

6

THE RIGHT TO BE OR BECOME A CITIZEN

THE SIGNIFICANCE OF CITIZENSHIP

6.1 In this chapter we review sections 22-30 of the 1990 Constitution which set out rules about who is, or may become, a citizen of Fiji, and about how Fiji citizenship may be lost on the acquisition of another. The submissions expressed concern about some aspects of these rules. We deal with them later in this chapter. They demonstrate the need for the rules about citizenship to be clear, to reflect people's expectations, to be technically sound and workable, and to contain sufficient flexibility so that anomalies can be put right fairly easily, while still safeguarding the citizenship rights people already have.

6.2 Citizens of the Republic of the Fiji Islands have rights not possessed by other people who happen to be in the country. We have already discussed the political rights of citizens. These include the right to vote and to be a candidate for election to Parliament, and the right to serve in the executive and judicial branches of government. We have also referred to the right of all citizens to make their permanent homes in Fiji. In Chapter 7 the components of that right are spelt out: they include the unqualified right to enter the country and remain in it.

6.3 Under international law a state is permitted, and may be required, to exercise rights and powers in respect of its citizens, usually referred to as its "nationals", even when they are outside the country. The international recognition of a person's nationality is the basis for the use of passports and the permission granted to their holders to enter other countries. A state also has the right to exercise diplomatic protection of its nationals when they are in the territory of another state. So Fiji citizenship or nationality remains important to people even when they are outside their own country, unless they acquire another country's citizenship.

6.4 The importance of a person's citizenship goes far beyond its tangible consequences. The citizens of a state are an essential component of the state itself. Citizenship has a highly symbolic significance, specially in a multi-ethnic country like the Republic of the Fiji Islands. We have recognised its unifying force already by recommending that all citizens should be entitled to describe themselves by a common name. We have also emphasised that the rights of all citizens must be equal.

Including rules about citizenship in the Constitution

6.5 Countries with written constitutions usually recognise both the symbolic and the practical importance of citizenship by including their basic citizenship rules in the constitution itself. In this way, people have a legal right to belong to the country that cannot be taken away by the ordinary law. On the other hand, aspects of citizenship law have to be relatively detailed and technical. But it would overload a constitution to include all matters of detail and would probably make the detailed rules too inflexible. Therefore, most countries provide in their constitutions that matters of detail, supplementing the basic citizenship rules in the constitution, can be dealt with in an Act of Parliament.

The international standards affecting the rules about citizenship

6.6 Under the international human rights instruments and other international instruments dealing specifically with nationality, everyone has a right to a nationality. The general principle is that a person who is closely connected with a particular state has the right to that state's nationality, unless he or she has a right to the nationality of some other state.

6.7 One purpose of this principle is to eliminate as far as possible cases of statelessness - where a person is not a citizen of any state. Statelessness arose on a large scale as a result of the transfers of territory during and after World War II. It can still arise in individual cases because states are free to base their citizenship laws on different principles. Where, in relation to a particular person, these principles conflict, that person can be left without the right to any nationality, unless care is taken to provide otherwise. The guidelines for avoiding statelessness are set out in the *Convention relating to the Status of Stateless Persons* (1954) and more particularly in the *Convention on the Reduction of Statelessness* (1961).

6.8 A second purpose of the international standards is to make sure that, on humanitarian grounds, a person has the right to acquire automatically, or to be granted, the nationality of the state with which he or she has a close connection, and not to be deprived of that nationality. The international standards also forbid the application of a state's nationality or citizenship laws on a discriminatory basis. These general principles are set out in the following instruments. Some of them combine the broad humanitarian considerations with the need to avoid statelessness.

6.9 Article 15 of the *Universal Declaration of Human Rights* provides:

1. Everyone has the right to a nationality.

2. No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.

Article 2 of the *Universal Declaration* provides that

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

6.10 These standards are reflected in the *International Convention on the Elimination of All Forms of Racial Discrimination* (1965), to which Fiji is a party. Article 5(d) obliges states parties

to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: ...

- (d) Other civil rights, in particular: ...
 - (iii) The right to nationality.

6.11 In the *International Covenant on Civil and Political Rights*, the focus of the right to nationality is on the child. Article 24 (3) provides:

Every child has the right to acquire a nationality.

Again, under Article 2, the right is to be accorded without distinction of any kind.

6.12 The rights of children are further spelled out in the *Convention of the Rights of the Child* to which Fiji is a party. Article 7 provides:

1. The child shall be registered immediately after birth and shall have the right from birth to a name, *the right to acquire a nationality* and, as far as possible, the right to know and be cared for by his or her parents.
2. States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, *in particular where the child would otherwise be stateless.*

Article 8 further provides -

1. States Parties undertake to respect the right of the child *to preserve his or her identity, including nationality*, name and family relations as recognised by law without unlawful interference.

2. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.

(Emphasis added.)

6.13 The *Convention on the Nationality of Married Women* (1957), to which Fiji is a party, was the first international instrument to address specifically the nationality problems that can arise for a married woman. The law of some countries used to provide that, on marriage, a foreign woman automatically acquired her husband's nationality. Sometimes she lost it again if the marriage was dissolved. If the husband changed his nationality during the marriage, his wife's nationality might change also. Articles 1 and 2 of the Convention recognise that a married woman should remain entitled to her nationality in her own right. They provide that a wife's nationality is not automatically changed either by her marriage or its dissolution, nor on the happening of any event during the marriage that changes her husband's nationality.

6.14 The Convention also recognised that, in many cases, a woman may wish to acquire her husband's nationality on marriage. The states parties undertook to allow foreign wives of their nationals to acquire their nationality either as of right or under privileged procedures, subject only to any limitations imposed in the interests of national security or public policy. This rule, to which Fiji gave effect in both the 1970 and 1990 Constitutions, has now been overtaken by a different approach that reflects a commitment to the equality of men and women and the greater mobility of both men and women between countries.

6.15 The most recent international instrument dealing with the citizenship rights of women is the *International Convention on the Elimination of All Forms of Discrimination Against Women* (1979). Fiji is a party, though with reservations, including one relevant to nationality, as explained below.

6.16 Under Article 2 of the Convention,

States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women, and, to this end, undertake:

- (a) *To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the realization of this principle; (emphasis added).*

Fiji is bound by this provision.

6.17 Article 9 sets out the specific standards applying to women in respect of nationality:

1. States Parties shall grant women equal rights with men to acquire, change or retain their nationality. They shall ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband.
2. States Parties shall grant women equal rights with men with respect to the nationality of their children.

Because the provisions of the 1990 Constitution about the citizenship of children born overseas to female Fiji citizens, and possibly those about the acquisition of citizenship by foreign wives, as distinct from foreign husbands, are inconsistent with Article 9, the Fiji Government made a blanket reservation to that article. Nevertheless the Convention as a whole must be regarded as setting out the current international standards.

6.18 In effect, it recognises that, if citizens of different countries marry, the couple may wish to make their home in either the husband's country or the wife's country. They should not be prevented from doing so by citizenship laws that make it harder for a husband to acquire his wife's nationality than a wife her husband's. If descent from a male Fiji citizen is relevant to the acquisition of citizenship, then descent from a female citizen should also be recognised on the same basis.

THE FRAMEWORK FOR CITIZENSHIP RULES

6.19 In reviewing sections 22-30 of the 1990 Constitution and in making recommendations about future constitutional arrangements governing citizenship, the Commission recognised the need to

- retain in the Constitution the basic rules about the citizenship of Fiji ;
- ensure that those basic rules are supplemented in a new Citizenship Act which is consistent with the new constitutional provisions and enters into force at the same time;
- take full account of the submissions on matters affecting citizenship; and
- apply the international standards.

A brief history of Fiji's citizenship laws

6.20 The needs listed above are based in part on the history of Fiji's constitutional and legislative provisions about citizenship. Before 1970, the people of Fiji were citizens of the United Kingdom and Colonies. The status of "citizen of Fiji" was first recognised by the 1970 Constitution which contained rules about who would become a Fiji citizen on 10 October 1970, or would have the right to become a citizen on application, subject to certain conditions. It also made rules about which persons born after 9 October 1970 would automatically become citizens of Fiji. The 1970 Constitution empowered Parliament to fill out its provisions by laws for various purposes, including the acquisition of Fiji citizenship by persons not entitled to it under the Constitution. Parliament duly enacted the Fiji Citizenship Act 1971.

6.21 The 1970 Constitution was abrogated with effect from 28 September 1987. To fill the gap in the law about citizenship, the military government, on 30 October 1987, promulgated the Fiji Citizenship Decree 1987. The Decree was deemed to have come into effect on 6 October 1987, the date on which Fiji was declared a republic. No provision was made for persons born between 28 September and 6 October 1987. The Decree did not state whether it wholly repealed the Fiji Citizenship Act 1971, or only those parts of it that were inconsistent with the Decree or relied for meaning on a provision of the 1970 Constitution, since abrogated.

6.22 The citizenship provisions of the 1990 Constitution, like the rest of the Constitution, came into force on 25 July 1990, but some of these provisions were backdated to 6 October 1987. However, the status of persons born between 28 September and 6 October 1987 was still not provided for. To the extent of any inconsistency, the 1990 provisions overruled both the 1971 Act and the 1987 Decree. The Court of Appeal has recently held that citizenship cannot be granted in a way not provided for in the Constitution. The Commission will address the specific problems arising from this situation in later sections of this chapter.

RECOMMENDATIONS

- 32. The basic rules about acquisition and loss of Fiji citizenship should continue to be provided for in the Constitution.**
- 33. The Constitution should provide explicitly for the making of laws by Parliament to give effect to the rules in the Constitution and to supplement them to the extent provided, in ways consistent with the Constitution.**

34. **A new and comprehensive Citizenship Act, consistent with the recommended new constitutional provisions, should be prepared at the same time as the constitutional provisions themselves, and should enter into force on the same date.**
35. **The new constitutional and statutory provisions should take full account of the international instruments designed to avoid statelessness and should be consistent with international human rights principles.**

REVIEWING THE 1990 PROVISIONS

6.23 Any new rules about Fiji citizenship need to provide for the following matters:

- the date on which the new rules take effect (“the effective date”);
- the fact that everyone who was a Fiji citizen immediately before the effective date remains a citizen on that date;
- which persons born after the effective date automatically become citizens at the date of birth;
- other rules governing the acquisition of citizenship;
- rules governing the loss of citizenship;
- transitional provisions to fill any existing gaps or take account of any anomalies.

We now make proposals about each of these matters.

RETENTION OF EXISTING CITIZENSHIP

6.24 The effective date of new constitutional rules about citizenship should be stated in the Constitution itself. Clearly, everyone already a citizen of Fiji immediately before the effective date should remain a citizen on that date, even if the rules about acquisition of citizenship are changed. That was the purpose of section 22 of the 1990 Constitution, even though its backdating to 6 October 1987 rather than 28 September 1987 failed to deal with some existing uncertainties and created new ones.

RECOMMENDATION

36. **Any new constitutional provisions about citizenship should provide that every person who was a citizen of Fiji immediately before their effective date continues to be a citizen.**

MANNER IN WHICH FIJI CITIZENSHIP MAY BE ACQUIRED

6.25 Section 23 of the 1990 Constitution provides that citizenship of Fiji may be acquired by birth, descent, naturalisation or registration. In itself, the section is a drafting device for easy reference in later sections to persons who became citizens in different ways, though this intention is imperfectly carried through. As an indication of how a person may become a citizen, the terminology itself is not self-explanatory.

6.26 Both a child who acquires citizenship by "birth" and one who acquires citizenship by "descent" automatically become citizens from the moment of birth, the difference being that, in the first case, the birth took place in Fiji and, in the second, the birth was outside Fiji to a father who is a Fiji citizen. The difference between "registration" and "naturalisation" is intended to convey the difference between a right to acquire citizenship, subject to fulfilment of certain conditions, and eligibility to benefit from a discretion to grant citizenship, applying the specified criteria. However, that distinction is not fully carried through in the substantive provisions themselves.

6.27 While the references to *how* a person may become a citizen have their uses, and will be maintained, we prefer to analyse the rules themselves by looking at *who* should become a citizen, by what means and with what consequences. The Commission leaves to the drafter the question of how effect should be given to its recommendations in the constitutional and statutory provisions themselves.

Persons born in Fiji after the effective date

6.28 Section 24 of the 1990 Constitution provides that a person born in Fiji after 6 October 1987 becomes a citizen only if that person's father or mother was a citizen at the time of the birth. In contrast, section 21 of the 1970 Constitution provided that everyone born in Fiji after 9 October 1970 would become a citizen, regardless of the citizenship of the parents. That rule was maintained by the 1987 Decree. The change of policy made by the 1990 Constitution presumably reflected the atmosphere of the times.

6.29 Because Fiji does not encourage large scale immigration, the change has probably had little practical effect. We received no submissions about it. Other countries, in the Pacific and elsewhere, apply the principle that their citizenship should be based on descent from a citizen, whether the child is born in the country or outside it.

6.30 However, most of those countries provide as an exception that a child born in their territory who would otherwise be stateless acquires the citizenship of the country at birth. Such cases are likely to be few in number, though important to those affected. Provision needs to be made for them.

6.31 The Commission considered whether, with an exception for children who would otherwise be stateless, it was desirable to maintain the provision restricting citizenship to children born in Fiji of a father or mother who was a citizen at the time of birth. It concluded that such a rule was not in the best interests of Fiji. The cases in which neither parent of a child born in Fiji has a real connection with the country are likely to be so few that they should not be regarded as a determining factor.

6.32 On the other hand, Fiji does grant the right to enter, reside and work in the country to the citizens of other countries who have a contribution to make. Some stay for long periods, even a lifetime, without becoming citizens. Their children born and raised in Fiji may know no other home. They are likely to be educated in Fiji (and often speak more than one of its languages). Even if their parents eventually leave, they may feel that they have permanent roots in Fiji. Their continuing presence is likely to be an asset.

6.33 We therefore consider that all children born in Fiji, except the children of diplomats, should automatically become citizens at birth. That rule will prevent any child born in Fiji from being stateless. It will also give citizenship to a small group with a contribution to make to Fiji. If a child born to foreign parents also has another citizenship, then, as we explain below, he or she will have to choose, at age 21, between that citizenship and Fiji citizenship. There is no question of opening the floodgates to citizens who do not want to maintain their connection with the country.

6.34 The provision in section 21 of the 1970 Constitution excluding from the general rule the children of male enemy aliens born in a place under occupation by the enemy should not be re-enacted. If that unlikely situation were ever to become a threat, it should be dealt with by emergency legislation made as recommended in Chapter 19. As required by Article 12 of the Convention on the Rights of the Child and as provided by section 2(2)(e) of the Fiji Citizenship Act 1971, a child found in Fiji should be regarded as having been born in Fiji in the absence of proof to the contrary.

Persons born outside Fiji after the effective date

6.35 Under section 25 of the 1990 Constitution, a person born outside Fiji after 6 October 1987 becomes a Fiji citizen if, at the time of the birth, the child's father was a Fiji citizen. If the child's parents are not married, then, under section 30(1), the child becomes a citizen if the mother was a citizen. The Commission received a number of submissions, particularly from women's groups, that this rule discriminates against women who are Fiji citizens, married to non-citizens, and give birth to a child overseas.

6.36 The rule is contrary to Article 9(2) of the *Convention on the Elimination of All Forms of Discrimination Against Women* which requires women to be granted equal rights with men with respect to the nationality of their children. Any departure from that principle inflicts hardship on the married female Fiji citizens involved. There is no reason why they should be treated less favourably than unmarried female Fiji citizens who give birth overseas.

6.37 In considering how effect should be given to this policy approach, the Commission evaluated two options. One was that every child born outside Fiji after the effective date should be a Fiji citizen at the date of birth, if, at that date, either parent was a citizen of Fiji. The other was that such a child should not become a citizen automatically but should be entitled to citizenship by registration. We consider that the second option is the better one. The right to citizenship by registration of a child born overseas to a Fiji citizen should remain open during that child's lifetime, subject to the rules for the avoidance of multiple citizenship. But it will require a conscious decision by the parent, or after reaching the age of 21, the child, to maintain the connection with Fiji.

6.38 A child born overseas of a parent who is a Fiji citizen is likely also to acquire at birth the citizenship of the country of birth. If so (as further discussed below) he or she will have to choose, at age 21, between Fiji citizenship and that other citizenship. So again, in providing that the child of any Fiji citizen born overseas should have the right to citizenship by registration, there is no question of opening up Fiji citizenship to persons who do not wish to maintain their connection with Fiji. The fact that there will be a record of children born overseas who have been registered as citizens will make it easier to determine whether or not they have renounced their other citizenships in due time, and thus continue to be Fiji citizens.

RECOMMENDATIONS

37. **The Constitution should provide that every child born in Fiji after the effective date is a citizen of Fiji at the date of birth, unless, at that date, one of the child's parents possesses diplomatic immunity and neither parent is a citizen of Fiji.**
38. **A child found in Fiji should be taken as having been born in Fiji, in the absence of proof to the contrary.**
39. **The Constitution should provide that every child born outside Fiji after the effective date has the right to become a citizen of Fiji by registration, if, at that date, either parent was a citizen of Fiji.**

THE AVOIDANCE OF MULTIPLE CITIZENSHIPS

6.39 Section 28 of the 1990 Constitution implements a clear policy that an adult should not be permitted to remain a Fiji citizen if he or she retains or acquires the citizenship of another state. It also continues the policy under the 1970 Constitution and the Citizenship Act 1971 that a person's registration or naturalisation as a Fiji citizen is of no effect unless that person renounces his or her existing citizenship.

6.40 Generally speaking, the submissions supported these policies, although some people thought them too restrictive in a world that was becoming more internationalised, with opportunities for Fiji citizens to work and reside in a variety of countries. Some people also thought it anomalous that indigenous Fijians who acquired another citizenship should cease to be Fiji citizens, although remaining registered in the *Vola ni Kawa Bula*.

6.41 The Commission considers that the Constitution should continue to be based on the principle that an adult citizen of Fiji should forego the right to citizenship if he or she *voluntarily* retains or acquires another. The acquisition of another citizenship by operation of law, through marriage or a change in the law of another country with which a person has a connection, should not deprive a person of his or her Fijian citizenship unless the person fails to renounce the other citizenship within 12 months of becoming aware of it, or of being required to do so by the Minister responsible for citizenship, whichever first occurs.

6.42 The 1990 Constitution contains provisions about the automatic loss of Fiji citizenship by operation of law, renunciation of Fiji citizenship and deprivation of Fiji citizenship, as well as provisions about renunciation of a foreign citizenship

in order to become registered or naturalised as a Fijian citizen. At the technical level, these provisions are far from clear. They should be clarified on a principled and workable basis. (Those about replacing the difficult concepts of “residence” or “continuous residence” in Fiji with references to “presence” in Fiji are expanded below. They affect all adult persons qualifying for citizenship either by registration or by naturalisation.)

6.43 One matter, in particular, needs to be provided for. Incorporating provisions of the Fiji Citizenship Act 1971, section 28(2) of the 1990 Constitution provides that a person’s registration or naturalisation as a citizen of Fiji is conditional on the effective renunciation of that person’s foreign citizenship within 12 months from the date of the registration or naturalisation. The rule seeks to take account of the fact that, to avoid statelessness, the laws of other countries usually prevent their citizens from renouncing that citizenship unless they have *already* become a citizen of another country. It should be clarified by providing that Fiji citizenship can be granted by registration or naturalisation before renunciation of other citizenships, but that the grant of citizenship will be forfeited, unless other citizenships are renounced within the specified period.

6.44 The underlying intention of section 28 is clear. The adult citizen of another country who wishes to be registered or naturalised as a citizen of Fiji must be prepared to renounce all other citizenships. The law of some countries, however, does not permit their citizens to renounce their citizenship. In such a case, a citizen of the country concerned who wishes to retain or acquire Fiji citizenship should be permitted to do so if he or she declares an intention not to exercise the benefits of that other citizenship. The Constitution should provide for the making of such a declaration under conditions provided by law.

A right to resume the citizenship of Fiji

6.45 The Commission considers that a former citizen of Fiji should have a constitutional right to resume his or her citizenship on certain conditions. Most persons who renounce their citizenship of Fiji, or lose it automatically, are likely to have done so, not only because they possessed or acquired another citizenship, but also because they were living outside Fiji. We consider that they should be able to resume their citizenship if they effectively demonstrate a desire to return to their former country. We therefore propose that former citizens should have the right to be registered as citizens of Fiji if they have been present in Fiji for 3 out of the 5 years immediately preceding the date of application for registration.

6.46 The three year period should not include time spent in Fiji before the loss or renunciation of Fiji citizenship. Former citizens who have not left Fiji but have lost their citizenship through their own inaction will have to spend 3 more years in the country to acquire the right to have their citizenship restored. This could, for example, be the situation of young adults who do not realise that, at birth, they acquired a second citizenship and do not renounce it in due time.

6.47 To permit former citizens no longer living in Fiji to take advantage of the right just proposed, they should also have a constitutional right to enter Fiji and to reside here. Already, under the Immigration Act, a former citizen *born in Fiji* has a statutory right to enter and reside in the country. Our proposal involves a constitutional extension of that right, so that *all* former citizens will be able to fulfil the requirement for an aggregate period of physical presence in Fiji before registration as a citizen. As well as being justified on humanitarian grounds, such a right is likely to bring back to Fiji some otherwise lost sources of expertise and potential capital investment.

Concern about the loss of citizenship by indigenous Fijians

6.48 We believe that a clear right for former citizens to resume Fiji citizenship after a qualifying period, and in the meantime to enter and reside in Fiji, would do much to ease the concerns of those who felt that indigenous Fijians, specially if registered in the Vola ni Kawa Bula, should not lose their Fijian citizenship on acquiring the citizenship of another country, or, if they did lose it, should be able to regain it promptly on renouncing the other citizenship.

6.49 These concerns must be examined in the context of changes of lifestyle that will continue to take some indigenous Fijians away from their country of origin. Inevitably, some will settle permanently in their adopted country and acquire its citizenship. Although they will remain registered in the Vola ni Kawa Bula, they will no longer have a need or justification for exercising rights as citizens.

6.50 In view of the widespread support for the view that multiple citizenship should not be permitted, we believe it would be wrong on grounds of policy as well as discrimination, to provide that indigenous Fijians, or persons registered in the Vola ni Kawa Bula, should be permitted to acquire or retain the citizenship of another country while still retaining their Fiji citizenship. For the same reasons, we also believe it would be wrong to give indigenous Fijians or persons registered in the Vola ni Kawa Bula preferential treatment in regaining Fiji citizenship.

6.51 If it is well understood that no adult Fiji citizen is entitled to multiple citizenship, few will voluntarily forego their Fiji citizenship without careful thought. If their circumstances should change, those who have lost their citizenship will be entitled to regain it after a qualifying period during which they will have a constitutional right to enter Fiji, and to live and work here.

RECOMMENDATIONS

40. **The Constitution should continue to provide that an adult citizen of Fiji automatically loses that citizenship if he or she voluntarily acquires another citizenship, or voluntarily retains another citizenship in the circumstances referred to in Recommendations 11 or 12.**
41. **An adult person's involuntary acquisition of another citizenship, through marriage or a change in the law of another country with which the person has a connection, should not deprive the person of his or her Fiji citizenship, unless the person fails to renounce the other citizenship within 12 months of becoming aware of it, or of being required to renounce it by the Minister responsible for citizenship, whichever first occurs.**
42. **A child who, at birth, or by the action of a parent or guardian before he or she attained the age of 21, acquired both Fiji citizenship and the citizenship of one or more other countries, should automatically lose his or her Fiji citizenship on attaining the age of 22, if he or she has not, after attaining the age of 21 and before attaining the age of 22, renounced all other citizenships.**
43. **The procedures for the grant of Fiji citizenship by registration or naturalisation should continue to require an adult applicant to renounce the applicant's existing citizenships, but it should be recognised that, under the law of the country concerned, the renunciation of a foreign citizenship may be permitted only after the actual grant of Fiji citizenship.**
44. **If, for the purpose of retaining or acquiring Fiji citizenship, a person is unable effectively to renounce the citizenship of another country under its law, the Constitution should permit that person to make a declaration of intention not to exercise any of the benefits of that citizenship under conditions provided by law.**

45. **In view of the recommendations already made for the loss, by operation of the Constitution, of the Fiji citizenship of an adult person who remains or becomes a citizen of another country, it should not be possible, on that ground alone, to deprive such a person of his or her citizenship of Fiji.**
46. **The Constitution should entitle an adult person who was formerly a citizen of Fiji to be registered as a citizen if he or she has been lawfully present in Fiji for an aggregate of 3 out of the 5 years immediately preceding the application for registration.**
47. **A former citizen should have a constitutional right to enter Fiji and reside here, subject to compliance with the conditions applicable to other persons granted the right to enter and reside in Fiji.**
48. **A person should be permitted to renounce his or her Fiji citizenship only if he or she has attained the age of 21 years, and is a citizen of another country from the date of birth or has been granted the citizenship of another country by registration or naturalisation.**

FOREIGN SPOUSES OF FIJI CITIZENS

6.52 Section 26(1) and (2) of the 1990 Constitution permit a woman who is or has been married to a citizen of Fiji to be registered as a citizen. As has been seen, Fiji was required by its adherence to the *Convention on the Nationality of Married Women* to allow a foreign woman who is or has been married to a Fiji citizen to become a citizen herself on a preferential basis.

6.53 The Commission received submissions from a number of people that the preferential treatment should be extended to the foreign husbands of women who are Fiji citizens. Such a change would be within the broad requirements of Article 2(a) of the *Convention on the Elimination of All Forms of Discrimination Against Women* which requires states parties to embody the principle of the equality of men and women in their national constitutions. However, some submissions opposed any such change, mainly on the ground that a woman who marries a foreigner is expected to make her home in her husband's country and perhaps to acquire his nationality.

6.54 The Commission considers that this expectation is no longer well-founded, at least as a universal rule. The women of Fiji now have many

opportunities of meeting and marrying foreign men. They should have the opportunity of making their home in Fiji. Otherwise Fiji is likely to be deprived of valuable sources of trained skills, usually acquired at Fiji's expense. We consider that all foreign spouses of Fiji citizens, husbands as well as wives, should be treated on an equal basis.

6.55 To allay any concerns, a spouse should spend a reasonable time in Fiji before becoming eligible for registration as a citizen. We think this period should be 3 years out of the 5 years immediately preceding the application for registration. Again, the three year period should not include time spent in Fiji before the marriage. During the period after the marriage and before registration as a citizen, the spouse should have a constitutional right to enter and reside in Fiji, subject to compliance with the ordinary conditions applying to other persons granted those rights.

6.56 As permitted by the *Convention on the Nationality of Married Women*, the registration of foreign wives as citizens has always been subject to such exceptions or qualifications as may be prescribed in the interests of national security or public policy. The requirement that a foreign spouse seeking registration as a citizen must renounce all foreign citizenships is within the permitted public policy exception and should remain. The Constitution should permit other conditions to be prescribed by Act in the interests of national security or public policy. For example, the foreign spouse should be required to produce evidence that the marriage is not one entered into solely for the purpose of obtaining Fiji citizenship.

6.57 The right to be registered as a Fiji citizen of any woman who is *or has been married* to a citizen of Fiji includes a woman married to a man who died before she was registered as a citizen or a woman who married to a Fiji citizen from whom she has since been divorced. As required by the *Convention on the Nationality of Married Women*, this approach should remain, though it should now apply to a former husband as well as a former wife. Even after death or divorce, a spouse may have good reason for seeking to become a citizen, especially if there are children of the marriage and the family home is in Fiji. As already discussed, the requirement to renounce other citizenships will provide a safeguard against abuse.

RECOMMENDATIONS

- 49. The Constitution should entitle a citizen of another country who is or has been married to a Fiji citizen to be registered as**

a citizen, if he or she has been lawfully present in Fiji for an aggregate of 3 out of the 5 years immediately preceding the application for registration and complies with other conditions imposed by the Constitution or by Act in the interests of national security or public policy.

- 50. The foreign wife or husband of a Fiji citizen should have a constitutional right to enter and reside in Fiji, subject to compliance with the conditions applicable to other persons granted the right to enter, reside and work in Fiji.**

OTHER PERSONS WHO SHOULD BE ENTITLED TO CITIZENSHIP BY REGISTRATION

Adopted children

6.58 Under the proviso to section 26(2) of the 1990 Constitution, a foreign child adopted by a citizen of Fiji has the right to registration as a citizen. The Constitution should maintain that right. It should apply to a child adopted either under the law of Fiji or under the law of another country prescribed by law. That requirement gives the Fiji authorities the opportunity to be satisfied that the foreign adoption is valid and took place under conditions safeguarding the rights of the child and its natural parents.

6.59 To avoid abuses, the right should be limited to children who were under 18 years of age when adopted, but the right itself should be of indefinite duration. If the adopted child is over the age of 21 at the date of the application for registration, the rules requiring a period of physical presence in Fiji and renunciation of other citizenships should apply. An adopted child registered as a Fiji citizen before attaining the age of 21 would lose that citizenship unless he or she renounces all other citizenships before attaining the age of 22.

Natural children of a Fiji citizen

6.60 The right to registration as a citizen should extend to the natural-born children of a Fiji citizen who are not already citizens of Fiji. The rule to that effect in the Fiji Citizenship Act 1971 has been implicitly repealed by the Fiji Citizenship Decree 1987 and the 1990 Constitution, although the provision for the registration of the grandchildren of Fiji citizens in section 26(2)(b) of the 1990 Constitution covers some of the ground. That provision should be consequentially repealed.

6.61 The beneficiaries of the proposed new right would include:

- children born outside Fiji before the effective date to a married woman who was a Fiji citizen at the date of the birth;
- children born outside Fiji before 6 October 1987 to a father who was a Fiji citizen at the date of the birth but who was himself born outside Fiji after 10 October 1970 (this category would be very small);
- the children of a person registered or naturalised as a citizen of Fiji at any time, whether before or after the effective date.

6.62 The essential purpose is to recognise that a Fiji citizen may have natural-born children who are not themselves citizens. These children should have a right to be registered as citizens on the initiative of their parents, or if, after becoming adults, they themselves so desire. In the last-mentioned case their right to registration should arise only if they were under the age of 21 at the time when their parent became a Fiji citizen. They should also be required to comply with the conditions applicable to the registration of other adult persons as citizens.

RECOMMENDATIONS

51. **The Constitution should entitle a child adopted by a Fiji citizen when the child was under the age of 19 years to be registered as a citizen. Provision for the recognition in Fiji of an adoption under foreign law should be made by Act.**
52. **The Constitution should entitle a natural-born child of a Fiji citizen to be registered as a citizen if the child was under 21 when the parent first became a citizen.**
53. **The Constitution should provide that applications for registration under these provisions may be made by an adoptive or natural parent or a legal guardian, if the child is under 21 at the time of the application. If the child is 21 or over, he or she may make the application but will be entitled to registration only if he or she has been lawfully present in Fiji for an aggregate of 3 out of the 5 years immediately preceding the date of the application. Before registration as a citizen, the adopted or natural-born child of a Fiji citizen should have a constitutional right to enter and reside in Fiji, subject to compliance with the conditions applicable to other persons granted the same rights.**

THE ACQUISITION OF CITIZENSHIP BY NATURALISATION

6.63 Section 27 of the 1990 Constitution provides the current basis for the acquisition of Fiji citizenship by naturalisation. As some of the submissions indicated, the grant of citizenship by naturalisation is closely linked with immigration policy. The most usual ground for a person's naturalisation is that the person has been allowed to settle in the country and make a permanent home there. Once new settlers have demonstrated an intention to stay indefinitely, and a capacity to become good, law-abiding citizens, it is in the interests both of the country of settlement and the settlers themselves that they should be granted citizenship.

6.64 As we have indicated, the difference between the grant of citizenship by registration and by naturalisation is that registration is a right: a person who fulfils the specified conditions is entitled to be registered. The duty to register can if necessary be enforced in the courts. Naturalisation is not a right. Nevertheless, states normally set out in their constitutions or other law the criteria by reference to which naturalisation will be granted. Persons settling in a country have a legitimate expectation that, if they meet the criteria, they will be granted naturalisation.

6.65 Some criteria will be factual - for example how long the person has lived in the country. Some may involve the exercise of judgment - for example, to quote from section 27(2), whether the person is "of good character" or whether he or she "has been assimilated into the way of life of the people of Fiji". Legally, naturalisation involves the exercise of a discretion. At present, section 27 of the 1990 Constitution vests that discretion in the Prime Minister.

6.66 As will be seen in Chapter 6, such a discretion must not be exercised on a discriminatory basis. In any event, its exercise is subject to the supervision of the courts by the process known as judicial review. A person refused naturalisation would be able to claim that no reasonable Prime Minister, applying the criteria set out in section 27, could, in the circumstances, have decided that the criteria had not been met. It follows that the criteria for naturalisation should be clear and not too subjective.

6.67 The Commission considers that provision for the grant of citizenship by naturalisation should continue to be made in the Constitution. The Constitution should also specify the period a foreign citizen needs to have spent in Fiji before becoming eligible for naturalisation. He or she should be required to have been lawfully present in Fiji for an aggregate period of five out of the ten years

immediately preceding the application for naturalisation. We explain below the reasons for requiring “presence” rather than “residence” in Fiji, and discuss the circumstances in which a person’s physical presence in the country should not count towards the qualifying period. The Constitution should permit other reasonable criteria for the grant of citizenship by naturalisation to be specified by Act.

The link between immigration and naturalisation

6.68 At the time of the public hearings, the Government was apparently considering a scheme for large-scale immigration from Hong Kong. A number of submissions expressed opposition to the proposal, which may no longer be under active consideration. Immigration is not a matter dealt with in the Constitution. The Commission considers that it should remain a matter of government policy within the framework of the Immigration Act. However, it recognises that the crucial decisions affecting the question of who will eventually qualify for citizenship of Fiji by naturalisation are those made on applications for permits to work in Fiji, as well as to enter and reside here. The few difficult decisions that need to be made on applications for refugee status will have similar consequences.

6.69 The Commission considers that the Constitution should not specify the identity of the Minister responsible for either citizenship or immigration. Those responsibilities should flow in the normal way from the responsibility for administering a new Citizenship Act on the one hand and the Immigration Act on the other.

6.70 However, because of the close link between immigration and the grant of citizenship by naturalisation, the Commission considers that the Minister responsible for immigration should be assisted by an advisory body. All applications for the grant or extension of work permits and for refugee status, except those by a person who has a constitutional right to enter and reside in Fiji, should be referred to the advisory body for a recommendation. The Minister should also be entitled to seek the input of the advisory body on immigration policy.

6.71 The advisory body could be set up either by the Immigration Act or by administrative action. The Minister should not be bound to accept its recommendation but should disclose in his or her annual report to Parliament the number of cases in which the recommendation was not followed. The setting up of an advisory body should not affect the existing arrangements under which the immigration authorities consult with the relevant departments, and through them

with the private sector, about the specialised skills required in Fiji and whether there is a need to supplement them from overseas. Careful decisions made in these ways about the grant or extension of a person's work permits should ensure that there will be little difficulty, when the time comes, in making the decision that the person should be granted naturalisation.

6.72 The Commission's recommendations about the acquisition of citizenship, including those made below for transitional remedial measures, make it unlikely that there will be any cases where a person who has a genuine connection with Fiji is not entitled to, or eligible for, citizenship. It considers therefore that the provisions made in the Constitution for the grant of citizenship by registration or naturalisation should be exhaustive. Parliament should not be permitted to confer a right to citizenship by Act, either by direct grant or by the exercise of a discretion. Any provision for such a purpose would be open to abuse.

RECOMMENDATIONS

54. **The Constitution should continue to make provision for the grant of citizenship by naturalisation.**
55. **It should specify that, to become eligible for naturalisation, a foreign citizen needs to have been lawfully present in Fiji for an aggregate period of five out of the ten years immediately preceding the application for naturalisation.**
56. **The Constitution should not specify which Minister should be responsible for decisions about citizenship. That should flow from the assigned responsibility for administration of the new citizenship legislation.**
57. **Immigration should not be dealt with in the Constitution but should remain a matter of government policy within the framework of the Immigration Act. In view, however, of the link between immigration policy and grants or extensions of work permits or refugee status, and a foreign citizen's eventual eligibility for citizenship by naturalisation, the Minister responsible for immigration should be assisted in these matters by an advisory body. The body could be set up under the Immigration Act or by administrative action. The Minister should not be bound to accept its recommendations, but his or her annual report to Parliament should disclose the number of cases in which its recommendations were not followed. The existing arrangements for consultation about whether people with special skills are needed from overseas should be retained.**

- 58. The provisions of the Constitution about the ways in which Fiji citizenship can be acquired should be exhaustive. It should not permit Parliament to confer a right to citizenship by Act, either by direct grant or by the exercise of a discretion.**

MATTERS INCIDENTAL TO REGISTRATION OR NATURALISATION AS A CITIZEN

6.73 We have already mentioned several matters of detail incidental to registration or naturalisation as a citizen. For convenience, we gather them together in this section. First, to avoid overloading the Constitution with detail, it should specify only the main conditions for registration and the main criteria for naturalisation. It should, however, permit the imposition, by Act, of other reasonable conditions or criteria. The additional conditions or criteria should not, of course, be so onerous as to negate a person's right to registration as a citizen or eligibility for naturalisation. If necessary, the reasonableness of particular conditions could be called in question in the courts.

6.74 Secondly, we have suggested that a person should have been "lawfully present in Fiji" for a specified aggregate period, as a condition precedent to registration as a citizen in certain cases, and also as the main criterion for naturalisation. We have done so because the existing references in section 27(2)(g) of the 1990 Constitution to a person who has "resided", "resided for a continuous period" or "resided continuously for a period" in Fiji are problematic. A person may in fact maintain a residence in more than one country. A person may also leave his or her country of residence temporarily, for purposes including study, business, family reunification or holiday. It is not clear whether the continuity of a period of residence is broken by such a temporary absence.

6.75 The modern approach to demonstrating that a person has such a real and lasting connection with a country as to justify the grant of its citizenship is to look at the aggregate period during which the person has been physically present in the country, during a longer period of elapsed time immediately before the date of the application for citizenship. If the person has been out of the country, periods of absence can be determined by looking at his or her passport. The aggregate period during which he or she was present in the country can easily be calculated by taking the period of elapsed time and deducting periods of absence.

6.76 These days, it is normal for people to come and go from the country of which they are, or would like to become, citizens. If, as the qualification for registration as a citizen, a person shows that he or she was physically present in

Fiji for a total period of 3 years in the immediately preceding 5 years, that will be a clear indication that the person has a real connection with Fiji. The same is true of a person who qualifies for naturalisation as a citizen by spending 5 out of the immediately preceding 10 years in Fiji.

6.77 It follows that, once registered or naturalised as a citizen, a person should not be liable to lose that citizenship however long he or she subsequently spends out of Fiji. Apart from cutting across a citizen's right to leave or return to Fiji, persons registered or naturalised as citizens will have no other citizenship. They should not be deprived of their citizenship if that would make them stateless. The automatic loss of Fiji citizenship on the acquisition of another is all that is needed to ensure that people who have lost all real connection with Fiji will no longer remain citizens.

6.78 The Constitution should, however, permit some further inquiry into the reasons for a person's presence in the country in order to see whether they should count for the purposes of entitlement to, or eligibility for, citizenship. It should allow appropriate provisions for this purpose to be put in place by Act. A period in prison should presumably be excluded, if indeed the commission of an offence punishable by imprisonment, or imprisonment for more than a specified period, is not in itself a bar to the grant of citizenship. A period spent as a student should also be excluded, at least for the purposes of eligibility for naturalisation. As a country with a regional university, Fiji could not afford to allow foreign students to qualify for its citizenship by virtue of a period of study in the country, and their home countries could not afford to lose them so easily.

RECOMMENDATIONS

59. **The Constitution should specify only the main conditions for registration as a citizen and criteria for naturalisation. It should, however, permit other reasonable conditions or criteria to be imposed by Act.**
60. **In those cases where the Constitution requires a foreign citizen to spend an aggregate period of time in Fiji before becoming entitled to, or eligible for, citizenship, it should permit provision to be made by Act excluding periods during which the person was present in Fiji for reasons that conflict with the purpose of imposing the qualifying period in that case.**

DEPRIVATION OF CITIZENSHIP

6.79 The brief statements in the Universal Declaration of Human Rights that “everyone has the right to a nationality” and that “no one shall be arbitrarily deprived of his nationality” make the point that, once conferred, citizenship gives rise to inalienable rights. Therefore, there is no question of depriving a citizen of his or her citizenship even for the gravest of crimes involving disloyalty to the state.

6.80 Under the 1970 Constitution and the Fiji Citizenship Act 1971, there was some departure from this principle in the case of persons who acquired citizenship by registration or naturalisation. However, the provisions had no practical effect because the Act provided that such a person could not be deprived of citizenship on grounds of disloyalty or residence for a continuous period of 5 years if he or she would thereby become stateless, and renunciation of foreign citizenships was a requirement for registration or naturalisation as a citizen.

6.81 Because those adult citizens who retain or acquire foreign citizenship are automatically deprived of their Fiji citizenship, there is no reason to confer a power to deprive any person of Fiji citizenship solely on the ground that he or she possesses another citizenship. The broad power conferred on Parliament by section 29(c) of the 1990 Constitution should therefore be repealed.

6.82 The only statutory power required to avoid the exercise of multiple citizenships relates to the few cases in which a citizen of another country cannot, under its law, renounce its citizenship. We have recommended that, in such a case, the person may instead declare his or her intention not to exercise any of the benefits of that citizenship. Some sanction for the observance of such a declaration is required. The Constitution should permit Parliament, by Act, to provide that the Minister may deprive of Fiji citizenship a person who has made such a declaration, if satisfied that he or she has exercised a right pertaining exclusively to the citizens of the country concerned.

6.83 The only other power to deprive a person of his or her Fiji citizenship that Parliament should be able to confer, concerns the situation where a person is found to have obtained citizenship by registration or naturalisation by means of fraud, false representation or the concealment of any material fact. A power to deprive a person of Fiji citizenship in these circumstances is needed as a deterrent. It may need to be exercised even if the person concerned would thereby become stateless.

6.84 The power to deprive a person of Fiji citizenship in either of the circumstances mentioned should be exercised only in accordance with procedures that are in conformity with the rules of natural justice. That is the purpose of section 12(5)-(9) of the Fiji Citizenship Act 1971. The committee of inquiry which the Minister may be required to establish under that section is a quasi-judicial body quite different in character from the advisory body that we have recommended to assist the Minister responsible for immigration in making decisions about the grant of the right of permits to work in Fiji.

RECOMMENDATIONS

61. **The Constitution should provide that no person may be deprived of his or her Fiji citizenship otherwise than by operation of the Constitution itself, for the avoidance of multiple citizenship, or under a provision made by Act providing for deprivation on the grounds referred to in Recommendation 62.**
62. **The Constitution should authorise Parliament to provide by Act for a person to be deprived of citizenship in the following cases only:**
 - (a) **where citizenship by registration or naturalisation was obtained by fraud, false representation or the concealment of any material fact; or**
 - (b) **where, as a condition of retaining or acquiring Fiji citizenship, a person, who is a citizen of another country and is unable under its law to renounce its citizenship, has declared an intention not to exercise the benefits of that citizenship, but nevertheless exercises a right pertaining exclusively to the citizens of that country.**
63. **The Constitution should provide that an Act conferring power to deprive a person of his or her Fiji citizenship in the circumstances referred to in Recommendation 62 must provide for that power to be exercised through procedures which are in conformity with the rules of natural justice.**

TRANSITIONAL PROVISIONS

6.85 Earlier in this chapter, we outlined the history of Fiji's constitutional and legislative provisions about citizenship, showing how the abrogation of the 1970 Constitution, the promulgation of the Fiji Citizenship Decree 1987 and later of

the 1990 Constitution gave rise to certain gaps or inconsistencies. The persons whose citizenship status is not clear are those born in Fiji in the period 28 September 1987 to 24 July 1990 (the day before the 1990 Constitution entered into force), and those born outside Fiji in the period 29 September to 6 October 1987. We noted also that no provision was made by the 1990 Constitution to avoid the possible statelessness of persons born in Fiji after 25 July 1990 to parents neither of whom were citizens of Fiji at the time of the birth. We deal with each of these groups in turn.

6.86 As already explained, neither the 1987 Decree nor the 1990 Constitution made any provision about the citizenship of persons born in or outside Fiji in the period 28 September 1987 to 6 October 1987. The Decree provided that a person born in Fiji after 7 October 1987 became a citizen at the date of birth. That rule applied whether or not a parent of that person was a citizen at the date of the birth. Section 24 of the 1990 Constitution, which came into force on 25 July 1990, purported to apply, as from 7 October 1987, the rule that a person born in Fiji became a citizen only if, at the time of the birth, the person's father or mother was a citizen of Fiji.

6.87 Taken literally, that provision would have retrospectively deprived of Fiji citizenship a person born in Fiji in the period 7 October 1987 to 24 July 1990, neither of whose parents were citizens. Those persons had become citizens at birth under the Fiji Citizenship Decree. The courts, however, are loath to attribute retrospective effect to a provision taking away a right as basic as that of citizenship unless the intention that it should operate retrospectively is unmistakable.

6.88 In our opinion it is not. The references to 6 October, the date on which Fiji became a Republic, were apparently included, first in the decree and later in the 1990 Constitution, for the purpose of reassuring people that their citizenship status had not changed by reason only of that fact. They did not signify an intention to bring about a retrospective policy change. We consider therefore that the proper course is to treat all persons born in Fiji in the period beginning on 28 September 1987 and ending on 24 July 1990 as having become citizens of Fiji at the date of their birth.

6.89 Section 25 of the 1990 Constitution provides that a person born outside Fiji after 6 October 1987 becomes a citizen of Fiji at the date of birth if at that date the person's father is a citizen. The effect of backdating that section to 7 October 1987 was to liberalise the rule under both the 1970 Constitution and the 1987 Decree that a person born outside Fiji of a father who was a citizen became a citizen at birth only if the father himself had not been born outside Fiji.

6.90 We think the courts would in a case of this kind be inclined to give an affected person the benefit of the apparently retrospective liberalisation. Therefore we conclude that there is no need to interfere with the citizenship of persons born outside Fiji after 6 October 1987. Remedial action should be limited to the persons born outside Fiji in the period beginning on 28 September 1987 and ending on 6 October 1987. For the avoidance of doubt, they should be made subject to the rule under both the 1970 Constitution and the 1987 Decree. They should become citizens by birth only if born to a father who was not himself born outside Fiji.

6.91 The final group are those born in Fiji on or after 25 July 1990, neither of whose parents was a citizen at the time of the birth. It should be provided that they became citizens of Fiji at birth if they would otherwise have been stateless.

6.92 The groups affected by these proposals are not large. Those who as a result acquire the citizenship of Fiji in addition to another citizenship will, like other multiple citizens, have to decide, in the year after attaining the age of 21, whether to renounce their other citizenships in order to retain their citizenship of Fiji. Their failure to do so will result in the loss of their Fiji citizenship by operation of law.

6.93 The provisions we propose should be included among the transitional provisions of the Constitution because they will become spent, once the people to whom they apply are no longer alive, or no longer citizens of Fiji. They should not be allowed to complicate new citizenship rules of general and indefinite application.

RECOMMENDATION

- 64. For the avoidance of doubt and possible statelessness, the transitional provisions of the Constitution should include declaratory provisions to the following effect:**

Notwithstanding anything in Chapter IV of the 1990 Constitution,

- (a) a person born in Fiji in the period beginning on 28 September 1987 and ending on 24 July 1990 is to be taken as having become a citizen of Fiji at the date of birth;

- (b) a person born outside Fiji in the period beginning on 28 September 1987 and ending on 6 October 1987 is to be taken as having become a citizen of Fiji at the date of birth if his or her father was a citizen on that date and was not himself born outside Fiji;
- (c) a person born in Fiji in the period beginning on 25 July 1990 and ending on the day before the effective date is to be taken as having become a citizen of Fiji at the date of birth if that person would otherwise be stateless.