THE EVOLUTION OF HUMAN RIGHTS AND FREEDOMS WITHIN THE FRAMEWORK OF THE LAW MAKING PROCESS IN FIJI

By

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Declaration

Statement by Author

I, Nilesh Nirvaan Bilimoria, declare that this research project is my own work and that, to the best of my knowledge, it contains no material previously published, or substantially overlapping with material submitted for the award of any other degree at any institution, except where due acknowledgment and footnotes are given within the text of this paper and acknowledged in the bibliography.

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Abstract

Tracing the development of human rights and freedoms brings immediately to mind the violent history of revolutionary struggles to secure *individual rights and freedoms* against tyrannical European and American states in the eighteenth century. We associate this era with the creation of the *Universal Declaration of Human Rights* proclaiming rights of all and styling itself as the protector of international human rights and freedoms documents.

This paper goes back before then to explore human rights and freedoms as an *idea* by drawing on the works of theorists. It will demonstrate *how the core idea* of *human rights and freedoms* gained momentum in *constitutional documents* in England, France and America followed by *how it got carried forward* in the three Constitutions of Fiji and in the law making process in Fiji.

This paper further demonstrates the *pace* at which Courts have exercised their judicial power independent of the legislature and executive in interpreting and giving meaning to the rights and freedoms provisions appearing in the Constitutions and in International Conventions and Treaties.

Finally, this paper considers written submissions on provisions appearing in the *Broadcasting Licensing Bill 2006* and the *Employment Relations Promulgation 2007* and identifies whether the legislative and the executive arms of government in Fiji are seriously committed to ensure that the provisions appearing in those *Bills* have been fully devoted to human rights and freedoms and are in conformity with the Constitution. These two pieces of legislations are taken as examples to illustrate the national law making process.

Judicial interpretation and enforcement of the rights and freedoms provisions and the legislature/executive mandate and political policies are the key proponents for the law making machinery in Fiji. This paper will show that it is these areas along with the Constitution where the roadmap for the evolution of human rights and freedoms begins and the pace with which it has developed.

Abbreviations and Acronyms

BL	Broadcasting Licensing
BLA	Broadcasting Licensing Authority
BOR	Bill of Rights
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading
CCF	Citizens Constitutional Forum
CCPR	Covenant on Civil and Political Rights
CEDAW	Convention on the Elimination of All Forms of Discrimination against
CERD	Convention on the Elimination of all forms of Racial Discrimination
CESCR	Covenant on Economic, Social and Cultural Rights
CPC	Criminal Procedure Code
CRC	Convention on the Rights of the Child
CRC-OPAC	Optional Protocol to the CRC on the Involvement of Children in Armed Conflict
CRMW	Convention on the Protection of the Rights of All Migrants Workers and Treatment or Punishment Members of Their Families Women
CSL	Cabinet Sub-Committee
DOE	Department of Education
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms
EEO	Equal Employment Opportunity
EOA	Equal Opportunity Act
ER	Employment Relations
ERP	Employment Relations Promulgation
FCRC	Fiji Constitutional Review Commission
FHRC	Fiji Human Rights Commission
FIA	Fiji Institute of Accountants
FLP	Fiji Labour Party
FLRC	Fiji Law Reform Commission
FLS	Fiji Law Society

FMC	Fiji Media Council
FWCC	Fiji Women Crises Centre
FWRM	Fiji Women Rights Movement
GA	General Assembly
GCC	Great Council of Chiefs
HRC	Human Rights Commission
JPSC	Joint Parliamentary Select Committee
IR	Industrial Relations
ILO	International Labour Organization
JPSC	Joint Parliamentary Select Committee
MGDs	Millennium Development Goals
MRGI	Minority Rights Group International
NAP	National Alliance Party
NFP	National Federation Party
NGOs	Non-Governmental Organizations
OHCHR	Office for the High Commissioner for Human Rights
PC	Penal Code
OECD	Organization for Economic Cooperation Development
RTU	Reconciliation, Tolerance and Unity
SDL	Soqosoqo Duavata ni Lewenivanua
SVT	Soqosoqo Ni Vakavulewa Ni Taukei
UN	United Nations
UDHR	Universal Declaration of Human Rights
UNDP	United Nations Development Programme
UNICEF	United Nations Children's Fund
UNIFEM	United Nations Development Fund for Women
UDHR	Universal Declaration of Human Rights (1948)
US	United States
VCAT	Victorian Civil and Administrative Tribunal
WWI	World War One 1917 – 1918
WWII	World War Two 1939 – 1945

Introduction

Tracing the development of fundamental rights and freedoms requires an appreciation of the theoretical and philosophical foundations of the *idea* of *human rights* and *freedoms*. Chapter 1 is intended to offer some of the works by theorists and their versions of *the idea of rights and freedoms* followed by considering its influence within the contemporary international society of states. Chapter 2 narrows the geography of the idea of human rights and freedoms and links it to map out the Constitutional framework in Fiji by considering the development of fundamental rights and freedoms starting from pre-European contact times through to pre colonial and post colonial days. The entrenchment of *Chapter 4 BOR* in the *1997 Constitution* significantly increased the law-making power of Courts in Fiji. Courts are now empowered to deal with issues that range far beyond what were available in the *1970 and 1990 Constitutions*. Courts can now have regard to the application of international conventions and treaties. The approach and attitude by Courts in Fiji and the manner in which they have come to practically apply and give meaning to the provisions appearing in *Chapter 4 BOR* and international conventions and treaties appear in Chapter 3 alongside interpretations of Courts from within the South Pacific region. In addition, the realization of the provisions appearing in the *BOR* and international conventions and treaties is supported by the establishment of various Parliamentary Sector Standing Committees. This initiative introduced by the State, overseeing that the formulation of political polices are in conformity with the provisions of *Chapter 4 BOR* and international conventions and treaties appear in Chapter 4. The final chapter concludes by drawing together the development and the law making process of human rights and freedoms in Fiji. At the end of this paper, the reader should be better placed to reach a position on the veracity of human rights and freedoms and the pace with which it is developing in Fiji.

Chapter 1
Theoretical Perspectives

1.1■ Introduction

This introductory chapter explores the theoretical basis of human rights and freedoms. One of the earliest theories, natural law theory, which led to natural rights theory, is examined in this chapter. Initially, the reader is driven to the idea of individual rights which found its early expression in *constitutional documents* as well as including many of those of ideas codified in legal texts in America and France. A thin appreciation of some form of recognition and existence of individual rights and freedoms within the framework of public international law is also discussed. This is followed by the creation of the *UDHR* marking the foundation of contemporary human rights. An analysis of the *UDHR* together with an overview of the *International BOR* and the seven core *International Human Rights Treaties* also appears in this chapter.

1.2 ■ Public International Law

Understanding the origins and evolution of *individual rights and freedoms* requires an appreciation of the nature of public international law ("international law"). The emergence of international law can be traced as far as the historic international treaty "***Peace of Westphalia*** in 1648, marking the creation of the modern independent state".[1] "States were the only lawmakers as well as the only subjects".[2] Individual human beings were regarded as "objects rather than subjects of that law".[3] According to Freeman and Van Ert "international law was the 'law of nations', it was not the 'law of humans' and states could generally treat their own citizens however they wished".[4]

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[1] Mark Freeman and Gibran Van Ert, *International Human Rights Law* (2004) 4.
[2] See above, 5.
[3] Mark Freeman and Gibran Van Ert, above n 1, 4; See also Thomas Buergenthal, 'International Human Rights in an Historical Perspective' in Janusz Symondides (ed), *Human Rights Concepts and Standards* (2000) 5.
[4] Mark Freeman and Gibran Van Ert, above n 1, 5.

In my view, the core *'subjects'* are the *state* and *state* with each state exercising absolute control over its nationals. With international law overlapping with national and constitutional law, there is a danger that states obligation and commitment with other states will override the fundamental rights and freedoms protection of its nationals. Its nationals will have a legitimate expectation that recognition and protection of their rights and freedoms are not compromised arising out of states' relationship under international law.

Treating individuals as subjects under international law and giving expression to individual rights and freedoms in limited circumstances gained momentum after WW I.[5] The ***Covenant*** of the ***League of Nations 1919*** ("the Covenant") at the conclusion of WW I, "codified and consolidated custom and practice into a written tabulation of rights" in which *Article 22* and *Article 23* of the Covenant significantly "inspired later developments in human rights".[6] *Article 22* dealt with the "provisions of former colonies of the states that had lost WW I" and *Article 23* dealt with "international labour rights and protections".[7] The Covenant did not directly contain substantive provisions on individual rights and freedoms but it thinly introduced and inspired the start of some form of protection of individual rights and freedoms.

In tracing the development of international law there is a great variety of theoretical approaches on the foundation of international law which this paper does not address in much detail.[8] The problem of sources of international law is of great "theoretical and practical importance as it has to answer how norms or standards of international law originate and where to find them".[9] Various theories of sources of international law may be divided into four group's ***natural law theory***, ***positivist theory***, ***sociological theory*** and ***mixed theories***.[10] Amongst the oldest approaches is the theory of ***natural law*** which

[5] Thomas Buergenthal, above n 3, 5.
[6] Mark Freeman and Gibran Van Ert, above n 1, 15.
[7] See above.
[8] Levi Werner, *Contemporary International Law: a Concise Introduction* (2nd ed, 1991) 17.
[9] Martin Dixon and Robert McCorquodale, *International Law* (2nd ed, 1991) 20.
[10] Levi Werner, above n 8.

"led to ***natural rights theory***, the theory most closely associated with ***modern human rights***".[11]

The doctrine of human rights and freedoms can be ascertained by appreciating that it has developed as an *idea of individual rights and freedoms*. The theoretical aspects of human rights and freedoms are many but the for the purpose of my paper, I have attempted to explore the ***medieval notions of natural law theory*** followed by concentrating on ***natural rights*** which transformed into concrete formulations of the idea of ***individual rights*** and ***freedoms*** inherent and fundamental to all humans. For the *idea of freedoms*, I have examined the works of philosophers and scholars who provide varying versions of freedom either by bringing together and merging it with the *idea of liberty* or isolating it. I then proceed to advance discussions on contemporary conceptions of human rights and freedoms.

1.3 ■ Medieval Notions – Natural Law – Natural Rights

The doctrine of human rights and freedoms can be traced back to the medieval notions of natural law originating from the classical "Greek Hellenistic period and later the Roman period which drew upon the elementary principles of justice which were *right reason* in accordance with nature, *unalterable* and *eternal*".[12] The writings of Aristotle in the *Nicomachean Ethics* refer to the medieval notion of natural law as *natural moral order*, "providing the basis for all truly rational systems of justice".[13] Roman Stoics, legends such as Senator Cicero and Emperor Marcus Aurelius and Seneca supplemented Aristotle's work by positing that "morality originated in the rational *Will of God* and the

[11] Thomas Buergenthal, above n 3, 37; See also David Sidorsky, 'Contemporary Reinterpretations of the Concept of Human Rights' in Henry J Steiner and Phillip Alston (eds), *International Human Rights in Context: Law, Politics, Morals* (first published 2000, 2nd ed, 2000) 327; See Mark Freeman and Gibran Van Ert, above n 1, 5.

[12] Jerome J Shestack, 'The Philosophical Foundations of Human Rigjhts' in Janusz Symondides (ed), *Human Rights Concepts and Standards* (2000) 36; See also Burns Weston, 'Human Rights' in Henry J Steiner and Phillip Alston (eds), *International Human Rights in Context: Law, Politics, Morals* (first published 2000, 2nd ed, 2000) 324-5; See Mark Freeman and Gibran Van Ert, above n 1, 36.

[13] Andrew Heard, *Human Rights: Chimeras in Sheep's Clothing* (1997) http://www.sfu.ca/~aheard/intro.html (Accessed 14/03/08).

existence of a cosmic city from which one could discern a natural, moral law whose authority transcended all local legal codes".[14] Catholic theorists of the Roman Catholic Church in medieval Europe "equated *natural law with divine law*."[15] Christian theologians interpreted natural law "as conferring immutable rights upon individuals as part of the *Law of God*".[16] They referred to "the idea that the human person, as the creation of some Divinity, has worth and value and accordingly should be treated with a measure of dignity and respect".[17] Christians maintained "belief in the existence of a universal moral community"[18] the authority for it being God's Will as interpreted by his vicars of Christ on earth".[19]

According to Orend, the "idea that everyone deserves some decent treatment and respectful regard clearly plays a major role in human rights thinking".[20] Shestack, adds that:

> "in a religious context, every human being is considered sacred. Accepting a universal common father gives rise to a common humanity and from this flows a universality of certain rights. Since the rights stem from a divine source, they are inalienable by mortal authority".[21]

Orend and Shestack both agree and state that "the enduring standards of morality and justice subscribed to by the major religions started out first as *articulations* not of rights but, rather, of *duties*".[22] At the beginning of the seventeenth century with the plunging unity of Christendom, the theological approach posed difficulty to "support the various fundamental principles of equality and justice which underlie international human rights".[23] According to Heard, "the moral authority of natural rights precisely lay in its

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[14] See above.
[15] Anthony H Birch, *The Concepts and Theories of Modern Democracy* (3rd ed, 2007) 181.
[16] Jerome J Shestack, above n 12, 37.
[17] Brian Orend, *Human Rights Concept and Context* (2002) 191.
[18] Andrew Heard, above n 13, 3.
[19] Anthony H Birch, above n 15, 181.
[20] See above.
[21] Jerome J Shestack, above n 12, p 37.
[22] See above, 36; See also Brian Orend, above 17, 192.
[23] See above.

religious foundations as it had *divine authorship* in which God decided what limits ought to be placed on the human political activity".[24] This brings us to "*natural law* theorists who turned to *human reason* rather then *divine revelation* as the source of law that had greater authority then the dictates of government".[25] The medieval notions of divine or inherent natural law received little reception as it excluded the central ideas of freedom and equality.[26]

In England, there existed since the days of the ***Magna Carta*** earlier constitutional documents.[27] They presented and enshrined "the earliest known expressions of some *core human rights ideas* which now fall within the broad ambit of human rights and freedoms".[28] In a nutshell the significance of these constitutional documents embedded the "principles of *habeas corpus* and the right to due process and an element of religious freedom".[29]

Let us take two examples from these documents the ***Magna Carta*** and the ***BOR***. In the former, King John of England in 1215, in exchange for money from the nobles guaranteed them recognition of their "rights to due process, political participation, and land-ownership" by formally documenting these rights in the ***Magna Carta***.[30] The exercise of these rights were however limited to nobles and aristocrats.[31] In the latter, Protestant monarchs, King William and Queen Mary overthrow Catholic leadership led by King James II by issuing a *BOR* thus "declaring absolute monarchy 'illegal' with the establishment of an elected parliament to advise the monarch".[32] This provision in the *BOR* stipulated that:

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[24] Andrew Heard, above n 13, 2.
[25] Anthony H Birch, above n 15, 181.
[26] Jerome J Shestack, above n 12, 36.
[27] Rhona K M Smith, *Textbook on International Human Rights* (2nd ed, 2005) 16; See also Mark Freeman and Gibran Van Ert, above n 1, 6 - "earlier *constitutional documents* from England such as the ***Magna Carta*** of ***1215***, ***Petition of Rights*** of ***1627***, and ***BOR*** of ***1689***".[27]
[28] Mark Freeman and Gibran Van Ert, above n 1, 6.
[29] See above.
[30] Brian Orend, above n 17, 163.
[31] See above, 102 and 197; See also Mark Freeman and Gibran Van Ert, above n 1, 6.
[32] Brian Orend, above n 17, 5.

> "'the subjects…have the right to petition the King' through their elected members of parliament and election to parliament must be 'free and fair'".[33]

The Crown and Parliament acknowledged various rights of British citizens as the *BOR* significantly "proclaimed 'a right to freedom of speech and debates' within parliament and insofar as convicted offenders of crime were concerned they had the right not to be inflicted with 'cruel and unusual punishment'".[34] According to Orend:

> "the *Bill* widened the scope and number of objects claimed as a matter of justice including property rights and due process in legal proceedings. There also appeared certain rights to self-defence, political participation, free political speech, and even some personal security from cruelty and torture".[35]

I now examine the *theory of natural law* in Europe and America. In these countries the "idea of *individual rights* found its early expression"[36] as early as the seventeenth and eighteenth centuries.[37]

1.3.1 ■ Natural Rights

Moral and political theorist Thomas Hobbes in his writings *Leviathan* rolled out the "doctrine of the foundation of his societies and legitimate governments".[38] He relied on the notion of '*a natural right*' rather than *'natural right*' where no list existed for naturally right or wrong behaviours.[39] "In Hobbes view, this natural right was one of self-preservation which was everyone's natural instinct".[40] He claimed that "we should behave as if we had voluntarily entered into such a contract with everyone else in our

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[33] See above, 102.
[34] Brian Orend, above n 17,103.
[35] See above; See also ***Declaration of Arbroath*** of 1320 (Scotland) which concentrated on the idea of the right to liberty as opposed to rights.
[36] Mark Freeman and Gibran Van Ert, above n 1, 5.
[37] See above; See also Jerome J Shestack, above n 12, 37; See also Burns Weston, above n 12, 324-5.
[38] http://en.wikipedia.org/wiki/Thomas_Hobbes (Accessed 28/03/08).
[39] Andrew Heard, above n 13, 2.
[40] See above; See also http://history.wisc.edu/sommerville/367/367-092.htm (Accessed 28/03/08).

society, that is, except the sovereign authority".[41] "The way out of this desperate state was to make a social contract and establish the state to keep peace and order".[42] According to Hobbes, "society was a population beneath a sovereign authority, to whom all individuals in that society submitted their natural rights for the sake of protection. Any abuse of power by this authority was to be accepted as the price of peace".[43]

In my view, Hobbes's theory attempts to establish a society where individuals surrender their natural rights to be protected by a superior authority. Indirectly, individuals are at the mercy of the *state*.

English philosopher and natural rights theorists John Locke, a great supporter of the British Glorious Revolution of 1688, supported Hobbes's divine basis of natural rights in his writings in the *Second Treatise of Civil Government*. He argued "that natural rights flowed from natural law".[44] "Natural law originated from God".[45] In recognizing "the Will of God, it provided us with an ultimately authoritative moral code".[46] He asserted that "human, or 'natural,' rights were non-visible properties of personhood".[47] He rested his analogy on "the claim that individuals possess natural rights, independently of, and prior to, the formation of any political community".[48] Just like a coin, natural law had two sides, a "religious side and a secular side".[49] The former "Locke asserted that God the Creator established for us laws as contained in the Bible, for instance the Ten Commandments and the Golden Rule" while the latter "knowable through reason alone were principles of action that every normal human being agreed to follow" for instance "rules regarding self-preservation".[50] According to Locke "each of us owed a duty of self-preservation to God" and in discharging this duty "each individual had to be free

[41] See above, n 38.
[42] http://oregonstate.edu/instruct/phl302/philosophers/hobbes.html (Accessed 28/03/08).
[43] See above, n 38.
[44] Andrew Heard, above n 13, 2; See also Brain Orend, above n 17, 202; See also http://www.iep.utm.edu/h/hum-rts.htm (Accessed 14/03/08).
[45] http://www.iep.utm.edu/h/hum-rts.htm (Accessed 14/03/08) p 4.
[46] See above.
[47] Brian Orend, above n 17, 18.
[48] See above n 45.
[49] Brian Orend, above n 17, 202.
[50] See above.

from threats to life and liberty, whilst also requiring positive means for self-preservation, personal property".[51] He found that:

> "certain rights self-evidently pertained to individuals as human beings (because they existed in 'the state of nature' before humankind entered civil society); that chief among them were the *rights to life, liberty* (freedom from arbitrary rule), and *property*; that, upon entering civil society (pursuant to a 'social contract'), humankind surrendered to the state only the right to enforce these natural rights, not the rights themselves; and that the state's failure to secure these reserved natural rights (the state itself being under contract to safeguard the interests of its members) gave rise to a right to responsible, popular revolution".[52]

Locke's imaginary state of nature provided "the establishment of legitimate political authority upon a rights foundation".[53] His theory on natural rights rested with the *state* "who were presented as existing to serve the interests of the people and not of a Monarch or a ruling cadre".[54] According to Orend with the assistance of Locke's theory "men took into civil society their natural rights to life, liberty, and the property with which they had mixed their labour".[55]

Locke's theoretical contribution on the "*nature-based conception of individual rights*"[56] at the close of the eighteenth century during the transition of the American and French revolution inspired the American colonists and the French to create the foundational platform for rights and freedoms. This inspiration came from the constitutional documents which were "codified in legal texts as the ***American Declaration of Independence 1776*** and the ***French Declaration of the Rights of Man and of the Citizen 1789***".[57]

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[51] See above n 45.
[52] Jerome J Shestack, above, n 12, 37; See also Burns Weston, above n 12, 324-5; See also Mark Freeman and Gibran Van Ert, above n 1, 5.
[53] See above n 45.
[54] See above.
[55] Brian Orend, above n 17, 182.
[56] Rhona K M Smith, above n 27, 6; See also Mark Freeman and Gibran Van Ert, above n 1, 6.
[57] See above. See also Burns Weston, above n 12, 324-5.

The introduction of the ***American Declaration of Independence of 1776*** running almost parallel to the ***Virginia BOR***[58] "left out property rights but inserted reference to God"[59] as stressed in the *preamble*:

> "We hold these truths to be self-evident,…all men are created equal,…endowed by their Creator with certain unalienable rights, that among these are *life, liberty,* and the *pursuit of happiness*. That to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed".[60]

According to Freeman the *preamble* to the Declaration "derives in part from the writings of John Locke as highlighted earlier who spoke of the 'natural right' to preserve one's property, which he defined as his '*life, liberty, property, security and resistance to oppression*'".[61] He further added that:

> "man being born, as has been proved, with a Title to perfect Freedom, and an uncontrolled enjoyment of all the Rights and Privileges of the Law of Nature, equally with any other Man or Number of Men in the World, hath by Nature a Power …to preserve his Property, that is his Life, Liberty and Estate, against the injuries and Attempts of other Man".[62]

The drafters of the American Declaration ensured that they did not limit the exercise of rights and freedoms for a particular class structure as the British did, since in their view "all men were children of God, they ought to possess equal intrinsic worth by their very nature: intrinsic worth because created by God Himself, and equal worth because no one is more a child of God than the next men".[63] In 1789, with the US Constitution taking

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[58] *Virginia Bill of Rights Clause 1* http://www.constitution.org/bor/vir_bor.htm (Accessed 26/06/08) *"That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society they cannot, by any compact, deprive or divest their posterity: namely, the enjoyment of life and liberty, with the means of acquiring and possessing property and pursuing and obtaining happiness*".

[59] Anthony H Birch, n 15, 182.

[60] http://en.wikipedia.org/wiki/United_States_Bill_of_Rights (Accessed 16/04/08); See also Mark Freeman and Gibran Van Ert, above n 1, 6.

[61] Rhona K M Smith, above n 27, 6.

[62] Conor Gearty, *Civil Liberties* (2007) 12.

[63] Brian Orend, above n 17, 104.

precedence over the *Declaration of Independence* included the first ***Ten Amendments*** which formed the ***American BOR*** ("the *Bill*").[64] Majority of the rights in the *Bill* made reference to due process in particular from the ***Fifth Amendment*** to the ***Eighth Amendment***.[65] The *Fifth Amendment* also expressly provided for the "'*right not to be 'deprived of life, liberty or property without due process of the law*'" and where dispute over property existed and property was lawfully seized the disadvantaged party remained entitled to 'just compensation'.[66] The exercise of powers by the police to carry out search and seizures and arrest perpetrators was provided for by the ***Fourth Amendment*** with the element of due process further attached when police executed their powers during criminal investigations.[67] The right to liberty appeared in the ***First Amendment*** where liberty had been interpreted to include the right to choose ones own religion, freedom to exercise free speech including freedom of the press and the "right to peaceably assemble both for religious worship and for partisan political rallies".[68] It can be asserted that the *American BOR* is an extension of the rights enumerated in the *English BOR* with the former providing a wider scope to express and exercise the various rights and freedoms in the Amendments. The rights were more refined and attached to every person as opposed to the British framework of rights and freedoms.

The political battle between France and ancient rival England resulted in the signing of the ***Treaty of Paris*** in 1763, between France and America.[69] With the conclusion of the revolution in 1789, the ***Declaration of the Rights of Man and of the Citizen*** ("the Declaration") was the "most influential rights document throughout Europe".[70] The *Declaration* "abolished all exclusionary social privileges, offices and distinctions and replaced them with a universally accessible system of social recognition and reward enabling maximum participation".[71] In addition, the *Declaration* drew many of the rights from the English and American documents and proclaimed seventeen rights as

[64] See above, 202.
[65] Brian Orend, above n 17, 105.
[66] See above.
[67] Brian Orend, above n 17, 105
[68] See above.
[69] Brian Orend, above n 17, 204.
[70] See above, 106.
[71] Andrew Heard, above n 13.

"*the natural, inalienable and sacred rights of men*" these rights being liberty, property, security, and resistance to oppression. [72] In a nutshell "it offered the same due process protections and respect for rights to 'liberty, property security and resistance to oppression' with a little addition to property and security rights".[73] "The *Declaration* was perhaps most notable, though for its bold, repeated and approving references to the right of equality".[74] *Article 1* stated "*men are born and exist free and with equal rights; social distinctions may be based only upon general usefulness*".[75] Subsequent *Articles* guaranteed equality of all citizens before the law, "*equally in proportion to their means*" and equally to seek public office, assessed "*solely on the basis of merit and not heredity or privilege*".[76] The concept of liberty was defined by *Article 4* "*as being able to do anything that does not harm others*" while exercise of the rule of law, including fair trial processes was provided in *Articles 6-10*".[77] "*The right to free communication of ideas and opinions and the right to exercise such opinions*" subject to such limitations prescribed by law was provided in *Articles 10-11*.[78] According to Orend the "*French Declaration's* distinctive contribution of human rights history rested in two fields the right to political participation and the right to equality".[79]

The *American BOR* and *French Declaration* reflected the beginning of a structured framework of rights and protections despite the political rivalry between them for absolute control and power over territories. The earlier constitutional documents must not be ruled out as the *essential ingredient* for introducing the core human rights and freedoms ideas. It is with their formulation that these human rights and freedoms ideas were embraced by later documents appearing in the form of *BOR* and *Declarations*. Securing rights and freedoms for all continued to resound in Europe until the outbreak of *WW I* and *WW II* in the twentieth century. Myriad of lives of soldiers and innocent

[72] See above.
[73] Brian Orend, above n 17, 106.
[74] See above.
[75] *French Declaration, Article 1* http://www.hrcr.org/docs/frenchdec.html (Accessed 16/04/08); See also Brian Orend, above n 17, 106; See also Rhona K M Smith, above n 27, 6.
[76] *French Declaration, Articles 13-14*.
[77] *French Declaration, Articles 6-10*.
[78] *French Declaration, Articles 10-11*.
[79] Brian Orend, above n 17, 107.

civilians were lost under ambitious European empires followed by mass killings of Jews in what was known as the Holocaust under German Nationalist Socialist Adolf Hitler's regime.[80] The mass violations of rights and freedoms and the catastrophic sufferings of human beings were of grave concern for the global international community. They made it their 'business' to ensure that '*never again*' would *state* national machinery collapse to permit violations of rights and freedoms of human beings. Their intervention was the defining moment in elevating human rights and freedoms by the creation of the *UDHR* marking the foundation of contemporary human rights. The *UDHR* is discussed later in this chapter.

The theoretical development reveals that the idea of individual rights derives from many sources. My perception about the idea of rights rests on the thought that through divine intervention the idea of individual rights came into being. We know that it is inbuilt within us and therefore we accept and recognize the idea of individual rights. We firmly believe it cannot be taken away from us. At birth, when a human being took the first breath, it was at that point that *recognition* of his or her rights and freedoms came into existence. It is the fetus beginning at or near conception-fertilization that embraces his or her rights and so it is at that point the fetus recognizes his or her rights.

The conceptions of nature by theorists of natural law can be understood to differ but essentially they were conceived as *inalienable, eternal, and divine*. The offspring of *natural law* show the way to *natural rights* featuring the existence, recognition and protection of individual rights as presented by Locke. The idea of individual rights and freedoms nonetheless endured in one form or other thus giving weight and substance to the doctrine of human rights and freedoms.

[80] http://en.wikipedia.org/wiki/World_War_I (Accessed 3/04/08); See also http://en.wikipedia.org/wiki/World_War_II (Accessed 3/04/08); See also Brian Orend, above n 17, 219.

1.4 ■ Idea of Freedom or Liberty

I now consider the *idea of freedom or liberty* by examining the works of philosophers and scholars. Hobbes together with British Utilitarians and British idealists in the first half of the nineteenth century accorded preference to the *idea of freedom or liberty* as it played a significant role in the progress of political life within the parameters of the state's exercise of powers and functions. In the *Leviathan*, Hobbes presented the definition of liberty or freedom as "liberty, or freedom, signifieth, properly, the absence of opposition; meaning external impediments of motion".[81] Hobbes believed that:

> "men were born, where liberty abounded to counter-productive effect: because the condition of man…was a condition of war of every one against every one; in which case everyone was governed by his own reason and there was nothing he could make use of that may not be a help unto him in preserving his life against his enemies; it followeth that in such a condition every man had the right to everything; even to ones another's body".[82]

In my view, Hobbes belief resonates around the idea of free will without any interference or regulation by any person, authority or body. His analogy must be treated with caution as a danger arises of creating an atmosphere for oneself with no accommodation for others. Indirectly, Hobbes is suggesting individuals to be self-centered and self-motivated.

Utilitarians and initiators of liberal individualistic, Jeremy Bentham and John Stuart Mill "regarded freedom as the most important political value, but they realized that boundaries to individual liberty had to be established in order to protect other values such as security".[83] British individualist Mill by his works in *On Liberty* asserted that "citizens are free in so far as they are not constrained by laws and regulations"[84] while in Bentham's view "whether a proposed law or regulation was acceptable or not was the so

[81] Anthony H Birch, above n 15, 160.
[82] Conor Gearty, above n 62, 11.
[83] Anthony H Birch, above n 15, 160-161.
[84] See above.

called 'felicific calculus'".[85] Bentham's central question rested on the test as to whether all legislation "was likely to increase or diminish the sum total of human happiness".[86] This reflected the spirit of Ultilitarianism on achieving "the greatest happiness for the greatest number".[87] Mill viewed his principle pretty straight forward as "the state would only be justified in curtailing the freedom of individuals if the purpose of that curtailment was to prevent harm to others".[88] This public law could impose restrictions on the rights of the person like public interest justifies taking over ones property for greater use of others generally.

English idealist perception of the nature of liberty upon examining Utilitarian view of liberal individualist assumptions embraced the writings of Bernard Bosanquet who claimed that the term liberty had two components attached to it, a lower sense and a higher sense.[89] *Liberty* meant "the absence of restraint in the lower sense and acceptance by individuals of their real will, as rational beings, to make the best of themselves in the higher sense".[90] English idealist rejected the Utilitarian view of the state as it ignored the social basis of the state. The idealist believed that "ideally the state should not have to depend on coercion except at the margin for 'will, not force, as the basis of the state'".[91] The idealist established that "political institutions were central to human self-improvement and self-realization in the context of a harmonious community organized for self-government".[92]

In comparison Hannah Arendt, German political theorist found that "liberty was used when the writer meant the absence of restraint and freedom was used when the writer meant the opportunity to engage in some activity, such as political participation".[93] Arendt expressed objection to merge the terms as if they were synonymous as they were

[85] Anthony H Birch, above n 15, 160-161.
[86] See above.
[87] See above; See also Brian Orend, above n 17, 181.
[88] Anthony H Birch, above n 15, 162.
[89] See above, 168.
[90] Anthony H Birch, above n 15.
[91] See above.
[92] Anthony H Birch, above n 15, 170.
[93] See above, 159.

used in slightly different ways.[94] Sir Isaiah Berlin one of the leading liberal thinkers of the twentieth century in his famous lecture on *Two Concepts of Liberty* streamlined and interpreted the concept of liberty in two categories: the *negative concept of liberty* and the *positive concept of liberty* by treating liberty and freedom synonymous.[95] Berlin defined the *negative concept of liberty* as "freedom for the individual to do whatever he or she wants to do; that liberty is the absence of restraint"[96] and the *positive concept of liberty* as "freedom to do things that are worth doing, to engage on self-development, to have a share in government of one's society, the idea of self-mastery, or the capacity to determine oneself, to be in control of one's destiny".[97] Berlin highlighted that "the concept liberty or freedom is essentially political when applied to human beings".[98] He further highlighted that notions of positive liberty were "used to defend nationalism, self-determination and the Communist idea of collective rational control over human destiny".[99] By this approach Berlin argued that "demands for freedom paradoxically become demands for forms of collective control and discipline, those deemed necessary for the 'self-mastery' or self-determination of nations, classes, democratic communities, and even humanity as a whole".[100] The *positive concept of liberty* provides a wider basis for the improvement in human condition thus taking precedence over the greatest happiness principle of the individual which fits into Utilitarian approach.

On the other hand, the writings of psychoanalyst and humanistic philosopher Erich Fromm, in '*The Fear of Freedom'* merits examination as he confines both the terminologies to freedom and links *negative and positive freedom* with humanity's evolution.[101] Fromm argued, freedom "was here used not in its positive sense of 'freedom to' but in its negative sense of 'freedom, namely freedom from instinctual

[94] http://en.wikipedia.org/wiki/Hannah_Arendt (Accessed 12/04/08).
[95] Anthony H Birch, above n 15, 160-161; See also http://en.wikipedia.org/wiki/Isaiah_Berlin#.22Two_Concepts_of_Liberty.22 (Accessed 12/04/08).
[96] See above.
[97] Anthony H Birch, above n 15, 160-161; See also http://en.wikipedia.org/wiki/Isaiah_Berlin#.22Two_Concepts_of_Liberty.22 (Accessed 12/04/08)
[98] Anthony H Birch, n 15, 159.
[99] http://en.wikipedia.org/wiki/Isaiah_Berlin#.22Two_Concepts_of_Liberty.22 (Accessed 12/04/08).
[100] See above.
[101] http://en.wikipedia.org/wiki/Positive_liberty (Accessed 12/04/08).

determination of his actions".[102] Positive freedom, Fromm maintains, came through the "actualization of individuality in balance with the separation from the whole a 'solidarity with all men', united not by instinctual or predetermined ties, but on the basis of a freedom founded on reason".[103]

American philosopher Dworkin, wrote on the idea of liberty. He was not happy with this and his theory of politics which he felt was based on the primacy of moral rights.[104] He found liberty to entail principles of equality, more specifically 'equality of resources'.[105] He described the distribution of resources such as access to food, proper healthcare and education as examples to exercise one's individual right. These also included freedom of speech and right to vote which fell under the fountainhead of liberty. He found troublesome to equate liberty with equality, especially when someone was born with no or minimal resources and was disadvantaged in life through no fault of his or her. He compared this situation with others, who were born with manageable resources and were able to elevate themselves to attain a better quality of life. Outside the legal rights that would be available by the Constitution, he found comfort with the theory of moral rights that we all had moral rights exercisable against the State.[106] This occurred when a person was treated in an unacceptable manner by the State. Bearing in mind the interest of the public, the State would perceive such treatment to be reasonable and justifiable. It is in this situation, that Dworkin mounts a challenge against the State on the grounds of moral rights as opposed to the right to liberty.

The idea of freedom can be also be traced by visiting the works of European political thinkers who shaped the socialists' human rights agenda by committing to the positive concept of liberty. German philosopher Georg Wilhelm Friedrich Hegel, in his writings

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[102] See above.
[103] See above, n 101.
[104] http://en.wikipedia.org/wiki/Ronald_Dworkin#Theory of equality (Accessed 4/04/08); http://www.denbridgepress.com/emfm_pdf/13.pdf (Accessed 20/5/09); http://books.google.com.fj/books?id=v_PIX6WBZgcC&pg=PA280&lpg=PA280&dq=dworkin+theroy+-+moral+rights&source=bl&ots=jWn8UtjPRA&sig=y5kMG5hSt3h5cd_efXn4AhgyOBU&hl=en&ei=iaITSuLNKcWUkAXe58CMDw&sa=X&oi=book_result&ct=result&resnum=1 (Accessed 20/5/09)
[105] See above.
[106] See above n 104.

Encyclopedia Philosophy of Spirit[107] revises the notion of freedom or autonomy formulated by practical German philosophies such as Immanuel Kant and Johann Gottlieb Fichte and sets the formula for freedom by stating that:

> "The basis of right is the realm of spirit in general and its precise location and point of departure is the *will*; the will is free, so that freedom constitutes its substance and destiny and the system of right is the realm of actualized freedom, the world of spirit produced from within itself as a second nature". [108]

Hegel found that "*free will* was the basis of right and the *will* was not a faculty separate from thinking but, rather, 'a particular way of thinking-thinking translating itself into existence, thinking as the drive to give itself existence".[109] "Hegel did not perceive freedom as separable from the will and characterized freedom as a formal feature of spirit that allowed it to 'withdraw itself from everything external and from its own externality, its very existence'".[110]

The writings by various theorists on the *idea or concept of freedom or liberty* presents divided versions and interpretations. In giving expression to them, some have merged them to be used interchangeably, while some have isolated them to separately give meaning. Others have dissected either liberty or freedom further to sprout out the positive and negative aspects inherent in them. The interpretations are many but eventually lead to the essential ingredient of liberty or freedom as a *political value* rather than an *inherent value* in the evolution of rights and freedoms discourse. In my view, this value denotes or defines freedom as the ability to participate, choose and exercise one's *free will* with others within the authority of the state.

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[107] Paul Franco, *Hegel's Philosophy of Freedom* (1999) 155; See also http://en.wikipedia.org/wiki/Hegel (Accessed 30/03/08).
[108] See above.
[109] Paul Franco, above n 107, 157.
[110] See above, 159.

1.5 ■ Universal Declaration of Human Rights

With the conclusion of global warfare at the end of WW II, "a special committee of the UN"[111] was established under the UN Charter of 1945 ("the Charter").[112] The Charter "was not a world constitution but merely a treaty binding on its states parties".[113] One principle objective under the Charter, included '*promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion*,' which led to the evolution of a single landmark document the ***UDHR***. This marked the foundation of contemporary human rights adopted by the General Assembly ("the GA") in 1948".[114] The *UDHR* was proclaimed by the GA:

> "as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this *Declaration* constantly in mind, shall strive by teaching and educating to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance,…".[115]

The *UDHR* was a statement about being human. It was a "yardstick by which to measure the degree of respect for, and compliance with, international human rights standards".[116] As a Declaration, it was 'not a directly legally binding treaty," but "was of high *moral*

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[111] See above n 45; See also Anthony H Birch above n 15, 184.
[112] *Charter of the United Nations* http://www.un.org/aboutun/charter/ (Accessed 4/04/08).
[113] Mark Freeman and Gibran Van Ert, above n 1, 20.
[114] *An introduction to the core human rights treaties and the treaty bodies, Fact Sheet No. 30, p 5* http://www.ohchr.org/Documents/Publications/FactSheet30en.pdf (Accessed 16/04/08); See also GA Res 217A(III) (10 December 1948) http://www.un.org/Overview/rights.htm; See also *Article 1(3) UDHR* http://www.unhchr.ch/udhr/lang/eng.htm (Assessed 4/04/08); See also Jack Donnely, *International Human Rights: Dilemmas in World Politics* (2nd ed, 1998) 5; See also Brian Orend, above n 17, 107; See also above n 45.
[115] *Preamble,* GA Res 217A(III) (10 December 1948); See also *The International Bill of Rights, Fact Sheet No. 2 (Rev.1)* http://www.ohchr.org/Documents/Publications/FactSheet2Rev.1en.pdf (Accessed 16/04/08); See also http://www.unhchr.ch/html/menu6/2/fs2.htm (Accessed 4/04/08); See also http://www.unhchr.ch/udhr/lang/eng.htm (Accessed 4/04/08).
[116] See above, *Fact Sheet No. 2.*

force, representing as it did, the first intentionally agreed definition of rights (human rights and freedoms) of all people".[117] The:

> "Declaration through its comprehensive drawing together of the different types of rights emphasized the commonality, interrelatedness and interdependence of all rights…In addition, it was a fundamental source of *inspiration* for national and international efforts to promote and protect human rights and fundamental freedoms".[118]

The *UDHR* in the sphere of human rights and freedoms development and ideas "had set the *direction* for all subsequent work by providing the basic philosophy for many legally binding international instruments designed to protect the rights and freedoms which it proclaimed".[119] The rights in the *Declaration* can be itemized and categorized as:

> "**first**, individual rights of action, namely rights to life, liberty, property privacy, emigration, freedom of speech and association, and freedom of religion; **second**, rights to protection under the law, namely rights to equal treatment by the law, freedom from arbitrary arrest, trial by impartial tribunal, and freedom from cruel and degrading punishment; **third**, political rights, namely to participate in periodic free elections based on universal suffrage; and **fourth**, economic and social rights, namely to employment, an adequate standard of living, equal pay for equal work, holidays with pay, social security benefits, and free education".[120]

These are the very rights and freedoms that are entrenched and appear in the *constitutional BOR* such as the *American BOR 1791*, *African BOR 1996, Indian BOR 1950* and the *Canadian Charter of Rights and Freedoms 1982* and in *statutory BOR* such as *New Zealand BOR Act 1999* and the *Human Rights Act 1998 of the United Kingdom.*

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[117] See above n 114, *Fact Sheet No. 30.*
[118] See above; See also above n 115, *Fact Sheet No. 2 (Rev.1)*; See also Rhona K M Smith, above n 27, 39.
[119] See above n 115, *Fact Sheet No. 2 (Rev.1)*; See also *Vienna Declaration and Programme for Action 1993* http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/A.CONF.157.23.En (Accessed 14/04/08).
[120] Anthony H Birch, above n 15, 184-185; See also Brian Orend, above n 17, 107-109; See also http://www.unhchr.ch/udhr/lang/eng.htm (Accessed 4/04/08).

Twenty years later, the *UDHR* was reviewed at the International Conference on Human Rights at Teheran in 1968, which gave rise to the ***Teheran Proclamation***.[121] Proclamation No 2 provided:

> "*UDHR* states a common understanding of the peoples of the world concerning the inalienable and inviolable rights of all members of the human family and constitutes an obligation for the members of the international community".[122]

Between 1951 and 1952, the GA in its sixth session declared the drafting of 'two Covenants on human rights, one to contain civil and political rights and the other to contain economic, social and cultural rights'.[123] The two covenants, ***ICESCR*** and ***ICCPR***, secured a legally binding status entering into force in 1976".[124] The *Preambles* and *Articles* of the two international covenants[125] were almost identical which recognized the *UDHR* as the:

> "ideal of free human beings enjoying civil and political freedom and freedom from fear and want can be achieved only if conditions are created whereby everyone enjoy his civil and political rights, as well as his economic, social and cultural rights".[126]

1.5.1 ■ International Bill of Rights – Seven Core Treaties

The *UDHR* together with *ICCPR* and *ICESCR* referred to as the ***International Bill of Human Rights***[127] inspired the international sphere of human rights and freedoms

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[121] See above n 115, *Fact Sheet No. 2 (Rev.1)*; See also *Proclamation of Teheran 1968* http://www.unhchr.ch/html/menu3/b/b_tehern.htm (Accessed 04/04/08).
[122] See above.
[123] See above n 115, *Fact Sheet No. 2 (Rev.1), p 2, Resolution 543 (VI) para 1.*
[124] See above, *Fact Sheet No. 2 (Rev.1), p 2-3, Resolution 2200 (XXI)*; See also "*The first Optional Protocol to ICCPR 1976, also adopted by the same resolution provided international machinery for dealing with communications from individuals claiming to be victims of violations of any of the rights set forth in ICCPR*" http://www2.ohchr.org/english/law/ccpr-one.htm (Accessed 4/04/08).
[125] http://www.unhchr.ch/udhr/lang/eng.htm (Accessed 4/04/08); See also *Articles 1,3 & 5* of *ICESCR* and *ICCPR*; http://www2.ohchr.org/english/law/cescr.htm (Accessed 4/04/08); See also http://www2.ohchr.org/english/law/ccpr.htm (Accessed 4/04/08).
[126] See above n 115, *Fact Sheet No. 2.*

regime. In particular, the *UDHR* had been the principle component of the *International BOR*, setting the pace and groundwork for the establishment of *human rights treaty-monitoring bodies* that took complete control of the treaty structures, such as the *seven core international human rights treaties*.[128] The treaty bodies consist of a Committee of independent experts responsible for monitoring the implementation of the "provisions of the core human rights treaties by States parties".[129] Implementation by the Committee for the appropriate treaty is monitored by "Committees on *CERD*, *ICESCR*, *ICCPR*, *CEDAW*, *CAT*, *CRC and CMW*".[130] The application of some of these treaties by the Courts in Fiji and neighbouring jurisdictions in the South Pacific region is discussed later.

In summing this chapter, I have examined the philosophical foundations of the idea of human rights and freedoms. Such idea of human rights (which initially was introduced as individual rights) and freedoms arose from different angles and sources by contributions of various theorists and philosophers. The ideas gained momentum as they became entrenched in constitutional documents and later codified in legal texts and then subsequently in treaties through the creation of the *UDHR*. Entrenching rights and freedoms in the constitution gives them not only their legal status to be enforceable but also enables Courts to be guided by the rules of Constitutional interpretation in giving effect and meaning to them.

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[127] See above; See also above n 114, *Fact Sheet No. 30, p 7.*
[128] http://www.ohchr.org/EN/HRBodies/Pages/HumanRightsBodies.aspx (Accessed 14/04/08).
[129] See above; See also above, n 114, *Fact Sheet No. 30, p 15*; See also http://www.unhchr.ch/udhr/lang/eng.htm (Accessed 4/04/08).
[130] See above n 128.

Chapter Two
Fiji Constitutions

2.1 ■ Introduction

The previous chapter attempted to trace the historical development of the idea of human rights and freedoms in one way within the international sphere. This chapter narrows the geography by focusing on the origins of human rights and freedoms in Fiji. An attempt will be made to expose the *traditional order of things* and to the content of the Constitutions of Fiji before colonization. Thereafter the three Constitutions of Fiji i.e. 1970, 1990 and 1997 are discussed with particular emphasis on human rights aspects and freedoms. When examining the 1990 Constitution, my paper digresses to address customary law with constitutional rights by taking examples from Fiji and our neighboring jurisdictions. I also attempt to discuss the position of human rights and freedoms in Western liberal democracies when introducing the 1997 Constitution.

2.2 ■ Pre-European Contact – 1871 Constitution – Deed of Cession

Tracing the development of human rights and freedoms in Fiji requires an appreciation of the *traditional order of things* before Baun Chief Ratu Seru Cakobau ("Cakobau") known to 'foreigners as Tui Viti (King of Fiji) submitted the Islands to Great Britain in 1874.[131] The descriptions about the way of life of the indigenous people of Fiji during pre-European contact times rested solely with their paramount Chiefs. The traditional chiefly hierarchy being the '*Mataqali* who claimed a link to a common ancestor formed a *yavusa* or clan'[132] the *yavusa* in extending its powers joined and combined 'to form a *vanua*, a small alliance'[133] which later expanded and extended 'to form a larger political

[131] Robyn Jones, Korina Miller and Leonardo Pinherio, *Fiji* (6th ed, 2003) 13.
[132] Terry Donnelly, Gavin Kerr, and Max Quanchi, *A History and Geography of Fiji in the Pacific* (first published 1969, 4th ed, 1994) 9.
[133] See above.

alliance known as the *matanitu*.'[134] The *matanitu* was an amplified version of the *mataqali*.

> "The earliest form of Fijian society of which there are hints in tradition were those of independent agnatic family groups. They were tillers of the soil. Ties of cognate blood attracted intermarrying groups to the same locality; but each unit had its own village, its own defined and recognized arable land, and the group was ruled by the senior male whose powers might be compared to the *patria potestas* of the Romans in its earliest stages".[135]

During pre-European contact times, the "*vanua* held tenure over adjacent mangrove, lagoons, and reefs, together with exclusive ownership of sea floor, water, marine life and rights of passage" which clearly reflects early expressions of some form of observance of *ownership* to their 'tribal land-sea estate" through traditional practices without actually being documented.[136] In 1837, Cakobau[137] with his immediate emerging power in *Bau* entered into warfare with neighboring rivals claiming to retain absolute power and title of 'Tui Viti'. By 1871 under Cakobau's leadership the Kingdom of Fiji was established as a constitutional monarchy.[138] Here, I would like to acknowledge the works[139] of Dr Shameem for providing a succinct and vivid analysis of the *1871 and 1873 Constitutions of the Kingdom of Fiji* in her article. She points out that:

> "The ***Constitution Act* of *1871*** confirmed Fiji's status as a constitutional monarchy. *Articles XXVI- XLI* of the Constitution firmly established the position of King Cakobau as sovereign. This was explicitly expressed in Article *XXXV*: *The King is Sovereign of all the Chiefs and of all the People. The Kingdom is his*. The most remarkable aspect of the 1871

[134] Terry Donnelly, Gavin Kerr, and Max Quanchi above n 132.
[135] Joeli Baledrokadroka, *The Fijian Understanding of the Deed of Cession Treaty of 1874* (2003) 24 http://dlc.dlib.indiana.edu/archive/00001204/00/Baldesrokadroka.pdf (Accessed 30/04/08); See also Terry Donnelly, Gavin Kerr, and Max Quanchi, above n 132.
[136] See above.
[137] Robyn Jones, Korina Miller and Leonardo Pinherio Jones, above n 131, 13; See also Terry Donnelly, Gavin Kerr, and Max Quanchi, above n 132, 22-26.
[138] http://en.wikipedia.org/wiki/History_of_Fiji (Accessed 22/04/08).
[139] Shaista Shameem, Dr, *Bill of Rights in the 1997 Constitution: 19th century constitutional foundations* http://www.humanrights.org.fj/pdf/BOR19century.pdf (Accessed 22/04/08).

> Constitution were the series of Articles describing civil and political rights of individuals. These might have been derived from the *American BOR, the Magna Carta, the 1689 BOR of Great Britain, and the French Declaration of the Rights of Man and of the Citizen*".[140]

It is further suggested by her that:

> "*Articles II –XIV* of the *1871 Constitution Act*, which was later replaced by the (similarly rights-based) ***1873 Constitution***, showed a remarkable range of rights that were available in the Kingdom of Fiji just before Cession".[141]

I have taken ***Article II*** as an example as it appears in her article which stipulates:

> "God hath endowed all men with certain inalienable Rights; among which are life liberty and the right of acquiring, possessing and protecting property, and of pursuing and obtaining safety and happiness".[142]

I chose to draw out *Article II* out of the many *Articles* from her article, as in my view it derives its origins from John Locke's theory of natural rights, "*rights to life, liberty and property*"[143] (as described in the forgoing chapter of my paper) which gained momentum in other constitutional documents as identified correctly by her. During the pre-European contact era, no institution existed like the FHRC, where violations of rights and freedoms are filtered and assessed pursuant to the *HRC Act 1999*. In my view, with a wide spectrum of rights available in the *1871 and 1873 Constitutions*, the *right to property* stood as the central right for indigenous Fijians. In the absence of any specialized institution during pre-European contact times to lodge violations of rights and freedoms, I think the right to property together with other rights were assessed and protected by the head of the traditional hierarchal system. It is my view that this system was the fountainhead for resolving violations of rights and freedoms of individuals.

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[140] See above.
[141] Shaista Shameem, above n 139.
[142] See above.
[143] Brenda Almond, 'Rights' in Peter Singer (ed) *A Companion to Ethics* (1999) 260.

With the arrival of Europeans into Fiji either as explorers, missionaries or traders, Fiji imported not only the values and lifestyles of a western world but also observed the need to recognize and give expression and meaning to the fundamental rights and freedoms of the indigenous people of Fiji. On 10 October 1874, Fiji submitted itself to imperial power for absolute protection and the Deed of Cession ("the Deed") was the response. Fiji signed the Deed and ceded to Her Majesty the Queen of Great Britain and Ireland.[144] The Deed as a historical and phenomenal document guaranteed "rights and interests of Cakobau as Tui Viti and other high chiefs who held the title to all land and any rights to land in Fiji".[145] "In return Her Majesty amongst other things stated "that the rights and interests of the said Tui Viti and other high chiefs, the ceding party hereto shall be recognized so far as is and shall be consistent with British sovereignty and colonial form of government".[146] The Deed further "promised to safeguard the 'paramountcy of Fijian interests which included their rights to land, customs and institutions'" as is evident in the 1970, 1990 Constitutions and the preamble to the 1997 Constitution.[147] According to Baledrokadroka the "Deed has been accepted under international law as the Treaty whereby chiefs of Fiji ceded their sovereignty to the British Crown".[148]

From 1874 until 1970, Fiji was under direct control and leadership of British rule. In my view this meant that the legal process in Fiji was absolutely controlled and dominated by the ***direct application*** of British laws within Fiji's domestic framework which Her Majesty prescribed and determined. This period is noteworthy, in terms of setting a common platform for rights and freedoms because it was imported from Britain. The principles and values emanating from British constitutional documents the *Magna Carta* and *BOR* complimented by Locke's theory of natural rights can be said to have carried forward in Fiji. A question comes to mind as to what would have happened to the *traditional order of things* when Fiji became a British colony? In my view these would

[144] The Deed of Cession of Fiji Islands to Great Britian 10 October 1874 as cited in Robert A Derrick, *A History of Fiji -Volume One* (1974) 251.
[145] Joeli Baledrokadroka, above n 135, 6.
[146] See above.
[147] Jone Dakuvula, *Protecting Fijian Interests in Democratic Fiji* – Paper submitted at Indigenous Rights in the Commonwealth South Pacific Regional Expert Meeting 15-16 October 2001, 14.
[148] Joeli Baledrokadroka, above n 135, 4.

still have remained ***intact*** and ***operative*** despite foreign intervention of laws. With British control over Fiji, I am inclined to reiterate that problems, conflicts and complaints which qualified as encroaching on one's right to property, liberty, and life were still resolved by the traditional method of going to the *matanitu*. The reason for believing that this alternative dispute mechanism existed is because the *traditional indigenous processes* continue to appear in the 1997 Constitution.[149] Where such method failed then the last resort would have been to formally seek redress under the legal system. The origins of human rights and freedoms principles and values in Fiji's Constitutions have been ***styled*** and ***adapted*** from the British *BOR* which will become visible when discussing the three Constitutions of Fiji. British control came to an end by the granting of independence to Fiji and the creation of the 1970 Constitution.

2.3 ■ 1970 Constitution – Fundamental Rights and Freedoms

Fiji's independence on October 10, 1970, saw Her Majesty the Queen Elizabeth II promulgate the ***Fiji Independence Order 1970***. This was initiated through the second Constitutional Conference[150] under the auspices of the NAP leader Ratu Sir Kamisese Mara. He held office as Prime Minister of Fiji.[151] "For the next 17 years, Fiji was a peaceful parliamentary democracy under a Westminster style of government".[152] The *preamble* of the *1970 Constitution* expressly made provision for "securing and safeguarding the rights and freedoms of individuals by firstly, adherence to the rule of law' and secondly the 'dignity of the human person and the position of the family in a society of free men and free institutions'".[153] The protection of rights and freedom from was advanced by ***Chapter 2*** expressed as *protection of fundamental rights and freedoms*

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[149] 1997 Constitution http://www.paclii.org/fj/legis/num_act/ca1997268/ (Accessed 26/06/08); See *Section 186*.

[150] Between April and May 1970, the *Second Constitutional Conference* was conducted in London and the agreement on the voting system seemed unresolved under the new Constitution, however, this issue became settled by applying an acceptable formula to it (alternative vote (AV system)).

[151] Don Paterson Prof and Stephen A Zorn., 'Fiji' in Michael A Ntumy, (eds) *South Pacific Legal Systems* (1993) 27.

[152] George Williams *That Case that stopped a Coup? The Rule of Law in Fiji* Quetin-Baxter Memorial Trust Lecture – Wellington 27 November 2003, 3.

[153] *1970 Constitution* http://www.itc.gov.fj/lawnet/fiji_act/cap1.pdf (Accessed 01/05/08); See also *Preamble*.

of the individual in the Constitution which included: right to life[154], personal liberty[155], slavery and forced labour[156], inhumane treatment[157], deprivation of property[158], privacy of the home and property[159], secure protection of the law[160], freedom of conscience, expression, movement, assembly, association[161], racial discrimination[162], detention under emergency laws[163]. A further feature of the Constitution was *Chapter 3* provisions on *Citizenship*. In reference to *Chapter 3*, Dakuvula in his article referred to a *Panel Report of the Constitution Review Commission* ("the Commission"), which highlighted:

> "giving equal rights to citizenship to Indo-Fijians at Independence in 1970 was a violation by the Crown of the Deed promise of political paramountcy for indigenous Fijians. Unless Fijians receive political control and absolute engagement in national decision-making process, there is no guarantee for long term political stability and peace in the country".[164]

I find substance in the Report by the Commission envisaging the political climate of Fiji. With the advent of Indo Fijians in 1879 as indentured labourers to work on the sugarcane plantations, under British colonial government, Fiji was progressively making efforts in opening its foreign ties with the international community for trade and investment. In my view, it was only timely that citizenship rights were introduced to enable Fiji to take advantage of building its economy. It is accurate to confirm that the underlying principle guaranteed protection of indigenous rights and interests under the Deed, but I disagree that giving equal citizenship rights was in contravention to the Deed. The Deed did not create any negative provision on citizenship. If anything, the Deed was silent in the manner in which citizenship could be acquired, as it concentrated

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[154] *1970 Constitution*, *section 4.*
[155] *1970 Constitution, sections 4 & 5.*
[156] *1970 Constitution*, *section 6.*
[157] *1970 Constitution*, *section 7.*
[158] *1970 Constitution*, *section 8.*
[159] *1970 Constitution*, *section 9.*
[160] *1970 Constitution*, *section 10.*
[161] *1970 Constitution*, *section 13.*
[162] *1970 Constitution*, *section 15.*
[163] *1970 Constitution*, *section 16.*
[164] Jone Dakuvula, above n 147.

on giving greater importance to the *process* of submitting Fiji to Her Majesty. The *preamble* to the 1970 Constitution was very explicit in ensuring protection of fundamental rights and freedoms to all individuals and to suggest to bar citizenship rights inherent in a democratic government, in my view was going against the broad tenor and spirit of the Constitution in the development of fundamental rights and freedoms.

I also examined Vaai's article[165]. She expressed that the 1970 Constitution:

> "did not contain expressions of indigeneity and its preamble recited the cession other significant events in Fiji's colonial history, espoused the promotion of a society of free men and free institutions and pledged allegiance to the British Crown and rule of law".[166]

In my view, the Deed is a significant document in Fiji. It has been expressed in all three Constitutions. On the interpretation of it, the rights and interests in property of indigenous Fijians is intact as a result of the Deed. I disagree with Vaai's view that it does not contain expressions of indigeneity. I believe the Deed has dictated the current plight of property rights and attachment to land held by indigenous Fijians as it was evident in the *Qoliqoli and Indigenous Claims Tribunal Bills* which were introduced under the SDL leadership.

Whether judges and lawyers had been adequately exposed to the concepts of rights and freedoms and resourced for the interpretation and enforcement of *fundamental rights and freedoms of the individual* under the 1970 Constitution can be determined by reviewing decisions handed down during the effective operation of the Constitution.

The Supreme Court in *Ba Town Coucil v Fiji Broadcasting Commission*[167] dismissed the plaintiff's application for interim injunctions and applied *section 12(1)* of the *1970*

[165] Asiata Vaai, *The idea of law: A Pacific Perspective* (1997) 21 Journal of Pacific Studies 239.
[166] See above.
[167] *Ba Town Coucil v Fiji Broadcasting Commission [1976] FJSC 2; [1976] 22 FLR 91 (29 July 1976)* http://www.paclii.org/fj/cases/FJSC/1976/2.html (Accessed 23/04/08).

Constitution protecting *freedom of expression* of every person in Fiji as stipulated by the following terms:

> "*12(1) Except with his own consent, no person shall be hindered in the enjoyment of his freedom of expression, ...freedom to hold opinions and to receive and impart ideas and information without interference,...freedom from interference with his correspondence*".[168]

The Plaintiff sought interim injunctions from Court for restraining the Defendant from:

> "*i)broadcasting relaying or announcing the progress or eye witness account of the soccer tournament to be held in the plaintiff's ground...; and ii) publishing, selling or circulating any news or other paper in regard to the soccer tournament...*".[169]

Kermode J held that:

> "*The plaintiff had no proprietary right to the property in a spectacle,...in the absence of express agreement, and were not entitled to ask for the imposition of a total ban on the media to prevent them from broadcasting or publishing information during the tournament. The press and radio enjoyed under the Constitution the right of free expression and speech and no court would or could restrict such rights where they were legally exercised*".[170]

From this decision, it must be inferred that Courts were prepared to give meaning and weight to freedom of expression provisions in the 1970 Constitution. The 1970 Constitution did not expressly provide for Courts to have regard to public international but I find that the Courts were indirectly expressing and applying the values emanating from the international Declarations and Conventions in which the right to freedom of expression enjoyed a prominent status. This decision demonstrates that the Courts during independence were prepared to interpret the fundamental rights and freedoms

[168] See above. See also *1970 Constitution*, *Section 12*.
[169] See above n 167.
[170] See above.

provisions broadly thus developing the jurisprudence of human rights and freedoms in Fiji.

In *Ram v Public Service Appeal Board*:[171]

> "*The applicant applied to the Court for a writ of certiorari to quash the decision of the respondent Board on the ground that it had acted in breach of the rules of natural justice in arriving at their decision without according the applicant any form of hearing whatsoever and secondly, that the appointment of the members of the Board was in contravention of section 10(8) of the Constitution of Fiji and was, therefore invalid*".[172]

Mishra J held that "the Board had reached its decision in breach of natural justice as it ought to have given the applicant a hearing despite the absence of a specific right in the statutory provisions".[173]

This administrative decision, applies the constitutional *right to fair hearing* which was available in the 1970 Constitution. The Court in applying the grounds for review of a decision of an inferior body took the opportunity to allow the applicant to resort to his constitutional right. This case also demonstrates the Court's willingness to develop human rights and freedoms and give a broad and balanced interpretation in cases where the human rights and freedoms provisions are not even directly in question.

Fiji's political map reveals that the 1970 Constitution was short-lived with the advent of the *SVT* and supported by the execution of the 1987 *Coup d'etat*.

2.4 ■ 1990 Constitution – Fundamental Rights and Freedoms

The *1970 Constitution* was repealed by the ***Fiji Constitution Revocation Decree 1987*** subsequent to a second military *Coup d'etat* on 26 September 1987. Respect for the rule

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[171] *Ram v Public Service Appeal Board [1975] FJSC 4 [1975] 21 FLR 53 (1 July 1975)* http://www.paclii.org/fj/cases/FJSC/1975/4.html (Accessed 23/04/08).
[172] See above.
[173] See above; see also *Public Service Act 1974 – section 14*.

of law failed under Lt. Col. Sitiveni Rabuka's (Rabuka) dictatorial order. The forceful removal of a democratically elected government from office was the dictates of political forces in Fiji. With Rabuka's military leadership, returning Fiji to Parliamentary democracy was not going to be an immediate achievement under his regime. Such political forces in Fiji encouraged the "national Constitution to express the values and symbols of Fijian culture and citizens who were not of indigenous ancestry to accept and understand the Fijian attitude to legitimising institutions and social order in the nation".[174] According to Ravuvu:

> "there never had been democracy as it was defined in the West, and power turned on racial considerations and other socio-cultural factors and not on party political loyalties and ideologies. Fiji democracy with its unique and complex voting arrangements, communal provisions and weighted representation, was not really democracy in the Westminister sense. Democracy was an illusion, a facade, a parting whim of colonial power that had itself only practised dictatorship".[175]

After a lapse of three years, on 25 July 1990 a new Constitution was promulgated "for Fiji by ***Constitution of the Sovereign Democratic Republic of Fiji (Promulgation) Decree 1990*** by the President Ratu Penaia Ganilau on the advice of the Cabinet".[176] ***Chapter 2*** contained the same provisions for *protection of fundamental rights and freedoms of the individual* as it had appeared in the 1970 Constitution. All Chapter 2 rights and freedoms provisions remained unchanged.

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[174] Sitiveni Rabuka, 'The Fiji Islands in Transition: Personal Reflections' in Brij V Lal (ed) *Fiji before the Storm – Elections and the Politics of Development* (2000) 11.

[175] Asesela Ravuvu Prof, *The Facade of Democracy-Fijian Struggles for Political Control 1830*-1987 (1991) 87.

[176] Jennifer C Care, Tess Newton and Don Paterson Prof, *Introduction to South Pacific Law* (1999) 18; See also Robyn Jones, Korina Miller and Leonardo Pinherio, above n 131, 19; See also Don Paterson Prof, Stephen A Zorn, above n 151, 36; See also Evelyn Colbert, *The Pacific Islands – Paths to the Present* (1997) 78-79; See also http://www.unhcr.org/cgibin/texis/vtx/refworld/rwmain?docid=3ae6b57d8 (Accessed 23/04/08); See also See also *Constitution of the Sovereign Democratic Republic of Fiji 1990 Constitution* http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3ae6b57d8 (Accessed 26/08/08).

In Vaai's views:

> "the 1990 Decree promulgating the Constitution and the Preamble of the 1990 Constitution itself state that 'the events if the 1987 were occasioned by a wide spread belief that the 1970 Constitution was inadequate to give protection to the interests of the indigenous Fijian people, their values, traditions, customs, way of life and economic well being'".[177]

In my view, the 1970 Constitution equally provided protection for fundamental rights and freedoms of the various ethnic groups in Fiji. The Constitutional rights and freedoms could be exercised without fear of any racial or political interference by every person. Fiji's problematic land issues and lack of fair and just recognition of indigenous rights in all aspects of Fiji's growth can be said to be the contributing factors, for the overthrow of the 1970 Constitution. This was evident by the events of 1987. In fact, the voting set up gave majority of seats to Fijians and much lesser to Indians even though when Indians proportionately made up Fiji's population compared with the indigenous community. Rotumans and other ethnic groups' seats were also minimal considering their relatively smaller population. This, not only demonstrated an unbalanced cross-section for representative democracy but also hindered the acceptance and development of fundamental rights and freedoms in Fiji during the period from 1987-1990.

With the political crisis resounding with the *Promulgation* of the *1990 Constitution*, some assistance can be obtained from the constitutional redress case of ***Prasad v Attorney-General of Fiji***[178] to demonstrate the Court's continued interpretation of giving effect and meaning to the *fundamental rights and freedoms provisions* appearing in *Chapter 2*. Prasad was detained by the Defendant in prison in excess of six months. He was being deprived of his *personal liberty*[179] and *freedom of movement*[180] pursuant

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[177] Asiata Vaai, above n 165, 239-40; See also *1990 Constitution, section 21.*
[178] *Prasad v Attorney-General of Fiji [1994] FJHC 91;Hbc0017d.93s (10 August 1994)* http://www.paclii.org/cgi-bin/disp.pl/fj/cases/FJHC/1994/91.html?query=dharmendra%20prasad%20 (Accessed 23/04/08).
[179] See above; See also *1990 Constitution*, *section 6(1)(c), (3)(c)*.
[180] See above n 178; See also *1990 Constitution*, *section 15(3)(c).*

to *sections 6 and 15 guaranteed by the 1990 Constitution of Fiji*.[181] This case is outstanding because the Court, in arriving at its decision, made specific reference to cases and Constitutions in other jurisdictions which almost mirrored the constitutional rights and freedoms provisions appearing in the 1990 Constitution. The direction by Byrne J in deciding in favour of the Plaintiff is illustrated.

Byrne J generally remarked that "as a general rule Constitutional Codes enshrining *fundamental freedoms* are to be given a liberal interpretation"[182] followed by making reference to Lord Wilberforce's remarks who said:

> "*Chapter 1 of the Constitution of Bermuda (similar to the heading of Chapter 2 of the Constitution of Fiji)…was influenced by the UDHR 1948 and the ECHR… 'these antecedents, and the form of Chapter 1 itself, call for a generous interpretation avoiding…'the austerity of tabulated legalism', suitable to give to individuals the full measure of the fundamental rights and freedoms referred to*'".[183]

In addition he, drew upon Dickson J (as he was then) contrasting analogy of a *Constitution* which contained a *Charter of Rights and Freedoms* and a *Statute* where the former was "drafted with an eye to the future while the latter could easily be enacted and repealed". Dickson J identified the function of the Constitution as:

> "*a…framework for the legitimate exercise of governmental power and, when joined by a BOR or Charter of Rights, for the unremitting protection of individual rights and liberties. Once enacted, its provisions could not easily be repealed or amended. It must, therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers. The judiciary is the guardian of the Constitution and must, in interpreting its provisions, bear these considerations in mind*".[184]

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[181] See above.
[182] See above n 178.
[183] *Minister of Home Affairs v Fisher (1979) 3 All E.R. 21* as cited in *Prasad v Attorney-General of Fiji [1994] FJHC 91;Hbc0017d.93s (10 August 1994)* http://www.paclii.org/cgi-bin/disp.pl/fj/cases/FJHC/1994/91.html?query=dharmendra%20prasad%20 (Accessed 23/04/08).

Byrne J in considering comments from his learned friends, dealt with the interpretation of Westminster-type Constitutions, in particular the *Constitution of Trinidad and Tobago* where he found a "striking similarity between *Section 6(1) and (3) of the Trinidad and Tobago Constitution* and that of *Section 19(1) and (3) of the Fiji Constitution*".[185] He took into account the decision by the Privy Council which held that:

> "*...section 6 of the Trinidad Constitution was intended to create a new remedy for the contravention of constitutional rights without reference to existing remedies...the word "redress" in its context bore its ordinary meaning of reparation or compensation including monetary compensation ...the claim was in public law for compensation that should be measured in terms of the deprivation of liberty, including consequential loss of earnings and recompense for the inconvenience and distress suffered during detention*".[186]

I feel this decision is relevant to the development of human rights and freedoms. The High Court was prepared to continue to introduce a significant degree of flexibility in the interpretation and enforcement of rights and freedoms provisions in the 1990 Constitution even though Fiji was in the transition of recovering from the aftermath of the coups and political uncertainties. The High Court was further prepared to draw examples of Constitutions from other jurisdictions including the *Canadian Charter* and give meaning to the protection of rights and freedoms in the 1990 Constitution. The approach of the Courts demonstrates the importance of judicial function in recognizing international human rights documents and advancing protection of fundamental rights and freedoms within the context of Constitutions. This decision sets out the approach the Courts are prepared to adopt when interpreting of rights and freedoms provisions and

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[184] *Hunter v Southam Inc 14 C.C.C. p.105* as cited in *Prasad v Attorney-General of Fiji [1994] FJHC 91;Hbc0017d.93s (10 August 1994)* http://www.paclii.org/cgi-bin/disp.pl/fj/cases/FJHC/1994/91.html?query=dharmendra%20prasad%20 (Accessed 23/04/08).

[185] *Maharaj v. Attorney-General of Trinidad and Tobago (No. 2) (1979) A.C. 385* as cited in *Prasad v Attorney-General of Fiji [1994] FJHC 91;Hbc0017d.93s (10 August 1994)* http://www.paclii.org/cgi-bin/disp.pl/fj/cases/FJHC/1994/91.html?query=dharmendra%20prasad%20 (Accessed 23/04/08).

[186] See above.

their willingness to import the core ideas expressed in international human rights documents to develop the jurisprudence of human rights and freedoms.

2.5 ■ Mapping Customary Law with Human Rights

Apart from *Chapter 2* rights and freedoms provisions, the 1990 Constitution also explicitly recognised the application of *customary law* "as part of the law of Fiji".[187] At this point I wish to introduce custom(ary) law or rights and make an effort to determine its influence on individual rights and freedoms provisions. *Section 100* states:

> "(1) Parliament shall make provision for the application of laws, including customary laws; (2) In exercising its powers under the preceding subsection, Parliament shall have particular regard to the customs, traditions, usages, values and aspirations of the Fijian people and (3) Until such time as an Act of Parliament otherwise provides, Fijian customary law shall have effect as part of the laws of Fiji".[188]

According to Care, "the purpose of *section 100(3)* was to give customary law status in formal system as it shows respect for customary law and confirms its importance at national level".[189] In her article she, found that "a more particular manifestation of the conflict between customary law and formal law occurs in the realm of human rights".[190]

Customary law describes the ideals that were traditionally practised by our forefathers and handed down from generation to generation. Ideals made up our culture and no monetary value could be attached to it, as they were sacred and pure to our hearts as a community. In the language of the *UDHR*, we refer to one of the core values of '*inherent human dignity*', this is central in the definition of human rights. In my view, *inherent human dignity* is a common value to both as they both relate to *human dignity,*

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[187] Jennifer C Care, *The Status of Customary Law in Fiji Islands after the Constitutional Amendment Act 1997* (2000) 4 Journal of South Pacific Law 1; See also http://www.paclii.org/journals/fJSPL/vol04/1.shtml (Accessed 24/04/08).
[188] See above; See also *1990 Constitution*, *section 100(1),(2),(3)*.
[189] Jennifer C Care, above n 187, 2-3.
[190] See above, 7.

human value. Its expression in practice is varied, as one expresses its value in a traditional, disciplined manner while the other guarantees its value in a formal and structured manner.

Care, made reference to the FCRC Report ("the Reeves Commission") established in 1995, headed by Sir Paul Reeves,[191] which highlighted that:

> "whilst customary law was generally subject to the fundamental rights and provisions in the Constitution, *section 16(3)(d) of the Constitution* validated any law '*for the application of the customary law with respect to any matter in the case of persons who, under that law, were subject to that law*'. This provision provided comprehensive protection for customary law even if it discriminated on the grounds of race, sex or any other ground prohibited by *section 16(2)*". [192]

I find that the status accorded to customary law in the *1990 Constitution* as worrying for it is in the area of empowering women that customary law had surpassed their rights and freedoms. One common example that comes to mind is domestic violence, rape and sexual abuse. Although these offences are punishable under the *Penal* legislations, the mechanisms available under customary law as an alternative to resolve and settle such offences were generally welcomed and practiced. Seeking pardon and making symbolic offerings to the victims were acceptable customary practices which thus failed to recognise the fundamental rights and freedoms of the victim and denied the victim access to justice through protection of the law. Another example is of individuals exercising their sexual preference. I think this was not only a customary prohibition but also a cultural prohibition. Under customary practices, such persons would have been exiled from their community without being given the option to exercise their rights to sexual orientation.

However, the Reeves Commission recommended that:

[191] George Williams, above n 152, 4.
[192] Jennifer C Care, above n 187, 7.

> "customary law relating to holding, use or transmission of land or fishing rights; or distribution of the produce or proceeds of and, fishing rights or minerals; or entitlement of any person to a chiefly rank or title should not be open to challenge on the ground of discrimination on a prohibited ground. Customary law applying to other matters should not be protected from challenge on the basis of infringement of any fundamental right or freedom, including discrimination on the grounds of gender, except for discrimination on the grounds of race or ethnic origin".[193]

With this recommendation, I find that customary law has stamped legal protection in the *specific areas or matters* as highlighted above. Matters which fall outside them are open for challenge when in contravention with fundamental rights and freedoms. It is fair to suggest that such protection reiterates the guarantee of the Deed of Cession's '*promise to safeguard the paramountcy of Fijian interests which included their rights to land, customs and institutions*' but it also creates insecurity in the event that the government of the day introduces political polices and affirmative action programmes inconsistent with the tenor and spirit of the Constitution. This creates an imbalance between individuals' duties and responsibilities to their wider group including minority and disadvantaged groups and fulfilling those duties for the full development and enjoyment of rights and freedoms.

Some assistance can be obtained from Farran's article in ascertaining the definition of custom and protected fundamental rights within the context of the South Pacific region.[194] She finds that "custom represents accepted and established mores and rights and once recognised by the legal system become customary law".[195] She stresses that:

> "while both law and custom seek to regulate behaviour, the inclusion of a *BOR* or a statement of fundamental rights in Constitutions of the South Pacific region confounds morality with legality as the rights and liberties drawn from the Codes and Conventions of the West represent a particular ideology".[196]

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[193] See above, 7, 8.
[194] Susan Farran, *Custom and Constitutionally Protected Fundamental Rights in the South Pacific Region: the approach of the Courts to Potential Conflicts* 21(1997) The Journal of Pacific Studies 103-122.
[195] See above, 107.
[196] Susan Farran, above n 194, 104

She also finds that by integrating morality with legality the constituent values of our "culture, social organization, religion and so on" are lost because they are absorbed "in diverse legal systems" within the international framework of rights and freedoms which shapes them to universally apply.[197] She contends that if "rights protected in constitutional provisions" undergo the integration process then "such approach appears to be inconsistent with legal systems that recognise custom as a source of law".[198]

Both Care and Farran, in their articles, discuss and use the word 'custom(ary)' ("customary law or customary rights") interchangeably giving it the force of law but Care goes further by suggesting to accord customary law the most important source of law. They also identify the *recognition* of it entrenched in the respective Pacific Island Constitutions and the *protection* of it with the rights and freedoms provisions available in the Constitutions. Care leaves her article open for readers with the proposition to determine whether customary law ought to be the *central source of law* for States in the South Pacific region. In my view, for example, the indigenous Fijians and Indians make up the majority of the population in Fiji. Both ethnic communities are governed by different sets of communal values, social norms and customary practices. With customary law comfortably making entry and securing a prominent place as a primary source of law in the Constitution, it signals a danger. As much as indigenous Fijians might find the application of customary law suitable for their communal operation and protection, it may not be as well equipped and suited for the Indians. Customary practices and communal values in the guise of customary law can not be given the full strength and support in the Constitution as it fails to fairly apply and suit to both factions of the population. Bearing this in mind, there may be objection but a middle ground can be struck. Farran takes a different turn on the status of customary law, by referring to the origins of the Constitutions in the South Pacific region. She finds that they are derived and influenced by modern concepts from the West making customary law to compromise morals, values, cultures of the people in the region. This she further finds to be the trend currently practiced by our developed and modern society as opposed to the

[197] See above.
[198] Susan Farran, above n 194, 106.

prevalent cultured behaviours and beliefs previously observed in our society traditionally as a wider group and community. In my view, Farran attempts to caution us of the transformation of our behaviours, morals, values and cultures in the context of our Constitutions which accommodates and entertains the supremacy of individual rights as opposed to group's rights which is central to customary law.

In the South Pacific region, the *communal rules* and *traditional practices* which dictate and form the basis of *land ownership, social organization* and *control* are noteworthy especially when *rights of individuals* entrenched in Constitutions require equal attention. Reference to cases and Constitutions within the South Pacific region can be of some assistance in determining their impact.

In the Vanuatu case of *John Noel v Obed Toto*[199] a conflict between *Articles 74* and 5 of the *Constitution of Vanuatu*[200] arose in the context ownership to land and equality of rights to women. *Article 74* "provided that rules of custom shall form the basis of ownership and use of land in Vanuatu" while *Article 5* "recognized that…all persons are entitled to the following fundamental rights and freedoms of the individual without discrimination on the grounds of…sex…".[201] Kent J did not discourage exercising customary rules and traditional practices when determining ownership to land. However, he expressed that when such rules and practices discriminated against women as provided by *Article 5* of the Constitution, then it amounted to gender discrimination and therefore must be struck down to the extent of inconsistency.[202]

In the Samoan Supreme Court case of *Chu Ling v Bank of Western Samoa*[203] the Court, identified that custom appeared to be entrenched in statute "conferring procedural

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[199] *John Noel v Obed Toto Case No 18/1994 Supreme Court of Vanuatu* as cited in Susan Farran, above n 194, 107-108. See also *VUSC 3; Civil Case 018 of 1994 (19 April 1995)* http://www.paclii.org/cgi-bin/disp.pl/vu/cases/VUSC/1995/3.html?query=Obed%20Toto (Accessed 29/04/08).

[200] http://www.paclii.org/vu/legis/consol_act/cotrov406/ (Accessed 30/04/08).

[201] See above, n 199; See also *1983 Vanuatu Constitution*, *Article 74 and Article 5*.

[202] See above.

[203] *Chu Ling v Bank of Western Samoa 1980-93 Western Samoa Law Reports Volume One* as cited in Susan Farran, above n 194, 108-9

advantages on Samoans that were not available to non-Samoans".[204] *Section 367 Samoa Act 1921* provided that "no security given by a Samoan over any property shall be enforceable…without the leave of the Supreme Court".[205] The Court found that the "provision was inconsistent with the provisions of *Article 15* of the Constitution providing for equal treatment and was therefore void".[206]

In the High Court of Solomon Islands in *Fugui & Anr v Solmac Construction Ltd* [207] the Court considered property acquired or possessed within the context of customary land rights amounted to a breach of the fundamental rights provided in the Constitution.[208]

> "The applicants had to show that they had property in the disputed area, and that it had been compulsorily taken possession of, or their interest or right compulsorily acquired, …were a breach of their fundamental constitutional rights. *Section 8 referred to 'property of any description' and any interest in or right over property of any description*".[209]

In interpreting *section 8* of the *Constitution*, the Court held that "any laws providing for compulsory acquisition of property must meet the conditions of the section in order to be constitutional".[210]

In a another Solomon Islands case of *R v Loumia*[211] the legal duty to kill based on custom as a defence was tested with the *right to life provisions* in the Constitution. The High Court ruled that any:

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http://www.paclii.org/cgibin/disp.pl/ws/indices/cases/WS_LR_Vol6.html?query=Ling%20v%20Bank%20of%20Western%20Samoa#dis (Accessed 29/04/08).

[204] See above.

[205] See above, n 203.

[206] See above.

[207] *Fugui & Anr v Solmac Construction Ltd [1982] SILR 51 (30 December 1984)* as cited in Susan Farran, above n 194, 109 http://www.paclii.org/sb/cases/SBHC/1982/8.html (Accessed 29/04/08).

[208] See above.

[209] See above n 207, 111.

[210] See above.

[211] *R v Loumia [1984] SILR 51 (30 December 1984)* http://www.paclii.org/sb/cases/SBHC/1984/15.html (Accessed 29/04/08) as cited in Susan Farran, above n 194, 112-119.

> "customary law purporting to entitle a person to kill another person on the grounds of custom was inconsistent with the Penal Code and the Constitution could not be treated as to have the force of law as it was so inconsistent".[212]

The Applicant in his appeal argued that the "Constitution could be tested between the State and Individuals and not between private individuals who acted on the grounds of a customary duty to kill and extenuating circumstances".[213] The test applied was to ask whether "Parliament could itself validly pass a statute (Penal Code) imposing a duty to kill on relatives of a victim".[214] Other arguments advanced were "belief in good faith on reasonable grounds and constitutional and statutory interpretation".[215] Justifying killing on the grounds of custom, goes against the constitutional *right to life* provisions in our Constitutions in the region and in International Conventions and Treaties. Custom springs from our ancestral rules, values and principles. Such conduct outdates them of being recognised and given effect as they are not only contrary to the *absolute guarantee to life* but also no longer an accepted norm or practice under the *UDHR* and in International human rights law.

These cases from the region illustrate the interpretation of the Courts in weighing *customary rights* with the *protection of individual rights*. They also demonstrate the Court's attitude and approaches in ensuring a balanced position to these rights. These decisions show that the Courts have been inclined to give weight to individual constitutional rights and read down provisions when inconsistent with individual guarantees under the Constitution.

The articles by Care and Farran have been very useful in inspiring and providing us with a different dimension to custom(ary) law or rights within the sphere of individual rights and freedoms and Constitutions. They address custom(ary) law or rights from different angles and in considering the concluding remarks of one author's article, Farran, I

[212] See above, 113.
[213] See above n 211, 114.
[214] See above.
[215] See above n 211, 115.

choose to differ. She concludes that values and rights as a community will be lost and "will lack relevance for the people who are meant to be able to claim them". [216] *Individual rights* must not be perceived as having a negative impact on the values, rules and practices of a group or community. It is my argument that as individuals we are born into a group or community and a reasonable expectation exists to uphold and obey communal values, norms and practices collectively. There would be times when individuals would want to express and exercise their individual rights but they conflict with the social norms, structures and practices of the collective group or community. As individuals, we become loyal towards our communal values, rules and practices and submerge our individual rights in favour of our community. No doubt, the modern concepts with respect to rights and freedoms have been borrowed from the West and they have been resonating amongst our closely knit community. Providing equal protection for individual rights does not prompt defiance against our communal values and norms but is a demonstration and expression which fits the language of the *UDHR*.

During the mid 1990's, Fiji's political map changed tide for democratic reform with the increasing internal struggles and delayed promises to the NFP and FLP by Rabuka's administration. This led to the approval by the JPSC in 1995 for the establishment of the Reeves Commission to review the 1990 Constitution.

2.6 ■ 1997 Constitution – Bill of Rights

The Reeves Commission tabled its Report in 1996 to the FPSC.[217] The "Report in addition to elaborating on a thorough examination on all relevant issues, also provided very practical recommendations for changes based on sound principles of law".[218] In an attempt to bring greater national unity the "GCC endorsed their support and sealed the ***Constitution Amendment Bill*** on 23 June 1997".[219] "Seats for ethnic groups were

[216] Susan Farran, see above n 194, 120.
[217] Parliament of Fiji, Parliamentary Debates, House of Representatives, *Hansard,* 23 June 1997, 4442, 4444 as cited in George Williams, above n 152, 4.
[218] Sitiveni Rabuka, above n 174, 15-16.
[219] See above; See also Robyn Jones, Korina Miller and Leonardo Pinherio, above n 131, 20.

reserved, with an indigenous Fijian majority and contrary to the Reeve's Commission recommendations the GCC retained the power to appoint the President".[220] "The ***Constitution Amendment Act 1997*** brought about the ***Fiji Constitution of 1997***, which took effect into effect on 27 July 1998".[221]

Dr Shameem in her article stated that:

> "The Constitution of Fiji is a human rights-based document. The *Preamble,* the *Interpretation provisions,* the *Compact, BOR* provisions, *Social Justice*, *Parliament*, *Accountability*, and *Group Rights* sections are all based on a firm human rights foundation sourced from international human rights law".[222]

She highlights that:

> "The rights that are protected in the Constitution are a combination of civil, political, economic, social, cultural and development rights. This is a special feature of the Fiji Constitution shared by only two other constitutions of the world, first, the Canadian Constitution, which does however have some other limitations, and second, the South African Constitution, which is quite similar to ours. However, the South African Constitution does not have any human rights Interpretive provision, like *section 3* of the Fiji Constitution, which gives the courts the mandate to interpret the entire Constitution in human rights terms".[223]

The tabulation of rights and freedoms in the Constitution is broad and extends to bind the State at all levels including public officials holding public office. The text and the interpretation of the Constitution reflects the attitude and approach receptive for the State to take affirmative action measures designed to ensure civil, political, economic, social and cultural rights. The Courts are guided by virtue of the constitutional

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[220] Robyn Jones, Korina Miller and Leonardo Pinherio, above n 131, 20.
[221] George Williams above n 152, 4; See also *1997 Constitution.*
[222] Shaista Shameem (Dr), *Human Rights in Fiji: Constitutional and Statutory Provisions* 9 January 2007 http://www.humanrights.org.fj/publications/2007/Human%20rights%20and%20Const - %20January%2007.pdf (Accessed 30/04/08).
[223] See above.

interpretation provision to acknowledge, interpret and give effect to the protection and promotion of human rights and freedoms.

The Deed of Cession again made entry in the *Preamble* to the 1997 Constitution as was earlier expressed in the 1970 and 1990 Constitutions in this paper. The people of Fiji as provided by the *Preamble*:

> "committed ourselves anew to living in harmony and unity, promoting social justice and the economic and social advancement of all communities, respecting their rights and interests and… reaffirming our recognition of the human rights and fundamental freedoms of all individuals and groups, safeguarded by adherence to the rule of law, and our respect for human dignity…".[224]

The *Compact* as set out in *Chapter 2*:

> "recognised that,…the conduct of government will be based upon certain principles including recognition that: (a) rights of all individuals, communities and groups are fully respected; (c) all persons have the right to practise their religion freely and to retain their language, culture and traditions; and (k) affirmative action and social justice programs to secure effective equality of access to opportunities, amenities or services for the Fijian and Rotuman people, as well as for other communities, for women as well as men, and for all disadvantaged citizens or groups,…"[225]

The new Constitution in creating the provision for inter-ethnic harmony and national ethic stand "strengthened the protection of rights and freedoms by bringing a scheme of rights in Fiji into conformity with the international regime of rights"[226] expressed in the *BOR in* Chapter 4. Dr Akram-Lodhi's findings on the 1997 Constitution reveals that it:

> "seeks to protect national unity so that all communities are respected and their interest protected. Its electoral system provides clear incentives for multiethnic politic, either through the collaboration of ethnic parties or indeed their

[224] *1997 Constitution*, *preamble*.
[225] *1997 Constitution, compact*.
[226] Yash P Ghai, 'The Implementation of the Fiji Islands Constitution' in Akram-Lodhi H A., (eds) *Confronting Fiji Futures* (2000) 28, 29.

replacement by multiethnic parties".[227]

In my view, Dr Akram-Lodhi has made his assessment of the Constitution within the framework of politics. He fairly suggests that the Constitution aims to bring the two major racial groups together with the formation of a multiethnic polity and with the introduction of revised electoral reforms. These guarantee to harmonise the division between the two parties keeping intact their interests to move the nation forward.

Now, I would like to acknowledge the existence of *BOR* in Western liberal democracies, with particular focus on the Commonwealth of Australia ("Australia"). It presents a unique jurisprudence on express and implied guarantees. I chose to introduce this because, I find that in ***Chapter 4 BOR***, we can automatically seek redress for violations of our constitutional rights and freedoms whereas in Australia it needs a systemic legal regime to ensure protection including violation of human rights and freedoms at all levels of government.

"The Australian Constitution does not contain a BOR (nor even any judicially unenforceable 'directive principles')".[228] In comparison, other Western democracies such as America and Canada have developed as part of their written Constitution, the *American BOR* and the *Canadian Charter of Rights and Freedoms 1982* and as an *ordinary statue*, in New Zealand the *BOR Act 1990* and in the Untied Kingdom the *Human Rights Act 1998*.[229]

"Australia's constitutional system is essentially that of a federal republic rather than parliamentary monarchy"[230] and is "best described as one which enshrines the idea of constitutional supremacy".[231] The Commonwealth Constitution makes *express provision for specific guarantees of individual rights* in different *Parts* of the Constitution and

[227] See above, 31.
[228] Tony Blackshield and George Williams, *Australian Constitutional Law & Theory: Commentary & Materials* (3rd ed, 2002) 1099.
[229] See above; See also Melissa Castan and Sarah Joseph and David Wiseman, *Federal Constitutional Law: A Contemporary View* (2001) Chs 12 & 13.
[230] Brian Galligan, *A Federal Republic: Australia's Constitutional System of Government* (1995) 12, Ch 1.
[231] Imtiaz Omar *Constitutional Law* (1998) 27.

these relate to "*a right to just compensation if one's property is compulsorily acquired*,[232] *a limited right to trial by jury*,[233] *freedom of religion*,[234] *and freedom from discrimination on the basis of State residence*".[235]

The jurisprudence on implied guarantees has a place in Australian constitutional law and the "High Court of Australia recognized that the text and structure of the Constitution may give rise to a number of implied freedoms".[236] One example is "implied freedom of political communication having its origins inherent in the Commonwealth Constitution "upon a general conception of representative and responsible government".[237] The idea of implied freedoms in the Constitution was signaled by Murphy J in 1977 in the case of *Ansett Transport Industries (Operations) Pty Ltd v Wardley* which merits consideration. Murphy J highlighted:

> "Elections of federal Parliament provided for in the Constitution require freedom of movement, speech and other communication, not only between States, but in and between very part of the Commonwealth. The operation of the system of representative government requires the same freedoms between elections… From these provisions and from the concept of the Commonwealth arises an implication of a constitutional guarantee of such freedoms, freedoms so elementary that it was not necessary to mention then in the Constitution".[238]

The implied guarantees of political communication established its mark when the majority of the High Court unanimously in *Nationwide News Pty Ltd v Wills* and *Australian Capital Television Pty Ltd v Commonwealth* "based their reasoning on the notion that the Constitution implies a commitment to freedom of political

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[232] *Commonwealth of Australia Constitution Act 1990 (C'th) section 51(xxxi)* http://www.comlaw.gov.au/comlaw/comlaw.nsf/440c19285821b109ca256f3a001d59b7/57dea3835d797364ca256f9d0078c087/$FILE/ConstitutionAct.pdf (Accessed 26/06/08).

[233] *C'th Constitution 1990*, *section 80*; See also Melissa Castan and Sarah Joseph and David Wiseman, above n 229.

[234] *C'th Constitution, section 116*.

[235] *C'th Constitution*, *section 117*.

[236] Melissa Castan and Sarah Joseph and David Wiseman, above n 229, 319.

[237] Tony Blackshield and George Williams, above n 228, 1158; See also *C'th Constitution, sections 7 and 24*- "*chosen by the people*".

[238] *Ansett Transport Industries (Operations) Pty Ltd v Wardley (1977) 139 CLR 54 at 88* as cited in Tony Blackshield and George Williams, above n 228, 1160.

communication".[239] These two leading cases were followed in a number of subsequent cases concerning issues of other implied rights "affecting the scope or content of the common law protection against defamation".[240] In a nutshell the High Court in *Theophanous v Herald and Weekly Times Ltd*[241] and *Stephens v West Australia Newspaper*[242] held that "implied freedom of political communication was not only directed at Commonwealth legislation which impaired that freedom, but also against the law of defamation, whether derived from common law or from state legislation".[243] Following these cases the High Court in *McGinty v Western Australia*[244] and *Langer v Commonwealth*[245] raised concerns on "constitutional implications in general and to identifying the source of implied freedom of political communication" thus narrowly construing "an implied constitutional entitlement to voting equality".[246] The High Court made a clear distinction that "neither the Constitution's commitment to freedom of political communication, nor the system of representative government which was treated as requiring that freedom, could be treated as a 'free-standing principle'".[247] The majority shared similar views with Brennan J, who expressed that:

> "Implications were not devised by the judiciary; they existed in actual text and structure of the Constitution and were revealed or uncovered by judicial exegesis. No implications could be drawn from the Constitution which was not based on the actual terms of the Constitution, or on its structure…"[248]

In a more recent interpretation of implied freedom of political communication in *Lange v Australian Broadcasting Corporation*[249], the Court introduced a two tier test once it

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[239] *Nationwide News Pty Ltd v Wills (1992) 177 CLR 1* and *Australian Capital Television Pty Ltd v Commonwealth (1992) 177 CLR 106* as cited in Tony Blackshield and George Williams, above n 228, 1162-1179.
[240] Melissa Castan and Sarah Joseph and David Wiseman, above n 229, 322.
[241] *Theophanous v Herald and Weekly Times Ltd (1994) 182 CLR 104.*
[242] *Stephens v West Australia Newspaper (1994) 182 CLR 211.*
[243] Imtiaz Omar, above n 231, 256; See also Melissa Castan and Sarah Joseph and David Wiseman, above n 229, 322-325.
[244] *McGinty v Western Australia (1996) 186 CLR 140*
[245] *Langer v Commonwealth (1996)186 CLR 302*
[246] Melissa Castan and Sarah Joseph and David Wiseman, above n 229, 325.
[247] Tony Blackshield and George Williams, above n 228, 1179.
[248] Melissa Castan and Sarah Joseph and David Wiseman, above n 229, 325-326.

was satisfied that an implied right to communication was drawn from the text and structure of the Constitution and where the subject matter related to government and politics.[250] The Court settled for the view that the nature of the implied freedom was not that of a personal or individual right capable of conferring private rights in common law defamation actions.[251]

Outside the discourse of express and implied guarantees, Australia's statutory guarantees also merits examination as a catalogue of human rights protection in Australian law is found in legislation. The Commonwealth Parliament has "passed a range of measures designed to provide for the protection of human rights" these appear in the *Racial Discrimination Act 1975*, *Sex Discrimination Act 1984*, *Human Rights and Equal Opportunity Act 1986*, *Crime Torture Act 1988*, *Disability Discrimination Act 1992*, and *Racial and Religious Tolerance Act 2001* in order "to give effect to Australia's obligation under international human rights agreements".[252] In addition, at the federal level, the State of Victoria recently enacted the *Charter of Human Rights and Responsibilities Act 2006*, but the "rights do not have legal force as they are not dealt with other Statutes available in Victoria".[253]

A constitutional *BOR* for Australia still remains open for debate despite Australia's commitment to the development and implementation of rights and freedoms set out in International Conventions and Treaties ratified by it. The common law position has played an important part in the recognition of express and implied guarantees but Australia is still lacking a forum and regime to systemically enforce rights and remedies which is why now I return to ***Chapter 4 BOR*** as it establishes the FHRC, a national human rights institution mandated to protect and promote individual rights and freedoms entrenched by the *BOR*.[254]

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[249] *Lange v Australian Broadcasting Corporation (1997) 145 ALR 96.*
[250] Melissa Castan and Sarah Joseph and David Wiseman, above n 229, 326-335.
[251] See above.
[252] Imtiaz Omar, above n 231, 253.
[253] Mirko Bagaric (Prof), 'More Punch than Expected' (2007) 81 *Law Institute Journal* 64-68.
[254] *Human Rights Commission Act 1999* http://www.paclii.org/fj/legis/num_act/hrca1999267/ (Accessed 30/04/08); See also Shaista Shameem (Dr), above n 222.

Likewise, the Constitution also ensured protection of indigenous rights in *sections 185 and 186*.[255] Baledrokadroka accurately sums up both these *sections* in his article[256] and states that it:

> "deals with group rights and entrenches the rights of Fijians with regard to the alteration of certain Acts like the Fijian Affairs Act, Native Lands Act, Native Lands Trust Act and their customary laws and rights. These entrenched provisions were also a special feature of the *1970 Constitution of Fiji*, when Fiji became an Independent State and the *1990 Constitution of the Republic of Fiji* when Fiji relinquished its ties to the British Crown".[257]

The application of customary law for dispute resolution as provided by *section 186* ought to be read in conjunction with "*section 163* of the *CPC,* which encourages traditional settlement of cases involving certain offences that are 'substantially of a personal or private nature', and not aggravated in any way".[258] Settling minor criminal offences including limited civil claims in accordance with traditional Fijian practices can be viewed as falling within the meaning and interpretation of *section 186*. Serious criminal offences requiring protection under customary and traditional methods may fall outside *section 186*. Corrin Care suggests that "this does not mean that it is no longer part of the law. *Section 195(2)(e)* of the 1997, Constitution preserves not only all written laws, which are not expressly repealed,[259] but also '*all other law*'".[260] The Reeves Commission[261] noted that:

> "This system should apply to only disputes involving Fijians but if successful, persons who are not Fijians should be permitted to agree to the application of traditional process, in

[255] George Williams, above n 148, 4; See also above n 152.
[256] Joeli Baledrokadroka, above n 135, 13; *The Fijian Understanding of the Deed of Cession Treaty of 1874*
[257] See above.
[258] Jennifer Corrin Care, above n 187, 4.
[259] *1997 Constitution*, *Section 195(1)*; See also footnote 3 as cited in Jennifer C Care, above n 187, 1.
[260] Jennifer C Care, above n 187, 1.
[261] See also footnote 8 as cited in Jennifer C Care, above n 187, 4; See also Sir Paul Reeves, Tomasi Vakatora, Brij V Lal, *The Fiji Islands: towards a united future* Report of the Fiji Constitution Review Commission 1996.

> disputes with Fijians, or with one another. For that reason a scheme should be set up by an Act of Parliament".[262]

In my view, the recognition and protection of indigenous rights are still available, although it does not expressly appear in ***Chapter 4 BOR***. As discussed in Care's article which I had looked at earlier, the *1990 Constitution* firmly established the foundation of customary law and now it continues to receive reception and recognition in the 1997 Constitution in the provisions identified above.

I turn now to the landmark ***Chandrika Prasad*** case that inspired and confirmed the continued existence of the 1997 Constitution, despite another political upheaval by the 2000 *Coup d'etat*.[263] On 29 May 2000, the 1997 Constitution was removed by ***Decree No 1, Fiji Constitution Revocation Decree 2000***.[264] In order to address violations of rights and freedoms in the absence of *Chapter 4, BOR*, *Decree No 7, Fundamental Rights and Freedoms Decree 2000*[265] was introduced which was a reprint of the *BOR*.[266] Pursuant to *section 23 of the Decree* the establishment of the FHRC remained in existence with powers to continue its operation in the protection and promotion of rights and freedoms.[267] The *Decree* "restated the right to equality" in *section 19*, but "*section 24(6)* made this right '*Subject to any law providing for or protecting the enhancement of Fijian or Rotuman interests*'".[268] "This was designed to grant Indigenous Fijians a predominant position in the political future of Fiji. This provision was contrary to the *Compact* and *section 38* equality provisions guaranteed in the 1997 Constitution".[269]

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[262] See above.
[263] Sir Paul Reeves, Tomasi Vakatora, Brij Vikash Lal, above n 261; See also George Williams above n 152, 5.
[264] George Williams above n 152, 5; See also *Fiji Revocation Decree 2000* http://www.paclii.org/fj/legis/num_act/rd2000146/index.html (Accessed 4/04/07).
[265] *Decree No 7, Fundamental Rights and Freedoms Decree 2000* http://www.paclii.org/fj/legis/num_act/frafd2000302/ (Accessed 4/04/07); See also George Williams, above n 152, 6.
[266] See above; See also *1997 Constitution – Chapter 4*.
[267] George Williams, above n 152, 6; See also *Decree No 7, Fundamental Rights and Freedoms Decree 2000, section 23*.
[268] George Williams, above n 152, 6; See also *Decree No 7, Fundamental Rights and Freedoms Decree 2000 sections 19, 24(6)*.
[269] See above.

Chandrika Prasad challenged the validity of the rights and freedoms protection provisions under the *Decree*. Deliberations on recognition and protection of his fundamental rights and freedoms provisions and on the doctrine of *necessity and effectiveness* in the High Court[270] and Court of Appeal of Fiji[271] settled the ambiguity in the *Decree*, thus resurrecting the 1997 Constitution as the supreme law of the land. This continues to be intact even after the 2006 *Coup d'etat*. The case of the deposed Prime Minister Laisenia Qarase against the Fiji Military Forces Commander Frank Voreqe Bainimarama which is currently before the Courts[272] is beyond the purview of this paper.

In summing this chapter, the historical events during pre-European contact times leading to British rule in Fiji, shaped the beginning of rights and freedoms provisions in the early days of the Constitution of Fiji. The human rights and freedoms core values emanating from British constitutional documents were imported and adapted to apply within the indigenous framework in Fiji. These core values were amplified when Fiji gained independence and Courts started to give meaning to the rights and freedoms provisions in the 1970 Constitution. The political crises did not deter the Courts in continuing to maintain its independence and upholding the rights and freedoms as it appeared in the 1990 Constitution. The recognition, protection and promotion of rights and freedoms gained momentum with the creation of a *Bill of Rights* entrenched in the 1997 Constitution. With this framework, I now turn to the next chapter which examines the courts attitude, approach and interpretation in giving meaning to the development of the rights and freedoms provisions in ***Chapter 4 BOR*** and in international conventions and treaties.

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[270] *Prasad v Republic of Fiji [2000] FJHC 121; Hbc0217.2000l (15 November 2000)* http://www.paclii.org/fj/cases/FJHC/2000/121.html (Accessed 1/05/08); See also George Williams, above n 152, 7-9.

[271] See above; See also George Williams, above n 152, 9-16.

[272] *Prime Minister Laisenia Qarase against the Fiji Military Forces Commander Frank Voreqe Bainimarama Civil Action No HBM 60/2007 (unreported).*

Chapter Three
International Declarations and Conventions and Treaties

3.1 ■ Introduction

In this chapter, I discuss the attitude and approach of the Courts in implementing the rights and freedoms entrenched in a large body of international declarations, conventions and treaties in addition to the provisions available in ***Chapter 4 BOR*** of the 1997 Constitution of Fiji. I also expose the approach adopted by the Courts in the South Pacific region on the interpretation of international declarations, conventions and treaties. I feel the attitude and approach of the Courts is a stepping stone in carrying forward the idea of human rights and freedoms and embracing the development of human rights and freedoms.

3.2 ■ Domestic Legal Apparatus

The *UDHR*, previously discussed, does not have a legally binding effect but is "recognised as a historic document articulating a common definition of human dignity and values and measuring the respect for and compliance with international human rights standards".[273] In effect it is a moral ideal, the fountainhead for inspiring and transforming many States even though many are not members of the UN. This inspiration and transformation is reflected through extension of the core human rights values and ideas in the respective State constitutions. In this respect, the *Concluding Statement and Recommendations* of the Pacific Islands Human Rights Consultation forum held in Fiji with national and regional civil society and human rights NGO's is noteworthy. In particular ***Resolution No 20*** states that:

> "Pacific Island Governments even where they (States in the Pacific) have not ratified international human rights treaties, to strive to protect basic human rights through entrenchment in constitutions or through appropriate legislation, through

[273] See also above n 114, *Fact Sheet No. 2 (Rev.1)*.

implementing relevant programmes and polices…".[274]

In my view it is commendable that Fiji has taken the leading role in the South Pacific region with regards to international declarations, conventions and treaties.[275] Sadly, not all States are signatories to the core international human rights treaties but implementation of the substantive provisions of the treaties is reflected by similar provisions in the States respective constitutions and domestic legislation. The general principle dictates that:

> "legally binding international human rights standards should operate directly and immediately within the domestic legal system of each State party, thereby enabling individuals to seek enforcement of their rights before national courts and tribunals. The rule requiring exhaustion of domestic remedies reinforces the primacy of national remedies in this respect".[276]

Former Commonwealth Secretary General Rt Hon Don McKinnon, who has been instrumental in providing technical advice, assistance and support in the ratification and implementation of international conventions and treaties for the States in the South Pacific, in addition to member countries of the Commonwealth during his term in office says that:

> "Some countries' Constitutions contain certain rights and freedoms, and it may be that ratification is not thought to add greatly to the aggregate of existing human rights protection. But every Commonwealth member country can always improve its human rights protections. He adds that some States say that it lacks knowledge and capacity to ask where the Covenants do and do not fit with their

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[274] Conclusion Statement and Recommendations of the Pacific Islands Human Rights Consultation Workshop for Judges and Lawyers on the Human Rights issues affecting the Pacific Region including the Mechanisms required to Respect, Promote, Protect and fulfil Human Rights. Suva Fiji Islands 1 – 3 June 2004; See also http://www.humanrights.org.fj/pdf/ConcludingStatement.pdf (Accessed) 1/05/08).

[275] *1997 Constitution*, *section 43(2)*.

[276] Committee on Economic, Social and Cultural Rights, General Comment 9, *Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights,* 3 December 1998, UN Doc. E/C.12/1998/24, para 4.

national policies, legislation and culture". [277]

His findings on the non-participation by States to initiate the effort to commit and give effect to the promise particularly with respect to the two 1966 Conventions *ICESCR* and *ICCPR* apart from the other international conventions and treaties reveal that:

> "States follow a system whereby the general rules of public international law are accepted as an integral part of domestic law which create rights and duties without having to be incorporated by specific legislation into domestic law and where an ambiguity exists in domestic law, the State's domestic law can be used to interpret in a way which does not place the State at odds with its international obligation in the realization of economic, social, cultural and political rights". [278]

3.2.1 ■ International Covenants on Economic, Social and Cultural Rights AND Civil and Political Rights

In light of ICCPR and ICESCR, if the substantive provisions of these treaties are reflected by similar provisions in State constitutions in the South Pacific region, then that should be more of a reason for States to ratify these treaties. This would strengthen and reinforce those provisions and in addition ensure and affirm a comprehensive web of legal protections at an international level. Many States may argue that their Constitutions mirror the values emanating from UDHR which is developed into the corresponding rights in considerable detail from it followed by the core values and ideas reflected by these two treaties which are adequately contained in their constitutions. In addition they could also argue that the promotion and protection mechanisms are further enhanced through the domestic law making machinery legislation by incorporating them in their national policy, national plan of action and affirmative action programmes.

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[277] Don McKinnon Rt Hon, *Handbook on Ratification of Human Rights Instruments*, Commonwealth Secretariat (2006) 6, 48 http://www.thecommonwealth.org/Internal/154625/ratification_ofhumanrights_instruments (Assessed 14/10/06).

[278] See above, 47-49; *1997 Constitution*, *section 43(2)*; See also *Tuvalu Constitution, section 10(3)* http://www.paclii.org/tv/legis/consol_act/cot277/ (Accessed 1/05/08).

In my view, if these measures are taken by the States, then, it would be more of a compelling reason to embark on ratifying and implementing ICCPR and ICESCR in the region. However, States tend to justify its reluctance towards ratification of ICCPR and ICESCR. Some of the reasons for their inability, rest on the technical processes and requirements for ratification, implementation and fulfilment of their international reporting obligations to ICCPR and ICESCR monitoring Committees. In addition, ensuring consistent progressive compliance of the provisions from both the Conventions within their national legislative policies contributes further to their reluctance.

I turn now to examine the situation in Fiji to determine the implementation of the rights and freedoms of both these Conventions followed by drawing examples from our neighbouring jurisdictions in the region.

Fiji is not a party to ICESCR[279] but Fiji's constitutional and legislative framework is designed to achieve the realization of the rights emanating from ICESCR. An examination of the 1997 Constitution, illustrates the recognition and realization of the values stemming from economic, social and cultural rights.

Firstly, the State affirms its obligation and commitment to the realization of 'economic, social and cultural rights' in the ***Preamble*** which stipulates "…promoting social justice and the economic and social advancement of all communities, respecting their rights and interests and strengthening our institutions of government". [280] Secondly, the State has amplified its commitment by the ***Compact*** provision of the Constitution which provides a framework of principles on which the conduct of government is based. The relevant principles which dictate such conduct in the context of 'economic, social and cultural rights' are provided in *section 6(a) and section 6(k)*.[281] *Section 7(1)* of the Constitution

[279] GA Res 2200 A (XXI) (16 December 1966) as cited in Office of the United Nations High Commissioner
For Human Rights Geneva, *A Compilation of International Instruments* (2002) Volume ST/HR/1/Rev.6,
page 7; See also http://www.unhchr.ch/html/menu3/b/a_cescr.htm (Accessed 1/05/08).
[280] *1997 Constitution*, *Preamble.*
[281] *1997 Constitution*, *Compact.*

makes it very clear that the principles stipulated in *section 6* are prima facie non-justiciable but *section 7(2)* expands the provision by giving consideration to the principles in the Compact when interpreting the "Constitution or a law made under the Constitution".[282] Thirdly, ***Chapter 4 BOR*** also contains a number of social and economic rights represented by the provisions on ***right to life***,[283] ***fair labour relations***,[284] ***right to education***[285] and ***right to property rights***.[286] Finally, ***Chapter 5*** deals with *Social Justice* which requires parliament to initiate and introduce programs to accommodate '*all groups or categories of persons who are disadvantaged*' as provided by *section 44(1)* of the Constitution.[287] One of the responses to the concluding observations by the monitoring committee on CERD, after reviewing Fiji's periodic report of 2006 is noteworthy. The CERD committee revealed that "Fiji has committed itself to take affirmative steps necessary to ensure that equal enjoyment of rights is guaranteed to all racial groups and their individual members".[288] This initiative is reflected by the *Social Justice Act* 2001 which provides the "legal framework for the implementation of the affirmative action and blueprint programmes of government".[289] This is discussed later in this chapter.

Fiji's constitutional and legislative framework does not specify or mirror all the provisions of ICESCR, but the State is committed in ensuring and realising those rights by devising affirmative action programs and policies. This is a positive initiative by the State and a positive direction of ICESCR in Fiji. This affirms the State's commitment to ICESCR as illustrated in *PAFCO Employees Union v Pacific Fishing Co Ltd*[290]

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[282] See above.
[283] *1997 Constitution*, *section 22*
[284] *1997 Constitution, section 33*.
[285] *1997 Constitution, section 39*.
[286] *1997 Constitution, section 40*.
[287] *1997 Constitution*, *Chapter 5 – Social Justice*.
[288] Committee on the Elimination of Racial Discrimination, Reports Submitted by State Parties under Article 9 of the Convention. UN Doc CERD/c/Fiji/17 [12 October 2006] para 36 or para 4.2.2 http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/72dfa13de8a7034bc125720a004f4540/$FILE/G0740026.pdf (Accessed 5/06/08).
[289] See above, para 39-54.
[290] *PAFCO Employees Union v Pacific Fishing Co Ltd [2002] FJHC 60; Hbc0543.2000s (25 January 2002)* http://www.paclii.org//cgi-bin/disp.pl/fj/cases/FJHC/2002/60.html?query=PAFCO (Accessed 1/05/08).

("*Pafco's case*") in which the High Court applied ***Article 8 paragraph 3*** of ***ICESCR*** inline with ***section 43(2)*** of the ***BOR*** to fill a gap in the *Trade Disputes Act* to enable workers to freely exercise their rights as trade unions. Byrne J, however being aware of the Convention in question in *Pafco's case*, highlighted and drew the analogy provided in the High Court of Australia case of *Minister of State for Immigration & Ethnic Affairs v Ah Hin Teoh* ("Teoh's case")[291] which considered CRC. Byrne J pointed out that in Teoh:

> "…ratification of the CRC gave rise to a legitimate expectation …the Minister would act in conformity with it in the absence of statutory or executive indications otherwise. The *C'th* had ratified …CRC but had yet to embody its contents in statutory form… Mason CJ Deane, Toohey and Gaudron JJ held that although a Convention ratified by Australia did not become part of Australian law unless its provisions had been validly incorporated into municipal law by statute, the ratification was an adequate foundation for a legitimate expectation, absent statutory or executive indications to the contrary, that administrative decision-makers would act conformably with the Convention…it was not necessary that a person seeking to set up such a legitimate expectation be aware of the Convention or personally entertain the expectation. It was enough that the expectation was reasonable in the sense that there were adequate materials to support it".[292]

The chief outcome emanating from this part of the judgement illustrates the Courts willingness to give effect to the application of a particular Convention in the absence of the domestic framework making provision for implementation of the Convention.

In a *Workshop on the Justiciability of Economic, Social and Cultural Rights in the Pacific*, the participants comprising of lawyers and judges from within the region revisited the approaches when reaching decisions in their respective jurisdictions towards economic, social and cultural rights. They resolved that:

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[291] *Minister of State for Immigration & Ethnic Affairs v Ah Hin Teoh (1995) 183 CLR 273* as cited in *PAFCO Employees Union v Pacific Fishing Co Ltd [2002] FJHC 60; Hbc0543.2000s (25 January 2002)* http://www.paclii.org//cgi-bin/disp.pl/fj/cases/FJHC/2002/60.html?query=PAFCO (Accessed 1/05/08).

[292] See above.

> "some economic, social and cultural rights embodied in domestic law and international instruments have been held to be justiciable by several national, regional courts and in international decision making…formulation of an optional procedure which would allow individual to complain about violations of the rights".[293]

In Fiji, the judiciary is continuing to play an active role in defining the application and limitations of social, economic and cultural rights. In addition, it is also actively giving equal importance for the implementation of civil and political rights as they appear in ***ICCPR***. The right to political liberty as provided by ***Article 25*** of ***ICCPR*** cannot be overlooked here as it is an essential element in the law making process within the context of freely choosing representatives and electing them into Parliament. In my view the guarantee to exercise one's *free will* towards democratic governance springs from the *idea of individual liberty or freedom*. One of the ideas favors *equality* as the basis for participation in public particularly through voting in elections to appoint a democratically elected government. The idea of political liberty or freedom thus leads us towards creating a transparent and independent process in the sphere of politics including upholding Parliamentary democracy.

It is noted that ***Chapter 4 BOR***, adequately provides for protection from ***cruel and degrading treatment***; ***rights of arrested or detained persons***; ***rights of charged persons and rights to access courts and tribunals***.[294]

In the landmark case of ***Taito Rarasea v The State***[295] the High Court considered and applied the provisions of *Article 10(1) of the ICCPR* and the *Article 32(1)* of the *Standard Minimum Rules for the Treatment of Prisoners* in a matter involving the

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[293] *Resolution 7* – In partnership with OHCHR, Interights, Commonwealth Secretariat & Fiji Human Rights Commission, 3rd Judicial Colloquium & Workshop, Fiji (2006) June 1 – 3 http://www.humanrights.org.fj/pdf/Final_Conclusions_Recommendations_JC2006.pdf (Accessed 1/05/08).

[294] *1997 Constitutions*, *sections 25(1), 27, 28, 29.*

[295] *Taito Rarasea v The State Criminal Appeal No HAA0027 of 2000S* http://www.paclii.org/cgi-bin/disp.pl/fj/cases/FJHC/2001/127.html?query=Taito%20Rarasea%20v%20The%20State (Accessed 1/05/08); See also *Sailasa Naba v The State* Criminal Case No HAC 0012 of 2000L http://www.paclii.org/fj/cases/FJHC/2000/146.html (Accessed 1/05/08).

accused's right to freedom from double jeopardy. The Court noted the offence committed by the appellant for escaping from lawful custody which was in breach of the *Penal Code and the Prisons Act and Regulations*. He was sentenced to two years imprisonment. In addition, the Commissioner of Prisons imposed sanctions by reducing his eight month remission entitlement for the original sentence of two years by one month and seven days and giving him reduced rations for two weeks. Furthermore the sixty six days he was at large was added to his sentence. The appeal had merit as he had been punished twice for the same offence which was contrary to *sections 25(1), 28(1)(k)* and *43(2)* of the Constitution. The Court took the opportunity to apply *section 43(2)* which made provision for it to have regard to public international law. It took the liberty to give meaning to the provisions from *ICCPR* and the *Standard Minimum Rules for the Treatment of Prisoners* and effectively apply and incorporate the principles before reaching its decision.

The case of ***Naushad Ali v The State***[296] involved the issue of corporal punishment in which the High Court noted the UN Human Rights Committee's interpretation of *Article 7* of *ICCPR* as follows:

> "The prohibition on torture and other ill-treatment in *Article 7* relates not only to acts that cause mental suffering to the victim. In the Committee's view,…the prohibition must extent to corporal punishment, including excessive chastisement ordered as punishment for a crime or an educative or disciplinary measure. It is appropriate to emphasise in this regard that *Article 7* protects, in particular, children, pupils, and patients in teaching and medical institutions".[297]

The Court took a purposive approach in interpreting and giving effect to the provisions of ***Chapter 4 BOR*** and considered the international standards in situations for corporal punishment.

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[296] *Naushad Ali v The State Criminal Appeal No HAA 0083 of 2001 ("Naushad Ali's case)* http://www.paclii.org/fj/cases/FJHC/2001/123.html (Accessed 1/05/08).
[297] See above, 14.

Prakash J observed that:

> "the wording of *section 25(1)* – cruel and degrading treatment was almost identical to *Article 5 UDHR and Article 7 ICCPR* and as such was bound to interpret *section 25(1)* in consonance with international human rights laws".[298]

These cases, confirm that the Courts when interpreting ***Chapter 4 BOR*** will embrace and draw assistance from the provisions in the international conventions and treaties to apply within the domestic framework.

The High Court of Cook Islands in ***R v Smith*** *("Smith's case")*[299] held that:

> "ICCPR had not been enacted as part of the national law (domestic enabling legislation) of Cook Islands which was the traditional approach to the applicability of international human rights instruments and so ICCPR has no effect to the case on hand".[300]

Smith's case illustrates the diverging views of the Court in giving effect and recognition to the application of ICCPR which could lead us to the conclusion that within the region Courts are expressing some reservation in embracing ICCPR.

3.2.2 ■ Convention on the Rights of the Child

In light of the **CRC**, some States in the South Pacific region have signed, accepted and ratified[301] CRC. These are Fiji, Marshall Islands, Samoa, Solomon Islands and Vanuatu.

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[298] See above, n 296, 11.

[299] *R v Smith Civil Division Case No 0.A 3 of 1998 – 26 April 1999* as cited in Imrana P Jalal and Ratu Jone Madraiwiwi H.E. VP *Part 1: Pacific Island Cases Referring to Human Rights Conventions* (2005) 1 *Pacific Human Rights Law Digest,* 39 – 40 http://www.rrrt.org/assets/HR%20Law%20Digest.pdf (Accessed 13/07/08); See also http://www.paclii.org/ck/cases/CKHC/1999/1.html (Accessed 1/05/08)

[300] See above.

[301] http://www.unhchr.ch/html/menu2/6/crc/treaties/status-crc.htm (Accessed 1/05/08); See also Cook Islands Fiji, Samoa, Kiribati, Marshall Island, Nauru, Nuie, Tonga, Tuvalu and Vanuatu.

Fiji has taken the leading role in adopting the optional protocol[302] *involvement of children in armed conflict* to CRC. Fiji, Marshall Islands and Solomon Islands have fulfilled their reporting obligations[303] by submitting their respective country reports to the monitoring Committee on CRC.

It is noted that some States have failed to honour their promise of reporting situations on children to the Committee on CRC to implement the rights of the child in their respective States as set out in CRC. It shows that they are not serious in their commitment in realising the rights under CRC and implementing them in their domestic framework. This can be interpreted as a denial of their pledge for CRC in the South Pacific region. It is possible to argue that failure to submit periodic reports, does not rule out the possibility that States do not have workable domestic machinery to develop, coordinate and implement CRC. Initiatives introduced by State actors such as programmes and workshops creates awareness and contributes towards addressing situations on children only at a State level. The attitude and approach by the Courts to establish the platform for the jurisprudence of CRC in the South Pacific region is noteworthy.

The case of ***Mark Lawrence Mutch***[304] related to a paedophilia offence. Here the issue was "whether the Court could also apply CRC to reflect its support for the international community's concern for the protection of children's rights in sentencing the accused".[305] In *Mutch's* case, applying section *43(2)* of *Chapter 4 BOR*, in addition to sexual offences provisions against children available under the *PC*, Pathik J stated that

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[302] http://www2.ohchr.org/english/bodies/ratification/11_b.htm (Assessed 1/05/08).

[303] http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CRC.C.15.Add.89.En?Opendocument (Assessed 1/05/08) (Fiji); See also http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CRC.C.Q.SOL.1.EN?OpenDocument (Assessed 1/05/08) (Solomon); See also http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CRC.C.15.Add.139.EN?OpenDocument (Assessed 1/05/08) (Marshall Islands).

[304] *The State v Mark Lawrence Mutch High Court Criminal Trial No 8 of 1998* as cited in Imrana P Jalal and Ratu Jone Madraiwiwi H.E. VP, *Part 1: Pacific Island Cases Referring to Human Rights Conventions* (2005) 1 *Pacific Human Rights Law Digest,* 57 http://www.rrrt.org/assets/HR%20Law%20Digest.pdf (Accessed 13/07/08);See also http://www.paclii.org/fj/cases/FJHC/1999/149.html (Accessed 1/05/08).

[305] See above.

"Courts here have not used the CRC as the basis of decision making but where appropriate it could be used to support the decision making or to justify a decision".[306]

His Lordship stressed that:

> "*Article 3(1)* of *CRC* states 'in all actions concerning children, whether undertaken by…courts of law…the best interest of the child shall be a primary consideration' furthermore, *Article 19(1) of CRC* empowers 'States parties to take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect of negligent treatment, maltreatment or exploitation, including sexual abuse…".[307]

Some two years later, his Lordship when presiding in ***Maleli Qiladrau v State***[308] visited *Article 16*[309] *and Article 19*[310] of the *CRC*. This case concerned a 6 year old victim who was sodomized. The Judge in the course of his decision said that:

> "*CRC requires governments to take legislative and other measures to protect children from physical or mental violence including sexual abuse….the rights of children have particular poignancy. Children are the most vulnerable members of community. It is the duty of the Courts to protect their interests, especially where parents are wanting*".[311]

The implementation of the provisions of the CRC in both the cases reflects willingness by the Courts to embrace CRC in decision making.

In ***Naushad Ali v The State Criminal Appeal*** *(supra)* the Court in interpreting corporal punishment, took the opportunity to address and consider in depth guidelines and policies and regulations set by the Ministry of Education on corporal punishment on children in schools pursuant to the "*Education Act Cap 262 and Circular No 10 of 1986*

[306] *The State v Mark Lawrence Mutch High Court Criminal Trial No 8 of 1998, 3* http://www.paclii.org/fj/cases/FJHC/1999/149.html (Accessed 1/05/08)
[307] See above, 4.
[308] *Maleli Qiladrau v State (Cr Appeal No 48 of 2000)* as cited in *Nausad Ali's case*, 8.
[309] http://www2.ohchr.org/english/law/crc.htm#art16 (09/04/08).
[310] See above.
[311] *Nausad Ali's case,* 8.

on corporal punishment".[312] The High Court considered Committee reports on corporal punishment from the United Kingdom[313] and reviewed in detail the Namibian case ***Ex Parte Attorney General of Namibia, In re Corporal Punishment by Organs of State***[314] and the Zimbabwean case of ***Ncube and Others v State***.[315] Prakash J examined the relative provisions in the *Namibia* and *Zimbabwe* cases and compared them to *section 7* of the 1970 Constitution which provided that 'No person shall be subjected to torture or to inhuman or degrading punishment or other treatment'.[316]

He said:

> "*the 1990 and 1970 Constitutions refined the language reflecting developments in international human rights law and practice and that while there are slight variations in language it is clear that the interpretations of the provisions confirm to a clear pronouncement to the banning of corporal punishment, whether judicial or quasi judicial and administrative, including corporal punishment in schools*".[317]

The learned Judge after discussing the provisions under all three Constitutions of Fiji, considered *Article 19* and *Article 28(2)* of the *CRC* thereby reaching the conclusion that "corporal punishment on children in schools was unconstitutional, unlawful and in conflict with *section 25(1)*".[318]

By way of comparison I now discuss the application of CRC in our neighbouring jurisdictions.

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[312] *Nausad Ali's case,* 22, 24.
[313] *Nausad Ali's case,* 18; See also Hermann Mannheim, 'Report of the Departmental Committee on Corporal Punishment' (1983) 2(1) *The Modern Law Review* June http://www.jstor.org/pss/1089676 (Accessed 1/05/08).
[314] *Ex Parte Attorney General of Namibia, In re Corporal Punishment by Organs of State [1992] 7 LRC 515* (decided in April 1991) as cited in *Nausad Ali's case*, 19.
[315] *Ncube and Others v State [1998] LRC (const) 442* (decided in 1987) as cited in *Nausad Ali's case*, 19.
[316] *Nausad Ali's case*, 19.
[317] See above.
[318] *Nausad Ali's case*, 31; See also *Uhila v Kingdom of Tonga* Civil Case No 145/91 http://www.paclii.org/to/indices/cases/TLR_1992_TOC.html (Accessed 1/05/08).

In Tuvaluan case of ***Anderson v R***[319] the Court stated that "Tuvalu, a signatory to the CRC and State Parties to the Convention are required to review their laws in relation to children".[320] "The Court applied *Article 37of CRC* which provided that '*no person under 18 should be sentenced to life imprisonment without the possibility of release*'".[321]

In Samoa in ***The Attorney-General v Maumasi***[322] the "Court applied CRC although Samoa had not enacted any domestic enabling legislation following ratification. The Court held that all Samoan Courts should have regard to the CRC in cases within its scope".[323]

The Fijian and Regional cases in the South Pacific demonstrate that the application of CRC has been appropriately filtered, through the region. It shows the region, is committed to CRC. By and large where the domestic legislation does not adequately accommodate protection and interest of the child or where ratification of CRC is not present, the Courts will continue to confirm its reliance on the provisions of CRC as a tool to assist it in reaching an outcome in the *best interest of the child*. The approach of the Courts reinforces the commitment of the States to CRC acknowledging the growing acceptance and importance of international Conventions where domestic laws fall short.

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[319] *Anderson v R Criminal Case No 5 of 2003 – 26 September 2003*, as cited in Imrana P Jalal and Ratu Jone Madraiwiwi H.E. VP, *Part I: Pacific Islands Cases Referring to Human Rights Conventions,* (2005) 1 *Pacific Rights Law Digest,* 1 http://www.rrrt.org/assets/HR%20Law%20Digest.pdf (Accessed 13/07/08); See also http://www.paclii.org/tv/cases/TVHC/2003/27.html (Accessed 1/05/08).

[320] See above; See also *Constitution of Tuvalu 1986, Article 15(5)(c)*.

[321] See above n 319.

[322] *Attorney General v Maumasi Criminal Case No 7 of 1999 – 27 August 1999*, as cited in Imrana P Jalal and Ratu Jone Madraiwiwi H.E. VP, *Part I: Pacific Islands Cases Referring to Human Rights Conventions,* (2005) 1 *Pacific Rights Law Digest,* 2-3 http://www.rrrt.org/assets/HR%20Law%20Digest.pdf (Accessed 13/07/08); See also http://www.paclii.org/cgi-bin/disp.pl/ws/cases/WSCA/1999/1.html?query=Attorney-General%20v%20Maumasi (Accessed 1/05/08).

[323] See above; See also *Nauka v Kaurua* Matrimonial Case No 6 of 1996 as cited in Imrana P Jalal and Ratu Jone Madraiwiwi H.E. VP, *Part I: Pacific Islands Cases Referring to Human Rights Conventions,* (2005) 1 *Pacific Rights Law Digest,* 24 http://www.rrrt.org/assets/HR%20Law%20Digest.pdf (Accessed 13/07/08); See also http://www.paclii.org/cgi bin/disp.pl/vu/cases/VUSC/1998/53.html?query=Nauka%20v%20Kaurua (Accessed 1/05/08).

I shall now discuss the State initiatives and assurances for the formulation of policies and programmes to ensure conformity with its (State's) international obligation with respect to rights of the child.

In the case of Fiji, according to the concluding observations by the Committee on CRC,[324] the general principles on implementation of CRC has improved and expanded.

These are illustrated by the transformed approaches by Courts in handing down decisions on CRC. With the establishment of the FHRC, the Courts have been guided by the FHRC to *intervene* or act as *amicus curiae* on invitation by the Courts to assist it, on human rights and freedoms provisions of ***Chapter 4 BOR*** and ***CRC***. The FHRC ought to be commended for playing a vital role. Examples are illustrated in the case of ***Sarita Devi v The State***[325] where the FHRC was invited to appear as *amicus curiae* to make oral submissions on the rights of the child, where a 18 months old child needed to be breast fed by her mother while she was being incarcerated for two years. [326] In ***Naushad Ali v The State Criminal Appeal*** (supra) when the Court was considering corporal punishment in the context of the *Penal Code*, it requested submissions from the FHRC.[327] It extended its judgement to address corporal punishment that was currently being practiced in schools around Fiji pursuant to *Ministry of Education Circular on Corporal Punishment No 10 of 1986 as highlighted earlier*. With a detailed examination on the national policy for corporal punishment in schools, the Court found such punishment as going against the obligations under the Constitution and CRC.[328]

Turning, to the example of formulating national policies and programmes with respect to children, the Ministry of Education announced introducing sex education as a

[324] See above n 303, (Fiji).
[325] *Sarita Devi v The State Criminal Case No HAA 76/05* http://www.paclii.org/cgi-bin/disp.pl/fj/cases/FJHC/2005/429.html?query=Sarita%20Devi (Accessed 1/05/08).
[326] See above; See also *HRC Act 1999*, *section 36 & 37.*
[327] *Nausad Ali's case,* 14 and 22; See also *Mul Prasad v State* Criminal Appeal 37 of 1997; Consider also Reports from: *'Learning Together: Directions for Education in the Fiji Islands',* Fiji Island's Education Commission Panel, Ministry of Education, November 2000, 105 and *'Incidence and Prevalence of Domestic Violence & Sexual Assault'*, Fiji Women's Crises Centre 2001 as cited in *Naushad Ali's case* p 24 and p 26 respectively.
[328] See above.

compulsory subject in schools to address issues on unwanted pregnancies amongst females, prevention of infectious and contagious diseases such as HIV/AIDS.[329] The launching of this initiative is currently being tailored by the Education Ministry and state actors. In relation to the girl child, the Committee on CRC, expressed concerned on the:

> "lack of a systematic, comprehensive and disaggregated quantitative and qualitative data-collection mechanism for all areas covered by the Convention, especially addressing the most vulnerable groups of children, including those belonging to minority groups, children living in institutional care, girl children, and children living in rural areas".[330]

The Committee recommended that:

> "a more active approach be taken to eliminate discrimination against certain groups, in particular the girl child, children with disabilities, children in institutional care, children living in rural areas, poor children such as those living in slums, and children born out of wedlock (ex-nuptial children)".[331]

With Fiji's commitment to CRC in satisfying its international obligation to recognize and implement the provisions on CRC within the domestic framework, Fiji has taken positive steps in extending its efforts to accommodate issues in the area of the girl child.

In a recently published *situation paper for the Pacific Islands Region*[332] prepared by the FWCC and the FWRM in partnership with UNICEF, UNIFEM, the situation paper practically provides detailed data and in-depth reports from rural areas from around the South Pacific region on the "vulnerability of the girl child to poor health, poverty of

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[329] http://www.fijitimes.com/story.aspx?id=57968 (Accessed 1/05/08); See also obligations under *Article 12, ICESCR; Article 11.1(f) CEDAW; Article 24 CRC.*

[330] Committee on the Rights of the Child, Concluding Observations/Comments: Fiji, UN Doc. CRC/C/15/Add.89. 18th Session – 24 June 1998. See also above n 303; See also *Article 44 CRC* – State obligation & periodic reporting.

[331] See above.

[332] Penny S Meleisea Dr and Ellie Meleisea, '*Elimination of All Forms of Discrimination & Violence Against the Girl Child*', UNICEF Pacific and UNIFEM Pacific (2006); See also http://www.un.org/womenwatch/daw/egm/elim-disc-viol-girlchild/ObserverPapers/UNICEF%20Girl%20Child%20report.pdf (Accessed 1/05/08).

opportunity, economic exploitation, sexual abuse and commercial sexual exploitation".[333] In the South Pacific region the girl child issue has gained momentum in the context of CRC, which has recently received a lot of attention and concern. As a result the State actors together with the International NGO have commenced initiating and introducing "programmes of action to address protection of the girl child".[334]

To add, the Prime Minister, Commodore Voreqe Bainimarama of Fiji, during the International Women's Day celebrations last year re-affirmed to the nation that the:

> "Interim Government in focusing on implementation of policies and programmes of assistance takes a firm stand of ensuring that there is gender balance and this is particularly with reference to addressing the elimination of all forms of violence and discrimination against the girl child. This is in line with our compliance to international commitments".[335]

It can be concluded that although States party fall short in the implementation of the CRC in its entirety, reports[336] suggest that positive steps and efforts are being taken to ensure the development of CRC in the South Pacific region gradually and progressively.

3.2.3 ■ Convention on the Elimination of All Forms of Discrimination Against Women

I shall now discuss **CEDAW**. In the South Pacific region, Fiji, Samoa and just recently Cook Islands signed and ratified CEDAW[337] with Fiji being the first country to fully

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[333] See above, 10; See also HELP Resources, Inc and UNICEF (PNG) 2005.
[334] See above n 332, 25; See also The Pacific Children's Programme 2001; Pacific Regional Workshop on Combating Poverty and Commercial Exploitation of Children and Youth 2003; Pacific Consultation on Violence against Children 2005.
[335] Interim Prime Minister Frank Voreqe Bainimarama, "Opening Speech' (Speech given at International Women's Day Sukuna Park, Suva, Fiji, 8 March 2007) http://www.fiji.gov.fj/publish/page_8516.shtml (Accessed 20/04/08).
[336] See above n 303 (Fiji), (Solomon), (Marshall Islands).
[337] http://www.un.org/womenwatch/daw/cedaw/states.htm (Assessed 1/05/08); See also http://www2.ohchr.org/english/bodies/docs/status.pdf (Assessed 1/05/08).

ratify CEDAW without any reservations.[338] On the other hand, most of the States in the South Pacific region have so far failed to meet reporting requirements which reveals a denial of their pledge towards CEDAW.[339] But where country reports and reported cases are available the application of CEDAW tends to support the development of CEDAW.

In a report by Fiji, "being the first country from the South Pacific region to present a report to the Committee on CEDAW"[340] it was informed of some difficulties initially faced in implementing CEDAW because of the:

> "isolation of Fiji…from the rest of the world made the country susceptible to global economic forces and, consequently, sporadic political upheavals, and the country's goals and priorities were affected by social, economic…vulnerabilities. Fiji's…sluggish economy had led to major job losses, outward migration, a lowering of the living standard, increased poverty and crime…over half of the predominantly highly skilled and qualified professionals who had migrated from Fiji… had been women".[341]

Alternatively the report also commented that some of these difficulties had improved upon restoration of constitutional democracy and political stability after the political events of 19 May 2000 Coup d'etat. The report highlighted some positive developments in the following areas:

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[338] http://www.un.org/womenwatch/daw/cedaw/reports.htm (Accessed 1/05/08); See also *Article 9* – removed in 1999 and *Article 5(a)* – removed in 2000. Fiji is a party to four other UN Conventions to improve the status of women: *Convention for the Suppression of Traffic in Women & Children* 1921, *Convention on Political Rights of Women* 1954, *Convention on the Nationality of Married Women* 1958*, and Convention on the Rights of the Child* 1993 as cited in Committee on the Elimination of Discrimination against women, Consideration of reports submitted by States parties under article 18 of CEDAW: Fiji Islands. UN Doc.CEDAW/C/FJI/1. 14 March 2000; See also http://www.un.org/womenwatch/daw/cedaw/cedaw26/fji1.pdf (Accessed 1/05/08).

[339] See above; See also other countries to CEDAW: PNG, Solomon Islands, Vanuatu, Cook Islands, Nuie, Tuvalu, Kiribati and Marshall Islands.

[340] See above n 338; See also http://www.un.org/womenwatch/daw/cedaw/26sess.htm (Accessed 1/05/08).

[341] See above; See also Committee on the Elimination of Discrimination against Women: Participants Express Concern at Discriminatory Elements in Family Law, Domestic Violence, Pauperization of Fijian Women, UN Doc. Press Release 26th Session, 530th & 531st Meetings as cited in http://www.un.org/News/Press/docs/2002/WOM1307.doc.htm; See also http://www.unhchr.ch/tbs/doc.nsf/0/206085180eaba54fc1256c6a003b956a?OpenDocument&Click= para 25-37 (Fiji) (Accessed 9/04/08).

> "review of domestic legislation, improvement of girls' access to education; launch Women's Plan of Action 1999 – 2008 pursuant to commitments made at the 1995, 4th World's Conference on Women in Beijing and enable gender balance partnership at all levels of decision-making and initiatives introduced by government to i) achieve equal access to health care and education for rural women, ii) support programmes and training workshops on the issue of violence against women and iii) provide support to civil society organisations that assist victims of violence".[342]

The Committee on CEDAW expressed in its concluding observations pursuant to Fiji's periodic reporting obligations that:

> "1) employment was central to solving many women's issues;
> 2) drafting legislation on equal employment which guaranteed equal opportunities for employment, retirement and promotion;
> 3) Government's broad gender policies needed to be harmonized with the family law".[343]

In response to the issue of employment, the deposed Prime Minister Laisenia Qarase who led the SDL party tabled in Parliament the newly drafted *ER Bill No 8 of 2006* which came into force as *the ER Promulgation No 36 of 2007* by the Interim Administration earlier this year. The *Promulgation* balances gender issues by guaranteeing protection against direct and indirect unfair discrimination including providing equal opportunities in employment.[344] This will be discussed in detail later. The *HRC Act 1999*[345] also contains provisions relating to unfair discrimination apart from the *right to equality* provisions in ***Chapter 4 BOR***[346] which reinforces introducing legislation, national policies and programmes for the implementation of CEDAW.

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[342] See above; See also above n 338.
[343] See above n 337; See also Women's Plan of Action 1999 – 2008 pursuant to commitments made the 1995 Fourth World's Conference on Women in Beijing. http://www.unhchr.ch/tbs/doc.nsf/0/206085180eaba54fc1256c6a003b956a?OpenDocument&Click= para 46-70 (Accessed 9/04/08).
[344] *Employment Relations Bill (No 8 of 2006)* (Fiji), *Preamble*, *Part 2 section 6, Part 9 section 74, 77* http://www.parliament.gov.fj/legislative/bills.aspx?billID=308&viewtype=full&billnav=bill (Accessed 1/05/08).
[345] See *HRC Act 1999, Part III, sections 17, 26*.
[346] See *1997 Constitution, section 38(2)*.

In response to the issue of women being exposed to sexual abuse and domestic violence, Parliament under the SDL leadership reviewed the *Domestic Violence Bill 2005*, pioneered and steered by the FWCC. The *Bill* awaits the sitting of a new Parliament for enactment. FWCC working closely with the FLRC revisited and reviewed existing provisions in the *PC* and *CPC*, so that they conform to the minimum international standards and new guiding principles of family law and gender equity.[347] FLRC also considered addressing the existing laws on abortion at the time of the review. FLRC "formed no opinion as to the appropriate form of abortion offences and the grounds that may be considered to lawfully justify the termination of pregnancy".[348]

Furthermore, the recently enacted *Prisons and Corrections Act 2006*, makes provision to "apply to the fullest extent possible the rights and obligations of CEDAW in the administration of prisons and the treatment of prisoners".[349] In addition, the current approach adopted by the Courts in recent case authorities reveals a positive attitude in the efforts towards the development of CEDAW.

In Fiji, in the case of ***The State v Filipe Bechu***[350] the Court when sentencing the accused said that:

> "Women are your equal and therefore must not be discriminated on the basis of gender. Men should be aware of the provision of CEDAW, which our country has ratified in 1981. Under the treaty, the State shall ensure that all forms of discrimination against women must be eliminated at all costs. The Court shall be the watchdog of this obligation. The old school of thought that women were inferior to men, or part of your personal property,

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[347] http://www.parliament.gov.fj/hansard/viewhansard.aspx?hansardID=568&viewtype=full (Accessed 1/05/08); See also http://www.lawreform.gov.fj/common/default.aspx?page=domesticRev (Accessed 1/05/08).

[348] See above; See also http://www.lawreform.gov.fj/common/Default.aspx?Page=WP2006 (Accessed 1/05/08).

[349] *Prisons & Corrections Act 2006 (Fiji) – section 2*; See also http://www.parliament.gov.fj/legislative/bills.aspx?billID=276&viewtype=full&billnav=bill (Accessed 1/05/08)

[350] *The State v Filipe Bechu Criminal Case No 79 of 1994, [1999] FJMC 3 (2 December 1999)* http://www.paclii.org/cgi-bin/disp.pl/fj/cases/FJMC/1999/3.html?query=Filipe%20Bechu (Accessed 1/05/08)

> that can be discarded or treated unfairly at will, is now obsolete and no longer accepted by our society".[351]

In a recent 2006, sexual harassment case of ***The State v Azmatula & Pratap Bhan***[352] Magistrate Nadakuitavuki in handing down his judgment said that:

> "This…case…violates the principles of equality of rights and respect for human dignity, which is an obstacle to the participation of women, on equal terms with men,…and makes more difficult the full development…of women in the service of their countries and of humanity as enshrined under CEDAW. The sentence… should serve as a deterrent measure to any unscrupulous employer who may practice such forms of indignity to women because of their gender and physical being".[353]

By way of comparison, I now examine the application of CEDAW from our neighbouring jurisdictions.

The Samoan[354] country report on CEDAW, highlighted the significant difficulties it faced such as "enforcement of CEDAW through the local judicial system[355] and inadequate legislation protecting women against discrimination, namely in regard to gender-based violence and in family and employment law".[356] The Committee on CEDAW recommended:

> "to include in the Constitution or in other appropriate domestic legislation a definition of discrimination against women in line with the *Article 1* of the Convention; to take measures to ensure that the Convention becomes fully applicable in the domestic

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[351] See above.
[352] *The State v Azmatula & Pratap Bhan Criminal Case No 175 of 2003, (21 April 2006).*
[353] See above, 2; See also above n 350.
[354] Committee on the Elimination of Discrimination against Women, Concluding Observations/Comments:
Samoa, UN Doc.CEDAW/PSWG/2005/I/CRP.1/Add.7. See also http://www.unhchr.ch/tbs/doc.nsf/0/b86a1fbad3a7f5a9c125729700391b2c/$FILE/N0521698.pdf (Accessed 1/05/08).
[355] See above.
[356] Committee on the Elimination of Discrimination against Women, Concluding Observations/Comments:
Samoa, UN Doc.CEDAW/C/WSM/CC/1-3. See also http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CEDAW.C.WSM.1-3.En?Opendocument (Accessed 1/05/08).

> legal system, either through domesticating it in full or by adopting appropriate legislation; and revise existing discriminatory legislation and draft new laws to promote gender equality".[357]

Some positive developments and initiatives put in place from Samoa by its country report as observed by the Committee were as follows:

> "approval by government of the selection of women's representatives (women liaison officers) within villages to support the advancement in rural areas and conducting legislative reviews and identifying a number of areas of the law that are critical for promotion of gender equality".[358]

By comparison, for countries such as Tuvalu and Kiribati which have failed to meet reporting requirements, reported cases[359] illustrate some reservation for the application of CEDAW within its domestic context.

In the Tuvaluan matrimonial case of ***Tepulolo v Pou & Attorney General***[360] the court held that:

> "CRC and CEDAW were not applicable to the laws of Tuvalu unless an Act of Parliament was passed to implement their provisions. The Court however, might take cognisance of their terms as an aid to the determination of the true construction of a provision of written law where there was any difficulty in interpretation".[361]

In Kiribati, the issue before the Court in ***Republic of Kiribati v Timiti & Robuti***[362] was whether the "requirement for the cautionary corroboration warning constituted

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[357] See above.
[358] See above n 356.
[359] *Tepulolo v Pou & Attorney General* Family Appellate Court Case No 17 of 2003 (24 January 2005) http://www.paclii.org/cgi-bin/disp.pl/tv/cases/TVHC/2005/1.html?query=Tepulolo (Accessed 1/05/08) and *Republic of Kiribati v Timiti & Robuti* High Court Criminal Case 43 of 1997 (17 August 1998). http://www.paclii.org/cgi-bin/disp.pl/ki/cases/KIHC/1998/1.html?query=Timiti (Accessed 1/05/08) as cited in as cited in Imrana P Jalal and Ratu Jone Madraiwiwi H.E. VP, *Part I: Pacific Islands Cases Referring to Human Rights Conventions,* (2005) 1 *Pacific Rights Law Digest,* 64, 65 and 47, 48 respectively http://www.rrrt.org/assets/HR%20Law%20Digest.pdf (Accessed 13/07/08)
[360] See above.
[361] See above n 359.
[362] See above.

discrimination under the Constitution of Tuvalu and CEDAW. In this case the Court did not consider the alternative argument on discrimination or the relevance of CEDAW".[363]

While States are in the transition of keeping pace with the different attitudes with respect to gender issues locally, States generally have commenced taking cognisance of CEDAW as an aid if not interpreting CEDAW domestically.

3.2.4 ■ International Convention on the Elimination of All Forms of Racial Discrimination

I now turn to discuss ***CERD***. Fiji, Tonga and Solomon Islands have signed CERD in the South Pacific region and only Fiji and Solomon Islands have submitted their country reports.[364] Other countries in the South Pacific region have not committed to CERD which possibly could lead us to believe that racial discrimination does not exist and all races are in harmony and unison with each other. Alternatively, if any issues of racial discrimination exist then maybe States have in place the mechanisms to reconcile and resolve differences between the races by traditional and customary methods.

On the other hand, it could also be possibly argued that States in the South Pacific region do not want to commit to CERD as government's political policies and agendas cannot be advanced since it will be in contravention with CERD. "ICCPR and CERD specifically permit race-based distinctions to redress past discrimination and to promote the values of diversity".[365]

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[363] See above n 359.

[364] http://www2.ohchr.org/english/bodies/ratification/2.htm (Accessed 1/05/08); See also http://www2.ohchr.org/english/bodies/docs/RatificationStatus.pdf (Accessed 1/05/08); Committee on the Elimination of Racial Discrimination, Reports Submitted by State Parties under Article 9 of the Convention UN Doc CERD/C/Fiji/17 [12 October 2006]; See also (Fiji) http://www2.ohchr.org/english/bodies/cerd/docs/co/CERD-C-FJI-CO-17.pdf (Accessed 1/05/08); Tonga http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CERD.C.304.Add.96.En?Opendocument (Accessed 1/05/08); Solomon http://daccessdds.un.org/doc/UNDOC/GEN/G02/420/73/PDF/G0242073.pdf?OpenElement (http://tb.ohchr.org/default.aspx?country=sb) (Accessed 1/05/08).

[365] http://daccessdds.un.org/doc/UNDOC/GEN/G07/400/26/PDF/G0740026.pdf?OpenElement

In Fiji, pursuant to the *1997 UNDP Fiji Poverty Report*,[366] Fiji committed itself to take affirmative steps necessary to ensure that equal enjoyment of rights is guaranteed to all racial groups and their individual members.[367] This initiative is reflected in *Chapter 5 Social Justice Chapter section 44 of the BOR* and the *Social Justice Act*[368] enacted by Parliament in 2001 which provides the "legal framework for the implementation of the affirmative action, including the blueprint and the 50/50 by 2020 development plan".[369] The Committee on CERD in its concluding observations pursuant to Fiji's periodic reporting obligations stated that:

> "The State party ensures that affirmative action measures it adopts to pursue the above objectives [of ensuring the social and economic development as well as the right to cultural identity of the indigenous Fijian community] are necessary in a democratic society, respect for the principle of fairness, are grounded in a realistic appraisal of the situation of indigenous Fijians as well as other communities. The State party guarantee that the special measures adopted to ensure the adequate development and protection of certain ethnic groups and their members in no case lead to the maintenance of unequal or separate rights for different ethnic groups after the objectives for which they were taken have been achieved (*Article 1, paragraph 4, and Article 2, paragraph 2*, of the Convention)". [370]

The affirmative action and blueprint programmes recently were under attack after the FHRC released a Report in June 2006 by:

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para 35, (Accessed 1/05/08).

[366] http://peb.anu.edu.au/pdf/PEB13-2chung.pdf (Accessed 1/05/08);

[367] See above; See also Walter Rigamoto, 'FHRC Completes Affirmative Action Report' (2006) 5(2) *FHRC Rights Quarterly* June http://www.humanrights.org.fj - 'overall the Report found with some exceptions, the affirmative action programme by Government do not comply with the Constitution, *Social Justice Act 2001* itself does not comply with the Constitution'; See also Report on Government's Affirmative Action Programmes, 2020 Plan for Indigenous Fijians and Rotumans and

the Blueprint http://www.humanrights.org.fj/pdf/AA_report.pdf (Accessed 1/05/08); See also http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CERD.C.62.CO.3.En?Opendocument para 16 (Accessed 1/05/08).

[368] See above n 288, para 4.5.6.

[369] See above, para 4.6.

[370] Submission by NGO's to the Committee on CERD August 2007 http://www2.ohchr.org/english/bodies/cerd/docs/ngos/ngosfiji72.pdf (Accessed 1/05/08) para 4.1; See also http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CERD.C.62.CO.3.En?Opendocument (CERD/C/62/CO/3) (2 June 2003), (Accessed 1/05/08).

> "instigating an own motion investigation triggered by the number of complaints it received from different sources about the Affirmative Action law and policy as well as by the Commission's own concern about the proposals of two different Governments to enact Social Justice legislation for Fiji".[371]

The conclusion of the Report stated that:

> "The 50/50 by 2020 Development Plan, the Blueprint and the *Social Justice Act 2001* have the combined effect of imposing large-scale discrimination against the minority ethnic groups, specifically on the disadvantaged categories within these groups, and more generally on other disadvantaged groups who have not been provided with affirmative action programmes to improve their conditions of life. The affirmative action law, policies and programmes do not comply with the requirements of *Chapter 5 of the Constitution*".[372]

The Report recommended that "Government should put in place affirmative action programmes (for all disadvantaged groups or categories of persons) that conform to the requirements of *Chapter 5, section 44 of the Constitution*".[373]

In addition, CCF commented that with respect to the:

> "evolving social justice and affirmative action policies and programs, it would undermine race relations and is not in the long-term interest of all Fiji citizens. Efforts to create a united Fiji with discriminatory affirmative action policies will not work as it would not contribute to national unity. Additionally, in its present form, social justice and affirmative action policies and programs would be in conflict with ICERD's *BOR*".[374]

The controversy surrounding government's policy on affirmative action programmes remained unfinished as events of December 2006 took over SDL leadership. It remains

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[371] Walter Rigamoto, above n 367.
[372] *FHRC AA Report,* para 16, p 7.
[373] See above, 96; See also Walter Rigamoto, above n 367.
[374] See above n 370, 30, para 4.1, *Submission by NGO's*.

open for the government of the day to introduce national policies consistent with the Constitution to address groups or categories of persons who are disadvantaged.

Within the context of CERD, reference to the ***Promotion of Reconciliation, Tolerance and Unity Bill [RTU]***[375] cannot be overlooked. Just before the May 2006 general elections, the Qarase led government had introduced the *RTU Bill* in Parliament and allowed for deliberation from stakeholders and civil society. The *RTU Bill* established a *Reconciliation and Unity Commission*[376] followed by a *Victims and Reparations Committee*[377] and *Amnesty Committee*.[378] In addition a National Council for Promotion of RTU was to be established and entrusted with developing strategies for the promotion of greater understanding between two major racial communities".[379] The *RTU Bill* "aimed at providing amnesty to a number of convicted Government ministers, their supporters and those who were yet to be charged for the insurrection of May 2000".[380] From the Government's perspective "amnesties were necessary in order to put the coup behind us and unite the country. It portrayed amnesties as a form of State-sponsored forgiveness, and an essential stage in the journey to national reconciliation".[381]

The Committee on CERD in its concluding observations pursuant to Fiji's periodic reporting obligations indicated that:[382]

> "It was deeply concerned about the damage to race relations caused by the 1987 and 2000 Coups d'etat in Fiji. It encourages the State party to address perceptions that continues to politicize culture, identity and ethnicity in order to maintain

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[375] See above; See also *Reconciliation Tolerance and Unity {RTU] (Bill No 10 of 2005)* http://www.parliament.gov.fj/legislative/bills.aspx?billID=247&viewtype=full&billnav=bill (Accessed 1/05/08).
[376] *RTU Bill, Part 2, section 4.*
[377] *RTU Bill, Part 2, section 8.*
[378] *RTU Bill Part 2 section 9.*
[379] Mosmi Bhim, 'The Impact of the Reconciliation, Tolerance and Unity Bill on the 2006 election', in Stewart Firth and Jon Fraenkel (eds) *From Election to Coup in Fiji - The 2006 campaign andIts aftermath* (2007) 2.
[380] http://www.unhchr.ch/huricane/huricane.nsf/view01/4F08A76341ED6111C12573F5004B1AAB?Opendocument (Accessed 10/04/08).
[381] See above n 370, 30, para 2.2, *Submission by NGO's*.
[382] See above.

> Fijian hegemony. The State party was of the view that political events of 1987 and 2000 were occasioned by a widespread belief among the indigenous Fijians that the 1970 and 1997 Constitutions were inadequate to protect and preserve their rights and interests, their values, traditions, customs, way of life and economic wellbeing. Thus the *RTU Bill* was aimed at providing amnesty to a number of convicted Government Ministers, their supporters and those yet to be charged for the insurrection of May 2000. As a result, the *Bill* was a gross violation of the human rights of the victims of the Coup. The State party had not provided any serious rationale for introducing the *RTU Bill*. Therefore any purported claims that it would improve race relations are far from true. The title of the *RTU Bill* is in itself misleading".[383]

In my view, with recommendations from the Committee on CERD, it gives us an indication that the implementation of CERD has not been adequately filtered in Fiji. The deep rooted problems and political climate has constrained the realization of the provisions on CERD and Fiji's Social Justice framework.

The application of the principles enshrined in *international human rights documents*, and the enforcement of rights has been carried forward by Court's in Fiji and in our neighbouring jurisdictions. These principles have extended to national policy making as was illustrated in ***Naushad Ali v The State Criminal Appeal*** (supra), in which the national policy on corporal punishment in school's was revisited and reversed ensuring punishment was unacceptable. How comfortable are we able to embrace the various categories of rights and freedoms depend on a number of factors. These include the level of preparedness by us as a nation to stimulate the law making process and the national developmental progression.

For instance in Fiji, the realization of social, economic, cultural rights and civil and political rights rests on significant human resources, economic and technological advancement of the State which impresses on national policy making and the law-making processes. However, in December 2006, the military removed the democratically elected Qarase government. This led to a breakdown of adherence to the

[383] See above n 370, 30, para 2.3, *Submission by NGO's*.

rule of law. Political rights failed to be adequately embraced by the interim government pursuant to the guarantees provided by ***Chapter 4 BOR***, such as protection from torture and other cruel, inhuman or degrading treatment or punishment. With no Parliament and an atmosphere of political uncertainty, the observation and protection of political rights rests on the country returning to democratic rule. Our, children's rights and freedoms have significantly impacted on judicial determinations and the law-making processes. For instance, all decisions made on behalf of the child by any person, body or authority, have upheld the *best interests of the child* as the paramount consideration. Various forms of child exploitation and abuses have in fact seized the world's attention in an exceptional way which is the reason why their rights and freedoms have been seriously considered. The protections of women's rights encounter some form of discrimination directly or indirectly as is demonstrated by dominant social attitudes and unequal responsibilities between men and women rights and freedoms. It is only recently that participation by women's interest groups through public awareness, action and debate has elevated the legitimacy of securing balanced rights and freedoms for women. Protection of ethnic group rights have also been embraced comfortably as it introduces progressive affirmative action measures by the State to address disadvantaged groups. However, the affirmative action programmes have currently been shelved as a result of the events of December 2006.

The illustrations given in this chapter reveal the traces of the development of human rights and freedoms in Fiji and within the South Pacific region. These can be summed by the Courts in giving meaning to international human rights conventions, the delivery of country reports and the handing down of concluding observations by the Committees on some of the core international human rights conventions. Judging from initiatives introduced by States to keep pace with their international commitment, they have been instrumental in seriously facilitating their pledge. Some States have either responded gradually, progressively, or moderately to their commitment while others have yet to do a lot more work in developing the jurisprudence of rights and freedoms. Examples have been taken from Fiji and by way of comparison from the South Pacific region, to illustrate the development and implementation of international human rights conventions

to fit into the domestic framework. Fiji amongst other States in the South Pacific region is consistently engaged in taking serious steps not just to show but to continuously commit to its international obligations and commitment to international human rights conventions. Sadly, Fiji currently, is not a good example under the leadership of the interim government to display global moral leadership in the South Pacific region.

Chapter 4

National Lawmaking Machinery

4.1 ■ Introduction

In this chapter, I discuss the development and realization of human rights and freedoms within the ***national lawmaking machinery***. So far I have attempted to systematically give the reader an appreciation of the development of human rights and freedoms in Fiji's Constitutional documents. I have followed this by discussing the Courts' attitude and approaches towards interpreting rights and freedoms provisions in ***Chapter 4 BOR*** and within the international framework of *International Treaties and Conventions*.

Two proposed *Bills*, namely the *Broadcasting Licensing Bill (BL Bill)*[384] and the *Employment Relations Bill (ER Bill),*[385] appear in this chapter. These were introduced by the SDL government which after much debate was forced to temporarily shelve these.[386] The *ER Bill* was revisited in the absence of a Parliament by the interim administration and was promulgated as the *ER Promulgation 2007 (ERP).*[387] I will draw on SDL government's initiatives and review their political policies reflected in both these *Bills* while they were holding office until their administration succumbed to the events of December 2006.

I will consider how the idea of rights and freedoms have been carried forward in the national law making process by investigating whether both these *Bills* were consistent with the *1997 Constitution*, *International Treaties and Conventions* and responsive to

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[384] *(Bill No 10 of 2006)* http://www.parliament.gov.fj/legislative/bills.aspx?billID=316&viewtype=full&billnav=bill (Accessed 12/05/08).

[385] See above n 344.

[386] http://www.islandsbusiness.com/archives/index_dynamic/containerNameToReplace=MiddleMiddle/focusModuleID=130/focusContentID=6224/tableName=mediaRelease/overideSkinName=newsArticle-full.tpl (Accessed 12/05/08).

[387] *(Promulgation No 36 of 2007)* http://labour.gov.fj/bills/ER.pdf (Accessed 13/05/08). See also Introduction of the *Media Promulgation* by the interim administration http://www.fiji.gov.fj/publish/printer_13601.shtml (Accessed 2/04/09).

the needs and aspirations of the people reflecting transparent, responsible, accountable and participatory government.

4.2 ■ Introduction of Bills under Soqosoqo Duavata ni Lewenivanua Leadership

Laisenia Qarase in his second term in government to lead the nation after the May 2006 elections "believed in a government of multiethnic Cabinet with the principle of power sharing".[388] He encouraged social partners, stakeholders, civil society organizations and statutory bodies to engage in dialogue and deliver submissions on *Bills* before they went to various parliamentary sector standing committees.

It is only recently that Fiji in a short span of time embraced the principal of *participation* and *representation* in processing of *Bills* in parliament which mirrors the models for legislative procedures available in developed countries in particular British-style responsible government. This process of engagement and dialogue is construed indirectly as a guarantee of exercise of peoples' right in the law making power which is not visible in *Chapter 4 BOR*.

Some 24[389] Bills were introduced in 2006 by the SDL government. To ensure that their political policies were in conformity with the Constitution, the policy submissions made to Parliament on the various provisions introduced in both the *Bills* will be reviewed. The findings and policy submissions delivered on these *Bills* tabled in Parliament will now be discussed.

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[388] Hon. Laisenia Qarase (Press Conference on Elections May 18 2006).

[389] *Fiji Public Trustees Corporation Bill; Income Tax (Budget Amendment) Bill; Hotels Aid (Budget Amendment) Act; Hotels Turnover Tax Bill; Local Government Bill; Local Government Bill; Real Estate Agents Bill; Employment Relations Bill; Public Records (Amendment) Bill; Broadcast Licensing Bill 2006; Indigenous Claims Tribunal Bill; Qoliqoli Bill; Value Added Tax Decree (Diplomatic Missions Amendment) Bill; Income Tax (Amendment) (No.2) Bill; Telecommunication Bill; Commerce (Amendment) Bill; Radiation Health Bill; Medical Radiation Technologists Bill; Fiji Institute of Technology Bill; 2007 Appropriation Bill; 2007 Appropriation (Parliament) Bill; Customs Tariff (Budget Amendment) Bill; Excise (Budget Amendment) Bill; Value Added Tax Decree (Budget Amendment) Bill*.

4.3 ■ Broadcasting Licensing Bill 2006

The formulation of the *BL Bill* goes back to 2002, when Laisenia Qarase was appointed as the caretaker Prime Minister during the 2000 George Speight Coup. Cabinet had approved the implementation of the national media policy guidelines with the intention of formulating "comprehensive legislation that would develop a regulatory and developmental framework for the broadcasting industry in Fiji".[390] This was included in the 2005 legislation programme for Parliament.

Isireli Leweniqila,[391] in an address to the Honourable members of the House of Representatives, highlighted that the *Bill*, "establishes a fair, transparent system of licensing of broadcasters, along with a system for ensuring that licensees operate in the public interest with a key objective to transfer regulatory responsibility for the development of broadcasting to the *Broadcasting Licensing Authority [BLA]*".[392] In a submission to Cabinet, he stated that the *Bill*:

> "seeks to regulate broadcasting in Fiji to promote the upholding of the Constitution, as well as human rights, democracy and the rule of law. It will address protection and promotion of freedom of expression,…and license public, private and community broadcasters…It will enhance the public's right to know through promoting pluralism with a wide variety of programming of matters of public interest, preventing monopolization of ownership and promoting fair competition in the broadcasting sector with accurate information and balanced programming".[393]

The *Bill*, in a nutshell, was divided into nine parts providing for the "establishment of the *BLA* for the purpose of regulating broadcasting and related matters".[394] With the

[390] http://www.fiji.gov.fj/publish/page_2649.shtml (Assessed 8/05/07).
[391] *Minister for Information, Communications and Media Relations*.
[392] Isireli Leweniqila Hon, (speech given on *Broadcasting Licensing Bill 2006* - 9 August 2006) http://www.fiji.gov.fj/publish/printer_7222.shtml (Accessed 10/05/08); See also Parliament of Fiji Report of the Sector Standing Committee on Administrative Services – *Broadcasting Licensing Bill 2006 (Bill No 10 of 2006*) – Parliamentary Paper No 61 of 2006.
[393] See above.
[394] See above n 384.

establishment of *BLA*, the *Bill* made provision for certain powers and functions to be exercised by it when assessing broadcasting licenses within prescribed procedures provided by the *Bill*.[395] It also made provision for a complaints mechanism by establishing a *Complaints Committee*.[396] The *Bill* was tabled in Parliament in 2006[397] and in *Part 3 – Functions and Powers of the BLA* the *Bill* made express mention of *Chapter 4* of the *Constitution* in this Part.[398]

4.3.1 ■ Submissions on Broadcasting Licensing Bill

A glance at the provisions of the *BL Bill*, including the provisions specifically relating to the establishment and powers and functions of the *BLA*, presents, that the *Bill* is ***Chapter 4 BOR*** compliant. The FHRC submitted to the Sector Standing Committee on Administrative Services ("the Committee") that "the *Bill* could expand its inclusion of Chapter 4 by highlighting specific provisions of it rather than just making mention of it".[399] With the establishment of a body such as the *BLA*, responsible for processing, assessing and issuing broadcasting licenses and the release of media reports, contents and programmes, a possible conclusion could be reached that such a body would be dedicated and committed to operate independently guaranteeing freedom of the press and freedom of speech without any government restrictions and political interference.

However, a detail examination of the provisions of the *Bill* reveals that, the appointment of members to the *BLA* is dictated by the Minister. The functions and powers of the *BLA* is exercised in accordance with government policies which is determined by Parliament's day to day policy formulation programme. This signal's a danger with respect to appointments being made through political association. For instance, allowing wide powers to an affiliated member appointed by the Minister to control licenses and to

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[395] *Broadcasting Licensing Bill 2006 (Bill No 10 of 2006, Part 2 Establishment of the Broadcast Licensing Authority and Part 3 Functions and Powers of Authority*.
[396] *Broadcasting Licensing Bill 2006 (Bill No 10 of 2006), Part 8 Breach of License Conditions & Offences*
[397] Wednesday 23 August 2006.
[398] *Broadcasting Licensing Bill 2006 (Bill No 10 of 2006), section 12(1).*
[399] See above n 392, para 7.15.7, *Parliamentary Paper No 61 of 2006 September*.

regulate the boundaries of press freedom without realizing the media industry's autonomy. In addition, the idea of an independent and impartial licensing body would be compromised with the regulation of the media, especially when receiving directions and directives from the Minister. This strongly supports the possibility that the freedom of the press and the freedom of expression would be curtailed as the media would be prevented from demonstrating and exercising self-censorship, self-regulation and responsible journalism. Furthermore, the powers and functions of an already established body such as the *FMC*, responsible for monitoring journalists and broadcasters reporting and advertising and programming codes pursuant to the *Code of Ethics and Practice*, would not only duplicate but run parallel to the functions and powers of the *BLA*. This signals a further danger with respect to shifting the powers and functions away from the *FMC*. The *Bill* is silent, on whether, the *FMC* or the *BLA* would supersede, if a conflict arises between their powers and functions. In a submission by the FWRM to the Committee, it relied on the freedom of speech and media provided by *section 30 of the BOR*. It highlighted that a number of limitations appear in *section 30*, on the exercise of press freedom and expression. FWRM maintained that limitations could best be monitored "through effective self-regulation".[400] Their submissions went on to further state that the *FMC* was one such example of an independent body responsible for formulating and implementing *Code of Ethics and Practice* for regulation of the media industry.[401] Any attempt to establish another regulatory body to mirror the functions of the *FMC*, would create the potential for "abuse of power and possible control of the media by the *BLA* as a government selected regulator".[402] Caution would have to be exercised especially when the *FMC* has charge over all forms of broadcasting in Fiji and use of press freedom for the public's right to be fully informed. If there is to be a *BLA*, then the composition of it ought to be determined by a panel which works in the interest of a wide cross section of the public and without any governmental or political interference which brings me to the objects and purpose of the *Bill*.

[400] http://www.fwrm.org.fj/index.cfml?go=view&pgID=67 (Assessed 13/05/08).
[401] See above.
[402] See above n 400.

Besides the establishment of the *BLA*, the object of the *Bill* which relates to the issuance and renewal of broadcasting licenses and the purpose of the *Bill* which includes representing the public interest is lost, by interference and regulation by the government. The *Bill* expressly prohibits the *issuance of broadcasting license to a non Fiji resident or citizen*. This not only defeats the process of assessing licenses in a fair, transparent and accountable manner but it also prevents foreign ownership and the media in carrying out its work in keeping "government and other institutions fully accountable to the public".[403] This signals a sense of insecurity by the government rather then being open-minded in embracing freedom of the press and freedom of expression as provided by ***Chapter 4 BOR***. If issuing licenses to a non Fiji resident or citizen is encouraged by the *Bill* then it would allow flexibility to foreign nationals to report and broadcast programmes responsibly without interference from government. With the *BL Bill* in its current form, the media industry will have to take considerable caution and care, that it exercises a greater degree of responsibility in its publication, broadcasting and reporting on any news content so as not to echo a negative message that does not compliment the government or matters of significant national interest.

I now turn to the human rights issues in the *Bill* and the policy submissions on them. The *Bill* in *Part 2, section 7(2)* sets out the grounds for removal of members from the *BLA*, for instance, if, "their physical or mental disability during the course of their tenure affected the performance of any function under the *Bill*".[404] FHRC submitted that "sub-clause (2) of the *Bill* had the effect of unfairly discriminating against persons with disability. This section was not in conformity with the *section 38(2)* ***Chapter 4 BOR*** and *section 18* of the ***HRC Act***".[405] In view of the prohibited grounds for discrimination, physical or mental disability, ought to be treated with caution because a conservative interpretation would reveal that it fits with *section 38(2)* of ***Chapter 4 BOR***. On the other hand, a liberal interpretation would not qualify as unfair discrimination because it

[403] http://www.fiji.gov.fj/publish/printer_13625.shtml (Assessed 15/04/07).
[404] *Broadcasting Licensing Bill 2006 (Bill No 10 of 2006), section 7(2)(c).*
[405] See above n 392, para 7.10.2, *Parliamentary Paper No 61 of 2006 September*.

is a justified limitation on unfair discrimination and a *genuine justification of differentiation* which fits into *section 19* of the ***HRC Act***.

Another human rights issue arises in relation to the non issuance of licenses by the *BLA* to a non-citizen or resident of Fiji as provided in *section 23(1)* of the *Bill*. FHRC queried to the Committee by submitting that:

> if an application for license is made by a non-citizen or non-resident of Fiji and such a person demonstrates that he or she complies with the Codes for Broadcasting including advertising and programming and all other terms or conditions of a license, how would such an application fit into *section 23(1)* of the *Bill* which focuses on fair, non-discriminatory and transparent assessment of licenses?[406]

On this same human rights issue, an article from the Fiji Times reported that:

> "FHRC stated that the *Bill* was not in line …with the words '*actual or supposed personal characteristics or circumstances*,' which appeared in *section 38(2)* ***Chapter 4 BOR*** as the criteria for determining the existence of one or more of the prohibited grounds of unfair discrimination that is '*place of origin*' was contravened by the *Bill*".[407]

In my view the submissions by the FHRC, raises valid human rights issues in the *Bill* which fail to comply with the provisions of the Constitution. FHRC has correctly pointed out that the *Bill* makes mention of *Chapter 4 BOR* and in assessing license applications the *Bill* accommodates a fair and neutral process. The *Bill* expressly entrenches ***Chapter 4 BOR*** but also allows undue influence by political interference. This in my further view is misleading by the *Bill* because it needs to ensure that with the establishment of the *BLA*, such a body must be free from any form of political interference and influence when dealing, assessing and issuing broadcasting licenses. FHRC has raised and alerted the human rights issues which need to be revisited by the

[406] See above, para 7.26.5, *Parliamentary Paper No 61 of 2006 September*.
[407] Ernest Heatly, 'Rights Body Against Bill' *The Fiji Times*, (Fiji) 5 Tuesday September 2006, 12.

Committee so that its recommendations can be taken into consideration when redrafting those provisions which in its current form, fail to fulfill the promise of *Chapter 4 BOR.*

Gender equality is a further human rights issue. The submissions by "femLINKpacific is noteworthy as it raised "concerns that the *Bill* rendered women invisible in the decision-making process in this sector, and did not address gender equality as required by Fiji's ratification of CEDAW".[408] The *Bill* would have to give consideration and ensure that in the areas of appointment of members to the *BLA*, and in the application for licenses and in developing advertising, programme and technical codes, that women advocacy groups, and women's organisation's extending to women from the rural sectors are encouraged and welcomed to equally participate and be equally represented in the process of decision-making.[409] The framing of policy, guidelines and codes in the broadcasting industry are some examples of decision-making. Furthermore, women ought to be given the opportunity to introduce initiatives in the formulation of programmes and publications which would accommodate the needs and aspirations of women, thus representing gender balance in the *Bill*.

The Report of the Committee to Parliament upon considering submissions from all private and public sectors and independent bodies and NGO's stated that it:

> "scrutinized all the submissions and related it the 50 clauses in the *Bill*, with Fiji's Constitution as well as *Article 19 of the UDHR* which stipulates '*everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without any interference and to seek, receive and impart information, and ideas through any media and regardless of frontiers*'".[410]

The internationally renowned NGO on freedom of expression, *Article 19*, expressed concerns on the *Bill* in "granting extensive powers over broadcasting to a body which

[408] See above n 400.
[409] See above; See also above n 392, para 7.15.8, *Parliamentary Paper No 61 of 2006 September*.
[410] Report of the Sector Standing Committee on Administrative Services on the *Broadcasting Licensing Bill 2006*, Parliament of Fiji – Parliamentary Debates – House of Representatives - Daily Hansard, Monday 11 September 2006.

was not independent thus posing a great risk to the plurality and independence of the broadcasting sector as a whole".[411] *Article 19* highlighted that the:

> "balance between providing the broadcast regulatory body with considerable powers over broadcasting to achieve public interest purposes and safeguarding the independence of the this body against potential governmental interference has been sacrificed in the present *Bill*".[412]

I agree with *Article 19* with respect to the establishment of an independent *BLA* as it is possible that such a body can be exposed to a potential risk of being dictated by political policies by the government of the day. Pursuant to *Article 19*, submissions, William Parkinson[413] and Tony Yianni[414] lashed out against the *Bill* after the Parliamentary Committee's findings were tabled in parliament.[415] William Parkinson said that "the big area of concern in the *Bill* was that, we have a politically appointed body and it would have quite wide powers to control areas of programming and news content".[416] He further said that "the Committee's recommendation to delegate the appointing power to the Minister was like a politician asking politicians to take over the role. I would say one aspect of the rights of people has been taken away and this might be the first step in regulating the media".[417] Tony Yianni said that "Parliament could not enact a law that breaches the Constitution as it was a short step from control of the media and one that could easily be taken by a misguided future government".[418] Francis Herman[419] also shared strong sentiments and stated that:

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[411] *Article19* Submission on the *BLA Bill* London August 2006,1 as provided in Parliament of Fiji, Report of the Sector Standing Committee on Administrative Services – *Broadcasting Licensing Bill 2006 (Bill No 10 of 2006*) – Parliamentary Paper No 61 of 2006 September; See also http://www.article19.org/pdfs/analysis/fiji-broadcasting-law.pdf (Accessed 12/05/08).
[412] See above.
[413] Communications Fiji Limited Managing Director.
[414] The Fiji Times Limited Managing Director.
[415] Solomoni Biumaiono, 'Media up in Arms against Broadcasting Bill' *The Fiji Times* (Fiji), 12 September 2006 http://www.fijitimes.com.fj/story.aspx?id=48137 (Assessed 12/09/06) See also Cheerieann Wilson, 'Media Bill sparks fury' *The Fiji Sun* 23 August 2006, 1 & 3.
[416] http://www.pmw.c2o.org/2006/fiji4992.html (Accessed 13/05/08).
[417] See above n 415.
[418] See above.
[419] Chief Executive Officer for the Fiji Broadcasting Corporation Limited (FBCL)

> "the media must remain a strategic partner to assist in Building and maintaining an environment conducive to democracy in any country. It fulfils an important role in holding authority accountable and provides a platform for all peoples to express their views. This role of the media must be recognized and enshrined in any such legislation".[420]

In addition Mesake Nawari[421] said that "the proposed *Bill* was not just a thinly disguised attempt by the government to control and weaken the media industry but more worryingly, an attempt to suppress the rights of the people of Fiji to freedom of expression".[422]

In response to the submissions by the media organizations, the Report of the Committee to Parliament raised three fundamental issues, first "the lack of consultation by the Ministry in the preparation of the *Bill*" and second the wide use of power of the Minister to appoint "members to the BLA and in issuing licenses" and finally the duplication of roles of the *BLA* and the Media Council of Fiji where the latter had in place the legislation or code regulating the media organizations.[423]

The Committee Report further stated that:

> "in its overall scrutiny of the *Bill*, it noted the reluctance of the media organization to accept the *Bill* in totality,' and most of the them 'agreed that the draft *Bill* proposed by Toby Mendel …should be reconsidered and not the *Bill* in its current form. The Committee was informed that most of the clauses in the previous draft *Bill* had also been purposely deleted from the current provisions in this *Bill*".[424]

After the consultative process, the Report of the Committee was compiled, and Isireli Leweniqila, made submissions to Cabinet. The outcome of his submissions resulted in

[420] See above n 416.
[421] See above; See also Fiji Television Chief Executive Officer.
[422] See above n 416.
[423] See above n 410.
[424] See above.

Cabinet proposing that "selected parts of the *Bill* be amended and the Minister's powers be reviewed".[425] The proposed amendments would include:

> "a person who was neither a public officer nor a representative of the media or broadcast industry, as the independent chairperson; a member to represent the Government; a member who has had wide experience in broadcast spectrum management; a member to be nominated by the radio broadcast licensees; a member to be nominated by the television broadcast licensees; and the Executive Secretary of the Consumer Council of Fiji. The reconstitution of the Authority together with the method of appointing members would adequately address the concerns raised regarding the need for a fairer system of participation in the decision making processes which form the functions and powers of the Authority".[426]

Whether these amendments as suggested above demonstrate a fair and neutral composition of the *BLA* remains to be materialized. It is commendable that in Fiji, government had introduced proposed comprehensive broadcasting legislation to regulate the functions and operation of broadcasting in Fiji. Unless any proposed amendments as highlighted by Cabinet becomes visible, the *Bill* in its current form, fails to embrace the principles and values emanating from freedom of expression and media protected under ***Chapter 4 BOR*** and international Conventions by introducing the *BLA* with the Minister being vested with powers to make appointments. The power to appointment members to the *BLA* must be reflective of all organizations, stakeholders, civil society organizations including the public. The Minister's role in the *Bill* must not be totality excluded but remain minimal. Rather, the presence of the Minister can be of use to bridge the gap between the *BLA* and the stakeholders and members from the media organizations in situations when dialogue fails or weakens or when there is a lockout situation in determining whether to issue, renew or refuse a broadcasting license. With the events of December 2006 taking over the operation of Parliament, whether this *Bill* will be tabled again remains to be seen.

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[425] 'Cabinet approves amendments to Broadcastings Bill 2006' [27 October 2006] http://www.fiji.gov.fj/publish/page_7736.shtml (Accessed 5/08/07); See also Freedom and Independence of the Media in Fiji http://www.humanrights.org.fj/pdf/fhrcmediarpt2007.pdf (Accessed 13/05/08).

[426] See above.

4.4 ■ Employment Relations Promulgation 2007

The *ERP 2007*[427] contains many parts covering a wide range of labour matters but for the purposes of this paper, I have drawn out three sections from the entire *ERP* and have provided my thoughts on those particular sections to identify how they are relevant and devoted to human rights. The *ERP* came into force effective from 1 October 2007.[428] The *ERP* can be traced as far as 1997, when the *Bill* took the form of the *IR Bill* which "was further "revised and renamed as the *ER Bill 2004*".[429] The *ER Bill 2004* was revisited by the Cabinet Sub-Committee on Legislation which went through further wide consultations and then tabled to the Lower House as the *ER Bill No 16 of 2005* for deliberation by the Sector Standing Committee. With the 2006 May elections the *ER Bill 2005* was re-tabled again making entry into the Lower House as the *ER Bill No 8 of 2006*. Both these *Bills* "consolidated all existing labour legislations repealing and replacing: *Employment Act (Cap 92); Wages Council Act (Cap 98); Trade Disputes Act (Cap 97); Trade Unions Act (Cap 96); Trade Unions (Recognition) Act (Cap 96A) and Public Holidays Act (Cap 101)*".[430]

4.4.1 ■ Long Title

In a nutshell, the *ERP* is a special piece of law, as it harmonizes the employment relationship of employers and workers giving wider protection of rights and freedoms. The *ERP* specifically:

> "establishes labour standards that are fair to both workers and employers to build productive employment relationships; it

[427] See above n 387.
[428] Pursuant to *Legal Notice No 36 of 2007 dated 5 October 2007* the following substantive parts came into force effective from 2 April 2008: *Part 2*, *Parts 5-13*, *Parts 16-22* and *Schedules 2-8* while *Parts 1*, *3*, *4*, *14*, *15*, *section 264* and *Schedule 1* came into force effective from 1 October 2007.
[429] Labour Minister's Hon. Krishna Datt Parliament Speech to Introduce the ER Bill 2006 (Bill No 8 of 2006) for the Bill's Second Reading in the Lower House on Thursday, 22 June 2006, 8.
[430] *Employment Relations Bill No 16 of 2005*, *section 265*; See also Report of the Sector Standing Committee on Social Services on the *Employment Relations Bill 2006 (Bill No 8/2006) Parliamentary Paper No 49 of 2006, 4.*

> introduces EEO to prevent any form of discrimination in the workplace and promote good governance; it also introduces the principles of good faith to promote orderly individual and collective bargaining to promote partnership approach and it establishes the *Mediation Service,* the *ER Tribunal* and the *ER Court* to settle employment grievances and employment disputes speedily".[431]

At the outset, the *ERP* ought to be commended for setting the platform and framework for consistency with the *1997 Constitution* as is visible in the *Long Title* to the *ERP* which stipulates:

> "Helping to prevent and eliminate direct and indirect discrimination in employment on the basis of race, colour, gender, sexual orientation, age, physical or mental disability, HIV/AIDS status, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin; AND complying with international obligations and giving effect to the Constitution".[432]

Here, the landmark age and gender discrimination case, *The Proceedings Commissioner, Fiji Human Rights Commission v Suva City Council*[433] merits recognition where Coventry J, cited and applied the principles emanating from the Supreme Court of Canada case of *Andrews v Law Society of British Columbia*[434] in which McIntyre J stated:

> "Discrimination may be described as a distinction, whether intentional or not, based on grounds relating to personal characteristic of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits

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[431] See above n 429, 9-10.
[432] *Employment Relations Promulgation 36 of 2007*, *Preamble*.
[433] *The Proceedings Commissioner, Fiji Human Rights Commission v Suva City Council Civil Action No 73 of 2004* http://www.humanrights.org.fj/pdf/tilly_martin.pdf (Accessed 27/05/08).
[434] *Andrews v Law Society of British Columbia [1989] 56 D.L.R. (4th) 18* as cited in *The Proceedings Commissioner, Fiji Human Rights Commission v Suva City Council Civil Action No 73 of 2004, 15-16.*

> and advantages available to other members of society. Distinction based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed".[435]

Here, I have used the age and gender discrimination case to illustrate the definition of discrimination which the High Court found to be of assistance in relation to ***Chapter 4 BOR*** before arriving at its decision. Although the *ERP* provides for the definition of discrimination in the *interpretation section*, I find that this case authority will also be of assistance to the *ER Tribunal and Court*. It is my view that it will guide them to expound on the interpretation of direct and indirect discrimination more openly since the prohibited grounds for unfair discrimination in the *ERP* includes a wide spectrum of grounds, one that ***Chapter 4 BOR*** does not contain to that extent. I am not suggesting that they will need to confine themselves with the High Court's line of interpretation to define the breath of discrimination nor am I suggesting the provisions in the *ERP* will override the Constitution. Obviously there are other discrimination cases locally and from other jurisdictions which they can be alerted to. It is my view that it remains to be seen which angle they will apply to the rules of interpretation. As the High Court has expounded to apply a broad interpretation on the definition of discrimination, the *ER Tribunal and Court* may also adopt broad rules of interpretation in reaching an outcome under the *ERP*.

4.4.2 ■ Part 2

The intention of the framers in the *Long Title* is amplified in *Part 2* of the *ERP* which:

> "provides for the entitlements to fair labour practices for all persons and prohibits forced labour…upholds the fundamental rights and principles at work and disallows discrimination in employment, consistent with the ratified *ILO Conventions* and *Constitution*. *Section 38* of the

[435] See above.

> *Constitution* provides for the equality of treatment. No person shall be unfairly discriminated against directly or indirectly, on the basis of actual or supposed personnel characteristics or circumstances including a number of specified grounds".[436]

Part 2 is fully devoted to promoting, protecting and ensuring fundamental rights and freedoms of workers. It also ensures Fiji's international obligations and commitment to ratifying the *ILO* Conventions[437] reflected and drafted in *Part 2*.[438] It is also reflective of ***Chapter 4 BOR***.[439] In *Part 2*, I would like to specifically highlight *section 6(2)* which stipulates:

> "No person shall discriminate against any worker or prospective worker on the grounds of ethnicity, colour, gender, religion, political opinion, national extraction, sexual orientation, age, social origin, marital status, pregnancy, family responsibilities, state of health including real or perceived HIV status, trade union membership or activity, or disability in respect of recruitment, training, promotion, terms and conditions of employment, termination of employment or other matters arising out of the employment relationship".[440]

Section 6(2) mirrors *section 38(2)* ***Chapter 4 BOR*** as identified above, in fact *section 6(2)* goes beyond the wording of *section 38(2)* to include additional prohibited grounds of unfair discrimination and these are political opinion, national extraction, marital status, pregnancy, family responsibilities, state of health and union membership. In a

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[436] See above n 430, 46, para 9.8.1-2, *Parliamentary Paper No 49 of 2006*.

[437] http://www.ilo.org/public/english/region/asro/suva/countries/fiji.htm (Accessed 14/05/08); See also http://www.ilo.org/ilolex/english/newratframeE.htm (Accessed 14/05/08)

[438] *Convention No 29* – Forced Labour 1930 – *section 6(1) ER Promulgation*; *Convention No 87* – Freedom of Association and Protection of the Right to Organize 1948 – *section 6(6)ER Promulgation*; *Convention No 98* – Rights to Organize and Collective Bargaining 1949 – *section 6(6) ER Promulgation*; *Convention No 100* Equal Remuneration 1951– *section 6(4)ER Promulgation*; *Convention No 111* – Discrimination (Employment and Occupation) 1958 – *section 6(2)ER Promulgation; See also* http://www.ilo.org/ilolex/english/newratframeE.htm (Accessed 14/05/08); See also *1997 Constitution*; See also *Employment Relations Promulgation 36 of 2007*; See also above n 430, para 5.7.1-3, p 6-9, *Parliamentary Paper No 49 of 2006*.

[439] *Sections 5 and 6 ER Promulgation – section 33 BOR; section 6(1) ER Promulgation – section 24 BOR and section 6(2) ER Promulgation – section 38(2) BOR*; See also above n 430, para 5.7.1-3, p 6-9, *Parliamentary Paper No 49 of 2006*.

[440] *ER Promulgation 36 of 2007, section 6(2)*.

submission by the FLS to the Sector Standing Committee on Social Services ("the Committee"), FLS remarked that the:

> "grounds in *clause 6(2)* are more detailed than *section 38* of the Constitution. It appears to be exhaustive, unlike the inclusive list in the Constitution and recommended that the 'grounds' be clearly inclusive, so as to make it consistent with the superior law, and allow unlisted but similar grounds, to be a basis of prohibited discrimination as well".[441]

The Committee "noted the provisions in this *Part* and whether it was consistent with the Constitution. It recommended that *Part 6*" would remain unchanged[442] as it appears in its current form.

On the reading of *section 6(2)*, I agree with the submission from FLS that it is exhaustive, but I am also cautious of the fact that the intention of framers to expand the list of grounds for unfair discrimination has been to ensure Fiji's commitment to *ILO* Conventions and to give effect to the rights recognized in the international sphere of industrial relations.

4.4.2.1 ■ The Australian Approach – Unfair Discrimination

The High Court has provided a new dimension to the interpretation of the inclusive list of prohibited grounds in *section 38(2) BOR* in the landmark sodomy[443] and disability[444] cases and it is timely to consider how the interpretation of *unfair discrimination* in the context of additional prohibited grounds in *section 6(2)* might develop and be interpreted by the *ER Tribunal and Court*. Now that *section 6* accommodates for additional prohibited grounds for unfair discrimination, I would like to highlight the landmark

[441] See above n 430, para 9.10.10, p 49, *Parliamentary Paper No 49 of 2006*.
[442] See above, para 9.10.18 & 9.10.23, p50-1.
[443] *McCoskar v The State [2005] FJHC 500; HAA0085 & 86.2005 (26 August 2005)* http://www.paclii.org/fj/cases/FJHC/2005/500.html (Accessed 27/05/08).
[444] See above n 433.

indirect discrimination Victorian Court of Appeal case of *State of Victoria v Schou*[445] which I believe the *ER Tribunal and Court*, once presented to provide an interpretation on *section 6(2)*, will find to be of assistance and persuasive authority.

I will now discuss the facts of the *Schou's* case. Ms *Schou's* indirect discrimination complaint by reason of her status as a parent and carer was heard by VCAT.[446] VCAT had found that "it was discriminatory not to allow Ms Schou, to spend some time working from home while her son was sick".[447] Ms Schou lodged her complaint under *section 9(1), (2)* of the *EOA* 1995 (Vic) which "required employers, where reasonable, to adopt alternative work practices to cater for the needs of those protected by *EOA,* in this case those with parental or career responsibilities".[448] "The claim by Ms Schou was that, by requiring her to attend work full-time at Parliament House on house-sitting days (the attendance requirement) the State of Victoria as employer had indirectly discriminated her".[449] VCAT was of the view that "there was a reasonable alternative available to requiring attendance at Parliament during house-sitting days, namely the installation by the state at Ms Schou's home of a modem which would allow her to work online while remaining at home to care for her child".[450]

The Tribunal visited the modem proposal and attendance requirement.[451] It found substance in the former as opposed to the latter which was not reasonable because her nature of work was desk bound and thus was practical for her to work from home via a modem whilst taking care of her child.[452] The Court of Appeal revisited both issues and

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[445] *State of Victoria v Schou (No 2) [2004] 8 VR 120.*
[446] David Janson, 'The Court of Appeal and Indirect Discrimination' (2004) 78(7) *Law Insitute Journal* 58 https://www.liv.asn.au/cgi-bin/advsearch.cgi (Accessed 28/05/08); See also above n 442; See also *Schou v State of Victoria (Department of Victorian Parliamentary Debates) (2000) EOC 93-100; State of Victoria v Schou (2001) 3 VR 655;* See also *Schou v State of Victoria [2002] VCAT 375.*
[447] Fiona Knowles and Penny Dedes, 'When The Schou Just Doesn't Fit: Implications for Discrimination Law after State of Victoria v Schou' (2005) 79(11) *Law Institute Journal* 47 https://www.liv.asn.au/cgi-bin/advsearch.cgi (Accessed 28/05/08);
[448] See above.
[449] David Janson, above n 446.
[450] See above.
[451] Fiona Knowles and Penny Dedes, above n 447.
[452] See above.

found that the reasonableness of the attendance requirement could not be isolated. The Court outlined the test for reasonableness and clarified that "one needs to have regard not only to the impact on the complainant but also the impact on the employer, in particular impact if the whole workforce sought the same kind of accommodation".[453] The Court overturned the decision of the Tribunal and dismissed her complaint.[454]

The two tier test the Court of Appeal was faced with in considering indirect discrimination under *section 9 of the EOA* was 'reasonableness' and 'alternatives' to the usual work practices.[455]

> "The Court of Appeal followed the decision in *Waters v The Public Transport Corporation* in which Dawson and Toohey JJ approved the following observations of Bowen, CJ and Gummow J in *Secretary, Department of Foreign Affairs and Trade v Styles*: The test of reasonableness is less demanding than one of necessity, but more demanding than a test of convenience ... the criterion is an objective one which requires the Court to weigh the nature and extent of the discriminatory effect, on the one hand, against the reasons advanced in favour of the requirement or condition on the other. All circumstances of the case must be taken into account".[456]

Phillips JA and Buchanan JA deciding in favour of the State found that the:

> "existence of an alternative will only be relevant in very limited circumstances. This is where the alternative is 'as efficacious' or 'equally suited' to the employer's end. It is 'plain beyond argument' that the modem proposal is not as efficacious as the attendance requirement for the employer".[457]

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[453] Fiona Knowles and Penny Dedes, above n 447.
[454] See above.
[455] Fiona Knowles and Penny Dedes, above n 447.
[456] David Janson, above n 446; See also *Waters v The Public Transport Corporation* (1991) 173 CLR 349; See also *Secretary, Department of Foreign Affairs and Trade v Styles (1989) 23 FCR 251 at 263* (a case on *s5(2)* of the *Sex Discrimination Act* 1984 (*C'th*)).
[457] Fiona Knowles and Penny Dedes, above n 447.

I have highlighted in some detail the direction of the Court of Appeal in *Schou's* case because I find that the *ERP* in the interpretation section[458] does not provide for the definition of *indirect discrimination* and the *ER Tribunal and Court* will find *Schou's* decision to be of benefit to it especially when interpreting unfair discrimination on the express ground of *family responsibility*. Whether they will take a conservative or liberal interpretation remains to be seen but with the assistance of *Schou's* case they can lay out the boundaries as to what constitutes *family responsibility*. Ms *Schou* could not physically be present at her place of work due to her parental responsibilities and an alternative was available to work from her home via a modem as provided by legislation. From *Schou's* case, I think the *ER Tribunal and Court* can consider the genuineness of non attendance to work, the nature of work provided by an employer, the impact of non attendance on the employer and the discretion by an employer to provide an alternative work practice, as guideposts to formulate the constituent elements of *family responsibility*. The labour relations in Fiji's context is different to that of developed countries such as Australia, but now that the *ERP* has introduced exhaustive list of prohibited grounds, the *ER Tribunal and Court* will have to be open to accommodate interpretations to envisage the intention of the framers at the time of incorporating this particular prohibited ground. This now brings us to consider *Part 9* of the *ERP*.[459]

4.4.3 ■ Part 9

It introduces in the public and private sectors for the first time the EEO principle "prohibiting discrimination based on personal characteristics, ensuring equal rates of pay for work of equal value and specifying the exceptions to discrimination".[460] The prohibited grounds of discrimination appearing under *Part 9*, is derived from "*Chapter 4 BOR, HRC Act,* and *ILO Convention*".[461] *Section 76* sexual harassment provisions under

[458] *ER Promulgation 36 of 2007, Part 1 – section 4 – Interpretation Section.*
[459] *ER Promulgation 36 of 2007*, *Part 9 – Equal Employment Opportunity*.
[460] See above n 430, 121, para 9.86.1, *Parliamentary Paper No 49 of 2006*.
[461] See above, para 9.86.2 *Parliamentary Paper No 49 of 2006*; See also *ILO Convention No 100 on Equal Remuneration,* and *ILO Convention No 111 on Discrimination (Employment and Occupation)*

Part 9 is an important component featuring in the *ERP*,[462] eliminating sex discrimination, sexual harassment in the workplace, and promoting recognition and acceptance of the principle of the equality of men and women as provided by *section 38* right to equality provisions under ***Chapter 4 BOR***. It also confirms "government's commitment to upholding the dignity of female workers and other marginalized workers in our country".[463]

Statistics compiled by the MRGI in partnership with CCF show that "while women constitute just under 50 per cent of the population, they comprise only 33 per cent of the economically active population and less than 25 per cent of those in formal paid employment".[464] The sexual harassment provision directs employers "to take reasonable steps to prevent sexual harassment in the workplace and develop and maintain sexual harassment policies consistent with national policy designed by the *ER Advisory Board*".[465] Earlier this year in a Cabinet release by Hon. Vayeshnoi announced that "Cabinet had approved the *National Policy on Sexual Harassment in the Workplace* ("the policy") under the *ERP*".[466] The "policy had been developed by the Labour Ministry with various women's interests groups which had been endorsed by the Labour Advisory Board in 2005" pursuant to the *Report by the Sector Standing Committee on Social Services on the ER Bill 2006*.[467]

Hon. Vayeshnoi remarked that:

> "as a Member State of the *ILO* and signatory to the *CEDAW* the draft Policy fulfils Government's obligations to ensure that every worker should enjoy work and at the end of the day returns home to his or her family with his or her dignity intact".[468]

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[462] *ER Promulgation 36 of 2007, section 76.*
[463] See above n 430, 126, para 9.89.2, *Parliamentary Paper No 49 of 2006*.
[464] Satendra Prasad, Jone Dakuvula and Darryn Snell *Economic Development, Democracy and Ethnic Conflict in the Fiji Islands* Minority Rights & Development Macro Study November 2001.
[465] See above n 462.
[466] http://www.fiji.gov.fj/publish/page_11133.shtml (Accessed 15/05/08); Minister for Labour, Industrial Relations, Employment, Local Government, Urban Development and Housing.
[467] See above n 430, 126, para 9.89.3, *Parliamentary Paper No 49 of 2006*.
[468] See above n 466.

In addition, he highlighted that the core principles include ensuring:

> "all stakeholders associated with a workplace and the community at large are safeguarded against sexual harassment; the behaviour appropriate to promoting and ensuring a harassment free workplace environment... empowering those persons within an organization who have insufficient power to prevent any form of harassing behaviours from occurring and to support people who feel sexually harassed to find appropriate solutions".[469]

Finally, he said that "it is an evolving policy and would be reviewed and amended as and when required".[470]

With the approval from Cabinet on the policy the onus now rests with the public and private sectors to ensure compliance with *section 76* to develop in-house sexual harassment policies. *Section 76* is silent as to what happens after employers have drafted, introduced and maintained a sexual harassment policy in the workplace consistent with the policy. It is clear that the *ER Tribunal and Court* will interpret *section 76* as a mandatory obligation for employers and where employers have complied it will be tasked to consider whether the employer's obligation has been discharged. In my view it will have to apply the rules of statutory interpretation to imply from *section 76* that a presumption exists for employers to extend their obligation to include different methods of awareness and trainings to employees on sexual harassment which brings me to take examples from Victorian case authorities which may be of assistance to it in defining the framework to discharge the obligation by an employer on sexual harassment policies.

4.4.3.1 ■ The Australian Approach – Sexual Harassment

VCAT "imposed very high standards on employers, requiring more than the mere distribution of a policy"[471] in the workplace as illustrated in the case of *McKenna v State*

[469] See above.
[470] See above n 466.

of Victoria & Ors (McKenna's case)[472] and *Gray v State of Victoria (Gray's case)*.[473] VACT was guided by "*sections 102 and 103* of the *EOA* 1995 (Vic), which stipulated that an employer could be vicariously liable for sexual harassment or discrimination by its employees in the course of employment unless the employer had taken 'reasonable precautions' to prevent the sexual harassment or discrimination".[474]

In *McKenna's case*:

> "the Victoria Police had distributed information about discrimination and sexual harassment to all its employees with their payslips and had also offered equal opportunity training to employees who volunteered to be equal opportunity contact officers. VCAT found that the employer had not taken 'all reasonable precautions' because the steps taken had no impact on the senior people in the police force who were responsible for sexual harassment and victimization against the employee".[475]

In *Gray's case*:

> "VCAT was not satisfied that the DOE had taken reasonable precautions to prevent sexual harassment and discrimination of a teacher by the school principal and that disseminating a standard package, the lack of any assessment of its effective reception, and the lack of any attempt to educate [the principal] after the complaint was made, indicates an assumption by the Department that no other precaution was needed".[476]

In comparison with *McKenna's* and *Gray's case*; in *Howard v Geradin Pty Ltd (Howard's case)*[477] VACT had to determine whether the company was vicariously liable for the actions and conduct of one its employees. VACT found that the company had

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[471] Carolyn Sutherland, 'Avoiding Liability for Sexual Harassment: Enforcement of Workplace Policies' (2005) 79(4) *Law Institute Journal* 46.
[472] *McKenna v State of Victoria & Ors (1998) EOC, 92-927*.
[473] *Gray v State of Victoria (1999) EOC, 92-996*.
[474] Carolyn Sutherland above n 471.
[475] See above.
[476] Carolyn Sutherland above n 471.
[477] *Howard v Geradin Pty Ltd [2004] VCAT 1518*.

formulated and implemented a sexual harassment policy in the workplace.[478] Informally, it engaged in dialogue on a regular basis about the policy with staff and exchanged views and provided feedback.[479] This internal arrangement by the company, VACT found "fitted into 'reasonable precautions' as the test to be satisfied was whether the precautions taken were reasonable, rather than ideal to avoid legal liability for discrimination and harassment".[480] It relied on:

> "*McKenna's case* and *Gray's case* to outline the preventative measures which would ordinarily need to be taken by an employer to avoid vicarious liability which included taking appropriate steps to communicate sexual harassment policies to all employees, the implementation of adequate educational programs on sexual harassment and monitoring of the workplace to ensure compliance with the policies".[481]

In my view the Victorian decisions identified above can be of assistance to the *ER Tribunal and Court* as it introduces the primary measures for introducing sexual harassment policies, including vicarious liability of employers in the workplace.

It can use these measures as guideposts especially when *section 76* does not expand in any detail. They can be guided on the premise whether adequate provision has been made or introduced by the employer to educate its workers on sexual harassment. In addition the Labour Ministry can also play an important role by ensuring that a preventative measure has been taken by an employer in the workplace. The sexual harassment provision is devoted to ensuring protection of rights of workers and in my view although the language of *section 76* is unclear, I am confident the *ER Tribunal and Court* can guided by these decisions. I now turn to *Part 13* which makes provision for filtering complaints on sexual harassment.

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[478] Carolyn Sutherland, above n 471.
[479] See above.
[480] Carolyn Sutherland, above n 471.
[481] See above.

4.4.4 ■ Part 13

It establishes the complaints mechanism for employees to channel their employment grievances through the new dispute and grievance settlement institutions, the *ER Tribunal*[482] *and Court*.[483] Where the grievance relates to discrimination or sexual harassment, it gives the employee the flexibility to lodge the grievance through the institutions created under the *Promulgation* or to the FHRC.[484] I now turn to consider the maternity provisions in *Part 11*.

4.4.5 ■ Part 11

Part 11 of the *ERP* "for the first time in Fiji's history gives a woman the right for payment of full wages during the whole period of her eighty four consecutive days maternity leave".[485] At the time the *ER Bill (Bill No 8 of 2006)* was debated in Parliament during *SDL's* leadership, Krishna Datt before proceeding to highlight the recommendations of the Committee raised "two particular issues, *maternity leave and trade union recognition* as it gave rise to closer scrutiny by government after the tabling of the Committee's Report".[486] He further highlighted that:

> "government agreed on maternity leave provision to be amended, to ensure that only the three births be fully paid and thereafter, half payment for all other births as reflected under *Part 11*. The current provision is consistent with the non- discrimination provision against women in employment under the Constitution and the Fiji Human Rights law. Moreover, it promotes the fulfillment of the MDGs for

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[482] *ER Promulgation 36 of 2007, Part 20 (Division 2) – Institution*; See also *section 110(4),(5)*.
[483] See above, *Part 20 (Division 3)*.
[484] *ER Promulgation 36 of 2007, section 110(5)*; *HRC ACT 1999*, *Part III, section 17(1), (2)* 'unfair discrimination and sexual harassment'.
[485] *ER Promulgation 36 of 2007, Part 11 – Section 101*; See above n 430, 152, para 9.116.2, *Parliamentary Paper No 49 of 2006*.
[486] Report of the Sector Standing Committee on Administrative Services on the *Broadcasting Bill 2006*, Parliament of Fiji – Parliamentary Debates – House of Representatives - Daily Hansard, Thursday 30 November 2006, p 1777; See also Acting Minister for Labour and Industrial Relations.

mothers and children in reducing poverty with families".[487]

The product of this deliberation, with the assistance of various interests groups submissions[488] including recommendations from the Committee is now reflected in *Part 11* of the *ERP*. This enhanced maternity leave provision ensures that "a woman retains her full employment rights and benefits upon returning to work after maternity leave, and cannot be terminated on grounds of her pregnancy".[489] All employed women under the *ERP* are now entitled to maternity protection, maternity leave, maternity pay and benefits as agreed by the Government and as ratified by the provisions under *CEDAW* and *ILO* Conventions.[490] As much as *Part 11* is a key feature devoted to maternity protection and empowering women in the workforce, the FIA was of a different view forecasting that in reality male workers would now be more accepted than females to receive jobs in the market as a result of paid maternity provision. FIA recommended that the:

> "maternity leave provision should be amended so there is full pay for 84 consecutive days for the first child; half pay or $7.50 per day, whichever is the higher, for 84 consecutive days for the second or third child; or quarter pay or $7.50 per day, whichever is the higher, for subsequent births beyond the first three".[491]

In my view there is some substance in their submission as they have approached paid maternity provision from a practical point of view. I find that their views represent the bundled views of low to medium private sectors. Practically, for larger private business sectors including multiparty corporations paid maternity for three confinements is welcomed. It is premature by them to reach the conclusion that females will find difficulty in finding a job in the context of the revised paid maternity provision in the

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[487] See above, paragraph 3.
[488] See above n 430, 151-165 *Parliamentary Paper No 49 of 2006*.
[489] See above, 152, para 9.116.3, *Parliamentary Paper No 49 of 2006.*
[490] See above n 337, *Article 4(2), 5(b) CEDAW*; See also http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm#article 1 (Accessed 14/05/08); See also *Article 4(4), 4(5) – ILO Convention No 183 –* http://www.ilo.org/ilolex/english/newratframeE.htm (Accessed 14/05/08).
[491] See above n 430, 154, para 9.116.10, *Parliamentary Paper No 49 of 2006*.

ERP. The labour market has a variety of jobs for both men and women and there are some jobs where only men are suited like the mining industry and there are some jobs where only women are suited such as the garment industry. The labour market cannot exclude women as they are a major contributor towards the economy and it would be discriminatory and against the spirit of *Chapter 4 BOR* and the *ERP* if workplaces employed males.

4.4.5.1 ■ Australian and New Zealand – Maternity Provisions

On another note, the Committee drew comparisons from neighboring jurisdictions Australia and New Zealand admitting paying full maternity "is not a cost borne by the employer" as practiced in these countries.[492] These countries have developed social welfare system able to sustain such costs, this being the State's responsibility; Fiji has no social welfare safety net, and thus the employer is to meet the costs".[493] Comparing our neighboring jurisdictions, New Zealand introduced the *Parental Leave and Employment Protection Act 1987* [the Principal Act] allowing for "unpaid parental leave with entitlement restricted to employees who had worked for the same employer for at least 10 hours per week for at least one year by the time of the birth".[494] Parental leave included "special leave, maternity leave, paternity/partner leave and extended leave".[495] In July 2002, with the introduction of the *Parental Leave and Employment Protection (Paid Parental Leave) Amendment Act 2002*[496] and inclusion of new provisions to the Principal Act, "new mothers were entitled to paid parental leave who usually worked at least 10 hours a week". They would receive NZ$325 gross per week for the 12-week period or 100% of their previous earnings, whichever was lower".[497]

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[492] See above, 157, para 9.116.28.
[493] See above n 430, 157, para 9.116.27.
[494] http://www.womenz.org.nz/pol%20alerts/PPLdetails.htm (Accessed 19/05/08); See also *Part 1 – Parental Leave and Employment Protection Act1987* http://interim.legislation.govt.nz/libraries/contents/om_isapi.dll?clientID=2119334011&infobase=pal_statutes.nfo&jump=a1987-129&softpage=DOC (Accessed 19/05/08).
[495] See above, *Parental Leave and Employment Protection Act1987*, *section 2*.
[496] *Parental Leave and Employment Protection (Paid Parental Leave) Amendment Act1987* http://www.nzlii.org/nz/legis/consol_act/plaepplaa2002634.pdf (Accessed 19/05/08).
[497] See above*, Part 1 and Part 7A*, *Parental Leave and Employment Protection (Paid Parental Leave)*

"Australia and the US are the only OECD countries without a legislative paid maternity/parental leave system".[498] Parental leave in Australia similar to New Zealand "includes maternity leave, paternity leave and adoption leave".[499] In Australia "full-time and part-time employees and eligible casual employees who have been employed for 12 continuous months are entitled to no more than 52 weeks of unpaid leave on the occasion of the birth or adoption of a child"[500] pursuant to the *Workplace Relations Act 1996 (Cth)*".[501] "Commonwealth employees receive 12 weeks paid maternity leave and most banks and accounting firms also offer 12 weeks paid leave".[502] A universal paid maternity leave scheme does not exist for Australian women but hopefully with the introduction of the *Workplace Relations (Guaranteed Paid Maternity Leave) Amendment Bill 2007* which has yet to be formally enacted will enable women to seek a system of paid entitlement.[503]

Fiji has introduced paid maternity and the various types of leave which fall under parental leave, as is available in Australia and New Zealand, will be a new and emerging approach, if Fiji proposes to formulate additional categories in the area of '*leave*' outside bereavement, annual, sick and maternity, leave as is currently available in the *ERP*. With the various forms of parental leave available in Australia and New Zealand in addition to paternity and same sex, leave entitlements are far beyond Fiji's legislation programme. In my view, Fiji will have difficulty in embracing and expanding on any additional categories on '*leave*' as it will need to have the adequate machinery, resources and

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Amendment Act1987 http://www.nzlii.org/nz/legis/consol_act/plaepplaa2002634.pdf (Accessed 19/05/08); See also http://www.aeufederal.org.au/Women/NZPML.html (Accessed 19/05/08).

[498] Simone Jacobson, 'According to Merit? Pay for Parents' (2007) 81(10) LIJ, p. 85 https://www.liv.asn.au/journal/archive/81-10-Oct2007/81-10-Oct2007-Accordin.html (Accessed 19/05/08).

[499] Leigh Johns, 'Safety net entitlements under WorkChoices' (2006) 80(7) *Law Institute Journal* 36 https://www.liv.asn.au/journal/archive/80-07-Jul2006/80-07-Jul2006-Safety.html (Accessed 19/05/08); See also *Part 7, Division 6 –Parental Leave – Subdivision A, B, C, – Workplace Relations Act 1996* http://www.austlii.edu.au/au/legis/cth/consol_act/wra1996220/ (Accessed 19/05/08).

[500] See above.

[501] See above n 499; See also Natalie Berk, 'Human Resources – To here from Maternity' (2005) 79(7) *Law Institute Journal* 94 https://www.liv.asn.au/journal/archive/79-07-Jul2005/79-07-Jul2005 Human.html (Accessed 19/05/08).

[502] Simone Jacobson, above n 498.

[503] https://www.liv.asn.au/members/sections/admin/legislation/paidmaternity_1.html (Accessed 19/05/08).

annual budgetary allocation from the Ministry of Finance for advancing labour relations in Fiji.

In Fiji, women seeking paid maternity leave may comfortably receive their entitlement under the *ERP* but the challenging issue that the *ER Tribunal and Court* may be presented before it, would be for women to return to work to their same position in employment. Some of the causes the *Tribunal and Court*, in my view will need to consider are one, whether the position pre-maternity was demanding requiring full attendance and the only option was to get an immediate replacement and two, upon returning from maternity the parental responsibilities have added to the existing work commitments that adequate time and additional responsibilities cannot be devoted thus affecting performance of that duty.

Here I would like to highlight the Australian Federal Magistrates' Court case of *Mayer v ANSTO*[504] which illustrates the direction adopted by the Court when dealing with work and child rearing responsibilities and whether it amounts to any form of discrimination.[505] Mayer brought a discrimination claim against ANSTO, on the grounds of family responsibility, sex and pregnancy as she was refused to return to work part-time after her maternity.[506] "Mayer was a business development manager employed on a three-year contract term" but despite informing her employer in advance to work part-time upon her return she was "awarded only a one-year contract renewal and was informed that her position was only available on a full-time basis".[507] This was not practicable for Mayer to meet her childcare commitments and work full-time. The Court held that:

> "there was no direct discrimination because the requirement to work full-time was based on business-related reasons, not

[504] *Mayer v ANSTO [2003] FMCA 209*.
[505] Sarah Rey and Robyn Sweet, 'Work and the Caregiver' (2004) 78(5) *Law Institute Journal* 43 https://www.liv.asn.au/cgi-bin/advsearch.cgi (Accessed 28/05/08); See also http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/FMCA/2003/209.html?query=title(Mayer%20%20and%20%20ANSTO) (Accessed 28/05/08).
[506] See above.
[507] Sarah Rey and Robyn Sweet, above n 505.

> because Mayer had family responsibilities *per se*". The conduct did, however, amount to indirect discrimination because the requirement to work full-time was likely to disadvantage women in general, as women are likely to have a greater need for part-time work than men in order to meet child rearing responsibilities. The employer had imposed a requirement with which Mayer could not comply. Simply because an employee had been engaged under a full-time contract, this did not provide the employer with an excuse, in itself, for denying the request for part-time work. There must be genuine consideration given to the proposal".[508]

In my view this decision can be of assistance to the *ER Tribunal and Court* when interpreting *Part 11* maternity provision. This decision encompasses the prohibited grounds of *sex, family responsibility* and *pregnancy* which are also available in *section 6(2) of the ERP*. In addition *section 6(7) of the ERP*, can further assist the *Tribunal and Court* as it clearly and expressly directs the employer to re-appoint the woman from her maternity to same or equivalent position.

In summing up both the *Bills*, it can be said that the *BL Bill's* intention to promote human rights, democracy and the rule of law could not be achieved as it thinly addressed such principles without actually making the *Bill* fully consistent with the 1997 Constitution. The *Bill* in introducing the *BLA*, at the outset, ought to have ensured that such a body was free from any government restraint and political interference. The independence of the *BLA* has been compromised by the appointment of members through the Minister. Such appointment criterion demonstrates elements of political interference with media freedom. The *Bill* ought to have established an independent *BLA* free from government influence. This would ensure protection of freedom of expression and press freedom. It would also promote diversity in airwaves by quality broadcasting in the media industry. The *long title* to the *ERP* showed that it was devoted to the provisions of human rights and freedoms in industrial and labour relations. In fact the provisions went beyond the wording of the equality provisions in *Chapter 4 BOR* to entrench additional grounds for discrimination. It would be premature to bundle both the *BL Bill* and *ERP* and reach the conclusion that they were fully in conformity with

[508] See above.

Chapter 4 BOR. However, these proposed legislations under the SDL leadership demonstrated some elements for the realization of human rights and freedoms within the national law making machinery. I must confess that the SDL government openly and genuinely encouraged dialogue and consultations to work towards ensuring conformity and consistency with the 1997 Constitution and international conventions and treaties within the national law making machinery.

Chapter Five
Conclusion

This paper confirms that the core *idea of human rights and freedoms* is embedded in the law making process by all arms of government.

Chapter 1 traces the *notion of individual rights and freedoms* and explores how the ideas about rights and freedoms arose. The formulation of constitutional documents in England, America and Europe, such as the *Magna Carta*, *Petition of Rights* and the *Bill of Rights* were early traces of the development of the idea of rights and freedoms. These constitutional documents establish primarily the idea of rights and freedoms. They set the platform in giving a structured framework and expression to the idea of individual rights and freedoms. The ideas emanating from the constitutional documents later joined a wider stream of discussions which received reception from different sources and contributions from various philosophical writings and theories. Though their writings and theories reveal that their perceptions were divided, they professed that *the idea of human rights and freedoms* had an origin. Such ideas became to be commonly known and expressed as human rights and freedoms. These developments were found to be of assistance for shaping the global international outlook through the United Nations instruments in the aftermath of the World Wars. Notable amongst such instruments was the *UDHR* which inspired States' to embrace an agreed definition of rights and freedoms within the international sphere. The *UDHR* in failing short to be elevated as a legal document was instrumental in motivating development of subsequent human rights instruments as it was of high moral force. These developments led to the formulation of conventions, declarations and treaties and the establishment of human rights institutions. This Chapter set out the platform for the origins of the idea of rights and freedoms.

With this international framework and background, chapter 2 focuses on the evolution of the idea of rights and freedoms in Fiji from pre-European contact days leading to British rule. During this period, the Constitutions of 1871 and 1873 treated Fiji as a

constitutional monarchy. They embedded protection of *indigenous rights* under the chiefly hierarchal system. Upon submitting itself to imperial power in 1874, Fiji continued to enjoy protection of indigenous rights as was embedded in the *Deed of Cession*. This confirms that the idea of rights and freedoms existed even when the traditional order of things rested with the paramount chief. At independence in 1970, the core ideas of rights and freedoms were imported from Britain and incorporated in the 1970 Constitution of Fiji. They were continued in the 1990 and the 1997 Constitutions. The 1990 Constitution expressly devoted provisions for customary law. This confirms that customary law was given the force of law. In comparison to the 1970 and 1990, the 1997 Constitution contained a *BOR* in *Chapter 4*. This provided for an expansive range of rights and freedoms derived from the constitutional documents and United Nations instruments. These sources validate the origins of human rights and freedoms in Fiji.

Chapter 3 describes the approaches and attitude adopted by Court's in Fiji, in implementing the rights and freedoms provisions entrenched in *Chapter 4 BOR*. Further, it deals with the application by Court's, of the core international human rights conventions, treaties and declarations within the domestic legal framework of Fiji. Judicial decisions outside Fiji have also been considered by way of comparison which reveals that some States within the South Pacific region have been affirmative in keeping their international obligation and commitment towards applying the core international instruments. I must confirm that judicial interpretation and decision making is positively encouraging with respect to the *protection* and *enforcement* of the rights and freedoms in Fiji. The Court's embrace and carry forward the idea of rights and freedoms in national law making process.

Chapter 4 contains a detailed consideration of two proposed pieces of legislations, the *ERP* and the *BL Bill* during SDL leadership. These are used as examples to determine how the idea of human rights and freedoms has been assimilated in the *national law making process*. The initiative introduced by the *State* to constructively engage and apply the principle of participation and representation with the *State* and *non State actors* enables political policies reflected in proposed national laws to be framed

consistent with *Chapter 4 BOR* and *international human rights documents*. These processes under the *SDL* leadership played a key role in reflecting a true and genuine commitment by the *State* to ensure that proposed national laws were devoted to human rights and freedoms. I must admit that political policies of the political party in majority, is a stimulus which determines the application of the principles entrenched in *Chapter 4 BOR* and the application of the core international human rights conventions, treaties and declarations in law making. The *ERP* proves to go beyond the wording of *Chapter 4 BOR* ensuring full conformity and consistency with the Constitution and international conventions and treaties. Sadly, a detailed consideration and analysis of the *BL Bill* reveals that the protection of rights and freedoms failed to be incorporated in the *Bill* especially when it curtailed the freedom of the press and media by political interference and government restrictions. Hence, the *BL Bill* further failed to comply with the provisions in *Chapter 4 BOR* in the law making process.

It would be premature to bundle both *Bills* and conclude that Parliament in Fiji, *fully* complies with entrenching and incorporating human rights and freedoms in the *law making process*. But since both *Bills* have formed part of my paper, I can confidently state with favour that Parliament has been active in applying the principles emanating from *Chapter 4 BOR* and *international conventions, treaties* and declarations. This also demonstrates a consistent *pace of development* in the positive direction for human rights and freedoms in Fiji in the making of the law.

All was well and would still continue to be well with respect to the development of human rights and freedoms in the law making process, had Fiji not succumbed to the events of December 2006. It must be admitted that until Parliamentary elections are held and democratic government formed the human rights and freedoms is likely to continue on a low profile and develop very little.

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