not reserved to any community.

4. The power-sharing wrangle

Mr Qarase was, as the leader of the largest party in Parliament, appointed Prime Minister. Faced with the prospect of sharing power with all the other parties that had won more than 10% of parliamentary seats, he wrote to the leader of the FLP, Mr Chaudhry, inviting him to nominate the FLP's representatives for inclusion in the Cabinet. Mr Qarase added, curiously, that, in his opinion, the FLP 'might be happier in Opposition' for the following reasons:

> 'The policies of my Cabinet will be based fundamentally on the policy manifesto of Soqusoqo Duavata ni Lewinvanua [SDL], as the leader of this multi-party coalition. Our policies and your policies on a number of key issues of vital concern to the long-term stability of our country are diametrically opposed. Given this, I genuinely do not think there is sufficient basis for a workable partnership with your party in my Cabinet. Indeed, for my party, there can be no compromise on these issues. We have been given a clear and decisive mandate by the people who have voted my party in with the largest representative group in the House of Representatives. As such, we have no mandate to make any changes or adjustments to the policies on which we have been elected.'[22]

Mr Qarase also expressed his fears that, if the power-sharing arrangements in the Constitution were to be followed to their letter, there was a risk of his party becoming a minority group within the Cabinet which, he said, was 'inconceivable'. His party was, he added, fully capable of delivering a stable government with a 'coalition of like-minded parties and individuals', but found the constitutional provisions on power-sharing 'both unrealistic and unworkable'.[23] He was reported, on another occasion, to have announced his party's intention to initiate a wide-ranging review of the 1997 Constitution at the earliest possible opportunity, the unstated implication of which being that he favoured the restoration of the dominant position of the indigenous Fijians vis-à-vis the other races (Chandrasekharan, 2002).[24]

To Mr Quarase's dismay, Mr Chaudhry accepted the invitation for the FLP to join the Cabinet, although he qualified his acceptance with a number of conditions, hinting, intriguingly, that the FLP intended to provide 'Opposition from within' the Cabinet.[25] Mr Qarase dismissed the FLP's acceptance as inconsistent with the constitutional requirements and decided to exclude that party from his Cabinet. He did, however, express the hope that Mr Chaudhry would opt to become Leader of the Opposition and thus contribute to providing Fiji with a stable government.

22 Letter from Laisenia Qarase to Mahendra Chaudhry dated 10 September 2001, cited in Victor Lal (2003a).

23 Ibid.

24 Pinpoint reference not available.

25 Ibid.

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5. Legal challenges and the response of the courts

This rebuff provoked a legal challenge by Mr Chaudhry and the FLP, which led to a series of decisions from the higher courts, the details of which need not detain us except to the extent they are relevant to the present discussion on the role of the courts in enforcing power-sharing arrangements in divided societies like Fiji. Some of the legal proceedings, incidentally, involved discussions on the minutiae of the power-sharing formula. The salient principle that emerged from the decisions is that power-sharing (in the form of a multi-party Cabinet) was a non-negotiable part of the 1997 constitutional settlement. Indeed, the Supreme Court had already ruled that power-sharing was 'the central purpose' of the 1997 Constitution in a case decided in the immediate aftermath of the 1999 general elections,[26] and that ruling appears to have set the standard for its post-2001 decisions.

In its decision of 15 February 2002, the Court of Appeal, for instance, held that:

> '[S]ection 99(5) [of the Constitution] obliges a Prime Minister to invite in *unconditional terms* parties which have 10% or more of the membership of the House to be represented in the Cabinet in accordance with the provision. This means that the invitation to participate in Cabinet may have to be issued across political lines.'[27]

The court ruled that Prime Minister Qarase was in breach of his constitutional duty by not including members of the Fijian Labour Party in his government. It categorically rejected the argument advanced by Qarase's counsel that the Prime Minister's obligation (under s. 99) did not extend beyond issuing an invitation to the other qualifying parties. Nor did it find any merit in the argument that, since Mr Chaudhry had qualified his acceptance of the offer to be represented in Cabinet with a number of conditions, the Prime Minister was entitled to ignore the acceptance as invalid.[28]

This view was subsequently affirmed by the Supreme Court which also ruled,[29] after another lengthy round of litigation, that on a proper construction of s. 99, the FLP and the SDL parties were entitled to the same proportion of places in the Cabinet as the proportion of their seats in Parliament, regardless of the size of the Cabinet.[30] Many saw the wrangle over numbers as unseemly and as a needless distraction. Questions were also raised about the propriety of the courts getting involved in such minutiae of what was essentially a political dispute.[31] The Supreme Court had also, incidentally, directed the Prime Minister to negotiate in good faith with the FLP over the selection of that party's members for appointment to the Cabinet.

Prime Minister Qarase strongly disagreed with the court's verdict, but finally gave in – in the opinion of some, gracefully, and, in the eyes of others, out of sheer desperation – and offered the FLP 14 seats in a reduced Cabinet of 30 Ministers, keeping the remaining 16 for his own party and its coalition partners. He did not, as advised by the Supreme Court, engage in any negotiations with the

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26 *President of the Republic of Fiji Islands and Inoke Kubuabola and others* [1999] FJSC 8, judgment of the Supreme Court, 3 September 1999. This case had arisen in the context of a challenge to appointments to the Senate.

27 *In re the Constitution, Chaudhry v. Qarase*, [2002] FJCA 1, judgment of the Court of Appeal, 15 February 2002 (pinpoint reference not available). This case, originally filed in the High Court, was, on account of its urgency (and with the consent of the parties), fast-tracked to the Court of Appeal.

28 Ibid. Based on this decision, the High Court, in an order dated 24 April 2002, directed the Prime Minister to comply with the relevant constitutional provisions as interpreted by the Court of Appeal. The government, however, preferred an appeal to the Supreme Court which did not hear the case until some 15 months later. In the meantime, the stalemate over the inclusion of the FLP in the Cabinet continued.

29 *In re the President's Reference, Qarase v. Chaudhry* [2004] FJSC 1, judgment of the Supreme Court, 9 July 2004.

30 The SDL had argued that, as long as the proportion of Cabinet seats allocated to itself and to the FLP corresponded to the proportion of parliamentary seats won by each party, it was permissible for the actual numbers to be varied by the creation of a larger Cabinet.

31 See, e.g., Lal (2003a).

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FLP leader, choosing instead to hand-pick 14 MPs of that party on his own motion for Cabinet positions. He assigned them token portfolios (many created from small departments of existing Ministries) with low staffing and budgetary allocations. For good measure, he also excluded the leader of the FLP and two of the party's most senior members from consideration for Cabinet positions, leading to bitter denunciations from Mr Chaudhry, who accused Mr Qarase of 'making a mockery of the entire concept of power-sharing'.[32] The FLP leader also announced the withdrawal of his party from the power-sharing deal that had been offered, choosing instead to assume the role of the official Opposition in Parliament and to bide his time until the next general election.

This decision of the FLP signified the end of Fiji's turbulent and acrimonious first experiment in attempted power-sharing – an experiment which ran for over three years and which involved both the political establishment and the judiciary in a series of tortuous but ultimately fruitless moves. Perhaps the Fijian experience proves the truth of the oft-repeated dictum that no amount of institutional design or constitutional engineering can bring about accommodative government in a divided society where the political will to make the necessary concessions is absent. Arendt Lijphart's cautionary note appears more than justified in relation to Fiji: 'Consociationalism cannot be imposed against the wishes of one or more segments in a plural society and, in particular, against the resistance of a majority segment' (Lijphart, 1977, p. 160).

6. The consociational experiment: phase two

Notwithstanding the failure of the consociational experiment between 2001 and 2004, the issue continued to bedevil Fijian politics. It assumed renewed importance in May 2006 when, faced with a growing multitude of problems,[33] Prime Minister Qarase ordered an early general election, the results of which produced another Parliament that was sharply divided along racial lines.[34] Qarase was once again compelled – by the constitutional imperative – to invite the Fiji Labour Party to join the government being formed by him. On this occasion, the FLP, surprisingly, accepted the invitation and nominated nine of its MPs for cabinet positions. A curious feature of the FLP's agreement to participate in government was that its leader, Mr Chaudhry, insisted on continuing to remain the Leader of the Opposition – a state of affairs which was guaranteed to make power-sharing unworkable. The ensuing imbroglio was broken only by the Government Solicitor ruling that Mr Chaudhry's stance was constitutionally untenable. In the event, another MP from one of the minor opposition parties was sworn in as Leader of the Opposition. Mr Chaudhry remained intransigent by refusing to vacate the offices that he had previously used in the Parliament building as Leader of the Opposition.

Further strains between the government and the FLP began emerging when one of the FLP ministers publicly announced that he would not support government policies that were inconsistent with those of his own party. This was rightly seen by the Prime Minister as a threat to the doctrine of collective responsibility by which all ministers were bound. The stability of the coalition government was further weakened by serious infighting within the senior ranks of the FLP – infighting which threatened to unravel the multi-party power-sharing arrangements. This fresh attempt at power-sharing was, in any event, short-lived and it was rendered infructuous by yet another military intervention, executed this time by the Head of the Fiji Military Forces, Commodore Frank

32 Speech of Mahendra Choudhry, Fiji House of Representatives, 25 November 2004.

33 The most acute of these problems was a growing friction between the Qarase government and the Fijian army which, at one stage, even led to rumours of an impending coup by the army: see, Chandrasekharan (2006).

34 The 'open' seats were won in equal numbers by the SDL and FLP parties, and each of these parties attracted nearly 80% of support from their respective ethnic groups for the 'reserved' seats. The final results were as follows: SDL – 36 seats; FLP – 31 seats; United People's Party – 2; Independents – 2. The elections had a high voter turnout of 88%.

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Bainimarama on 5 December 2006. That *coup d'etat* resulted in Parliament being dissolved and the reins of government being seized by Commodore Bainimarama. The commodore justified the take-over on the basis that the civilian government of Prime Minister Qarase had, among other things, failed to bring to justice those who had been implicated in the 2000 coup. At the time of writing, no date has been set for a return to democratic rule.

IV. The prospects for consociationalism

1. The propitious factors

It would be unduly pessimistic to conclude that Fiji contains no possibility for the success, or at least partial success, of the consociational experiment. Notwithstanding that the divisions between the warring communities are deep and firmly entrenched, there are a number of factors – internal and external – which have the potential to push power-sharing along, and it may be worth recalling them if only to assess why they did not produce the results that may have been expected.

Lijphart has argued that there are six pre-requisites for successful consociationalism: 'a multiple balance of power, small size of the country involved, overarching loyalties, segmental isolation, prior traditions of elite accommodation, and . . . the presence of cross cutting cleavages' (Lijphart, 1977, p. 54). Of these pre-requisites, only two are present in Fiji; what are lacking are: a multiple balance of power (there are only two main powers), overarching loyalties,[35] a prior tradition of elite accommodation, and a high degree of cross-cutting cleavages (though there is some cross-cutting, e.g. in terms of the economic power and public sector employment cleavages and economic power and land ownership cleavages).[36]

But there are a few internal factors that do conduce to the success of consociational politics, viz. a culture of constitutionalism, a residual respect for peaceful settlement of disputes (as evidenced by the generally good record of compliance with court judgments),[37] and the presence of an highly independent and impartial judiciary, a courageous and public-spirited legal profession, and vibrant civil society organisations, to name but a few. The role of the judiciary is especially important, and this will be discussed at some length below.

The prospects for consociationalism could also be expected to be boosted by the lack of other, more attractive, options. Federalism or regional autonomy, much less partition, can hardly be contemplated because the two main communities are widely scattered and interspersed throughout the country. There is very little segmental isolation on a geographical basis, which makes the creation of a federal polity well nigh impossible. In this sense, the situation in Fiji is little different from the situation in, say, Northern Ireland where, despite the sharp polarisation between the Protestant and Roman Catholic communities, the idea of further partition has usually been dismissed as unrealistic given the enormous costs that it would entail in terms of an exchange and resettlement of the respective populations.[38]

35 The only possible common ground discernible between the Fijian and Indo-Fijian communities is a broad respect for, and commitment to, constitutionalism (see, e.g., Quentin-Baxter, 1999, para. 19), but this characteristic cannot by any means be said to be strong enough to form a cohesive force that is capable of prevailing over the deep linguistic, economic, social and other antagonisms.

36 However, it is worth noting that most of the cleavages are intensively felt on both sides, which casts serious doubt on their conciliatory or healing effects – see, in this regard, Dahl (1966), p. 378.

37 Although the experience of the *coups d'etat* may belie any optimism on this score.

38 But Lijphart has argued that partition may be the only 'realistic but highly undesirable alternative to power sharing' in Northern Ireland, given the failure of consociationalism in the province – see Lijphart (1977), p. 141. There is certainly a precedent for such a view: Cyprus, which following the Turkish invasion in 1974 did result in a territorially divided state despite the fact that the Cypriot Greeks and Turks had been previously living as an interspersed community.

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If participatory and negotiated settlements are likely to be more durable than imposed arrangements, as argued by Yash Ghai (Ghai, 2000, p. 18), then the prognosis for the success of power-sharing in Fiji should, again, be good, given that, unlike the 1990 Constitution, the 1997 Constitution was the result of due consultation, extensive negotiations and democratic deliberation between the indigenous Fijian and Indo-Fijian communities. This process was, moreover, assisted and supported by the international community (notably Fiji's neighbours, Australia and New Zealand) – another factor which has been seen to conduce to more durable ethnic accommodation (Ghai, 2000, pp. 15–16).

External pressure, it needs to be stated, is bound to play a significant role in persuading Fijian politicians to get their act together: Fiji is in a position of insecurity, vulnerability and dependency vis-à-vis its larger and more powerful neighbours, especially Australia and New Zealand, for economic reasons, and this should give those neighbours a strong voice in pushing the process of political accommodation between the warring factions along. A particularly propitious factor in this regard is that the feeling of insecurity and vulnerability is shared by all the communities of Fiji, and not only by one of them. This factor should have exerted a much stronger influence in the outcome of the consociational experiment than appears to have been the case.

2. The stumbling blocks

A formidable obstacle to the realisation of the consociational objectives of the 1997 Constitution is the unrelenting assertion by representatives of the indigenous Fijian community that that community was entitled, in perpetuity, to a position of political 'paramountcy' over every other community in Fiji – an assertion which has its origins in a principle that had, according to one observer, been articulated by the colonial government 'for self-serving as well as altruistic reasons' (Quentin-Baxter, 1999, para. 10), but which became a handy electoral slogan for indigenous Fijian leaders in the run-up to independence. This claim is curious and quite extraordinary because most parties to a constitutional bargain appeal to the impartial value of *equality* – even if they are motivated by self-interest – rather than *superiority* over other contenders (e.g. Elster, 1995, p. 379).

In practical terms, the indigenous Fijians' assertion has translated itself into a demand for political and administrative dominance in the executive branch of government and in the civil service. Although the factual basis of this claim has been seriously questioned (see, e.g. Robertson and Sutherland, 2001, pp. 67–68), the strength of that community's attachment to it can be seen from the fact it was used as a justification for the 1987 coup mounted by Col Rabuka.[39]

Successive Constitutions have made a number of concessions to indigenous Fijian interests through the entrenchment of political and customary rights, and many of these concessions, for example the special role for Christianity and the protection of indigenous land rights, have been seen as broadly compatible with international law norms on the accommodation of group interests by national political systems. Serious concerns were, however, raised by some of the blatantly racial provisions in the 1990 Constitution such as those which excluded the participation of non-indigenous Fijians in the election of the national President or imposed a mandatory racial identification for electoral purposes. These arrangements were seen as deliberately intended to disenfranchise non-indigenous Fijians and thus inconsistent with the standards laid down both in international human rights instruments and in the jurisprudence of bodies such as the International Court of Justice.[40]

39 The non-Fijian coalition government which had come to power in 1987 represented, to many politicians, a serious threat to the future political interests of indigenous Fijians, and the coup, they argued, rightly served to '[nip] in the bud' that threat – see, e.g. *Report of the Fiji Inquiry and Advisory Committee* (1989), p. 13.

40 The explicitly and permanently racially based provisions for electoral representation were, for example, condemned as incompatible with the norms enunciated by the ICJ in the *Namibia* case (1970); they were also, it has been argued, possibly inconsistent with the terms of the Convention Against Apartheid – see, Reisman (1997), pp. 224–5.

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The relevant standards were summarised by Michael Reisman as follows:

> 'Arrangements that permit groups, including racial or ethnic groups, to be effective politically may be lawful if (a) they allow for voluntary affiliation or disaffiliation; (b) they are integrated in more complex systems, e.g. bicameral legislatures, in which the dominant chamber is popularly elected; and (c) they incorporate feasible procedures for adjustment to take account of demographic and personal identification changes. Long-term group entrenchments based on race or ethnicity are unlawful, but short-term differentiations may, under certain conditions, be lawful. Race and ethnicity are often part of reality. Because politics is realistic, it will take account of these variables. Legal regimes may not, however, be explicitly based on them or operate so as to segregate racially.' (Reisman, 1997, p. 226)

The deleterious effects of such arrangements on consociational politics are not difficult to imagine. Reisman has characterised group political entrenchments as an 'anachronism' in that they tend to debilitate consociational processes:

> 'by establishing, as a basic norm, a rule of a single group per person, that group assignment supposedly based on the dominant and enduring identity, usually ethnicity or race, which is not selected by the individual, but by the 'system'. Where the groups in question are traditionally organised, what is actually entrenched in the national political system is the political position of the leadership or elites of the entrenched groups. In this respect, group political rights entrenchments retard processes of consociation, integration and new identity group formation. Insofar as one conceives of these protean re-definitions and re-identifications of the self as the core of individual liberty and, hence, central to international human rights, political group rights entrenchments carry a significant cost. When the alternative is very destructive internal strife, the cost may seem cheap. At a particular moment, it may seem worthwhile or ineluctable, but it will never be cheap.' (Reisman, 1997, p. 226)

Not surprisingly, the 'paramountcy' argument engaged the attention of the experts who reviewed the 1990 Constitution. They found that, while the indigenous Fijians were entitled to guaranteed rights in relation to their land, fishing, the chiefly institutions and some of the affirmative action programmes put in place to promote economic, social, educational, cultural, traditional and other interests, their claims to the 'paramountcy of Fijian interests' and 'Fijian political paramountcy' merely reflected their 'interests and concerns' and did not amount to 'rights' as such.[41] The Commission decisively rejected calls for the reservation of senior posts in government for indigenous Fijians, and for quotas for particular ethnic communities, on the grounds that that would be inconsistent with both international human rights standards and the efficiency of the administration.[42]

A related argument that has been made to buttress claims for special privileges for the indigenous Fijians – and thus to justify measures aimed at disenfranching Indo-Fijians – is that the Fijians possess an exclusive and inherent 'sovereignty' which gives them unfettered power to make or unmake any rule of law within the territorial limits of the country. This argument proceeds on the assumption that, when British rule ended in 1966, the sovereignty that had been ceded to the colonial government by the Fijian Chiefs in 1874 reverted to the indigenous population alone who could exercise it as they chose to. Much doubt has, however, been cast on the soundness of this view, unsupported as it is either by post-independence Fijian constitutional law or by settled international human rights standards. Alex Frame, an expert on constitutional questions in the South Pacific, has

41 Fiji Constitutional Review Commission (1996), paras. 3.113–3.117 and 3.119.

42 Ibid., paras. 8.86–8.99 and 14.15–14.42.

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analysed this issue at some length and compared it with the position in New Zealand under the Treaty of Waitangi where similar claims of separate and residual sovereignty by the Maoris have been considered but decisively rejected by the courts (Frame, 1997, pp. 252–59).[43] In Frame's view, the correct position is that sovereignty vests with the entire population of Fiji but that this sovereignty may be limited or qualified in some respects, for example to safeguard the traditional rights of the indigenous Fijians to their cultural or tenurial identity (in relation to land) (Frame, 1997, p. 259).

In any view of the matter, therefore, the Fijian demands of 'paramountcy' over other communities are as misconceived as they are untenable as a matter of law. This fact has found implicit recognition in the 1997 constitutional settlement, and it is strengthened by the increasing acceptance globally of democracy as an emerging norm of international law (see, e.g. Franck, 1992; Cerna, 1995; Burchill, 2001). It is imperative therefore that leaders of the indigenous community stop using arguments based on alleged 'paramountcy' to thwart consociational government.

Encouragingly, a number of community leaders and intellectuals on the indigenous Fijian side have mounted public challenges to the hardliners' claims of superiority over the Indo-Fijians and have argued for greater accommodation of the rights and interests of the non-indigenous communities. Sample this plea from Jone Dakuvula, a prominent commentator (and a cousin of the former coup leader Sitiveni Rabuka):

> 'What is so special about us descendants of the many waves of early settler groups in Fiji that our political rights to be the government must be greater and secured unaccountably, compared to the descendants of the later settlers?' (Dakuvula, cited in Lal, 1990, p. 239)

But in the prevailing atmosphere of highly charged competitive politics, such sentiments do not appear to have had much resonance or influence.

3. Co-operation without co-option

For a short time before the 2006 general election, the Indo-Fijians, under the leadership of Mahendra Chaudhry, seem to have resigned themselves to a system of 'co-operation without co-option',[44] under which they assumed the role of a disgruntled but dignified 'loyal opposition' to the Fijian-dominated government of Qarase. But whether this can be a durable long-term solution to the problem is doubtful given that the Indo-Fijians are unlikely to tolerate a permanent oppositional role to which they seem to be destined if the traditional intransigence of the Fijians to share power is anything to go by.[45] The viability of any such strategy is also put in doubt by the ever-present factionalism within the Indo-Fijian community itself: the community shows few signs of putting up an united front against its political opponents, as is evidenced by the constant infighting between and within Indo-Fijian parties that have straddled the political arena since independence.

There is, moreover, a growing assertiveness, at the same time, on the Indo-Fijian side of the communal divide which is unlikely to countenance the prospect of permanent exclusion of their community from government. Those at the forefront of this movement are reportedly demanding full equality with the indigenous Fijians, drawing inspiration for their campaign from political

43 Frame cites, among others, the cases of *New Zealand Maori Council v. Attorney-General* [1987] 1 NZLR 641 and *Tainui Maori Trust Board v. Attorney-General* [1989] 2 NZLR 513.

44 This phrase is borrowed from Barry (1975), pp. 405–6.

45 An arrangement of this kind has been described as 'hegemonic group pragmatism paternalism', and doubts have been cast as to whether it would justify being seen as a consociational arrangement at all – see, Mauzy (1993), p. 124. There are, however, some advantages to be had from such an arrangement in certain circumstances, as Mauzy notes in relation to the non-Malays in Malaysia.

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leaders in Australia and New Zealand who have rejected claims for special treatment for the indigenous peoples of those countries (see Lal, 1990, p. 240).[46]

Unlike in, say, Malaysia, where the basic terms of the deal struck between the three main racial groups in the early 1950s, viz. guaranteed political superiority for the Malays in return for largely unimpaired freedom of dominance in the business and professional spheres for the Chinese and the Indians, were, by and large, honoured, at least in the first decade of the country's independent existence,[47] the unwillingness of the indigenous Fijians – or at any rate their political leadership – to respect the bargain encapsulated in successive Constitutions has made the prospects for consociationalism rather bleak. It is also the case that the indigenous Fijian community has become quite fragmented in recent years (see, e.g. Lal, 1990, pp. 237–40), and where deep segmentation occurs within this community, there is a resulting dearth of clear-cut leadership which can speak with authority for the community as a whole (see, e.g., Darby, 1997, p. 117). This, again, does not bode well for the future of consociationalism in Fiji. Perhaps the time has now come to look at other options. Before these are explored, however, it would be helpful to turn to the role that the courts have played in the consociational experiment in Fiji and to assess the prospects for future judicial intervention in this area.

V. Courts and consociationalism

1. Judicial processes and transitional societies

The role of the courts in transitional societies has been the subject of much academic and professional comment (see, e.g., Ginsburg, 2003; Brzezinksi, 1998; Epp, 1998; Ginsburgs, 1992; Klingsberg, 1992; Sólyom and Georg, 2000; Stotzky, 1993; Tate and Thorsten, 1995). While it would be over-optimistic – even counterproductive – to rely on judiciaries to bring about transformative miracles, the fact remains that courts and judges can and do exert significant influence on the process of democratic consolidation, particularly where they have been allowed to operate in an enabling environment.[48] There are, of course, clearly recognised limits to the power of judges in this area: these limits stem as much from well-established constitutional principles and conventions – e.g. the separation of powers – as from practical considerations such as the ability of courts to micro-manage and police the implementation of complex changes, the responsibility for which rests primarily with the executive branch of government.[49]

Judicial processes cannot also, of course, be a substitute for the political negotiation and bargaining which are so much a feature of transitional societies (and indeed of most established democracies). However, as Yash Ghai has perceptively noted:

46 Lal cites the remarks, among others, of the former New Zealand Minister of External Relations and Trade, Mike Moore, as influencing the Indo-Fijian campaigners: 'To claim that because someone's ancestors (Europeans) came to New Zealand 100 years and not 1,000 years ago made them less of a citizen with fewer rights or love of their country was arrogant, simplistic and wrong . . . People from many countries contributed equally to New Zealand's growth and they would not tolerate second class citizenship in a first class country' (fn. 6).

47 Milne has, for example, argued, writing in the early years of Malaysian independence, that 'when the whole scene is surveyed, in its social, economic and political aspects, it becomes clear that a kind of short-term rough justice between the claims of the communities [was] in fact . . . attained' (Milne, 1967, p. 41). That judgment is, however, questionable today because recent years have seen a growing disgruntlement on the part of the Chinese and Indian minorities following increasingly bold moves by the Malay majority to give themselves more and more privileges at the cost of the other two communities.

48 The 'uncommon ability of courts to get people to abide by disagreeable rulings' has been commented upon in Gibson and Caldeira (2003), p. 2.

49 For a recent exposition of the view that courts are not the best institutional actors to administer public bureaucracies, see Powers and Rothman (2002).

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> 'Judicial decisions need not curb political bargaining; their function is to maintain constitutional parameters and, when necessary, to provide authoritative rulings to break political deadlocks . . . A balance between political and judicial processes is necessary to ensure the successful operation of autonomy.' (Ghai, 2000, p. 21)

A number of justifications can be offered for judicial activism in transitional contexts. Judges are, by the very nature of their training, position and deportment, capable of bringing to bear a unique moral authority in safeguarding the integrity of the legal systems within their watch and in ensuring that constitutional rules are not flouted or ignored for reasons of political expediency. In doing so, they also help to further another valuable interest, viz. to signal a clean break with the past, whose importance – both symbolic and practical – should not be underestimated.

No less importantly, courts can reduce the tensions that are ever-present in societies undergoing transition by, as it were, converting – or at least giving the appearance of converting – political controversies into constitutional dialogues. Such dialogues are, by their very nature, less strident, and therefore less threatening, than political slanging-matches.

More fundamentally, the power of judicial review serves as a guarantee against politicians reneging on the basic deals that the state may have made with its citizens. These deals, as in the case of Fiji, are usually contained in carefully negotiated constitutional documents.

The rationale for judicial intervention, especially in polities governed by written constitutions that define with some precision the jurisdictional parameters of the major branches of government, admits of little doubt in modern democracies. Although there has been much academic discussion about the 'counter-majoritarian' difficulty with judicial review (see, e.g., Bickel, 1962; Ackerman, 1984; Tushnet, 1985; Friedman, 1998; Bork, 1990), few would seriously dispute that judicial review is, as a matter of practical fact, an inescapable a part of the political landscape today; many would contend that it is also a necessary and inevitable feature of any society governed by the rule of law.

As the author of a recent study of constitutional courts in the new democracies of Asia has noted, judicial review is, on the whole, a good thing for democracy:

> 'Judicial review can deepen the constitutional order and contribute to the consolidation of the democratic system. By providing a non-partisan forum that issues authoritative pronouncements drawn from the fundamental text, judicial review encourages losers in the legislative process to bring their disputes to court, increasing the likelihood that they will remain loyal to the constitutional order. Judicial review provides an alternative channel for those out of power, be they aspiring democrats or erstwhile authoritarians.' (Ginsburg, 2003, p. 262)

There is no denying as well that courts can, in the right circumstances, perform a valuable role in mediating 'the inescapable tension between constitutionalism and democracy' – a tension which, if left unattended, could have particularly serious consequences in transitional societies, given the fragility of political structures in such societies (Issacharoff, 2003–4, 1893).

2. Judicial activism and the Fijian situation

No observer of Fijian law and politics will fail to notice two remarkable features which cut across ethnic lines. First, the generally high esteem in which the country's judiciary is held by both politicians and the people at large, and, secondly, a culture of popular respect for, and commitment to, constitutionalism, notwithstanding the unfortunate legacy of the two *coups d'etat* and their destabilising effects on the rule of law. Court judgments in Fiji have, on the whole, been respected and complied with, and unlike in many divided societies – and, it may be added, some stable democracies as well – judicial review has never been attacked as tainted by democratic illegitimacy. Both these facts bode well for the future of the rule of law and for judiciary-driven democratising reform. The widespread respect for constitutionalism and the rule of law is, arguably, one of the abiding legacies of two centuries of English common law.

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One of the reasons for the high respect accorded to the judiciary, in the opinion of this writer, is that many – and, in the case of the higher judiciary, often a majority – of the judges manning the Fijian courts are expatriates, i.e. judges brought in from other neighbouring Commonwealth countries, to serve either for a fixed number of years or on long tenure. This practice has meant, among other things, that post-independence Fiji has, for all the upheavals experienced by the country's other organs of state, had a judiciary which, besides providing a remarkable degree of stability and institutional continuity, has remained largely untouched by the shifting sands of political jostling and manoeuvring. The importance of this fact can never be overestimated, not least for the protection and preservation of rule of law values in times of transition from military rule to democratic government. The presence of foreign judges is also, it is submitted, one of the best guarantees for the future of accommodative politics in this conflict-ridden society.

Judges in the higher courts of Fiji are both *impartial* and *insulated from political pressures or inducements*. They also enjoy a wide scope of authority (jurisdiction), the origins of which can be traced back to colonial rule but whose legitimacy continues to be fully respected by all the major actors in post-independence Fiji. This stands in a sharp contrast to countries where judges may be independent – in the sense that they may disagree strongly with the views and/or political philosophy of the other branches of government and may even be willing to express such disagreement without fear or favour – but where their ability to influence is often circumscribed by strict limits being placed on the scope of their authority.[50]

The Fijian judges have shown their independence in practice by tackling difficult and sensitive issues without hesitation; they have fearlessly entered areas of contestation where judges in other comparable situations usually fear to tread. They have eschewed the tendency, prevalent among superior court judges in many jurisdictions (including some which enjoy a high degree of political stability), to hide behind the 'political question' doctrine when confronted with difficult choices. A shining example of the Fijian judges' uncompromising independence is provided by the series of decisions rendered in the immediate aftermath of 2000 *coup d'etat*; those decisions affirmed the primacy of the rule of law in the face of strong political pressure to recognise the actions of the constitutional usurpers and the martial law regime which followed.[51] This stands out in luminous contrast to the behaviour of national judiciaries in other Commonwealth law countries (composed of local, as opposed to 'foreign', judges) which have experienced unlawful overthrow of governments in the recent past.[52]

While formal safeguards for judicial independence (e.g. a fixed tenure or prohibitions against lowering of remuneration and arbitrary removal) can go a long way in providing protection against executive pressures or blandishments, they do not always prove to be a sufficient guarantor, in practice, of a robustly independent judiciary.[53] Viewed from that perspective, the arrangements in Fiji have much to commend themselves in that they presage a greater degree of judicial detachment

50 A stark example of such undermining of judicial independence is provided by the case of the Spanish judiciary under General Franco. While a number of judges serving in the Franco regime were manifestly independent of that regime (in the sense that they freely dissented from the policies and actions of the government), they could not exercise their independence in relation to many 'sensitive' matters – including aspects of the criminal justice system – as these were expressly excluded from their jurisdiction and entrusted to special tribunals manned by less independent judges: see Toharia (1975)).

51 E.g. *Prasad v. Republic of Fiji* [2001] NZAR 21; *Republic of Fiji v. Prasad* [2001] NZAR 385; *Jokapeci Koroi and others v. Commissioner of Inland Revenue and Attorney-General and Republic of Fiji* [2003] NZAR 18. For a detailed exegesis of the actions of the Fijian courts in relation to the 2000 coup, see Iyer (2005).

52 For an account of the behaviour of such judges, see Hatchard and Ogowewo (2003).

53 For example, a study carried out of the independence of Latin American courts in 1975 indicated that judges in Argentina had strong formal protections from interference by the government, but as is well known, the reality was quite different: see Clark (1975).

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than is usually the case with national courts. In terms of public perceptions, this factor is hugely important: it allows the populace to understand constitutional decisions as 'rest[ing] in some fixed and discernible understanding of 'law'' rather than as 'more mutable and politically motivated' (Friedman, 1998, p. 351).

Crucially, the presence of foreign judges ensures that the courts are not likely to split along ethnic lines. This is a danger which is ever-present in divided societies like Fiji, and one which needs to be avoided at all costs if public faith in the judicial process is to be preserved. The experience of Cyprus, which had a brief and rather ill-fated experiment in consociationalism, offers a salutary lesson in this respect.[54] There the Supreme Court, which had been composed of one Greek, one Turk and one external, neutral, judge, invariably tended to split along communal lines, which eroded its credibility and contributed to the failure of the power-sharing experiment.

Even in terms of the physical security of judges, the Fijian arrangements are noteworthy. Judges enjoy *de facto* a higher degree of protection than is normally accorded to them in jurisdictions where the judiciary is composed entirely of the country's own nationals. This is, again, a matter of some importance, especially in societies where arbitrary arrest and detention, not to mention extrajudicial violence, is rampant.[55] One consequence of bringing in judges from outside is that any attempt at intimidation or physical violence will be met with swift and vigorous protests, not to mention retaliatory action, from the governments of their countries of origin (which, in the case of Fiji, includes two powerful neighbours, Australia and New Zealand). Even the ever-present threat of international condemnation against interference with the physical integrity of foreign judges is often enough to put the host government on its best behaviour.

Yet another important consideration which conduces to judicial independence in Fiji is the fact that, unlike most transitional societies, the government has not been faced with the dilemma of how to deal with judges from the previous, authoritarian, regime, given that the composition of the higher judiciary has remained more or less constant over the years. This also means, in practice, that there will be none of the suspicion that usually attaches to the judiciary when an authoritarian regime gives way to a democratising one. Crucially, the Fijian system avoids the problem of 'regime relative' judicial independence identified by Owen Fiss not so long ago (Fiss, 1993). This means, among other things, that the country can save itself the bother, turmoil and agony of mass purges of 'tainted' judges which is often an unsavoury, but inevitable, feature of transitional societies.

There is a further aspect of the matter which is not without relevance, namely, the close connection between the existence of an independent judiciary and the smoothness of the transition to democracy. This has been characterised as 'one of the most significant quagmires' for the courts and has been explained thus by one analyst:

> '[W]hile the viability and stability of democratisation relies to a large extent on the independence of the courts, so also does the independence of the courts hinge quite a bit upon the stability of the transition.' (Larkins, 1996, p. 625)

In the case of Fiji, however, the fact that the judiciary is, as it were, insulated from the political tumult to a much higher degree than is usually the case, makes the process far less precarious. Foreign judges have also, arguably, been better able to institutionalise respect for the rule of law among the Fijian population over the years.

54 See reference to the Cyprus experience in Coughlan (2000), p. 225.

55 The experience of Argentina during that country's notorious 'dirty war' (1976–83) is an instance in point. A large number of judges and lawyers are known to have disappeared during this period, when the judiciary became the target of sustained political attacks – see Garro (1993).

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3. Judicial capacity to deliver change

As much as the factors discussed above suggest that judiciary can be an important agent for democratising change in Fiji, we must now return to the question posed earlier in this article about the *capacity* of the courts to deliver the necessary reforms. In particular, how far can the Fijian courts be relied upon to ensure that the power-sharing provisions of the 1997 Constitution are given effect to in both letter and spirit? The answer to that question must, alas, be: 'only up to a point'.

Of particular interest in the Fijian context is what may be called 'constitution-reinforcing' judicial review – a process which has been one of the defining characteristics of the country's evolution since the May 2000 disruption of democracy by George Speight and his supporters. In a series of headline-making interventions – the most notable being the landmark decision in *Prasad* referred to above, which decisively stopped the abrogation of the 1997 Constitution – the higher judiciary in Fiji has sought to protect democratic norms and affirm rule of law values with a vigour that is not usually seen in the developing world. Such activism can be commended on practical grounds, and it is consistent with the Dworkinian theory of 'result-driven' justification for judicial review in democracies (Dworkin, 1996, p. 34).

Viewed in that light, the actions of the Fijian judiciary in favour of consociational government do not raise any serious doctrinal dilemmas. By insisting, for example, that the Prime Minister and his government give effect to the constitutionally mandated scheme of power-sharing between the various parties that have met the threshold requirements of electoral success, the judges can hardly be accused of political meddling, much less of imposing values incompatible with their constitutional role. All they are doing is giving effect – as they are obliged to do under their oath of office – to the mandate of a validly enacted Constitution. In that sense, no issue of impropriety, much less illegality, can possibly arise.

Judicial intervention of this kind can also be justified by the 'participation-oriented, representation-reinforcing' role that the courts are seen legitimately to play by jurists such as John Hart Ely (see Ely, 1980, p. 87). In Ely's view, judges have a duty to, among other things, facilitate 'the achievement of a political process open to all on an equal basis and a consequent enforcement of the representative's duty of equal concern and respect to minorities and majorities alike' (Ely, 1980, p. 99). In the Fijian case, this would extend to, for example, the courts ensuring that the terms of the constitutional provisions on the sharing of cabinet positions in a multi-party government are not subverted through machinations by the dominant party to the detriment of its Indo-Fijian minority partner.

Judicial intervention in this area is not, however, entirely free of difficulties. A particularly intractable problem is that courts, by their very nature, lack the institutional *capacity* to oversee the implementation of power-sharing in spirit as well in letter. As was amply demonstrated by Fiji's first experiment in consociationalism, a determined dominant party can quite easily subvert the concept by going through the motions of complying with the law in purely formalistic terms while ignoring the substantive requirements, i.e. the spirit, of power-sharing.

It would be well nigh impossible in those circumstances for the judiciary to intervene. Not only are common law legal systems ill-equipped to engage in sustained long-term monitoring of the implementation of court decisions, but any attempt to enforce the spirit of such decisions by dictating the minutiae of policies to be followed by those charged with their implementation would invite fundamental criticism about the proper role of the judiciary in a liberal democracy. As even Ely has accepted, 'Judicial enquiries into the substantive merits of impugned political decisions should be avoided, primarily because they imply imposing the normative or prescriptive views of appointed and non-accountable judges on citizens' (Ely, 1980, p. 181). In the case of Fiji, for instance, it would have put an unbearable strain on the judiciary if it had attempted to micro-manage the allocation of portfolios to each of the parties that were entitled to seats in the Qarase multi-party cabinet.[56]

56 The Supreme Court of the United States was, for example, criticised for engaging in the 'judicialisation of politics' when it decided that George W. Bush, rather than Al Gore, was the winner of the 2000 presidential election in *Bush v. Gore* 531 U.S. 98 (2000) (see, e.g., Hirschl, 2004, p. 163).

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It is well to recognise, therefore, that courts are not best placed to deal with the minutiae of constitutional disputes. They can certainly provide guidance on the manner in which particular provisions of a Constitution can be given effect to, but they do not usually possess the requisite technical expertise to provide detailed prescriptions, or to weigh the relative merits of the range of options that may be available in a given context. This is particularly so in the cases involving issues of resource allocation or other economic decisions, but it is no less true in political disputes of more than ordinary complexity or sensitivity.

Secondly, even where the courts are able to offer prescriptive guidance, their power to enforce compliance may be severely restricted. This restriction may stem either from institutional constraints – the traditional lack of the power of the 'sword' or the 'purse' being the most frequently encountered problem – or from wily moves by intransigent politicians bent upon thwarting the desire of the courts to see justice done. In the Fijian example discussed above, the Qarase Government was able effectively to deny the Fijian Labour Party of any real power-sharing through a combination of protracted post-litigational negotiations and half-hearted implementation of the court judgments.

Thirdly, in dealing with such disputes, the courts also run the risk of 'entering the political thicket' – an act which is best avoided especially in fragile, transitional societies. The Supreme Court of India's warning in this regard, administered some years ago, is worth recalling. Commenting on the dangers of judges pronouncing on finely-balanced issues of political sensitivity, it noted that:

> 'The Court will thus travel unwittingly into the political arena and subject itself more readily to the charges of encroaching upon policy making. The "political thicket" objection sticks more easily in such circumstances.'[57]

More generally as well, it is doubtful whether even the best-intentioned court can, in the long run, continue to bear the heavy burden of righting political wrongs in the absence of judicially sustainable reasons and outside commonly understood judicial parameters. The Fijian courts have, it is submitted, by and large stayed within acceptable limits of judicial discretion in their treatment of the power-sharing problem, which probably explains why there has not been any major political backlash against the judiciary so far. But it also explains why the problem of power-sharing has continued to remain a running sore in the body politic of Fiji.

The courts would, however, have been subjected to more severe strains – and suffered a major dent to their credibility – had they been called upon to decide the legality of Prime Minister Qarase's decision to offer the Fijian Labour Party the derisory deal that he did offer them in 2004. That would have presented the judges with a truly difficult dilemma: if they were to hold that the decision was unsustainable, they would be accused by the politicians – and not without justification – of transgressing the acceptable bounds of judicial function; if, on the other hand, they turned down the challenge, they would have been condemned as impotent by those who have begun to look upon the judiciary as a bulwark against political chicanery and worse.

In the event, the decision of Mahendra Chaudhry to withdraw from the fray and accept an Oppositional role spared the Fijian courts that unpleasant fate. The entire episode does, however, underline the need for courts to be cautious in relation to disputes where a veneer of constitutionalism conceals intractable problems of a political nature. The dynamics have been best explained by Tom Ginsburg thus:

> 'Constitutional courts play games of power in legal arenas. Courts are empowered by constitutional designers and given tools to protect the constitutional bargain. But the subsequent choices courts make as they play their games can supplement or deplete their arsenals. Courts can challenge others or can seek powerful allies. They can cautiously accumulate policy gains in an

57 *S.R. Bommai v. Union of India* AIR 1994 SC 1918 at 1983.

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> incremental fashion or boldly battle for larger pieces of territory. They can choose their battles carefully, limiting conflicts to those they can win and thus making future threats credible; or they can blunder badly and provoke crippling counterattacks.' (Ginsburg, 2003, p. 247)

4. Future options

With the prospects of the consocialist experiment remaining as bleak as they are in Fiji, the time has probably come to explore other options for the future peaceful development of that country. As has been noted earlier, neither partition nor territorial federalism are viable alternatives. In the circumstances, it may be worth considering two other possibilities which offer some hopes for peaceful co-existence between the warring communities.

The first is a consociational solution, albeit one based on a different electoral approach. An ideal initial step would be for the existing system of separate electoral rolls – which, as noted earlier, have been the cause of much complaint since independence – to be scrapped in favour of a common roll. This will encourage voting across the ethnic divides and, in the long run, lead to greater co-operation between the races.

However, given that the move towards a common electoral roll may not be a politically realistic option, at least for the time being, it may be necessary to achieve the objective of genuine power-sharing by simply changing the existing *voting* system to another, lower threshold system based on proportional representation whilst still retaining the separate electoral rolls, and removing the automatic entitlement of Cabinet positions to parties achieving a pre-determined proportion of seats in Parliament. The advantage of this change will be that the rigidities of the current system may give way to a more flexible, consensual model of power-sharing. The rationale for this change is not difficult to see. Indeed, the best proof of the superiority of voluntary, as opposed to coercive, power-sharing is provided by the experience of post-apartheid South Africa where, as described above, the rigid consociational structures of the interim Constitution could not stand the pressures of competitive democratic politics.

The likely result of a move to a more flexible system will be the formation of natural, voluntary coalitions between parties that are able to agree on common policies and programmes for government and to work more harmoniously than is possible under a system of coercive power-sharing. The experience of such coalitions in Israel and Germany, for instance, indicates that, despite certain shortcomings, the system offers greater space for democracy than one based on compulsory power-sharing.

A second, less desirable but probably more viable, option is majority rule with strong minority protections. Although this may seem fraught with potential for hegemony by one group over another, that may not necessarily be the result. For one thing, neither of the major communities in Fiji has an overwhelming edge over the other in terms of numbers.[58] For another, a carefully designed bill of rights, coupled with strong enforcement mechanisms, including extensive judicial oversight, will mean that no community can ride roughshod over the basic rights of the other. The shining record of the Fijian judiciary in the cause of constitutionalism and the rule of law noted above augurs well for such a course of action.

These formal mechanisms should, ideally, be complemented by a revival of the informal pre-1987 system of balance in sectoral pre-eminence identified by the political scientist Ralph Premdas:

> 'The idea of balance has been embedded in Fiji's multi-ethnic politics by practices whereby sectoral pre-eminence was distributed as follows: (1) the Fijians controlled the government, in particular, the prime minister's office; (2) the Indians dominated the sugar industry and the

58 According to the latest population figures, the indigenous Fijians and Indo-Fijians constitute 54.3% and 38.1% of the population respectively.

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> intermediate-size businesses; and (3) the Europeans owned the very large businesses, such as banks, hotels, factories, etc. This distributive sectoral 'balance' was not a rigid formula for the sharing of power in all its details. Room existed for one ethnic group to penetrate and participate in another group's domain. For instance, the government used subsidies to encourage the entry of Fijians into businesses, while the prime minister, a Fijian, deliberately appointed several Indians to his cabinet. Fijians leased their land to Indians and others. In the end, this limited 'mix' had moderated the sharp edges and virtual monopoly rights of the 'balancing' concept.'
>
> (Premdas, 1993, pp. 256–7)

Whichever of the alternatives is pursued, it seems that the time has probably come for another round of constitutional re-engineering. The well-intentioned, but ultimately impractical, power-sharing arrangements in the 1997 Constitution do not appear likely to survive for much longer. A future constituent assembly will have to temper its idealism with a heavy dose of pragmatism and, in the words of Aristotle, 'have [its] eyes upon not only what is the absolute best, but also what is the best in relation to actual conditions' (Aristotle, 1948, p. 181).

VI. Conclusions

The merits of consociationalism as a solution to the problem of government in divided societies have been reasonably well demonstrated in a number of jurisdictions during the past 30 or so years, although evidence for the larger claims made by consociational theory remains still somewhat limited (Norris, 2005).[59] The idea of power-sharing held out the promise of a brighter future for Fiji, particularly in the wake of the widespread popular endorsement of the country's 1997 Constitution. That promise has, however, been belied by the actual experience of its working, and the consociational experiment has all but failed as a way of ensuring a stable and peaceful future for the Fijian people. The Fijian experience clearly raises questions about the democratic and practical viability of enforced power-sharing as a universal model.

Clearly, there are structural shortcomings within the consociational model which make it less suitable for some societies than others. Consociationalism appears to work better in moderately, rather than deeply, divided societies. There is also the problem of the tensions between consociationalism and democracy – tensions which were highlighted by Prime Minister Qarase in his oft-repeated lament that, despite winning a decisive electoral mandate from a significant proportion of the Fijian people, he was compelled to share power with parties that had diametrically opposed views from his own on major issues of national policy. Also, the model of coercive consociationalism adopted in Fiji, under which any party which had won over 10% of the parliamentary seats was automatically entitled to a place in the Cabinet, led to the Opposition being effectively eliminated, which is seen as unhealthy for any democracy. There is a risk as well that power-sharing would degenerate into tokenism by giving the appearance, but not the reality, of minority participation in governmental decision-making, when in fact all the shots are being called by the majority.

The Fijian experience with consociationalism also illustrates some weaknesses that are endemic in Fijian society. Chief among these is that real reconciliation has never been achieved between the indigenous population and the Indo-Fijians since the watershed events of 1987. This, coupled with a lack of the requisite political will, remains a major stumbling block to any durable settlement which can be relied upon to bring the two groups together. The Fijian experience illustrates as starkly as ever the limitations of institutional engineering. As Michael Pinto-Duschinsky has perceptively noted:

59 Pinpoint reference not available.

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> 'Institutional mechanisms are important but not sufficient to solve the problems of ethnically divided societies. If members (and leaders) of different communities are prepared for conciliation and compromise, it will probably be possible to agree on a suitable framework. If they are set on a collision course, even the cleverest institutional devices will be likely to fail.'
>
> (Pinto-Duschinksy, 1997, p. 97)

Given these realities, the time has probably come for Fijians to look at other options, including particularly a looser, more consensual form of power-sharing based on a modified voting system, or outright majoritarian rule with strong minority protections.

The Fijian judiciary, which has played a significant role in promoting power-sharing among the country's political parties, offers valuable lessons on the capacity of courts to manage and deliver change in transitional societies. There is still a big role for the courts in protecting and promoting democratic development in Fiji, especially in view of the renewed threats from Prime Minister Qarase and his colleagues in the indigenous Fijian establishment to dismantle the 1997 Constitution and to restore Fijian political domination as the central tenet of future relations between the two communities. The importance of continued vigilance and activism to ensure that the Indo-Fijians and other minorities enjoy a modicum of equality and basic human rights in such circumstances cannot be overstated. The courts cannot, of course, be realistically expected to veto any constitutional change, however radical, which is brought about by democratic means. They should, however, be able to continue to use judicial review as a handy weapon against executive or legislative oppression, as they have done in recent years, even seeking additional reinforcements where necessary from the growing body of international human rights norms.

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