



Analysis #7

July 2021

The Rule of Law in Fiji: Freedom from Cruel and Degrading Treatment; Freedom of Speech and Association

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Despite celebrating her 50th year of Independence in 2020, Fiji since its independence in 1970 has had four coups and three constitutions, with the international community observing if there are solutions to stability for the rule of law and for democracy despite the coup cycle phenomena.

To date, Fiji has ratified seven of the nine core human rights treaties¹; the Standing Committee on Foreign Affairs and Defence of the Parliament of Fiji is deliberating on the accession to the last two: the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW) and the Convention on the Protection of All Persons from Enforced Disappearance (CED). The 2013 Fiji Constitution is applied by the judiciary to provide for guidelines on the gaps in the law with regards to these treaties.²

As at 20 January 2021, the Fiji Human Rights and Anti-Discrimination Commission (FHRAC) is not accredited as a National Human Rights Institution (NHRI) with the Global Alliance of National Human Rights Institutions (GANHRI) because it does not comply with the Paris Principles³, which set out the minimum standards that NHRIs must meet to be independent and effective. Accreditation with GANHRI can also confirm or strengthen the independence and credibility of the NHRI. The GANHRI listed FHRAC as a suspended NHRI and has developed focussed institutional recommendations necessary for it to comply with the Paris Principles.

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¹ They include a treaty on civil and political rights; a treaty on economic, social, and cultural rights; treaties to combat racial and gender-based discrimination; treaties prohibiting torture and forced disappearances; and treaties protecting the rights of children, migrant workers, and persons with disabilities. Georgetown University Law Library, 2020 at [U.S. Law, Research Process, and Non-Legal Topics - Research Guides, Treatise Finders, & Tutorials - Guides at Georgetown Law Library](#)

² United Nations Human Rights Council, 2020, at [docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPRiCAqhKb7yhsjuNjw8cUE3pRrdCdanf79k8o8Y2Y9FHevbs9N-wAlkLR8aTgwbBfmySVZarCjOpssB0PGy5QFOBTu9WJaMY79jI5OIPk2ILGvi%2BYbip8Zd](#)

³ United Nations Human Rights Office of the High Commissioner, 1996-2021 at [OHCHR | GANHRI Sub-Committee on Accreditation \(SCA\)](#)

This analysis brief will focus on how the fundamental freedom from cruel and degrading treatment, and the freedoms of speech and association, are recognised in Fiji, by highlighting certain cases and the practical implications of the law. This paper will also explore how FHRAC as the primary guardian of the Bill of Rights is able to preserve the rule of law.

Context

Fiji is a constitutional republic located in the South Pacific. The Fiji Bureau of Statistics in their 2017 Census recorded Fiji's total population at 884,887. Fiji has a young population with a median age of 27.5 years; and 69 per cent of Fiji's population is below the age of 40.⁴

Background

In November 2019, Fiji was one of 14 states that had their UN Human Rights Council Universal Periodic Review (UPR)⁵ rated for the third time⁶. The 112 recommendations identified existing gaps in various legislation that not only failed to harmonise with existing international human rights standards, but discriminated against marginalised groups; failure to ensure freedom of expression such as protection of journalists, or critics of the Government; and freedom of association with trade unions.⁷

During Fiji's second review in 2014, the Fijian Delegation in Geneva confirmed that it had not yet ratified the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Rights of Persons with Disability (CRPD) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.⁸ The Fijian Delegation responded that Fiji promotes these rights under the 2013 Constitution, noting that the country had implemented the National Policy on Persons Living with Disabilities, the National Council for Older Persons and the National Gender Policy.

The European Court of Human Rights' decisions under the European Convention and the ICCPR reiterate the UPR recommendations that any restrictions to basic rights must not only be prescribed by law but be within the scope of international obligations.

It is important to note that prior to the 2013 Constitution, the majority of legislation in Fiji was not translated in the native or local language, and that the 2013 Constitution now allows for respect of human rights to be translated into peacebuilding, prosperity and long-term international interaction.

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⁴ Fiji Bureau of Statistics, 2021 at [Fiji Bureau of Statistics - Fiji Bureau of Statistics \(statsfiji.gov.fj\)](https://statsfiji.gov.fj)

⁵ The Universal Periodic Review (UPR) is a unique mechanism of the Human Rights Council (HRC) aimed at improving the human rights situation on the ground of each of the 193 United Nations (UN) Member States. Under this mechanism, the human rights situation of all UN Member States is reviewed every 5 years. The ultimate aim of this mechanism is to improve the human rights situation in all countries and address human rights violations wherever they occur.

⁶ Fiji's first review was in February 2010 and second review was in October 2014, United National Human Rights Council, 2020 at www.ohchr.org/EN/HRBodies/UPR/Pages/fjindex.aspx

⁷ UPR Fiji 2019 Report: https://lib.ohchr.org/HRBodies/UPR/Documents/Session34/FJ/A_HRC_WG.6_34_FJI_1_Fiji_Annex_E.pdf

⁸ Fijian Government, 2021, "Fiji Ratifies UN Convention Against Torture, 17/03/2016 at [Fijian Government - FIJI RATIFIES UN CONVENTION AGAINST TORTURE](https://www.fiji.gov.fj/press-releases/fiji-ratifies-un-convention-against-torture)

Fiji Human Rights and Anti-Discrimination Commission (FHRAC)

Section 45 of the 2013 Constitution establishes the Commission, with the Human Rights and Anti-Discrimination Act 2009 specifying its operational functions. On 20 February 2020, the latest FHRAC Annual Reports (2016-2018) were discussed as per the Parliament Powers and Privileges Act and Section 70 of the 2013 Constitution, allowing an enquiry hearing by the Standing Committee on Justice, Law and Human Rights.

The Commission submitted that it had defended the Bill of Rights by instigating proceedings, making submissions on various acts of parliament and consulting in their outreach 52,776 Fijians including CSOs. According to the Director they also produced the first national consultation report on LGBT Rights.⁹ He submitted that despite issues in the UPR 2019 Report the provisions in law to protect Fijians are adequate and that they are committed to upholding human rights.

The enquiry hearing raised issues on (1) reporting pathways noting someone lodged a complaint against the Commission with Fiji Independent Commission Against Corruption (FICAC)¹⁰ with which they cooperated, and (2) monitoring of the Government SDG Goals with human rights perspective and alignment with FHRAC work, in response to which the Director stated that there is currently no system of monitoring. Some of the challenges that the enquiry revealed was that FHRAC has budget constraints as their budget in 2019 was reduced by 55%.

Section 11 Bill of Rights - Freedom from Cruel and Degrading Treatment:

The Fijian Constitution prohibits torture, forced medical treatment, punishment or degrading treatment. However, Article 4(1) of the ICCPR sets out that in public emergencies or threats of national existence states may under these exceptional circumstances derogate from their obligations¹¹ as per General Comment No 29 of the Human Rights Committee. The Public Order (Amendment) Act¹², which authorises the police to apply necessary force, has led to reports on brutality by law enforcement personnel and correctional officer violence. Fiji's obligations under the United Nations Convention Against Torture (UNCAT) compels law enforcement not to use this amendment as an excuse of human rights violations such as excessive force and brutality.

The court of Appeal in *Ali v State* [2011] FJCA 28; AAU0041.2010 (1 April 2011)¹³ stated that:

"Now the three groups of citizens who have the greatest burden in applying the safeguards and maintaining the rule of law in criminal cases are the police who investigate crime, the prosecution service under the Director of Public Prosecutions who have the duty of prosecuting criminal cases in the courts of Fiji, and finally, the judiciary..."

On 27 November 2020, the NGO Coalition on Human Rights in a press statement condemned police brutality and the use of excessive force as unacceptable. They pointed out that according to ODPF statistics, 110 Police Officers (2015-2020) were charged with assault, assault causing actual bodily harm, assault occasioning actual bodily harm and act with the intent to cause grievous bodily harm. The Coalition emphasized that urgent reviews in the investigation processes must be transparent.¹⁴

⁹ Parliament of the Republic of Fiji, 2021 at [Parliament of the Republic of Fiji](#)

¹⁰ Fiji Independent Commission Against Corruption established under Section 115 of the 2013 Fiji Constitution

¹¹ Article 4 of the ICCPR prescribes despite a state of emergency that no derogation may be made with regards to Articles 6-8, 11, 15-16 and 18

¹² www.parliament.gov.fj/wp-content/uploads/2017/03/Act-9-Public-Order-Amendment-No-2.pdf

¹³ www.paclii.org/cgi-bin/disp.pl/fj/cases/FJCA/2011/28.html?stem=0&synonyms=0&query=rule%20of%20law

¹⁴ Fiji Women's Rights Movement, at [Home \(fwrm.org.fj\)](http://Home(fwrm.org.fj))

In 2016, Amnesty International reported that¹⁵ there were no oversight mechanisms for security forces and that weak institutions led to a culture of violations. In September 2018, prisons with a capacity of 1,916 had a population of 2,643, with issues of inadequate sanitation, inhumane living conditions and insufficient beds/space. The most severe allegations of human rights abuses were raised against police and correction services.¹⁶

The Fiji Police Force despite its legislative independence acknowledged that training within its forces was needed in areas of investigations, interrogations, police culture of obtaining evidence through violence and internal investigations into police brutality.¹⁷ It was acknowledged that torture or violent treatments during interrogation is a longstanding workplace cultural misconception to avoid lengthy court proceedings.

An access to justice programme called '*The First Hour Procedure*' now requires the police to provide every suspect with legal aid assistance within the first hour of arrest and to inform all suspects of their constitutional rights.¹⁸

Section 17 Bill of Rights - Freedom of Speech, Expression and Publication:

The Universal Declaration of Human Rights 1948 - Article 19 (Freedom of opinion and expression) and Article 20 (Peaceful assembly and association) correspond to Article 10 (Freedom of opinion)¹⁹ and Article 11 (Freedom of assembly and association)²⁰ of the European Convention on Human Rights and are in line with case law guides issued by the European Court of Human Rights.²¹

Section 17(3) of the Bill of Rights sets out the limitation of these freedoms. The right to freedom of expression may, for example, be limited on the basis of Section 65 of the Crimes Act, under which criticism or contempt against the Government of Fiji may be regarded as seditious intent. The interpretation section for Chapter 4 states that the courts must promote values that underlie a democratic society based on freedom and equality and must, if relevant, have regard to public international law applicable to the protection of the rights set out in this Chapter. In the case of *Fiji National Provident Fund Board v Fiji Television Ltd* [2007] FJLawRp 45; [2007] FLR 339 (19 October 2007)²² the High Court adopted the dicta from *Fressoz and Roire v France* [1999] ECHR 1; (1999) 5 BHRC 654 when considering Article 10 of the European Convention on Human Rights in the process of interpreting the right to freedom of expression.

In Fiji, the Media Industry Development Act, the Online Safety Commission's Act, the Public Order (Amendment) Act and the Media Industry Development Authority regulate the media, public figures and social influencers.²³ The 2020 US Embassy Country Report on Human Rights Practices in Fiji states that:

15 Amnesty International, Fiji: Beating Justice: How Fiji's Security Forces Get away with torture, 4 December 2016, at [Fiji: Beating justice: How Fiji's security forces get away with torture | Amnesty International](#)

16 [Investigations into police and prison violence blocked by Fiji authorities, whistleblowers say | World news | The Guardian](#)

17 United Nations Human Rights Council 2021, at [OHCHR | Home](#)

18 United Nations Office on Drugs and Crime 2014, Early access to legal aid in criminal justice processes: a handbook for policymakers and practitioners, Criminal Justice Handbook Series, United Nations (UNDP), at [Early access to legal aid in criminal processes \(unodc.org\)](#)

19 [hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22002-808%22%7D](#)

20 [hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-58372%22%7D](#)

21 [www.echr.coe.int/Pages/home.aspx?p=caselaw/analysis/guides&c](#)

22 [www.paclii.org/cgi-bin/disp.pl/fj/cases/FJLawRp/2007/45.html?stem=0&synonyms=0&query=freedom%20of%20the%20press](#)

23 US Department of State, 2020 Country Reports on Human Rights Practices: Fiji, Bureau of Democracy, Human Rights, and Labor, 30 March 2021, at [Fiji - United States Department of State](#)

The media law authorizes the government to censor all news stories before broadcast or publication. Although the government ceased prior censorship in 2012, the law remains on the books, and journalists and media organizations continued to practice varying degrees of self-censorship citing a fear of prosecution. Despite this, media published opinion articles by academics and commentators critical of the government By law directors and 90 percent of shareholders in local publicly held media firms must be citizens and permanently reside in the country.²⁴

In 2016, the Fiji Times and its Publisher were charged by Fiji Independent Commission on Anti-Corruption with one count of sedition contrary to Section 67(1)(c) and 66(1)(v) of the Crimes Act, whilst two others were charged with Aiding and Abetting contrary to Section 67(1)(c). The case was acquitted by the High Court in 2018 because of lack of evidence adduced by the Prosecution.

FHRAC is trying to promote national dialogue on the Bill of Rights and specific legislative restrictions, using the Oakes Test²⁵ as per the Canadian Supreme Court formulation of the test for interpreting rights and limitations is instructive.

Section 19 Bill of Rights - Freedom of Association:

Section 19 of the 2013 Constitution provides workers with the right to not only form and join independent unions but also to bargain collectively and to strike. In 2020, Fiji ratified the ILO Convention on Violence and Harassment and amended the Employment Relations Act with regards to conduct in the world of work. This law also limits the actions of employers under the Employment Relations Amendment Act.²⁶

In the case of Fiji Electricity & Allied Workers Union v Fiji Electricity Authority [2006] FJAT 62; FJAT Award 24 of 2006 (9 May 2006)²⁷ the Arbitration Tribunal acknowledged that the ILO's supervisory bodies have provided guidelines according to which the right to strike is one of the essential means available to workers and their organisations for the promotion and protection of their economic and social interests". (Committee of Experts - General Survey 1983, at paras 200 and 205).

The Bill of Rights is limited in terms of national security, public order, morality and the orderly conduct of elections. In some instances, permits issued by the Police for Union marches from 2020 have been denied citing the Public Order (Amendment) Act 2017 and Covid-19 restrictions.²⁸

Unionists such as the Trade Unions Congress President Daniel Urai were charged with one count of urging political violence, Section 65(1) of the Crimes Act. These charges were withdrawn on two separate occasions by the Office of the Director of Public Prosecutions (ODPP) pursuant to Section 49 of the Crimes Act²⁹: in the year 2015 and in March 2014, where Daniel Urai and five others, who were charged in November 2013 under the Employment Relations promulgation with unlawful strike, citing no offence was committed.

²⁴ US Department of State, above in 25

²⁵ Oakes Test is how to read rights and limitations on reading rights broadly; reading limitations narrowly; limitations under prescribed law; is the limitation intended to respond to a legitimate aim; is the limitation proportionate to the aim?

²⁶ www.laws.gov.fj/Acts/DisplayAct/2910

²⁷ www.paclii.org/cgi-bin/disp.pl/fj/cases/FJAT/2006/62.html?stem=0&synonyms=0&query=freedom%20of%20association

²⁸ www.laws.gov.fj/Acts/DisplayAct/2910

²⁹ Office of the Director of Public Prosecutions, 2015, State v Daniel Urai, at [The Office of the Director of Public Prosecutions \(odpp.com.fj\)](http://TheOfficeoftheDirectorofPublicProsecutions(odpp.com.fj))

In sum, it would be desirable to empower FHRAC, the primary guardian of the rule of law in Fiji, so as to support the rule of law as a foundation for a peaceful, equitable and prosperous society. When Fiji's institutions embrace the 17 SDGs from a human rights-based perspective it ensures that no one is left behind, and that equal opportunities are created. Further, investment is required to reduce discrimination and inequalities and to ensure and build sustainable human rights standards.

About the Author

Ana Tuiketeti

Ana Tuiketeti is an international lawyer, arbitrator and the first listed Pacific Counsel with the International Criminal Court (The Hague). She was also elected at the ICC Bar Association General Assembly to the Defence and Membership Committee - another first for the Pacific. She is also the only female Pacific Islander listed as an Arbitrator with the Court of Arbitration for Sport (Lausanne, Switzerland). She is admitted to the Tongan and Fijian Bar.

She is the Deputy Director of the Institute of Small and Micro States based in the UK.

She sits on various Fijian and Regional Boards including the Fiji Employment Relations Advisory Board, Fiji Sports Council, Fiji Chamber of Commerce & Industry, Save the Children's Fund Fiji, and the Fiji Exporters Council. She is a Heart Ambassador for the internationally recognised Sai Prema Foundation Fiji that is creating a world-class facility with the aim of providing the best possible surgery and free treatment to the children of the Pacific.

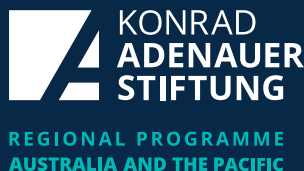
She is also in the UK Commonwealth Secretariat Task Force on International Arbitration. She is a fellow with FICA (Forum for International Conciliation and Arbitration) and has worked in ADB Projects around the region.

She is the only Fijian female accredited by World Rugby and is one of only two Pacific women that are Oceania Judicial Officers. She is the only Oceania International Rugby League Independent Chair. She is also an Arbitrator in the Fiji Employment Arbitration Court (High Court). In 2017, she was awarded the Medal of the Order of Fiji by the President of Fiji for her national contribution.

She has also been involved in presenting before the Fiji Parliamentary Committees; drafting legislative reviews, strategic policies and industry negotiations for regional institutions. She is passionate about law reform and comes with a wealth of experience, knowledge and extensive professional exposure not only limited to Fiji's domestic public policy and private sector engagement, but with a reasonable degree of regional professional perspective, engagement and experience.

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Periscope – Occasional Analysis Brief Series #7 (July 2021).
ISSN: 2652-7332 (Online)