

## **The evolution of trial by judge and assessors in Fiji**

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### **Introduction**

This article will discuss the evolution of the Fijian system of trial by judge and assessors, which is used in the most serious of criminal cases. As happened in most British colonies, the Fijian criminal justice system was based upon the English model, subject to certain alterations to cater for local circumstances. One such adjustment meant that trial by jury, an institution that is ideologically central to conceptions of criminal justice throughout the common law world,<sup>1</sup> was largely by-passed and ultimately abolished in favour of trial by judge and assessors. Unfortunately, there has been virtually no investigation of the history of the legal institutions of colonial (and postcolonial) Fiji and there is a complete dearth of writing on the origins of the Fijian criminal justice system.<sup>2</sup> Thus, this article describes the history of the Fijian assessor system and will demonstrate that it is not only substantive law that is affected by the complex relationship between alien law and the local environment; legal institutions and procedures have also been imported and adapted to suit local circumstances. In the first section of the article, I shall explain how and why it was that the system of trial by judge and assessors came to form part of the Fijian criminal justice system.

## **Early historical background**

Following the cession of Fiji to the British Crown on 10 October 1874 and the interim governorship of Sir Hercules Robinson, Sir Arthur Gordon took over as Governor of Fiji on 1 September 1875. He immediately proclaimed the Charter of the Colony, which inter alia set up a Legislative Council to add to the Executive Council created by his predecessor.<sup>3</sup> Legislation quickly followed. Many of the early Ordinances, which in theory were products of the deliberations of the Legislative Council, had in fact been drafted by the Colonial Office in London. These were sent to the Governor with instructions to lay the drafts before the Legislative Council, which was meant simply to 'rubber stamp' them. It seems that this procedure caused some resentment in Fiji. First, there was a perception that the Colonial Office was unaware of local conditions and was in some instances imposing an unsuitable set of laws upon the colony. Second, it was thought that this high-handed practice, in effect, 'neutralised' the Governor and 'co-erced' the Legislature.<sup>4</sup> It seems likely that the Colonial Office's approach resulted from its perception that there was an immediate need to put the basic institutions of civil government into place in Fiji.<sup>5</sup> Certainly, over twenty Ordinances, many of them long and complex, went through the legislative process between the setting up of the Legislative Council in September and the end of the year.

One such Ordinance was the Criminal Procedure Ordinance, passed by the Legislative Council on 29 December 1875.<sup>6</sup> This stipulated that trials before the Supreme Court would be heard either by jury or by the Chief Justice sitting with assessors.<sup>7</sup> Section 70 prescribed that where either the accused (or one of the accused) or the victim (or one of the victims) was 'a Native or Polynesian Immigrant', the trial would be heard by the Chief Justice<sup>8</sup> and assessors unless the Chief Justice 'shall for special reasons to be recorded in the minutes of the Court think fit otherwise to order'. The fundamental difference between trial by judge and assessors and trial by jury is that the court is not bound by the views of the assessors. Consequently, the Ordinance stated: 'In a trial before the Court with the aid of assessors the opinion of each assessor shall be given orally and shall be recorded in writing by the court but the decision shall be vested exclusively in the Judge'.<sup>9</sup>

A Despatch sent to the Governor of Fiji from London by the Secretary of State for the Colonies explained the necessity of adopting the assessor system in trials involving members of the indigenous population. Quite simply, it was assumed that a jury that primarily comprised white settlers (at that time, virtually the only persons qualified to sit as jurors<sup>10</sup>) could not be relied upon to determine any case involving a native Fijian in a fair and impartial manner. As the Colonial Secretary observed: ‘A similar system is in force in India for the protection of the natives, and under the circumstances of Fiji, both now and for some time to come, it is I think probable that this provision may prove beneficial in its application to that colony’.<sup>11</sup>

In 1883, the legislation was amended to extend trial by judge and assessors to any serious case involving a native of India, China or a Pacific island.<sup>12</sup> This was thought necessary because of the influx of indentured Indian labourers to work on the sugar cane plantations and, to a lesser extent, the arrival of Chinese traders and Melanesian immigrants.<sup>13</sup> [At this stage, it is worth clarifying a point about terminology. In the official discourse—of Government officers, legislators, judges and the like—frequent references are made to ‘all-European’ cases or to the fact that only ‘Europeans’ were called upon to serve as assessors or jurors.<sup>14</sup> It is clear that this term subsumes white Americans, Australians and New Zealanders, as well as any whites born and bred in Fiji, presumably because these groups are all of European stock. For the sake of simplicity, I shall follow this usage.]

The original Ordinance stipulated that there would be not less than four assessors in capital cases and not less than two in all other cases.<sup>15</sup> In practice, it has always been the norm to have five assessors in capital cases and three in non-capital cases, presumably to ensure a majority one way or the other. From the outset, the panel of assessors was treated like a jury and this tendency has since become more marked. For instance, the accused may challenge an assessor; assessors retire when the admissibility of evidence is debated; the judge sums up for the assessors; the assessors withdraw to consider their opinion etc.<sup>16</sup>

## **Trial by jury**

Before examining in more detail the nature of trial by judge and assessors, it is useful to outline the fate of trial by jury in Fiji. The more noteworthy features of the Fijian jury were as follows: it comprised seven persons;<sup>17</sup> if it were unable to reach a unanimous verdict after four hours, a majority of five sufficed;<sup>18</sup> the Chief Justice had the power to empanel an alternate juror if the trial was likely to be long;<sup>19</sup> and each side had four peremptory challenges.<sup>20</sup> The small size of the jury meant that, in terms of numbers, there was little difference between trial by jury and trial with assessors in capital cases. In an all-European case there would be seven jurors, but if a non-European was involved there would be five assessors. In essence, however, the whole purpose of dispensing with the jury was to allow the judge, if necessary, to counter any racial bias by overruling the opinions of the assessors, a power fundamentally inconsistent with the notion of trial by jury.

In practice, jury trials were infrequent because they occurred only in very serious cases where all the protagonists were European. The only challenge to the lack of availability of trial by jury appears to have come in the case of *R v Buchanan*,<sup>21</sup> which involved a European charged with a serious assault upon a native. The accused's counsel applied to the court for Buchanan to be tried by jury because the accused was European and the question to be decided was entirely one of fact. The issue was whether the accused had possessed the requisite intent and the defence argument was that this would best be decided by seven of the accused's peers.

In considering this application, the Chief Justice referred to correspondence between one of his predecessors and the Secretary of State for the Colonies in which the former had apparently sought clarification of the wording of the relevant provision of the Criminal Procedure Code.<sup>22</sup> The Secretary of State had responded that, under the terms of the Ordinance, there was clearly no 'constitutional right' to jury trial in Fiji. He had also observed: 'it is difficult to conceive the circumstances which would justify the judge in directing that a grave criminal offence alleged to have been committed by or against a white man, and in which a native is also concerned, should be tried before a jury'. Nevertheless, he had added that this rule should not be 'absolutely without exception' because there might be cases in which 'no serious miscarriage of justice would be risked by

allowing a jury'; it would be necessary, however, to have 'some very strong and exceptional reason' to 'suspend' the law and allow trial by jury in any case involving a native.

The Chief Justice stated that he entirely agreed with the Secretary of State 'even if I am not bound to do so'. He was not satisfied that in the instant case he had heard any reason that would justify him in allowing a departure from the normal mode of trial and, consequently, he rejected the accused's application to be tried before a jury. Nearly thirty years later, the Attorney General observed that, insofar as his office could tell, trial by jury had never been ordered in an interracial case and that Buchanan was the last accused to have made such an application.<sup>23</sup>

In 1961, the jury was abolished.<sup>24</sup> In the Legislative Council Debate on the subject, the Attorney General noted that the Governor had announced this possibility the previous year and this had caused 'little or no reaction'. Certainly, following the Attorney General's explanation of the reasoning behind the abolition of jury trial, the Legislative Council appeared to support the move wholeheartedly. At an early point in his speech, the Attorney General dispensed with the argument that jury trial was a 'constitutional right', stressing that 'Europeans' had never had a 'right' to trial by jury in Fiji; trial by assessors had always been the 'normal method'. He later observed that many of the colonies had never had jury trial, nor had they developed it as they moved towards self-government—including, for example, such 'great countries' as East Nigeria, Tanganyika, Uganda and Zanzibar. On a more practical note, he explained that there had only been two jury trials in the previous ten years, six since 1945, and only 25 cases in which both the accused and the victim were Europeans since 1929 (over thirty years before).<sup>25</sup>

According to the Attorney General, the rationale for the abolition of the jury was to bring the same method of trial into operation for all races and 'was in pursuance' of the British government's 'general policy of abolition of any remaining privileges . . . based on matters of race'.<sup>26</sup> Why then abolish trial by jury rather than trial by judge and assessors? The 'paramount reason', said the Attorney General, was that this would produce a 'fairer trial'.<sup>27</sup> Trial by judge and assessors was originally introduced because, in 1875, the British Government had thought that trial by jury 'would not do in inter racial cases' and, in the present Fijian Government's view, the same considerations still applied. It should be noted that, by this time, the

population in Fiji was approximately 50% Fijian and 50% Indian or, more accurately, Indo-Fijian.<sup>28</sup> According to the Attorney General, experience in other mixed communities showed that trial by jury did not work well, and he cited examples of various colonies—including Sierra Leone, Malaya, India and the West Indies—to demonstrate this point. He noted that, even in the UK and the USA, jury trial was being criticised and argued that, in mixed communities in particular, ‘matters of prejudice are more likely to enter into it and produce unjust results’. In order to minimise the role of prejudice, it had been the practice in Fiji ‘for many years’ to ensure that one Assessor was always of the race of the accused and one of the race of the victim.<sup>29</sup> With this latter claim, the Attorney General was rather ‘gilding the lily’, because, as we shall see below, it was only in 1950 (eleven years before) that Fijians and Indo-Fijians were accepted as assessors; until then, the Assessors List comprised only Europeans. Finally, he argued that in small communities, such as Fiji, it was more difficult to get an ‘independent’ jury, which did not know the parties, had not heard already about the facts, and could not be reached by those involved in the case.<sup>30</sup>

In the Attorney General’s view, the argument that it was the jury, rather than the assessor, system that should be abolished was bolstered by the fact that the ‘unanimous’ opinion of the judiciary of Fiji over the years—i.e. those with first-hand experience of the trial process—was that the jury would not produce ‘good justice’.<sup>31</sup> He also noted that the abolition of jury trial would make little practical difference because the opinion of the majority of the assessors had been followed in the ‘vast majority’ of cases: during the last ten years, the judge had ‘overruled’ the majority of assessors in only 21 out of 154 Supreme Court trials.<sup>32</sup>

## **Assessors and Jurors**

In this section, I shall describe the development of the rules governing the selection of assessors and jurors. This aspect of the history of trial by judge and assessors is important for two reasons. First, the ideology underlying the use of jurors and/or assessors emphasises that they are representatives of the broader community, charged with injecting an element of lay values and common sense into the criminal justice process.<sup>33</sup> Therefore, it is important to assess the extent to which juries or panels of assessors are

genuinely representative of the people. Second, the assessor system exists in Fiji and elsewhere because it was thought inadvisable in the colonial context to grant to a panel of lay persons the untrammelled power of the jury to reach a verdict upon the accused. There is an assumption that the composition of the panel is likely to affect the quality of the verdict and, for this reason, it is useful to examine the way in which such panels are selected and the differences between the composition of the jury and the panel of assessors.<sup>34</sup>

Under the 1875 Ordinance, the Colonial Secretary, or such other officer as designated by the Governor, was required from time to time to prepare a list of male residents who were, 'in the judgement' of the Colonial Secretary (or the designated officer), 'qualified from their education and character to serve as assessors'. The Assessors List was to provide the 'quality or business of such persons' as well as their names and addresses.<sup>35</sup> A provisional list was to be published in the Royal Gazette and thereafter laid before the Executive Council, which would hear objections and exercise its own judgment to insert or delete names as it thought fit. The revised List of Assessors was to be signed by the Governor, sent to the Supreme Court<sup>36</sup> and published in the Royal Gazette.<sup>37</sup>

The Jury List, on the other hand, was to comprise all male residents aged twenty-one or over, with 'a competent knowledge of the English language' and 'having or earning a gross income of £50 a year', and without a serious criminal conviction.<sup>38</sup> There were various exemptions, including: members of the Executive and Legislative Councils, doctors, ministers, ships' captains, licensed pilots, members of the armed forces etc., as well as 'persons disabled by mental or bodily infirmity' and persons appointed as Assessors under the Ordinance.<sup>39</sup> Provisional lists were to be drawn up for the various administrative districts into which Fiji was divided and published in the Gazette in order to give prospective jurors the opportunity to apply to be added to or struck from the list. Thereafter, the finalised List of Jurors was to be published in the Gazette.<sup>40</sup>

The first List of Assessors was completed in 1876.<sup>41</sup> It comprised 30 primarily upper-middle-class males with Anglo-Saxon names, including 12 barristers, 9 merchants and the Governor's interpreter. All these persons were inhabitants of Levuka (at that time the capital of Fiji and site of the Supreme Court), although there was no such statutory requirement that this

should be so. The Jurors List was published around the same time and contained over 400 names.<sup>41</sup> It included around 150 persons who lived in and about Levuka and comprised a rather broader social mix than appeared on the Assessors List, including a fair sprinkling of tradesmen, e.g. carpenters, compositors, dairymen—and even some labourers—among the clerks, shopkeepers and petty bourgeoisie who made up the bulk of list. It seems to have been assumed that most of these potential jurors, while capable of determining a case involving only Europeans, could not be trusted to maintain an impartial stance in any case involving a native. It seems to have been thought that only a few members of the higher echelons of Levuka society could be relied upon to judge the latter type of case in a fair manner. Even then, of course, the judge had the power to dispense with the opinions of the assessors.

In 1909, the Assessors List comprised 29 names, most of whom resided in Suva (which had replaced Levuka as capital in 1881), with a few dwelling in its immediate environs. In contrast, the Jurors List for Suva for that year comprised 58 names, all Suva residents.<sup>43</sup> Most of those on the Assessors List also appear on the Jury List (the rule exempting assessors from jury service apparently having been abandoned).<sup>44</sup> Again, the assessors are drawn exclusively from the professional classes whereas the jurors are of more mixed occupations, including some storekeepers, an engineer, a butcher and a watchmaker. By 1932, the Assessors List and the Jurors List for Suva were almost identical.<sup>45</sup> The former contained 114 names and the latter comprised 112 names. The Assessors List included: several 'gentlemen'; many clerks, managers, storekeepers and banana buyers; and an electrician, a motor mechanic and a sailmaker. Most of these persons were also on the Jurors List. It is noticeable, however, that those few jurors who failed to make an appearance on the Assessors List tended to come from the working classes—e.g., a painter, a storeman and barman—whereas those assessors who did not appear on the Jurors List were drawn from the professional classes.

In 1932, for the sake of administrative convenience, the Jurors and Assessors Ordinance<sup>46</sup> combined the procedures for drawing up the Jurors Lists and Assessors List. In essence, the Jury Lists would be compiled for the various administrative districts of Fiji and these would then be forwarded to the Chief Justice. After revising them in the light of any objections or pleas



for inclusion, the Chief Justice would select 'a sufficient number of persons who in his judgement are from education and character qualified to serve as assessors'.<sup>47</sup> These persons would then appear on the Jurors Lists with an 'A' opposite their name. This administrative reform also served to remove the 'anomaly'<sup>48</sup> whereby the Jurors Lists had been revised by the Chief Justice and the Assessors List by the Executive Council. Additionally, the opportunity was taken to raise the income/property qualification to £150 per annum, presumably to keep pace with inflation.<sup>49</sup> One further proviso was added, in that only those who lived within ten miles of the Supreme Court were to be listed as potential jurors and assessors. This was simply to avoid inconvenience to a primarily rural population, many of whom otherwise might have had to make long and difficult journeys in order to answer a summons. For precisely the same reason, this qualification still exists.<sup>50</sup>

In 1950, non-Europeans finally appeared on the Jurors and Assessors Lists. Until then, all jurors and assessors had been European, although the legislation had never laid down any such requirement.<sup>51</sup> It is fair to say that the income/property qualification and the need for competence in English would have served to exclude the vast bulk of the Fijian and Indo-Fijian populations. Nevertheless, there is no doubt that, from a relatively early stage after cession, some non-Europeans were qualified to serve as jurors and assessors but were simply not given the opportunity. By the 1950s, however, social change had been gathering momentum; for instance, mixed race bathing had been taking place at the beaches since the mid-1940s, and Suva opened its European-only Olympic sized Sea Baths to all races in 1956.<sup>52</sup> Thus, in 1950 the decision was taken to admit non-whites to the Jurors and Assessors Lists. At this precise time, the lists for the various areas were in the process of being revised and, in some districts, the alteration of the informal criteria obviously caught the legal officers involved by surprise.

The provisional List for Western District, which includes Lautoka, the second largest town in Fiji, contained around 175 names, all obviously European.<sup>53</sup> A supplementary list, issued two months later,<sup>54</sup> added a similar number of non-Europeans, the great majority of whom were Indo-Fijian rather than Fijian. The predominance of the latter among the non-Europeans probably reflects both the large number of Indo-Fijians living in this part of

the country and the more educated and urban nature of this ethnic group. It included many clerks, storekeepers and drivers, reflecting the nature of Indo-Fijian economic activity. Ultimately, most of those on the first list and around half of those on the second appeared on the final List of Jurors and Assessors; thus around one-third of those on the List were non-Europeans.<sup>55</sup> One might postulate that more Indo-Fijians sought excusal from jury service on the ground that their English was not of a sufficient standard, although this can be no more than an informed guess. Of the prospective jurors, about one-third were also denoted as potential assessors, the great majority of whom were European. Thus, only around 15–20% of prospective assessors were non-Europeans. This must reflect the judgment of the Chief Justice, or the Registrar and his staff who actually compiled the lists, as to the capacity of jurors to act in an unprejudiced manner in any trial involving a non-European.<sup>56</sup>

The provisional Jurors and Assessors List for Suva for 1950 was divided into three sections, containing: 1) around 200 Europeans; 2) 21 Fijians; and 3) around 200 Indo-Fijians.<sup>57</sup> The 21 Fijians included five salesmen, four roko (a type of sub-chief co-opted as a colonial officer), three magistrates (almost certainly of the separate Fijian court structure) and two office assistants. While most of the Europeans made it onto the final List, only six Fijians and around 30 Indo-Fijians survived.<sup>58</sup> Again, one assumes that lack of competence in English was the reason for the disappearance of such a high proportion of the non-Europeans; certainly, most of the drivers disappeared while more of the white-collar workers survived. Thus, around 15–20% of names on the final Jurors List belonged to non-Europeans. Around 40–45% of potential jurors were listed as assessors but, unlike in Western District, similar proportions of Europeans and non-Europeans were selected.

Both the provisional and final Labasa Jurors and Assessors List contained around 60 names, of whom 16 were non-European, mostly Indian. Thirty-five of these were denoted as assessors but only 6 of them were non-white. The Savusavu and Taveuni lists also changed little throughout their compilation, finally comprising, respectively, 30 and 25 European names, of whom 16 and 17 were denoted as assessors. It would seem rather unlikely that in the latter two administrative areas no Fijian or Indo-Fijian capable of serving as a juror or assessor could be found.

Following the introduction in 1950 of non-Europeans to the Jurors and Assessors Lists, the Supreme Court adopted the practice of ensuring that at least one assessor was of the same race as the accused and, if appropriate, another of the victim.<sup>59</sup> More recently, the policy has simply been to ensure that there is one representative from each of the two major racial groups of Fiji upon the panel. The third member is usually of another race—European or Chinese—or a member of the accused's race.<sup>60</sup> There is no legal requirement to balance the panel of assessors in this way; it is simply a convention that has evolved. In one very recent case, however, which involved only Fijians, the three Assessors were all Fijian. This was sufficiently unusual to have caused a senior member of the DPP's staff to check its legality. This individual was 'surprised' to discover that the legislation was entirely silent on the matter.

In 1961, at the same time as the jury was abolished, women became eligible to sit as assessors.<sup>61</sup> It was noted, however, that the property qualification was likely to limit the number of women on the Assessors List.<sup>62</sup> Women were also allowed various special exemptions, for example to cover pregnancy and particularly unpleasant cases.

In 1969, the income/property qualification was abolished.<sup>63</sup> The Attorney General explained that this was being done 'to link it' with the abolition of such a qualification for electoral purposes and that it was proposed to 'widen as far as can possibly be done the lists of assessors' so that they could be linked with the electoral rolls.<sup>64</sup> The leader of the Opposition welcomed this reform, observing that a citizen, no matter how poor, might well be responsible enough to discharge his duty as an assessor.

The present Criminal Procedure Code stipulates that the Assessors Lists should be revised every two years or 'at such other times as the Chief Justice may direct' and that both the provisional and final lists should be published in the Gazette.<sup>65</sup> Formerly, such up-dating appears to have been carried out by the Supreme Court Registry reasonably regularly but, particularly in the last ten years, this process seems to have slowed down considerably. Doubtless the administrative chaos that followed the coups in 1987 exacerbated the problem. The last published Assessors List to appear was that for Labasa in 1993.<sup>66</sup> This comprised around 230 names, virtually all Fijian or Indo-Fijian. Most prospective assessors were clearly middle-class, although the list did include a cook, a market vendor and a

motor mechanic. The last list for Lautoka (formerly the Western District List) appeared in 1988 and comprised around 600 names.<sup>67</sup> It is noticeable that the working class is virtually excluded, common occupations being bank officers, managers, sales representatives, company directors, customs officers and the like. A few Europeans and Chinese appear but the bulk of assessors are either Indo-Fijian or Fijian. An interesting point about both these lists is that they comprise such a small proportion of the population given that the assessors notionally represent the community. For instance, the population of Lautoka is around 30,000 yet only 600 names appear on the Assessors List. Although the former number includes persons under 21, it is still very clear that only a small minority of the eligible population is deemed suitable for service as assessors. On the other hand, given that only a handful of High Court trials take place in Lautoka every year, it is hardly necessary to enlarge the Assessors List.

I was unable to trace any published list of assessors for Suva in the last nine years. On enquiry, it was confirmed that the last time the Suva list had been revised, it was not published in the Gazette, as the result of an administrative oversight. This obviously denied citizens the opportunity to demand to be added to the list as is their right.<sup>68</sup> The list was revised, as it apparently always has been, simply by writing to major businesses in the Suva area, requesting them to recommend employees who might be suitable for service as an assessor and who would be released from work if necessary. The current list comprises various handwritten pages in a ring binder and certainly contains at least as many names as the published Lautoka list. When assessors are needed, one of the High Court clerks simply looks through the list and selects an appropriate number of names (usually four), bearing in mind the need to secure a representative of each of the two major ethnic groups. These names are then subjected to a check for a criminal record and, ultimately, three assessors are selected to hear the case.

### **Judge/assessor disagreements**

As noted above, the fundamental point of the assessor system is that the judge is not bound by the opinion of the assessors and is free to overrule them and return a verdict contrary to their opinions. Until recently, the

legislation did not qualify in any way the judge's power to dispense with the advice of the assessors. The 1875 Ordinance stated: '... the opinion of each assessor shall be given orally ... but the decision shall be vested exclusively in the judge'.<sup>69</sup> Similarly, the relevant provision in the 1945 Laws of Fiji stated even more clearly: 'The judge ... shall not be bound to conform to the opinions of the assessors'.<sup>70</sup>

Nevertheless, it became established through a series of cases in the 1950s and 1960s that the judge must give reasons for any decision that effectively overrules the opinions of the assessors. In *Ram Lal*,<sup>71</sup> the Fijian Appeal Court stated that the judge must have 'very good reasons' for differing from the assessors. In *Ram Bali*,<sup>72</sup> the court opined that in such cases, the judge should proceed on 'cogent and carefully reasoned grounds based on the evidence before him and his views as to credibility of witnesses and other relevant considerations'. This latter case went to the Privy Council, which observed that the trial judge was taking 'a strong course' by differing from the unanimous opinion of the assessors. Nevertheless, it thought that as the judge had paid 'full heed' to the views of the assessors, his decision was justifiable because it was based upon his own 'emphatic conclusions in regard to the evidence'.<sup>73</sup> In *Shiu Prasad*, the Appeal Court repeated that the judge must have 'cogent reasons' for differing from the assessors.<sup>74</sup>

It is clear that that it has not been uncommon for the judge to disagree with the assessors. In the debate over the abolition of the jury in 1961, the Attorney General stated that there had been 154 trials in the Supreme Court in the previous ten years and that the judge had overruled the opinion of the majority of assessors in 21 of these cases.<sup>75</sup> The Attorney General seemed more than happy that this indicated a high level of consensus. One might argue, however, that these figures do indicate that there was some dispute about the correct verdict in around one in seven cases and that this level of discordance was perhaps not particularly satisfactory. Further, the Attorney General noted that the disagreements included at least two cases where the judge had either acquitted the accused or reduced the offence after the assessors had expressed their opinion that he was guilty. The clear implication is that in the bulk of the remaining cases, the judge had convicted the accused where the assessors had thought that the charges were not proved.

In 1973, the Criminal Procedure Code (Amendment) Act incorporated into the relevant legislation the common law requirement that the judge give reasons for overruling the assessors.<sup>76</sup> This was the incidental effect of a move to streamline the trial process.<sup>77</sup> Up until that time, the judge had summed up for the assessors, reminding them of the evidence and explaining the law, and then, after hearing their opinions, he had issued his judgment. The judge had to produce both the summing up and the judgment in writing and the Attorney General argued that the latter was almost always a 'reduplication' (sic) of the former. Consequently, it would be much more sensible, where the judge agreed with the opinion of the assessors, for his judgment simply to state that this was also his verdict because all the details of the evidence and law would be contained in the summing up. It would only be in the situation where the judge disagreed with the assessors that he would need to explain in a judgment why, on the basis of the evidence, he was reaching a different verdict.

The leader of the opposition, S M Koya, a lawyer (and, incidentally, the appellant's counsel in *Ram Bali*), objected to the move to dispense with the requirement upon the trial judge to produce a fully reasoned judgment in all cases.<sup>78</sup> In essence, his point was that the assessors' views were 'merely opinions . . . the purpose (of which) is to give aid to the judge and the judge is there to receive the aid and that is all'. He argued that the judge could not reveal too much of his own views to the assessors in the summing up because that would be 'usurping' their function, thus it was still necessary for him to issue a full judgment, explaining what he had found to be the facts, which witnesses he had believed and disbelieved, and what his conclusions were. In other words, the judge still had to explain why he was accepting the assessors' advice. Technically speaking, S M Koya did have a point. If the judge does not adequately explain why he agrees with the assessors, the verdict becomes as inscrutable as that of a jury.

The Attorney General, however, was not impressed with this argument and the proposed reform went through unaltered. The statute now relieves the judge of the obligation to issue any judgment, other than the verdict, except that ' . . . when the judge does not agree with the majority opinion of the assessors, he shall give his reasons, which shall be written down and be pronounced in open court, for differing with such majority opinion . . .'<sup>79</sup>

There have been no reported appeal cases on judge/assessor disagreements since this amendment to the Criminal Procedure Code but there have been several unreported cases. Essentially, these have reaffirmed that the judge is entitled to disagree with the assessors but that he must give satisfactory reasons for so doing. For instance, the Appeal Court has recently stated: 'It is clear that a judge in Fiji is entitled in law to disagree with the majority opinion of the assessors, and even when they are unanimous, but his reasons for doing so must be cogent and they should be clearly stated. In our view they must also be capable of withstanding critical examination in the light of the whole of the evidence presented in the trial'.<sup>80</sup>

There has recently been an upsurge in the number of appeals resulting from the judge overruling the assessors. This is largely because, at the beginning of the 1990s, the prosecution was granted the right to appeal against an acquittal, on a question of either law or fact.<sup>81</sup> Previously, such appeals could only come from persons convicted by the judge despite the fact the assessors had thought the appropriate verdict to be one of not guilty. Since 1990, the prosecution has sometimes exercised its right of appeal in the reverse situation; i.e. where the judge has acquitted the accused despite the assessors' being convinced of the defendant's guilt. At the time of writing, three such cases are awaiting a hearing before the Court of Appeal: one involves a murder in the course of robbery; one a rape and subsequent murder; and one a rape. It should be noted that the Director of Public Prosecutions does not appeal on every occasion where the judge dispenses with the assessors' advice and acquits the accused. For instance, I was told by a member of the DPP's staff of one recent case where a woman was charged with murder for killing her young child. The latter had been just too old to allow the charge to be one of infanticide. In the assessors' view, which was probably perfectly correct according to the law, the woman was guilty of murder but the judge reduced this to manslaughter on the rather spurious ground, in the circumstances of the particular case, that she lacked the requisite mens rea for murder. The view in the DPP's Office was that this had probably been a 'merciful' result and that, consequently, it had been decided not to appeal against the judge's decision. It is interesting that in this case the judge appeared to be exercising what is usually regarded as a jury function: tempering the strict letter of the law with an element of mercy.

## **Profile of cases**

The number of cases heard in the Supreme Court, whether by a judge and assessors or by a jury, has always been extremely low. The vast majority of criminal prosecutions has always been dealt with in the lower courts by magistrates.<sup>82</sup> Consequently, one might well wonder why the assessor system continues to survive. It involves a disproportionate administrative burden for very little practical return in terms of throughput of cases. The answer undoubtedly lies in the ideological role played by the institution, in that it demonstrates community involvement in the Fijian criminal justice process and thus helps legitimate the system. A similar function is performed by the jury elsewhere in the common law world where very few cases are actually determined by juries, despite the political significance vested in the institution.<sup>83</sup>

In the 1980s, however, the still small number of cases before the Supreme Court was increasing steadily. This was not surprising given that the reported crime rate and the number of prosecutions had risen considerably over the last thirty years.<sup>84</sup> By this time, the Supreme Court sat regularly in Suva, Lautoka and Labasa but the bulk of cases were still heard in Suva. By the middle of the decade, it was not uncommon for over one hundred cases to be cited annually to the Supreme Court in Suva, typically involving charges of murder, manslaughter, rape, serious assault, robbery with violence, burglary, larceny and causing death by dangerous driving. It is unfortunately not possible to determine from the court records exactly how many of these cases resulted in a trial before a judge and assessors but it is clear that a large proportion ended in guilty pleas and others did not proceed or were referred back to the Magistrates Court. Nevertheless, there is no doubt that the number of actual trials had also grown considerably over the previous thirty years.

By the time of the 1987 coups, an unmanageable backlog of cases had built up in Suva Supreme Court and this was exacerbated by the subsequent resignation of all the Supreme Court judges.<sup>85</sup> This problem resulted in the Electable Offences Decree 1988, which reduced sharply the number of offences for which the accused could elect trial in the Supreme Court. In purely numerical terms, there had been 106 'electable offences' prior to the Decree and this was reduced to a list of 35. The accused could no longer



opt for Supreme Court trial on such charges as perjury, incest, death by dangerous driving, robbery, fraud, petty theft etc. Additionally, the Decree enabled the accused to elect trial in the Magistrates Court for conspiracy to murder, whereas previously such a charge could only be heard before the Supreme Court. This legislation operated retrospectively and enabled a large proportion of the backlog of cases to be referred back to the Magistrates Court. The continuing effect of the Decree has been to reduce considerably the number of trials heard before a judge and assessors.

At this stage, it should be noted that, under the 1990 Constitution, what had been the Supreme Court was renamed as the High Court.<sup>86</sup> The number of cases cited to the High Court in Suva over the last few years has been as follows: 1992, 32; 1993, 36; 1994, 15; 1995, 13. The equivalent numbers for Lautoka and Labasa are even smaller. These figures are dwarfed by the number of cases coming before the Magistrates Courts: a grand total of 23,895 in 1992 for instance.<sup>87</sup> Further, it again has to be emphasised that not all of the cases cited to the High Court go to trial, principally because some defendants plead guilty and some prosecutions are abandoned. Again, it is not possible to determine from the available records the precise number of trials that did take place in each of these years. The general impression of personnel involved in High Court trials—judges, prosecutors, clerks etc.—was that there were usually around ten or a dozen such trials each year in Fiji as a whole. My own research indicates that this is a fairly realistic estimate. For instance, as regards 1994, I was able to trace six trials in Suva, three in Lautoka and one in Labasa. This is probably an accurate figure but, because a small number of case files could not be traced, preventing me from determining whether the accused simply pled guilty or was convicted after a trial, it is impossible to state categorically that it is correct.

A fuller picture of the type of cases heard by assessors can be built up by examining trials in Suva between 1992 and 1995. During this four-year period, there were 26 trials, involving 47 defendants. The charges most commonly faced by the accused were: murder, 16; rape, 15; and manslaughter, 8. Other charges faced included abortion, abuse of office, forgery and embezzlement. Of the 47 defendants, 30 were found guilty and 17 not guilty. As regards those found guilty: the assessors were unanimous on 21 occasions; their opinions differed in 2 cases; and in 7 instances, it was not clear whether their view was unanimous or by majority. As regards

those who were acquitted: the assessors were unanimous on 11 occasions; in 4 instances, their opinions differed; and in 2 cases it was not clear what their individual views had been. The results of the assessors' deliberations—i.e. whether they convicted or acquitted, and whether unanimously or by a majority—did not appear to vary across the three most common types of trial: murder, rape and manslaughter.

It is interesting that, as far as I could tell from the court records, not one of these cases involved the judge's overruling the opinion of the assessors. At the time of writing, however, there have been two recent cases in Suva where a judge has overruled the opinion of the assessors that the accused was guilty.<sup>88</sup> Various respondents confirmed that, to the best of their recollection, there had been no judge/assessor disagreements in Suva for quite some time prior to these two cases.

### **The Commission of Enquiry on the Fiji Courts**

In this penultimate section of the article, I shall discuss the conclusions about the system of trial by judge and assessors reached in a recent review of the operation of Fijian courts.<sup>89</sup> The investigation was carried out in 1993 and 1994, by a Commission of Enquiry headed by Sir Stuart Beattie, a distinguished judge from New Zealand. As regards the assessor system, Beattie observed that 'for someone who has been used to a jury system, where juries are the sole judges of fact, the assessor system seemed to me to be not as good', but having heard the generally 'positive support' for the system, he was satisfied that it should be retained.<sup>90</sup> Amongst others, the Chief Justice, the former President of the Court of Appeal, the Attorney General, the Solicitor General and the Law Society all submitted that the assessor system was 'more suited' to the Fijian jurisdiction.<sup>91</sup> Beattie appeared to accept this argument but nowhere gives any indication as to why he, or his respondents, took this view.

According to my informants, the general feeling seems to be that the current political situation in Fiji would not permit the replacement of the assessor system with the jury. The country is polarised between the Fijian and Indo-Fijian communities, each of which comprises roughly half of the population. The recent coups, essentially by the Fijians against the Indo-Fijians, have exacerbated this tension.<sup>92</sup> Many of those responsible for the

administration of criminal justice think that jurors would not be able to reach dispassionate decisions in cases involving those from the other major ethnic community. It was also suggested that the hierarchical nature of Fijian society leads to Fijians being reluctant to convict their traditional chiefs or members of their families of criminal wrongdoing. Other comments were that the close-knit nature of both ethnic communities poses the danger of members of the extended family of the accused, or the victim, appearing on juries, with the consequent risk of bias. Finally, most, although not all, my informants argued that, whether the above fears are well founded or not, most of the community would certainly not perceive jurors as being able to cast aside their prejudices and family ties to reach the correct verdict.

It is clear that in supporting retention of the assessor system, Beattie was heavily influenced by ‘the well established convention that except in clear cases, a judge will not overrule the findings of the assessors’ and that these powers ‘have, in practice, been exercised very rarely’.<sup>93</sup> This last claim is perhaps something of an exaggeration because, as discussed above, it is not particularly unusual for a judge to dispense with the advice of the assessors. In any case, Beattie concluded that the chance of a miscarriage of justice occurring by reason of the assessor system per se was minimised by three safeguards: (1) ‘the judge can “interfere” and not “accept” the opinions of the assessors’; (2) the judge will only step in ‘where there is very good reason, on the evidence to do so’; and (3) there is a right of appeal and, consequently, a miscarriage is unlikely ‘to “survive” the scrutiny of an appellate court’.<sup>94</sup> Nevertheless, he did not think that the assessor system should be extended to the Magistrates Court; it would seem that this was because of the resource implications, although he does not spell this out.<sup>95</sup>

The only notable opponent of the assessor system was the DPP, who suggested to the Commission that it should be abolished because ‘assessors tend to lose their grasp of fraud trial evidence or be too easily swayed by racial undertones’.<sup>96</sup> In order to bolster this argument, the DPP’s Office submitted to the Commission a number of cases that were said to demonstrate the inability of assessors adequately to fulfil their role. In fact, only one of these involved fraud and it is not clear that any involved racial prejudice. Several were cases where the judge had felt forced to overrule the assessors and others involved what the DPP’s Office obviously thought were unsatisfactory acquittals where the judge had chosen not to intervene.

After analysing the cases,<sup>97</sup> Beattie was clearly not convinced. He argued that those cases where the assessors had been overruled showed that judges were prepared to intervene where the assessors' views were clearly not sustainable; this was precisely the point of having trial by judge and assessors rather than trial by jury. As regards the allegedly dubious acquittals, Beattie thought that the assessors' view in all of these cases had been tenable and, in those circumstances, the judges had been correct not to interfere.

In answer to some of the other criticisms levelled at the assessor system, Beattie recommended that assessors should be drawn from the wider community and should have more breadth of experience.<sup>98</sup> In his view, there were sufficient 'adequately educated' people in Fiji to ensure that the assessor system 'functions adequately'.<sup>99</sup> He also thought that the pool of assessors should include more females<sup>100</sup> and that, in particular, there was a case for requiring at least one of the assessors in a rape trial to be female.<sup>101</sup> Beattie did accept that charges of complex commercial frauds might prove too difficult for assessors to determine and consequently recommended that the accused should have the right to ask for trial by judge alone in such cases. More significantly, however, he did not accede to the demand that the prosecution should be allowed to apply for this option. In Beattie's view: 'The right to trial by jury (assessors) is a fundamental principle since Magna Carta and that basic right is vested in an accused'.<sup>102</sup> Such a sweeping proclamation is scarcely convincing in this context. As we have seen, the right to trial by assessors (or jury) in Fiji has always been extremely limited and the effect of the Electable Offences Decree 1988 has been to restrict it further. Against this background, it is clearly misconceived to talk of any 'fundamental' right to trial by assessors.

## **Conclusion**

The accession of Fiji to Britain in 1874 was followed by the imposition of English law and its institutions upon the colonised country in order to facilitate the process of government. As was the normal colonial practice, however, local cultures and conditions meant that certain adjustments had to be made and, consequently, the English legal system has never applied in its entirety to Fiji. In many spheres, it has been moulded to

fit local circumstances. Thus, trial by jury, conventionally hailed as one of the central pillars of the English criminal justice system, has never been allowed to take root in the Fijian legal system. Initially, its use was severely restricted and, ultimately, the institution was abolished. Instead, trial by judge and assessors, based on the provisions of the Indian Penal Code, was adopted for the bulk of Supreme Court trials. Trial by judge and assessors still survives, over one hundred years later, despite being a mechanism that appears rather odd to observers from most common law jurisdictions because of the judge's power to overrule the opinion of the assessors. The continued existence of the assessor system is largely explained by a perception that the risk of racial prejudice prevents the use of jury trial in Fiji: originally, a fear that all-European juries would not fairly judge any case involving an indigenous Fijian and, more recently, a fear that the two major ethnic communities cannot be trusted to sit in unrestricted judgment upon each other. Whether such concern is, or ever was, well founded is beyond the scope of this article. What is certain, however, is that the assessor system is a good example of the compromises and hybrids produced by the interaction between imported legal systems and local cultures and conditions. Such strategies inevitably affect legal institutions as well as the substantive law.

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## Notes

1 See M Findlay and P Duff (eds), *The Jury Under Attack*, Butterworths, London and Sydney, 1988.

2 The only book that covers the introduction of a modern Western legal system to Fiji at any length is J D Legge, *Britain in Fiji 1858–1880*, Macmillan, London, 1958. Like other such texts, it is mainly concerned with the law relating to land tenure and the attempt to preserve the traditional Fijian way of life through the creation of a separate Fijian court structure. See also D Paterson and S Zorn, 'Fiji', in *South Pacific Island Legal Systems*, ed. M A Ntuny, University of Hawaii Press, Honolulu, 1993, 26.

3 Legge, *Britain in Fiji 1858–1880*, pp.151–154.

4 See the Editorial in the *Fiji Times* of 19 January 1876.

5 It was also felt that the land and customs of the indigenous population urgently required protection from the influx of white settlers and many of the early Ordinances were concerned with this end. See Legge, *Britain in Fiji 1858–1880*, chapters 8 and 9.

6 Ordinance No. 23 of 1875.

7 Section 24.

8 The early Ordinances referred solely to the Chief Justice simply because at that time he was the only judge of the Supreme Court.

9 Section 84. It is worth noting that Section 70 refers to the decision of the Chief Justice ‘with the aid of such assessors’ as having ‘the same force and effect as finding or verdict of a jury’ (emphasis added).

10 See below.

11 This was quoted in the *Fiji Times* of 19 January 1876 (see n. 4) in order to demonstrate the allegedly dictatorial attitude taken by the Colonial Office towards the Governor and Legislature of Fiji. One might conjecture that it was ‘leaked’ to the newspaper by the Governor, or one of his staff, disgruntled by the Colonial Office’s policy.

12 The Criminal Procedure Ordinance 1883 (No. 8 of 1883). This comprised simply the one substantive section to make this change.

13 See B Lal, *Broken Waves: A History of Fiji in the Twentieth Century*, University of Hawaii Press, Honolulu, 1992.

14 See, for instance, the Attorney General, Legislative Council Debates 1961, p.379.

15 Section 80.

16 See the Attorney General, Legislative Council Debates 1961, pp.380-81.

17 The Criminal Procedure Ordinance 1875, s.24. This jury size was common throughout the colonies and simply reflected the lack of potential jurors.

18 Section 25.

19 Section 24.

20 Section 28.

21 (1934)3 Fiji LR.

22 Originally s.70 of the 1875 Code (see above) but, by this time, s.8 of the Jurors and Assessors Ordinance of 1932.

23 Legislative Council Debates 1961, p.379.

24 Criminal Procedure Code (Amendment) Ordinance (No. 35 of 1961).

25 Legislative Council Debates 1961, pp.380–381.

26 *ibid.*, p.378.

27 *ibid.*, p.381.

- 28 See Lal, *Broken Waves*.
- 29 Legislative Council Debates 1961, p.380.
- 30 It is beyond the scope of this article to assess the validity of the arguments cited by the Attorney General.
- 31 Legislative Council Debates 1961, p.383.
- 32 *ibid.*, p.380.
- 33 For various essays discussing the emphasis that jury ideology places on notions of representativeness, see Findlay and Duff, *The Jury Under Attack*.
- 34 For a review of the literature on the way in which the composition of juries affects their verdicts, see V Hans and N Vidmar, *Judging the Jury*, Plenum, New York, 1986.
- 35 Criminal Procedure Ordinance 1875, s.71.
- 36 Section 72.
- 37 Section 74.
- 38 Section 50.
- 39 Section 51.
- 40 Sections 53–56.
- 41 Fiji Royal Gazette 1876, p.56.
- 42 *ibid.*, p.85.
- 43 Fiji Royal Gazette 1909, pp.312, 459.
- 44 Unfortunately, I was unable to trace which Ordinance had brought about this change, despite checking most Criminal Procedure Ordinances between 1875 and 1909.
- 45 Fiji Royal Gazette 1932, 11 May and 31 May.
- 46 Ordinance No 16 of 1932.
- 47 *ibid.*, s.6(5).
- 48 The Attorney General, Fiji Legislative Council Debates 1932, p.143.
- 49 Section 5.
- 50 Criminal Procedure Code 1978, s.264(1). The distance had been raised to 30 miles by the Criminal Procedure Code of 1945, s.250, but was soon afterwards restored to 10 miles by the Criminal Procedure Code (Amendment) Ordinance 1950 (No 24 of 1950), s.18.
- 51 Thus, there was no need for legislation to bring about this reform. During that year, the Criminal Procedure Code (Amendment) Ordinance (No 24 of 1950) did make various minor administrative adjustments to the procedures by which the Jurors and Assessors List was drawn up. It might well be that this exercise prompted a rethinking of the policy of excluding non-Europeans from the list.

- 52 See Lal, *Broken Waves*, p.52.
- 53 Fiji Royal Gazette 1950, 19 May.
- 54 *ibid.*, 21 July.
- 55 *ibid.*, 1 September.
- 56 I am proceeding on the logical assumption that the standard of English required of jurors and assessors was the same and cannot explain the higher proportion of European assessors.
- 57 Fiji Royal Gazette 1950, 19 May.
- 58 *ibid.*, 1 September.
- 59 Attorney General, Legislative Council Debates 1961, p.381.
- 60 This and the following information about the way in which assessors are selected emerged from informal interviews I conducted with various personnel involved in High Court trials.
- 61 Criminal Procedure Code Amendment Ordinance (No 35 of 1961), s.10.
- 62 Attorney General, Legislative Council Debates 1961, p.383.
- 63 Criminal Procedure Code (Amendment) Act (13 of 1969), s.2.
- 64 Legislative Council Debates 1969, p.847.
- 65 The Laws of Fiji 1978, Cap 21, s.264. Originally, the requirement was that the Jurors List should be up-dated annually and the Assessors List only when necessary (Criminal Procedure Ordinance 1875, s.53 and s.71). Under the 1932 Jurors and Assessors Ordinance, s.6, the newly combined Jurors and Assessors List was to be revised annually.
- 66 Republic of Fiji Gazette 1993, p.572.
- 67 Fiji Royal Gazette, 1988, pp.836–843.
- 68 Criminal Procedure Code 1978 (Cap 21), s.264(3).
- 69 Criminal Procedure Ordinance 1875 (No. 23 of 1875), s.84.
- 70 Criminal Procedure Code 1945 (Cap. 4), s.308(2).
- 71 *Ram Lal v R* (Criminal Appeal No 3 of 1958).
- 72 *Ram Bali v R* (1960) 7 FLR 80.
- 73 Privy Council Appeal No 18 of 1961, cited in *Shiu Prasad v R* (1972) 19 FLR 68 at 71.
- 74 *ibid.*
- 75 Legislative Council Debates 1961, p.380.
- 76 Act No. 16 of 1973, s.12.
- 77 Fiji Parliamentary Debates 1973, p.875.
- 78 *ibid.*, pp.877–878.
- 79 This provision now appears in 299(2) of the Criminal Procedure Code 1978.



80 *Litiwai Setevano v The State* (Cr App No 14 of 1989).

81 The Court of Appeal Act (Amendment) Decree (No 7 of 1990).

82 Magistrates have considerable sentencing powers and thus can deal adequately with most cases. A Magistrate may impose upon a defendant a prison sentence of up to five years for one offence and up to ten years (made up of two consecutive five-year sentences) for two or more offences.

83 It is beyond the scope of this article to expand upon this argument. See P Duff and M Findlay, 'The jury in England: Practice and ideology', 10 (1982) *IJSL* 253; P Duff, 'The not proven verdict: jury mythology and "moral panics"', 41 (1996) *Juridical Review* 1.

84 See M Adinkrah, *Crime, Deviance and Delinquency in Fiji*, Fiji Council of Social Services, Suva, 1995.

85 Commission of Enquiry on the Fiji Courts (the 'Beattie Report'), Government of Fiji, August 1994, p.70.

86 Constitution of the Sovereign Democratic Republic of Fiji, 25 July 1990, s.101. A new court of ultimate appeal was inserted above the Court of Appeal, to take the place of the Privy Council, and henceforth this was named the Supreme Court.

87 See Adinkrah, *Crime, Deviance and Delinquency*, Appendix 14.

88 Both of these are being appealed and are discussed above. Originally, I had intended to determine the exact proportion of recent cases where the judge overruled the assessors. The Attorney General's Office was apparently able to carry out such an exercise in 1961 (see above) but it proved impossible to replicate this. It quickly became apparent that the court records lacked sufficient detail and that not all case files could be traced.

89 Beattie Report, (see note 85 above).

90 *ibid.*, pp.81–82.

91 *ibid.*, p.76.

92 See Lal, *Broken Waves*.

93 Beattie Report, p.76.

94 *ibid.*, p.81.

95 *ibid.*, p.76.

96 *id.*

97 *ibid.*, pp.77–81.

98 *ibid.*, p.82.

99 *ibid.*, p.77.

100 *ibid.*, p.82.

101 *ibid.*, p.75. He also recommended that rape trials should always be heard in the High Court, i.e. that they should not be 'electable'.

102 *ibid.*, p.85.

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