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Ethnic Conflict in Fiji and International Human Rights Law**

I. Ethnic Conflict in Fiji

A. Introduction

As a small island nation in the South Pacific, Fiji once enjoyed the reputation of a model democracy based on pluralism and ethnic harmony.¹ Today that reputation is marred by racial tension, economic uncertainty, and political instability, the latter triggered by two successive military coups—on May 14 and September 26, 1987, respectively—by Sitiveni Rabuka, then a lieutenant colonel in the Fijian army.² Although Rabuka initially claimed he had acted to prevent racial violence and to maintain law and order,³ both coups instead exacerbated the simmering ethnic conflict between indigenous Fijians and people of Indian origin living in Fiji.

Following the coups, Rabuka abrogated the constitution, declared himself head of state, proclaimed Fiji a republic, and announced the for-

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** This is an expanded version of remarks made by the author at the *Cornell International Law Journal's* twenty-fifth anniversary symposium, "The Nations Within," on March 7, 1992.

1. For an introduction to Fiji, see generally DERYCK SCARR, *FIJI: A SHORT HISTORY* (1984); ISIRELI Q. LASAQA, *THE FIJIAN PEOPLE BEFORE AND AFTER INDEPENDENCE* (1984); and POLITICS IN FIJI: *STUDIES IN CONTEMPORARY HISTORY* (Brij V. Lal ed., 1986).

2. On reports of the coups, see generally VICTOR LAL, *FIJI, COUPS IN PARADISE: RACE, POLITICS AND MILITARY INTERVENTION* (1990); *Fiji*, 39 *INT'L COMM'N JURISTS REV.* 3 (1987) [hereinafter 39 *I.C.J. REV.*]; *Fiji*, 40 *INT'L COMM'N JURISTS REV.* 3 (1988) [hereinafter 40 *I.C.J. REV.*]; AMNESTY INT'L REP. 156 (1988); Ramesh Thakur & Antony Wood, *Fiji in Crisis*, 43 *WORLD TODAY* 206 (1988); and Richard N. Kiwanuka, *On Revolution and Legality in Fiji*, 37 *INT'L & COMP. L.Q.* 961, 961-65 (1988). On March 20, 1990, Luis Kutner, President, Commission for International Due Process of Law, and the author jointly submitted a petition to the United Nations on behalf of "Fiji nationals deprived of the right of self-determination." See U.N. Center for Human Rights, U.N. Doc. G/SO 215/1, Fiji, April 12, 1990 (letter acknowledging receipt of the communication.) A copy of the petition is available from the author.

3. See 39 *I.C.J. REV.*, *supra* note 2, at 5.

mation of a new council of ministers.⁴ In Canada, at an October 18, 1987 meeting of the Commonwealth Heads of Government, Fiji's membership in the commonwealth lapsed because of the change in Fiji's status. Rabuka stepped down as the head of state on December 6, 1987. A new regime promulgated a new constitution in July 1990, which ensured that indigenous Fijians will always control the government.⁵ Those facts are not in dispute. The difficult question is: How are the different, often competing, group interests of Fiji's people to be reconciled? To appreciate fully the present dilemma, one must first consider the current problem in a historical setting and in some detail.

B. Background

Fiji has long been a country with two dominant races: indigenous natives and people of Indian origin. This mix resulted originally from the British Government's importation of indentured Indian laborers into Fiji following the island's British colonization in the 19th century. At the time of the May 14, 1987, coup, Fiji's total population of 785,000 was 48.4 percent people of Indian origin and 46.2 percent indigenous Fijians—a mixture of Melanesians and Polynesians. The remainder of the population consisted primarily of European and Chinese stock.

The government and the traditional power structure within Fiji have always favored the indigenous Fijian population with respect to land ownership and control. The British-dominated colonial government traditionally guaranteed Indians secure and sufficient leaseholds, but the colonial government kept the Indian and Fijian communities institutionally and physically separate. Because many countries' constitutions provide special measures or privileges for certain groups, few Indian descendants seriously questioned these measures in Fiji. As a result, indigenous Fijians today own eighty-five percent of the land; Indians own only 1.7 percent.

C. 1970 Constitution

A British colony since the late 1800s, Fiji became independent on October 10, 1970, but retained the Queen of England, represented by a Governor-General, as head of state and became a member of the British Commonwealth. Fiji also instituted a new constitution, which continued to favor indigenous Fijians.

The 1970 constitution guaranteed the rights of the Great Council of Chiefs and the Fijian Affairs Board, both composed of indigenous Fijians. Moreover, the constitution allowed the Council of Chiefs to submit recommendations directly to the Governor-General and required consultation of the Fijian Affairs Board before several important legislative

4. See generally note 2. The following description is primarily based on the reports cited there.

5. Kalinga Seneviratne, *Fiji: "Apartheid" Constitution Stirs Ethnic Tension*, INTER PRESS SERVICE, Nov. 11, 1991, available in LEXIS, Nexis Library, INPRES File [hereinafter "*Apartheid*" Constitution].

and executive functions could be carried out. Further, the constitution assured control of all "native" land to Fijians through the Fijian-dominated Native Land Trust Board.

The constitution also created a twenty-two-member senate, the composition of which assured control to the indigenous population. The Senate held a complete veto power over any legislation that would affect Fijian land, customs, or customary interests. No significant constitutional changes could be made without two-thirds Senate approval.

Members of a lower house of Parliament were elected through an electoral system based on three electoral rolls, one each for Fijians, Indians, and minorities (the "general" roll). The Indians and Fijians each received twenty-two seats and the general voters received eight in this lower house arrangement.

Two parties—the Fijian-dominated Alliance Party (the Alliance) and the Indian-based National Federation Party (the NFP)—traditionally dominated Fijian politics; but from at least the mid-seventies onward, party factionalism occurred frequently. It is noteworthy that the 1970 constitution did not allow Indians, by themselves, to form a majority government.

The Fijian-dominated Alliance Party's Ratu Sir Kamisese Mara continued as Prime Minister until the 1987 election. Reflecting social change, however, the Fiji Labour Party formed in July 1985 as the political expression of the country's professionals (of whom four-fifths are Indians) and others, including many Fijians. "The Labour Party is a genuinely non-racial party and eroded the support of both the Alliance and the NFP."⁶ In the 1987 election, as a coalition with the NFP, the Labour Party won twenty-eight seats to the Alliance Party's twenty-four. The coalition owed its victory to the nine percent shift in Fijian votes from the Alliance to the Labour Party.⁷

The election resulted in the formation of a new multiracial coalition cabinet, headed by Dr. Timoci Bavadra, a Fijian, as Prime Minister with an NFP Indian, Harish Sharma, as his deputy. The Bavadra cabinet included six Fijians, seven Indians, and one part-European. Although this composition could not have had much effect on the Fijian-dominated Senate or other areas of traditional Fijian advantages, it potentially might have affected Fiji's policies and the destinies of the voters, both Indian and Fijian.

D. The First Coup

Protest demonstrations occurred following the 1987 election and creation of the Bavadra cabinet. A strong racist and anti-Indian movement, called the Taukei Movement, which is known for demanding a political system composed exclusively of ethnic Fijians, repeatedly organized

6. 39 I.C.J. REV., *supra* note 2, at 5.

7. See Ram Swarup, *The Sad Plight of Fiji Indians*, INDIAN EXPRESS (New Delhi), Sept. 23, 1989, at 4.

those protests. On May 14, 1987, a month after the election, Lt. Col. Sitiveni Rabuka, the third-ranking Fiji Army officer, led ten masked soldiers into the Parliament where they arrested Bavadra and other members of the government and suspended the constitution. Rabuka claimed he acted to maintain order and prevent racial violence. Unfortunately, the illegal coup did not accomplish these laudable objectives.

Rabuka declared himself head of state. Bavadra's supporters expressed loud opposition to the seizures, leading Rabuka to abolish trade unions and ban strikes on May 16. Governor-General Ratu Sir Penaia Ganilau initially opposed the coup,⁸ but soon acquiesced and began to work with Rabuka to lay the foundation for a new government in which Rabuka would play a leading role. Ganilau accomplished this only through joint effort with the Council of Chiefs. It is worth noting that some observers view the coup as actually a "camouflaged measure of intra-Fijian tribal and ruling elite protection."⁹ There are considerable overlapping party, tribal, regional, feudal, and family connections between the Alliance's Mara, Ganilau, and Rabuka.¹⁰

Under the new government, supposedly established on an interim basis, Rabuka headed a nineteen-person Council of Advisors containing six of Rabuka's ministers, including members of the Council of Chiefs. The new government also added nineteen seats to the House, all reserved for native Fijians, none of whom would be directly elected. The Governor-General's new Constitutional Review Committee approved this last development.

E. The Second Coup

For whatever reason, Ganilau, himself a Tribal Chief, began proceedings designed to restore some form of parliamentary democracy in Fiji. An announcement was made on September 22, 1987, that a bipartisan government would be established and led jointly by Bavadra and former Prime Minister Mara under the Governor-General's chairmanship. Supporters claimed this government would provide "a framework for a multiracial society in which the rights and interests of all the communities are safeguarded."¹¹

But these actions broke faith with Rabuka and the Great Council. Rabuka, now promoted to commander of the Fiji Army, had repeatedly warned that if the objectives of his May coup were not realized, he would resume full control. On September 26, 1987, he did. One commentator wrote: "It is deplorable that Colonel Rabuka staged the second coup when there was a possibility of a settlement to the crisis created by the first coup."¹²

8. *Id.*

9. Thakur & Wood, *supra* note 2, at 207.

10. *Id.*

11. *Id.* at 210 (quoting the OTAGO DAILY TIMES, Sept. 22, 1987).

12. Cited in 39 I.C.J. REV., *supra* note 2, at 6.

Rabuka declared Fiji to be a republic and thus severed its 113-year-old ties to the Commonwealth. Through a decree, his new regime dissolved the courts and declared vacant all judicial appointments made prior to September 25. The same decree created a judicial advisory committee empowered to name judges and composed of those loyal to Rabuka. A similar decree prohibited the courts from questioning any decrees issued by the military government. Further, the new regime issued on October 14 the "Fundamental Freedoms Decree 1987," which stated that "freedom of life, liberty, security of the person and protection of the law may be restricted by decree in the interests of public order and morality."¹³

Rabuka later relinquished his office as head of government and appointed former Governor-General Ganilau as President. Before leaving his political office, Rabuka also appointed a new twenty-member Council of Ministers, comprised of seventeen Fijians, two Indians, and one part-European. Ganilau then named Ratu Sir Mara to Prime Minister, the post the latter had held previously for seventeen years. Two commentators described Fiji's new Republican government as "an unabashed assertion of indigenous Fijian hegemony, including the imposition of strict Methodist sabbatarianism on Fiji's non-Christian half and increased harassment of Fijian Indians."¹⁴ A writer for the *Economist* said, "the Methodists are the ayatollahs of Pacific Christianity. After the coups the Methodist Sunday was enforced: no buses, no taxis, no sport, restaurants closed. Even taking a walk was frowned upon, except to church."¹⁵

In March 1988 the new government announced that a cabinet committee was considering proposals for a new constitution. In so doing, Prime Minister Mara stated that once a broadly acceptable constitution with electoral provisions was finalized, elections would be held. He also said:

We are clear in our perception and firm in our belief that a new constitution will have to ensure the full protection of the fundamental interests and concerns of the indigenous Fijian people, but at the same time accommodate on a fair and equitable basis, the position of the other communities in our multi-ethnic and multi-cultural society.¹⁶

F. The 1990 Fiji Constitution

In September 1988, the government released a draft constitution¹⁷ under which indigenous Fijian political dominance over other ethnic groups was ensured. In a formal submission of the draft constitution to the Fiji Constitution Inquiry and Advisory Committee, Bavadra stated

13. *Quoted in id.* at 7.

14. Thakur & Wood, *supra* note 2, at 210.

15. *Shameless in Fiji*, *ECONOMIST*, Dec. 1, 1990, at 34.

16. 40 I.C.J. REV., *supra* note 2, at 3.

17. *Fiji CONST.* (Sept. 1988 draft) [hereinafter *Draft Constitution*]. The *Draft Constitution* comprised 14 chapters, 153 sections, and two schedules.

on January 6, 1989, on behalf of the National Federation Party and the Fiji Labour Party Coalition:

The Coalition's position is unequivocal. We totally reject the Draft Constitution proposed by the Interim Government. It runs contrary to the principles of democracy and social justice which are central to our party's philosophy. We are far from alone in this position. As you are aware, the vast majority of citizens who have made submissions to your committee have strongly opposed the Draft, as have religious bodies (among them the Christian churches), the trade unions, and other community groups including women's organizations. Evidently, the overwhelming sentiment of Fiji's people reflects a fervent belief in the principles of democracy, social justice, multi-racialism and religious tolerance.

Our society has been torn apart by the traumatic events of the last 20 months. People of all communities remain tormented by the many injustices perpetrated since the first military coup and are desperate for a just political solution that will pave the way for a secure and peaceful future. As the supreme law of the land, the new constitution holds the key to securing this. But to do this, it must reflect the values and principles that its people hold dear. The Draft Constitution is clearly anathema to these.¹⁸

The Coalition recommended against the adoption of the draft constitution on the ground that "it is profoundly authoritarian, undemocratic, militaristic, racist and feudalistic. It would be derisive and sow the seeds of terrible violence. It would retard our social and economic development. It would isolate us from many of our valued neighbours, the Commonwealth and the international community."¹⁹ The Coalition further denounced the draft constitution's electoral system as tainted "with the same sinister motives of apartheid and the supremacy of one race to the exclusion of others."²⁰

Notwithstanding such commentary, with few changes from the draft constitution, the government promulgated on July 25, 1990, a new constitution "based on racial characteristics."²¹ The constitution is inherently discriminatory as it provides that indigenous Fijians hold thirty-seven seats in the seventy-seat lower house of Parliament while the ethnic Indians have twenty-seven seats, Rotumans (culturally distinct Polynesians) one, and other races five.²² Dominance in the thirty-four-seat upper house, the Senate, which is an appointed body with review powers and the right to veto legislation, is even more marked. There,

18. Letter from the National Federation Party and the Fiji Labour Party Coalition to the Chairman and Members, Constitutional Advisory and Review Committee (Jan. 6, 1989), in National Federation Party and the Fiji Labour Party Coalition, *Submission on the Draft Constitution of Fiji*, Jan. 16, 1989, at i. A copy of the letter is available from the author.

19. *Id.* at 1-2.

20. *Id.* at 16.

21. *Minority Power in "Racist" Fiji Constitution*, DAILY TELEGRAPH, July 26, 1990, at 11.

22. U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1991 848, 853 (1992) [hereinafter STATE DEPARTMENT REPORT].

indigenous Fijians hold twenty-four seats, Rotumans one, and the other groups nine.²³

Other aspects of the constitution that appear to ensure political supremacy of indigenous Fijians include procedures governing the selection of the President and the Prime Minister.²⁴ To illustrate, the Great Council of Chiefs, a traditional Fijian leadership body, selects both the President and the Fijian members of the Senate. The President then chooses the Prime Minister from among the Fijian members of the lower house.

Although the 1990 Constitution incorporated a Bill of Rights, critics remained concerned that under the amendment provisions, "indigenous Fijians in the lower house would be able, solely on the strength of their own members, to abrogate constitutional human rights protections."²⁵

G. Recent Noteworthy Developments

Between 30,000 and 40,000 Indians fled Fiji after the second coup, "leaving Fiji's multiracial society about evenly divided between indigenous Fijians and ethnic Indians."²⁶ In July 1991, Rabuka, by then a Major General and army commander, resigned from the military and became co-Deputy Prime Minister. On December 11, 1991, after being elected President of the new Fijian Political Party (FPP), he resigned from the cabinet post.²⁷ Then, following the elections held in mid-1992, Rabuka was elected the country's next Prime Minister.²⁸

Fiji's economy, dependent primarily on sugar and tourism, was initially devastated after the coups but has mostly recovered to "pre-coup levels."²⁹ In October 1991, arson and other attacks on Hindu shrines and temples and a priest revived memories of terrorist assaults on temples belonging to non-Christians in 1984.³⁰

According to the U.S. Department of State report on Human Rights, "[p]rincipal human rights problems [in Fiji] in 1991 included the new Constitution's unequal representation features; several incidents of discrimination against ethnic Indians and women; inhibitions on freedom of speech and press; [and] continued delays in bringing cases to trial"³¹ However, Fiji's international isolation after the coups

23. *Id.*

24. *Id.* at 853.

25. *Id.* at 854.

26. *Id.* at 848.

27. *Id.*

28. See Mosese Velia, *Ratu Mara on Rabuka—Give Him a Chance Says Former PM*, THE FIJI TIMES, June 9, 1992, at 1, col. 1; Ved Nanda, *Fiji—Repression Set in Natural Grandeur*, THE DENVER POST, July 19, 1992, § I, at 4, col. 2.

29. Bob Drogin, *Trouble in Paradise: Behind Fiji's Facade*, Turmoil Brews, L.A. TIMES, Sept. 24, 1991, at 2.

30. *Christian Attacks on Hindu Temples Revive Religious Rivalries*, AGENCE FRANCE PRESSE, Oct. 13, 1991, available in LEXIS, Nexis Library, AFP File.

31. STATE DEPARTMENT REPORT, *supra* note 22, at 848.

appears to be ending, with some recent friendly overtures from Australia,³² France,³³ and New Zealand.³⁴

II. Applicable International Human Rights Law

A. General

An impressive body of international human rights law has developed since the late 1940s. The Nazi atrocities during the Second World War led to the realization that international peace and human rights are inextricably intertwined. Consequently, the Allied powers established the International Military Tribunal³⁵ at Nuremberg and tried alleged offenders for war crimes, crimes against peace, and crimes against humanity.

The United Nations Charter explicitly recognizes the central role of human rights in the international arena. For example, Article 55 mandates that "the United Nations shall promote: . . . universal respect for, and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."³⁶ Under Article 56, member states "pledge themselves to take joint and separate action in co-operation with the [United Nations] for the achievement of the purposes set forth in Article 55."³⁷ In December 1946, the General Assembly of the United Nations adopted a resolution affirming "the principles of international law recognized by the Charter of the Nürnberg Tribunal and the judgment of the Tribunal."³⁸

The U.N. in 1948 adopted the Universal Declaration of Human Rights, a landmark accomplishment.³⁹ This standard-setting document subsequently shaped two more international instruments, which along with the Declaration have come to be known as the International Bill of Human Rights. These instruments are the International Covenant on

32. See Michael Perry, *Fiji Political Leader Prepared to Change Constitution*, REUTERS, BC cycle, Feb. 4, 1992, available in LEXIS, Nexis Library, LBYRPT File (report of a meeting between Rabuka and Australian Foreign Minister Gareth Evans in Suva, Fiji); *Evans Encouraged by Rabuka on Constitution*, AGENCE FRANCE PRESSE, Feb. 4, 1992, available in LEXIS, Nexis Library, AFP File.

33. See Kalinga Seneviratne, *South Pacific: 'Rainbow Warrior Incident' Revives Colonial Fear*, INTER PRESS SERVICE, April 2, 1992, available in LEXIS, Nexis Library, INPRES File (The French embassy staff in Suva almost doubled, and the French are building an \$8.6 million arms storage facility for the Fiji military in Suva.)

34. See David Stamp, *Flawed Fiji Constitution Better than None, New Zealand Says*, REUTERS, BC cycle, Jan. 11, 1991, available in LEXIS, Nexis Library, LBYRPT File (regarding upcoming trip by New Zealand Foreign Affairs Minister McKinnon to meet Major General Rabuka in Suva. "We would certainly prefer them to go to an election on that than maintain a government virtually appointed by the military.")

35. 59 Stat. 1544, 1546 (1945).

36. U.N. CHARTER art. 55.

37. *Id.* art. 56.

38. *Affirmation of the Principles of International Law recognized by the Charter of the Nürnberg Tribunal*, G.A. Res. 95(I), U.N. Doc. A/64/Add. 1 (1946).

39. *Universal Declaration of Human Rights*, G.A. Res. 217A (III), U.N. Doc. A/810, at 71 (1948).

Civil and Political Rights⁴⁰ and its Optional Protocol⁴¹ and the International Covenant on Economic, Social and Cultural Rights,⁴² under which states have accepted in treaty form the obligation to protect international human rights.

B. International Convention on the Elimination of All Forms of Racial Discrimination

The world community has appropriately continued through treaties and declarations to extend its reach to influence state and individual conduct pertaining to human rights. Of particular relevance is the 1966 International Convention on the Elimination of All Forms of Racial Discrimination.⁴³ The genesis of the Convention lay in a 1960 recommendation by the Sub-Commission on Prevention of Discrimination and Protection of Minorities to the U.N. General Assembly to prepare a convention on those topics;⁴⁴ the recommendation followed renewed acts of anti-semitism in Europe and Latin America. In November 1963, the General Assembly adopted the Declaration on the Elimination of All Forms of Racial Discrimination⁴⁵ and adopted the Convention itself in 1966.

The Convention invokes in the Preamble the principles "of the dignity and equality inherent in all human beings," which undergird the U.N. Charter and the Universal Declaration of Human Rights, and resolves "to adopt all necessary measures for speedily eliminating racial discrimination in all its forms and manifestations, and to prevent and combat racist doctrines and practices in order . . . to build an international community free from all forms of racial segregation and racial discrimination"⁴⁶

40. *International Covenant on Civil and Political Rights*, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966) (entered into force Mar. 23, 1976).

41. *Optional Protocol of the International Covenant on Civil and Political Rights*, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 59, U.N. Doc. A/6316 (1966) (entered into force Mar. 23, 1976).

42. *International Covenant on Economic, Social and Cultural Rights*, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966) (entered into force Jan. 3, 1976).

43. *International Convention on the Elimination of All Forms of Racial Discrimination*, G.A. Res. 2106A (XX), 20 U.N. GAOR Supp. (No.14) at 47, U.N. Doc. A/6014 (1966) (entered into force Jan. 4, 1969) [hereinafter *Racial Discrimination Convention*]. For commentaries, see NATAN LERNER, *THE U.N. CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION* (2d ed. 1980); W.M. Reisman, *Responses to Crimes of Discrimination and Genocide: An Appraisal of the Convention on the Elimination of Racial Discrimination*, 1 DENV. J. INT'L L. & POL'Y 29 (1971); Egon Schwelb, *The International Convention on the Elimination of All Forms of Racial Discrimination*, 15 INT'L & COMP. L.Q. 996 (1966).

44. See *Report of the Twelfth Session of the Sub-Commission on Prevention of Discrimination and Protection of Minorities to the Commission on Human Rights*, U.N. Doc. E/CN.4/800, ¶¶ 163-66 (1960).

45. *Declaration on the Elimination of All Forms of Racial Discrimination*, G.A. Res. 1904 (XVIII), 18 U.N. GAOR Supp. (No. 15) at 35, U.N. Doc. A/5515 (1963).

46. *Racial Discrimination Convention*, *supra* note 43, preamble.

In its operative parts the Convention defines racial discrimination to mean:

any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.⁴⁷

The Convention continues:

Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.⁴⁸

The Convention expresses "that any doctrine of superiority based on racial differentiation is scientifically false, morally condemnable, socially unjust and dangerous" and finds that "there is no justification for racial discrimination, in theory or in practice, anywhere."⁴⁹

Furthermore, States Parties to the Convention assume an obligation to "condemn racial discrimination" and to "pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races. . . ."⁵⁰ States Parties specifically undertake to condemn racial discrimination⁵¹ and "to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions" act in accordance with this obligation.⁵² To ensure implementation, parties agree to "take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists."⁵³ States Parties also assume a duty to take affirmative measures to promote "understanding, tolerance and friendship" among racial and ethnic groups.⁵⁴

47. *Id.* art. 1 (1).

48. *Id.* art. 1 (4).

49. *Id.* preamble.

50. *Id.* art. 2 (1).

51. *Id.*

52. *Id.* art. 2(1)(a).

53. *Id.* art. 2(1)(c).

54. *Id.* art. 7.

C. Fiji Constitution Versus International Convention on the Elimination of All Forms of Racial Discrimination

Unquestionably, the constitution of Fiji blatantly violates the obligations undertaken by that country, a party to the Convention. By denying non-indigenous racial groups their equal rights in the governance of Fiji and by depriving them permanently of this basic right, the Fiji Constitution creates a permanent underclass.⁵⁵ Having undertaken obligations *to pursue without delay a policy of eliminating all forms of racial discrimination* and to “amend, rescind, or nullify” any domestic legislation that might be violative of the international standards set by the Convention, the unelected regime in Fiji is instead endeavoring to perpetuate institutionalized racism. It has created a racially based structure enshrined in its Constitution.

Might the Fiji Constitution’s provisions fall within the scope of “special measures” allowed under the Convention to secure “adequate advancement,” development and protection of certain racial groups?⁵⁶ The answer is an unequivocal negative, for such measures must: 1) be considered necessary to ensure such groups’ equal enjoyment of human rights and fundamental freedoms,⁵⁷ 2) not “lead to the maintenance of separate rights for different racial groups,”⁵⁸ and 3) not be continued after the accomplishment of the objectives for which they were taken.⁵⁹ The constitutional guarantees to indigenous Fijians meet none of these criteria.

Although Fiji accepted the Convention with a reservation to article 5, which relates to laws governing elections, indigenous land rights, and education,⁶⁰ Fiji cannot rely on this reservation to limit the scope of its international obligations under the Convention. Reservations must be interpreted in a contextual setting. In light of the objective of the Convention—the elimination of all forms of racial discrimination—no reservation incompatible with this purpose may be considered valid.

D. The Right of Self-Determination

The U.N. Charter embodies the principles of equal rights and self-determination of peoples.⁶¹ Self-determination encompasses both external

55. States Parties have undertaken the obligation to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone to the enjoyment of

[p]olitical rights, in particular the rights to participate in elections—to vote and to stand for election—on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service[.]

Id. art. 5 (c).

56. *See id.* arts. 1(4), 2(2).

57. *Id.* art. 1(4).

58. *Id.*

59. *Id.*

60. For the text of the reservation, see Campbell McLachlan, *The Fiji Constitutional Crisis of May 1987: A Legal Assessment*, 1987 NEW ZEALAND L.J. 175, 181.

61. *See* U.N. CHARTER arts. 1(2), 55.

and internal rights: external self-determination refers to the right of the people of an independent state to choose their political status in the international arena, whereas internal self-determination refers to their choice and selection in the internal arena of the government and includes the right to be free from discrimination.⁶² The International Court of Justice has construed the term "peoples" used in article 55 to include all peoples, irrespective of their political status.⁶³

Several subsequent U.N. declarations and instruments have reiterated that the right of self-determination belongs to "all peoples" and have imposed concomitant duties on all states to respect and uphold the right. Relevant documents include the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples,⁶⁴ the 1966 International Covenants,⁶⁵ and the 1970 Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance With the Charter of the U.N.⁶⁶

The principle of self-determination calls for the enjoyment of equal rights under law by all peoples in Fiji. This includes the right of the ethnic Indian community to participate in all the value processes of the society, including power in the body politic.⁶⁷ The disproportionately strong representation of indigenous Fijians under the 1990 constitution violates the principle of self-determination applicable to all peoples of Fiji.

E. Native-Versus-Settler Rights

The generally strained relations between indigenous Fijians and ethnic Indians relate broadly to the native-versus-settler issue.⁶⁸ Should native Fijians have the right to discriminate against the later-arriving ethnic Indians? The 1990 Fiji constitution answers the question by propaga-

62. See generally Antonio Cassese, *Political Self-Determination—Old Concepts and New Developments*, in U.N. LAW—FUNDAMENTAL RIGHTS 137 (Antonio Cassese ed., 1979); M. Rafiqul Islam, *The Proposed Constitutional Guarantee of Indigenous Governmental Power in Fiji: An International Legal Appraisal*, 19 CAL. W. INT'L L.J. 107, 120-22 (1988) (on self-determination and its application to the situation in Fiji).

63. See Legal Consequences for the States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. 15, 57 (June 21, 1971) (Namibia v. South Africa) (advisory opinion).

64. See *Declaration on the Granting of Independence to Colonial Countries and Peoples*, G.A. Res. 1514(XV), preamble ¶ 2, 15 U.N. GAOR Supp. (No. 16) at 66, U.N. Doc. A/4684 (1961).

65. See *International Covenant on Civil and Political Rights*, supra note 40, and *International Covenant on Economic, Social, and Cultural Rights*, supra note 42, art. 1.

66. G.A. Res. 2625(XXV), principle V, para. 4 (1970), reprinted in 9 I.L.M. 1292, 1296 (1970) ("The establishment of a sovereign and independent state, the free association with an independent state, or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people.")

67. See generally Ved Nanda, *Self-Determination Under International Law: Validity of Claims to Secede*, 13 CASE W. RES. J. INT'L L. 257 (1981).

68. On this issue, see generally Richard Mulgan, *Should Indigenous Peoples Have Special Rights?*, ORBIS 375 (Summer 1989).

ting discriminatory privileges and rights for indigenous Fijians. This constitutes rejection of a democratic form of government under which all nationals are guaranteed equal rights. No valid basis exists under international human rights law for such distinction between earlier and later arrivals.

Conclusion

The preceding discussion has demonstrated that the Fiji constitution violates internationally recognized human rights. In criticizing the constitution, Mauritius' Foreign Minister Paul Berenger said at the U.N. General Assembly in November 1991, "Isn't it a paradox that at a time when apartheid is being dismantled at one end of the world, a constitution with racist attributes unfortunately continues to prevail in Fiji?"⁶⁹ At the same General Assembly session, Indian Foreign Minister Solanki called upon the government of Fiji to "join the rest of the world in enlightened democratic governance."⁷⁰

An eventual solution to the constitutional and ethnic crisis in Fiji depends on the willingness of that nation's ethnic groups to address their legitimate concerns in a climate of trust. Peaceful settlement of their differences is possible through negotiation or through the use of good offices, mediation, or conciliation efforts by Australia or New Zealand. Past grievances must be resolved, but unfortunately there does not presently exist an adequate international legal framework within which the conflicting group claims can be reconciled.

69. *"Apartheid" Constitution*, *supra* note 5.

70. *Id.*

