

# Fiji Magistrates Bench Book

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**1:**

**THE LAW AND  
CONSTITUTIONAL FRAMEWORK**



## 1 Introduction

The *Constitution of the Sovereign Democratic Republic of Fiji* is the supreme law of Fiji. The *Constitution* states that Fiji is a democratic state in which all people may, to the full extent of their capacity, take part in the institutions of national life and thereby develop and maintain due deference and respect for each other and the rule of law.

## 2 The Rule of Law

The purpose and the function of law is often described as the maintenance of order and the punishment and rehabilitation of those who create disorder in the community. In fact, law operates to regulate most aspects of human behaviour and activity, whether economic, social or political.

The scholar Dicey defined the concept of the rule of law as follows:

“By the rule of law, we mean in the first place that no man is punishable or can be lawfully made to suffer in body or goods; except for distinct breach of law established in the ordinary legal manner before the ordinary Courts of the land.

In the second place, we mean not only that no man is above the law, but that every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals”.

This concept is important as it restates that everyone is subject to the law, no matter what his or her station in life, his or her affiliation, his or her beliefs or whatever else.

## 3 Sources of Law

The sources of law for the Republic of Fiji include:

- the *Constitution*;
- Acts of the Fiji Parliament;
- customary law; and
- the rules and principles of common law and equity.

### 3.1 The Fiji Constitution

The first Fiji *Constitution* was created on 10 October, 1970. It was abrogated in 1987 by the *Constitution Abrogation Decree 1987* and replaced by the *1990 Constitution*. A review of that document created the current *Constitution* which was adopted on 27 July 1998.

The *Constitution* is the supreme law of the State and any law inconsistent with it is invalid to the extent of the inconsistency: *s2 Constitution*.

The *Constitution* details the basic elements of Fiji's system of government by defining:

- the roles, responsibilities and powers of the Executive, Parliament and Judiciary;
- the organisation and structure of the legal system; and
- the requirements of citizenship and details related to finance, land and leadership.

The *Constitution* also states that governance will be based on the democratic principles of equality, social justice, human dignity and communal solidarity.

The *Constitution* is based on and outlines the **Doctrine of the Separation of Powers** which specifies that there should be three distinct and separate branches of government:

- 1 The Parliament (legislature): makes laws;
- 2 The Executive: administrator and policy maker;
- 3 The Judiciary: interprets and applies the law.

Each branch of government checks the roles and functions of the other branches. This process helps maintain the balance of power between the three branches and ensures the Executive not assume too much power.

### 3.2 Statute Law

#### Acts of Parliament

Legislation passed by Parliament is the next most important law after the *Constitution*. These laws, in the form of statutes, can only be changed by Parliament and are binding on the Courts.

However, the Courts may, in certain circumstances, recommend changes to the law or they may declare a specific statute law void if it is inconsistent with the *Constitution*: see *State v Audie Pickering* [2001] FJHC 69; HAM0007j.01s (30 July, 2001).

Under the *Magistrates' Courts Act* English common law, rules of equity and statutes of general application which were in force in England on 2 January, 1875 are in force within the jurisdiction of Magistrates' Courts, but only so far as local jurisdiction and local circumstances permit and subject to any existing or future local Act: *ss25, 26 MCA*.

See *Josefa Nata v State* FCA AAAH 0015/02.

### 3.3 Customary Law

Unless and until Parliament makes provision for the application of customary law, Fijian customary law has effect as part of the laws of Fiji. This is qualified to the extent that any customary law that is inconsistent with the *Constitution*, any statute or is repugnant to the general principles of humanity shall not be part of the law: *Chapter 13 Constitution*.

### 3.4 Common Law

The principles and rules of the common law and equity shall have effect as part of the law of Fiji as long as they are not inconsistent with the *Constitution* or any Act of Parliament.

The common law is law developed by the Court system through:

- interpreting existing legislation;
- interpreting the *Constitution*; and
- covering matters not dealt with by statute law.

The development of the common law does not mean that the Courts can make arbitrary decisions. They must follow the Doctrine of Judicial Precedent.

#### **Doctrine of judicial precedent**

According to Judicial Precedent, Judges and Magistrates in lower Courts are bound to follow like decisions of higher Courts.

#### Binding Authority

This means that lower Courts **must** apply the legal principles announced in the decision of a higher Court in any cases.

#### Persuasive Authority

This means that the Court **may** apply the decision of another Court, but is not required to do so. This usually occurs if the decision comes from a Court of the same level in Fiji or from a foreign Court. You should always carefully consider the decision of the other Court, but if the reasoning of the decision does not persuade you, do not apply it.

There are certain provisions of the law in Fiji which make direct reference to English law. For example, as a general rule of the *Penal Code*, the principles of legal interpretation and expressions used in the *Code* shall be presumed, so far as is consistent with their context, and, except as otherwise expressly provided, to be used with the meaning attached to them in English criminal law: *s3 Penal Code*.

## **4 The Branches of the State**

### **4.1 The Parliament**

The power to make laws for the State vests in a Parliament consisting of:

- the President;
- the House of Representatives; and
- the Senate: *s45 Constitution*.

The President must not refuse to assent to a Bill duly presented for his or her assent: *s46(2) Constitution*.

#### **The House of Representatives**

The House of Representatives consists of 71 members elected in accordance with the *Constitution* to represent single-member constituencies: *s50 Constitution*.

A person is not qualified to be nominated as a candidate for election to the House of Representatives if he or she:

- is not a registered voter;
- is an undischarged bankrupt; or
- has an interest or contract with the government of a kind that must not be held by a member of Parliament: *s58(2) Constitution*.

The House of Representatives, unless sooner dissolved, continues for 5 years: *s59 Constitution*.

#### **The Senate**

The Senate consists of 32 members appointed by various institutions and offices specified in the *Constitution*: *s64 Constitution*.

The term of the Senate expires on:

- the expiry of the House of Representatives; or
- its earlier dissolution: *s65 Constitution*.



## 4.2 Executive Government

### Cabinet Government

The basis of Cabinet Government is that the President, with few exceptions, only acts on the advice of the Cabinet or a Minister or some other body prescribed by the *Constitution: s96 Constitution*. The Cabinet is collectively responsible to the House of Representatives for the governance of the state: *s102 Constitution*.

Governments must have the confidence of the House of Representatives: *s97 Constitution*.

The Attorney-General is the Chief legal adviser to the Government: *s100 Constitution*.

### President

The executive authority of the State is vested in the office of the President: *s85 Constitution*.

The President is the Head of State and Commander-in-chief of the military forces: *ss86, 87 Constitution*.

The President must be a citizen with a distinguished career in any aspect of national or international life and be eligible as a candidate for election to Parliament: *s89(1) Constitution*.

The office of the President is for a five year term, unless removed from office by the Bose Levu Vakaturaga for inability to perform the functions of office or for misbehaviour: *ss91, 93(1)(2) Constitution*.

The President is required to act and exercise independent judgement with respect to:

- the appointment of the Prime Minister who, in his or her opinion, has the confidence of the House of Representatives: *s98 Constitution*;
- the appointment of two members of the Committee on the Prerogative of Mercy: *s115(2)(b) Constitution*;
- after considering the recommendations of a tribunal, the removal of judges from office: *s138 Constitution*; and
- the appointment of the chair-person of the Electoral Commission: *s78(7) Constitution*.

### Vice-President

The *Constitution* also establishes the office of the Vice-President. The Vice-President performs the functions of the President if the President is absent from duty or from Fiji or is from any other reason unable to perform the functions of that office: *s88 Constitution*.

### **Prime Minister**

The Prime Minister must keep the President informed of the general conduct of the government: *s104 Constitution*.

The Prime Minister:

- heads Cabinet;
- advises the President on the appointment of other Ministers of Cabinet: *s99(1) Constitution*;
- must establish a multi-party Cabinet: *s99(3) Constitution*.

### **Bose Levu Vakaturaga (Great Council of Chiefs)**

According to the *Constitution*, the Bose Levu Vakaturaga continues in existence as established under the *Fijian Affairs Act*. Its membership, operations, functions and procedures are prescribed under that Act, in addition to functions conferred by the *Constitution: s116(1) Constitution*.

Under the *Constitution*, for example, the Bose Levu Vakaturaga is responsible for appointing the President and Vice President as well as appointing 14 Senators: *s90 Constitution* and *s64(1)(a) Constitution*.

It is the duty of the Great Council of Chiefs also to make such recommendations to the President as it considers are for the benefit, good governance and well-being of the Fijian people.

## **4.3 The Judiciary**

The Judiciary is the third branch of the State. It comprises the Supreme Court, the Court of Appeal, the High Court and such other Courts as created by law: *s117 Constitution*.

The Judiciary:

- is an independent body which is responsible for interpreting and applying Parliament's laws;
- creates and interprets case law; and
- solves disputes of fact and law between individuals, as well as between individuals and the State.

The making of appointments to judicial office is governed by two principles: first that judges should be of the highest quality and; second, that the composition of the judiciary should, as far as practicable, reflect the ethnic and gender balance of the community: *s134 Constitution*.

The six types of Courts are:

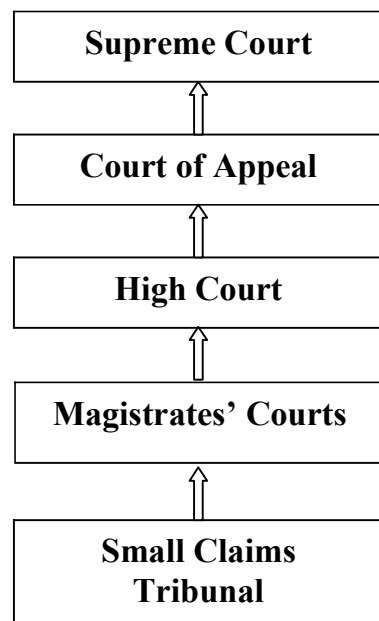
- the Supreme Court;
- the Court of Appeal;
- the High Court;
- the Magistrates' Court;
- the Fijian Court; and
- the Small Claims Tribunal.

The Court system is hierarchical and this is an essential feature of the Doctrine of Judicial Precedent.

The hierarchy provides an appeal system, allowing decisions to be checked by more senior Courts. This helps prevent inconsistency within the Courts and provides a check and balance system for the fair administration of justice.

### **The Structure of the Court System in Fiji**

Figure 1: Structure of Fiji's Court System



## **5 Jurisdiction**

Jurisdiction is the power and authority to hear or determine a particular matter. Courts may only act within their jurisdiction, as defined by law.

### **Original jurisdiction**

This means that a Court is given power to hear certain kinds of cases in the first instance.

### **Concurrent jurisdiction**

Concurrent jurisdiction means that several Courts have the power to hear a particular kind of case.

### **Territorial jurisdiction**

Territorial jurisdiction refers to a Court's power to hear cases for a particular district or tract of land.

### **Appellate jurisdiction**

This is the right of a Court to hear appeals from a lower Court. The Court of Appeal, the High Court and the Magistrates' Courts all have some type of appellate jurisdiction.

### **Criminal jurisdiction**

A crime is the commission of an act that is forbidden by Statute or the omission of an act that is required by Statute.

There are different categories of crime and the category of crime may determine which Court has jurisdiction to hear and determine the matter.

### **Civil jurisdiction**

This covers disputes between individuals, and disputes between individuals and the State that are not criminal in nature.

### **Advisory jurisdiction**

This refers to the power of the Court to provide an opinion in an advisory capacity.

The President has the discretion, in the public interest and on the advice of Cabinet, to refer to the Supreme Court any constitutional issue: *s123 Constitution*.

**Supervisory jurisdiction**

Supervisory jurisdiction refers to the supervisory role that a higher Court has over subordinate Courts to ensure that justice is properly administered.

The High Court has jurisdiction to supervise any civil or criminal proceedings before any subordinate Court: *s120(6) Constitution*.