

# Legal Protection against Discrimination in Pacific Island Countries

P. Imrana Jalal<sup>1</sup>

## Introduction<sup>2</sup>

For the purposes of this paper, commentary is confined to most of the fully independent Pacific Island countries (PICs),<sup>3</sup> which have largely inherited the British Westminster system of governance and the British common law system. Some Pacific Island countries are still, wholly or partially, “colonised”, or under pacts of “free association” or other arrangements, by either France or the USA; or under the protection, or partial jurisdiction, of New Zealand. In those semi-autonomous countries, some of the laws of the metropolitan power prevail. In the French occupied territories, the laws of the metropolitan power wholly prevail. These legal nuances add a further layer of complexity to discrimination law. In this paper, therefore, reference will be made mainly to those PICs which are fully autonomous in passing legislation; and where there is no extra-territorial jurisdiction of the metropolitan power over them.<sup>4</sup>

All independent PICs have written constitutions mostly granted to them after independence from the colonial powers during the 1960s and 1970s. A number of them have made significant amendments to their constitutions in the wake of civil strife, as in Fiji’s post-coup d’état Constitution in 1997. Most PICs have a bill of rights (BOR) in their constitutions, which contain basic civil and political rights. Only very few of them, such as Fiji, have some economic, social and cul-

tural rights, for instance the right to education contained in the BOR.<sup>5</sup> The principle of equality is not firmly embedded in the constitutions of most PICs even though some outlaw various forms of discrimination.

## International Human Rights Law

All PICs have ratified the Convention of the Rights of the Child (CRC); all but Tonga, Palau and Nauru have ratified the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW); only the Solomon Islands has ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR); Samoa and Vanuatu recently (2008) ratified the International Covenant on Civil and Political Rights (ICCPR); and Fiji, Nauru, Papua New Guinea, Solomon Islands and Tonga have ratified the Convention on the Elimination of All Forms of Racial Discrimination (ICERD). The Pacific region has by far the lowest ratification rates worldwide of the core international human rights treaties.<sup>6</sup> PIC governments generally perceive reporting requirements to be one of the most immediate practical constraints to ratification. The majority of PICs that have ratified various international human rights treaties have struggled to report on them in compliance with the legal obligations defined in the treaty.<sup>7</sup>

Some Pacific Island constitutions also have

specific mandatory provisions which allow for the use of conventions in the courts, apparently without the need for ratification.<sup>8</sup>

For example, Article 43 (2) of the Bill of Rights in the Constitution of Fiji states:

*“In interpreting the provisions of this Chapter, the courts must promote the 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.”*

Tuvalu’s Constitution states in Article 15(5):

*“In determining whether a law or act is reasonably justifiable in a democratic society that has a proper respect for human rights and dignity, a court may have regard to:*

- a) traditional standards, values and practices, as well as previous laws and judicial decisions, of Tuvalu; and*
- b) law, practices and judicial decisions of other countries that the court reasonably regards as democratic; and*
- c) international conventions, declarations, recommendations and judicial decisions concerning human rights; and*
- d) any other matters that the court thinks relevant.”*

Section 17 of Tuvalu’s Interpretation and General Provisions Act (Cap 1A) also states:

*“A construction of a written law which is consistent with the international obligations of Tuvalu is to be preferred to a construction which is not.”*

Despite these seemingly unequivocal empowering provisions, Tuvalu still generally follows the doctrine of non-enforceability of international law.<sup>9</sup> Recently the court did not uphold the principle of non-discrimination in religion when it outlawed the establishment of a new Christian church in deeply Christian Tuvalu, on the basis that it was against Tuvaluan “values”. In *Teonea v Pule O Kaupule & Nanumaga Falekaupule*<sup>10</sup> the High Court said that the equal right to freedom of religion was subordinate to the cohesion of Tuvaluan society as reflected in the constitutional recognition of Tuvaluan values and culture. In comparison, Samoan courts have consistently ruled in favour of freedom of religion on the basis of non-discrimination.<sup>11</sup>

### **Anti-discrimination Laws**

No PIC has standalone, comprehensive anti-discrimination legislation. However, the constitutions of all Pacific Island states have broad provisions granting all citizens equality before the law on the basis of general non-discrimination provisions. Some PIC constitutions have a general equality provision with specific definitions of discrimination. In general, all citizens are entitled to certain basic rights, regardless of their religion, race, place of origin, political opinions, colour, religion or creed and so on.<sup>12</sup> Apart from Fiji, no PIC constitution specifically protects people living with disabilities. No PIC constitution includes “health status” as a prohibited ground, making it problematic for discrimination on the grounds of HIV status to be challenged.

Fiji’s non-discrimination provision Section 38 is the most advanced providing that:

*“(1) Every person has the right to equality before the law.*

*(2) A person must not be unfairly discriminated against, directly or indirectly, on the ground of his or her:*

*(a) actual or supposed personal characteristics or circumstances, including race, ethnic origin, colour, place of origin, gender, sexual orientation, birth, primary language, economic status, age or disability; or*

*(b) opinions or beliefs, except to the extent that those opinions or beliefs involve harm to others or the diminution of the rights or freedoms of others; or on any other ground prohibited by this Constitution."*

The Fiji Human Rights Commission Act 1999 also contains the specific grounds of unlawful discrimination found at Section 38 of the Constitution, in the areas of employment, professional accreditation, training, the provision of goods, services or facilities, public access, land, housing or other accommodation and education.<sup>13</sup> The same section makes sexual harassment a civil offence by providing that "...sexual harassment, for the purposes of this section, constitutes harassment by reason of a prohibited ground of discrimination."

The Commission is empowered to investigate allegations of unfair discrimination and violations of the rights and freedoms set out in the Bill of Rights of the 1997 Constitution and to investigate other alleged violations of human rights.

The Fiji Constitution is also one of a very small number of constitutions in the world that explicitly protects sexual orientation, and is certainly the only one in the Pacific. In the landmark case of *Nadan v McCoskar*<sup>14</sup> the Fijian High Court ruled that the Bill of Rights, supported by international human rights standards, granted protection of the

right to privacy for sexual minorities in Fiji. The Court made it clear that its decision was based on the privacy provisions of the Constitution rather than relating to the equality provisions stipulated in Section 38. Although equality was raised in submissions, it was not canvassed in the judgment. The issue of whether the relevant provisions are discriminatory awaits further argument. There is some basis for suggesting that the apparently neutral character of Sections 175 and 177 of the Penal Code is contradicted by the actual practice of applying them only in sodomy cases involving males. (The Director of Public Prosecutions could not point to any example of prosecution against a heterosexual person for sodomy and the Court accepted the argument raised by the Fiji Human Rights Commission that the law was selectively enforced against homosexuals.) Reference is made also to the case of *Balelala v State*<sup>15</sup> where the Court held that the corroboration rule in sexual assault trials was discriminatory on the factual basis that although the law appeared to be gender-neutral, in reality, women were the main complainants of rape. Thus the corroboration warning was ruled unconstitutional on gender discrimination grounds. In this case CEDAW was also invoked to support and justify the Court's decision.<sup>16</sup>

The 1875 Constitution of the Kingdom of Tonga, a semi-authoritarian state, grants equality in the most interesting terms:

*"4. There shall be but one law in Tonga for chiefs and commoners for non-Tongans and Tongans. No laws shall be enacted for one class and not for another class but the law shall be the same for all the people of this land."*

In Vanuatu, the anti-discrimination provision is found in Section 5(1) of the Constitution of Vanuatu.

*"5. (1) The Republic of Vanuatu recognises that, subject to any restrictions imposed by law on non-citizens, all persons are entitled to the following fundamental rights and freedoms of the individual without discrimination on the grounds of race, place of origin, religious or traditional beliefs, political opinions, language or sex, but subject to respect for the rights and freedoms of others and to the legitimate public interest in defence, safety, public order, welfare and health...*

*(k) equal treatment under the law or administrative action, except that no law shall be inconsistent with this sub-paragraph insofar as it makes provision for the special benefit, welfare, protection or advancement of females, children and young persons, members of under-privileged groups or inhabitants of less developed areas."*

In Vanuatu, the Penal Code<sup>17</sup> also makes unlawful discrimination a criminal offence, an unusual provision in PICs.

*"No person shall discriminate against another person with respect to his right to the supply of any goods or services, or to gain or to continue in any employment, or to be admitted to any public place, by reason of the sex, ethnic or racial origin or the religion of any such person."*

The anti-discrimination provisions of the bill of rights in most PICs appear to cover the public sector and not the private sector, therefore limiting their application to that of the relationship between state and citizen. Courts have generally opted for a horizontal application. In *Loumia v DPP*<sup>18</sup> the majority of the Court of Appeal held that human rights concerned the relationship between the state and the individual exclusively; therefore rights are only enforceable vertically. The

ulterior purpose in this decision was to prevent the infringement of fundamental freedoms and the incorporation of *Kwaio* custom law as part of the Solomon Islands law, being inconsistent with the Constitution. The Constitution of Fiji together with the Fiji Human Rights Commission Act 1999, would appear to allow for the horizontal enforceability of rights. However, this interpretation is yet to be properly tested.

There are very few avenues for reporting rights violations in most PICs and very rarely are human rights violations reported at all. Both issues have a bearing on each other. Apart from Fiji, which has a Human Rights Commission, the only avenues to obtain remedies in most PICs are the mainstream courts. Thus the structures and mechanisms for promoting and protecting human rights are extremely limited. Existing mechanisms like Ombuds offices have limited and poor enforcement powers and are inadequately resourced and funded. Most Ombuds' powers are also restricted to investigating limited administrative malfeasance.

On the rare occasion where rights violations come before the courts, they have generally been enforced. Most PICs have independent judiciaries in general and more often than not the courts have demonstrated a willingness to make findings consistent with the bill of rights where civil or political rights violations are concerned and where victims have been persistent about asserting their rights.

Many PICs have traditional courts which exercise minor jurisdiction over village, family and personal matters. These informal courts often, unofficially and indirectly, adjudicate alleged human rights violations. For instance, many civil and criminal matters are handled by village *fono* (councils) in Samoa,

which vary considerably both in their decision making style and in the number of *matai* (chiefs) involved in the decisions. The 1990 Village *Fono* Act gives legal recognition to the decisions of the *fono* and provides for limited appeal to the Lands and Titles Court and to the Supreme Court. In 2000, the Supreme Court ruled that the Village *Fono* Act may not be used to infringe upon villagers' freedom of religion, speech, assembly, or association. More recent court decisions reinforced this principle. The *fono* concept sits uncomfortably within the formal legal system because of its dual role in administering both *fa'a Samoa* (customs) and village matters under the Act. Although its formal jurisdiction is circumscribed by the Act, the reality is that the *fono* exercises far more power than it is legally empowered to. Samoa citizens are unclear about its place in the legal system and there have been a significant amount of cases successfully challenging their rulings.<sup>19</sup>

### Exceptions to Anti-discrimination Law

The general limitation on equal rights is that of what is "reasonable and justifiable in a free and democratic society". This general limitation is either explicitly stated in some PIC constitutions as in Papua New Guinea,<sup>20</sup> or read in by the courts as a matter of common law. However, almost all PIC constitutions also provide for specific exceptions to the principle of non-discrimination on the grounds of custom, titles for chiefs and aristocracy or land rights for indigenous peoples.

Custom is accepted as an exception to the principle of non-discrimination on the grounds of sex by the courts in some jurisdictions. In *Tanavalu v Tanavalu & Solomon Islands National Provident Fund*,<sup>21</sup> the court took the view that the Constitution of the

Solomon Islands permitted the use of custom law even if it discriminated against women. In that case, pension funds were paid to the father of the deceased, rather than to the deceased's widow. The father then distributed the funds in his discretion, giving nothing to the widow. The court ruled that this was in accordance with the relevant custom, where inheritance was by patrilineal succession. The widow could not object on the ground that the custom was discriminatory, as Section 15(5)(d) of the Constitution specifically exempted custom law from the general prohibition on discriminatory laws.

In comparison, a custom not allowing widows to have relationships was held to be *ultra vires* the equality provisions of the Constitution of Papua New Guinea in *Raramu v Yowe Village*.<sup>22</sup> Raramu was a widow convicted and sentenced by a village court to a term of six months imprisonment for being involved with another man. The customary practice in many areas did not allow widows to have subsequent relationships. One of the issues for consideration was whether the custom contravened the Constitution of Papua New Guinea in that it was discriminatory towards women. The court refused to recognize such a practice because it was oppressive and discriminatory towards women. Prohibiting widows from relationships struck at the equality provision provided at Section 55 of the Constitution. The custom failed to recognise the inherent dignity of humankind. The village court erred in imprisoning people for breach of what was only custom and not codified as law. Accordingly, Raramu was to be released forthwith together with her four month old child.

In *Attorney-General v Olamalu*<sup>23</sup> a Samoan electoral law limiting candidacy in national elections and voting rights to title holders/

chiefs or Samoan *matai*, and excluding non-*matai* (or commoners) was held to be non-discriminatory on the grounds of, broadly speaking *fa'a Samoa* (the custom of Samoa), despite Samoa's Constitution having a standard anti-discrimination provision. The court made the point that Samoans had themselves chosen this form of discrimination knowingly, and that change had to be evolutionary and would come in good time.

On the other hand, the right to equality guaranteed in the Constitution of Fiji was held not to entitle or permit a traditional titled chief to argue that he must only be tried before a jury or assessors of his peers. The court said that jury members do not have to be selected from persons of equivalent rank and paramount chiefly status.<sup>24</sup>

Notably missing from the prohibited grounds in some constitutional definitions of discrimination, however, is sex discrimination. In Nauru, Kiribati, Tonga and Tuvalu, it appears to be lawful to discriminate against women on the basis of their gender. In Tuvalu, it is not an oversight that Section 27 of the Tuvalu Constitution defines discrimination, but does not forbid sex discrimination. It is an omission deliberately made since the definition does forbid discrimination on the grounds of race or religion. Similarly, in Kiribati, Section 15 of the Constitution defines discrimination, although one class of discrimination notably missing is sexual discrimination. The result of this omission is that it has been virtually impossible to challenge the legislative-based discrimination against women in the courts in these countries.

In *Minister for Provincial Government v Guadalcanal Provincial Assembly*,<sup>25</sup> in discussing the possibility that women were discriminated against because they were not able

to be chiefs, the Court of Appeal held that discrimination against women was not unconstitutional if the Constitution itself legitimated that gender discrimination. There is very little discussion in the Solomon Islands courts of the discriminatory effect of laws and practices on women. In this case, two members of the court recognised the effect of the particular constitutional provisions in reinforcing the traditional power structures. At the same time there was an acknowledgement that society was changing and not static and in time there was every likelihood that the question of male traditional chiefs would be re-evaluated. Solomon Islands has ratified CEDAW. Although there was no reference to international instruments ratified by the Solomon Islands, these conventions would have been modified by the constitutional provisions in place.

The exclusion of sex discrimination from the definition of discrimination in the constitution, being the supreme law, allows citizenship and immigration laws to discriminate against women in Kiribati, Nauru, Tonga and Vanuatu. Citizenship and immigration laws prohibit citizenship and automatic residency for female citizen's foreign husbands, forcing women to leave their countries. Similar legislation in Kiribati and Tonga discriminates against their children, if born abroad to foreign husbands, by denying their children citizenship.<sup>26</sup> The same restrictions do not apply to male citizens of those countries.

In *the Fiji Human Rights Commission v Suva City Council*<sup>27</sup>, *Fijian Teachers Association v AG of Fiji*<sup>28</sup> and *Kirisome v AG & Police*<sup>29</sup> (Samoa) Pacific Island courts finally ruled on the legality of retirement ages which had no specific link to an employee's fitness, or any other reason. Age discrimination is prohibited in the constitutions of both Fiji and



Samoa. In the *Fijian Teachers Association* case, the defendant had arbitrarily made the decision to reduce the retirement age pursuant to a policy made by the unelected Interim Government. The equality provisions of Section 38 of the Constitution of Fiji had been found to be breached and the justification for the policy made by the respondent was rejected. It was held not to have met the threshold requirement in that the justification for the decision, i.e. savings and employment generation, was not proportional or sufficiently connected to those ends.<sup>30</sup> Previously, in 2000, the court had briefly referred to the fact that under Section 16 of the Fiji Constitution 1990, restriction based on age was not unlawful, as it is the case under Section 38(6)(d) of the Constitution Amendment Act 1997.<sup>31</sup>

In considering discrimination in Samoa in *Kirisome v AG & Police*, the courts applied a

test to determine whether a limitation on the prohibition on age discrimination could be justified on an objective and reasonable basis. It said that the inequality challenged must exist for a legitimate purpose, and the manner in which those ends are achieved must be proportionate. In practice, a balancing exercise is undertaken; therefore, the relationship or connection between the two (i.e. the means and the ends) have to be reasonable or affect the other in a way that bears relevance to what is appropriate in the circumstances. Where this cannot be established then the apparent inequality will be struck down.<sup>32</sup>

Surprisingly, despite the racial polarisation of Fiji's two major racial groups, indigenous Fijians and ethnic Indian Fijians, racial discrimination cases do not appear to make it to the courts, at least on the basis of alleged race discrimination.

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<sup>1</sup> P. Imrana Jalal is a Human Rights Advisor, Pacific Regional Rights Resource Team (RRRT), Suva, Fiji Islands.

<sup>2</sup> The paper covers the following PICs: Cook Islands, Fiji, Nauru, Papua New Guinea, Samoa, Solomon Islands, Tonga, Tuvalu, and Vanuatu.

<sup>3</sup> The larger grouping recognized by the South Pacific Community includes American Samoa, Cook Islands, FSM, Fiji Islands, French Polynesia, Guam, Kiribati, Marshall Islands, Nauru, New Caledonia, Niue, Northern Mariana Islands (CNMI), Palau, PNG, Pitcairn Islands, Samoa, Solomon Islands, Tokelau, Tonga, Tuvalu, Vanuatu, and Wallis & Futuna.

<sup>4</sup> Jalal, P. Imrana. *Good Practices in Legislation on Violence Against Women: A Pacific Islands Regional Perspective*, Undaw/Unodc Expert Group Meeting On Good Practices In Legislation On Violence Against Women, Vienna, 26-30 May 2008.

<sup>5</sup> Section 39.

<sup>6</sup> Includes also the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICRMW).

<sup>7</sup> Jalal, P. I. *Ratification of International Human Rights Treaties: Added Value for The Pacific Region*, Paper prepared

for the Office of the High Commissioner for Human Rights, 2006.

<sup>8</sup> Article 43(2) of the Constitution of Fiji, Article 15(5)(c) of the Constitution of Tuvalu and Section 17 of the Tuvalu Interpretation and General Provisions Act (Cap 1A) and Article 39(3) of the Constitution of Papua New Guinea.

<sup>9</sup> This section is extracted directly from Jalal, P. I. and Madraiwaiwi J. (eds) *Pacific Human Rights Law Digest*, Published by the Pacific Regional Rights Resource Team (RRRT), Suva, Fiji, Volume 1, p. 10. See the Digest for comprehensive summaries of Pacific Island cases that have applied international human rights conventions in domestic courts.

<sup>10</sup> Civil Case No: 23/03, 11th October 2005.

<sup>11</sup> *Lafaialii & Ors v Attorney General*, Civil Case No. 8 of 2003, 24 April 2003, High Court of Samoa.

<sup>12</sup> Cook Islands 1975 (s. 64); Fiji 1997 (s.38); Solomon Islands 1978 (Art. 15); Kiribati 1979 (Art. 15); Nauru 1968 (Art.3); Tonga 1875 (Art. 4); Tuvalu 1978 (Art. 27); Vanuatu 1980 (Art. 5); Samoa 1960 (Art. 15); PNG 1975, s. 55.

<sup>13</sup> Fiji Human Rights Commission Act 1999, Section 17.

<sup>14</sup> Criminal Appeal Case Nos: HAA 85 & 86 of 2005, 6 August 2005 (Fiji) analysed in Jalal, P. I. and Madraiwaiwi J. (eds) *Pacific Human Rights Law Digest*, Published by the Pacific Regional Rights Resource Team (RRRT), Suva, Fiji, Volume 1, p. 30.

<sup>15</sup> Criminal Appeal No. AAU0003 OF 2004S, 8 November 2004, Court of Appeal, Fiji Islands.

<sup>16</sup> Jalal, P. I. and Madraiwaiwi J. (eds) *Pacific Human Rights Law Digest*, Published by the Pacific Regional Rights Resource Team (RRRT), Suva, Fiji, Volume 1, p. 16.

<sup>17</sup> Penal Code, Cap.135: Offenses against the public interest, s. 150.

<sup>18</sup> [1986] SBCA 1; [1985-1986] SILR 125, 24 February 1986.

<sup>19</sup> Jalal, P. I. and Madraiwaiwi J. (eds) *Pacific Human Rights Law Digest*, Published by the Pacific Regional Rights Resource Team (RRRT), Suva, Fiji, Volume 1.

<sup>20</sup> Section 39, PNG Constitution.

<sup>21</sup> [1998] SBHC 4, affirmed [1998] SBCA 8.

<sup>22</sup> [1994] PNGLR 486 N1262, 22 November 1993.

<sup>23</sup> 1980-93] WSLR 41.

<sup>24</sup> *State v Ratu Takiveikata*, Cr Case 005.04S, 20-22 October 2004, High Court, Fiji Islands.

<sup>25</sup> (1997) SBCA 1, 11 July 1997.

<sup>26</sup> Jalal, P. I. *Law for Pacific Women: a Legal Rights Handbook*, Fiji Women's Rights Movement, 1998, p. 38.

<sup>27</sup> Civil Action No 73 of 2006, Fiji High Court.

<sup>28</sup> Judicial Review No HBC 3J of 2007S, 20 December 2007.

<sup>29</sup> [2002] WSSC 3, 25 February 2002.

<sup>30</sup> See Jalal, P. I. and Madraiwaiwi, J., (eds) *Pacific Human Rights Law Digest*, Published by the Pacific Regional Rights Resource Team (RRRT), Suva, Fiji, Volume 2 (2008).

<sup>31</sup> *Susana Tusawau v Fiji Institute of Technology Council* [Court of Appeal], Civil Appeal No. ABU 0044 of 2000S.

<sup>32</sup> For a recent analysis of case law see Jalal, P. I. and Madraiwaiwi, J. (eds) *Pacific Human Rights Law Digest*, Published by the Pacific Regional Rights Resource Team (RRRT), Suva, Fiji, Volume 2 (2008).