

APPLICATION OF HUMAN RIGHTS CONVENTIONS IN THE PACIFIC ISLANDS COURTS

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INTRODUCTION.

This paper will explore the extent to which Pacific Island Courts have applied United Human Rights Conventions (UNHRC) to domestic law. Attention will be applied to article 43(2) of the new Fiji Island Constitution, which specifically authorises the application of public international human rights law in the interpretation of rights. The current status of that Constitution in Fiji is currently problematic, after the Speight-led coup attempt in Fiji in May 2000 which saw the establishment of an interim government and the proclaimed abrogation of the 1997 Constitution. However, the example is still instructive in many ways. The paper will also discuss the small but significant number of cases in the Fiji Islands, Samoa, Vanuatu, Solomon Islands, Cook Islands and Kiribati where the United Nations Conventions have been referred to either by counsel or the Court in relevant proceedings.

The implementation, rather than the adoption, of conventions in this area has created some difficulties. To take one example, the response of South Pacific Island countries to the application of the Convention on the Rights of the Child (CRC)^[1] has been rather ambivalent, or at least varied, in South Pacific countries. To some extent this can be put in terms of the alleged conflicts between customary law and the international culture of human rights. This lends some uncertainty about the application of the latter particularly where they might be destructive of existing customary status or rights. Usually it is pointed out that the regime of human rights is based on individualistic or liberal assumptions which are at odds with the community orientation of Pacific cultures. Hence the implementation of such conventions can be seen as an adoption of alien foreign values, particularly those of the West.

On the other hand, there have been instances where a regime of human rights has been used to challenge existing customary rights. Customary law, for example the payment of bride price in Melanesia to ensure custody of children to the father, has been over-ruled through the innovative use of the Convention on the Rights of the Child (CRC) to secure the protection of children in family law. In Samoa, the Court used the Hague Convention on Civil aspects of Child Abduction to protect the rights of a child abducted from Germany notwithstanding that the Government of Samoa had not ratified the Hague convention.

The paper will begin with a general discussion on the United Nations Human Rights Conventions (UNHRCs) and the *terms* used with the conventions. This will be followed by a discussion of the ways in which the UNHRCs can effect domestic laws through their application in the courts. This will be followed by a comparison of *human rights and customs*, since the adoption of *introduced laws*. A detailed examination of customs will be followed by a comparison of these two systems. This will lead to an analysis of their relationship.

Having established the relationship between human rights and customs, attention will be directed at how the Commonwealth Courts have applied the UNHRCs. This will be followed by an examination of how the UNHRCs have been applied in the Pacific Island Courts. The paper will then specifically focus on the application of the Convention on the Rights of the Child. Finally, there is an analysis of cases in which *the best interests of the child* was an issue in the Pacific Island Courts followed by a conclusion.

HUMAN RIGHTS.

Human rights can not be given one singularly effective definition. Nor does the concept imply one set of rights because human rights can be taken in principle to involve every aspect of human life. However, some generally accepted definitions will be mentioned. This will be followed by a general discussion of the United Nations Human Rights Conventions (UNHRCs) and *terms* specific to these conventions, followed by an examination of the ways in which the UNHRCs can affect domestic laws.

Definitions

Human rights are those rights that every human being possesses and is entitled to enjoy by virtue of being human^[2]. Human rights are the birthright of all human beings. The protection of human rights is the first responsibility of governments. Human rights are based on the fundamental principle that all persons possess inherent human dignity. People are entitled to enjoy rights regardless of national origin, colour, language, race, sex, and class or religious or political beliefs.

The former Chief Justice of India has stated that^[3]:

"Human Rights are as old as human society itself, for they derive from every person's need to realise his [or her] essential humanity. They are not ephemeral, not alterable with time and place and circumstances. They are not the products of philosophical whim or political fashion. They have their origin in the fact of the human condition; and because of this origin, they are fundamental and inalienable. Human rights were born not of humans, but with humans."

The Director of the Human Rights Commission^[4] in Fiji has described it as *"...a condition inherent to the Human Being. They are what any person has as a human being."* It is accepted that Human Rights are contained in the International Bill of Rights and they consist of the UDHR, ICCPR and ICESCR^[5].

Background

Human rights in the modern era can be traced back to the *American Revolution* and the *French Revolution*. The idea of freedom, which was introduced in these two revolutions, emphasised the importance of the individual before the community or society^[6]. Human Rights that emerged in the 18th century emphasised the *natural rights of man*; its form in the 20th century has become more global – advocating a standard form of human rights in cultures, societies and races. It has also emphasised the moral claims of individuals as superior to that of government.

The body of human rights law includes any law that can be used to promote or protect human rights and these can be found in either of the following:

- i. State Constitutions^[7],
- ii. Legislation,
- iii. Treaties or Conventions,^[8] and

iv. International customary law^[9], both written and unwritten.

What are the *United Nations Human Rights Conventions*?

The United Nations Human Rights Conventions (UNHRCs) are a part of the international law that sets out the human rights values and how they are to be protected and enforced^[10]. They address civil, political, economical, social, cultural, gender and other special rights for children and the disadvantaged^[11].

Some of the significant United Nations Conventions on Human Rights are^[12]:

- a. Universal Declaration on Human Rights (UDHR),
- b. International Convention and Civil and Political rights (ICCPR),
- c. Optional Protocol to the Covenant on Civil and Political Rights (OPCCPR),
- d. International Covenant on Economic, Social, and Cultural Rights (ICESCR),
- e. Convention Against Torture (CAT),
- f. Convention Against Genocide (CAG),
- g. The Geneva Conventions on the Condition of the Wounded and Sick in Armed Forces (I), The First Geneva Convention.
- h. Convention on the Rights of the Child (CRC),
- i. Convention on the Elimination of all forms of Discrimination Against Women (CEDAW),
- j. Charter of the United Nations.

TERMS.

The following terms are used frequently and require some basic explanation:

Conventions.

These are part of the international law, drafted and agreed upon by the international community mainly under the United Nations. They are agreements containing international standards agreed upon by two or more states. Traditionally, conventions may become part of national law when they are incorporated into local law^[13] by a legislative act of the legislature.

Reservation.

A country can become a party to the treaty or international convention and have certain reservations on a particular section or article of the Convention. In this way, a state shows that it does not wish to be bound by the certain provision of the article or section. If a state enters a reservation under CRC, the reservation is scrutinised to decide whether or not it is against the object and purpose of the convention^[14].

Declarations.

Declarations are *statements of general principles and intent* and do not carry with them any special obligations that are binding in law^[15]. The term "*declaration*" is often deliberately chosen to indicate that the parties do not intend to create binding obligations but merely want to declare certain obligations.

Ratification or Accession.

To ratify is to confirm an agreement by signature or other formality^[16]. A country can become a State party to a treaty either by ratification or accession. Both of these acts signify an agreement to be legally bound by the terms of the treaty. Most commonly, a country will sign the treaty shortly after it has been adopted and follow this up with ratification when all procedures required by domestic law have been satisfied. Countries that have not signed can become State Parties directly, though through accession.

The United Nations Human Rights Conventions ratified by Pacific Island States as at April 20th 1999 are tabulated at Appendix 1.

Country obligations.

Countries that have ratified a convention have the obligations to fulfil ratification in the following manner:

- (i) Amend national Laws to comply with the standards of the convention^[17],
- (ii) Amend policies to comply with the standards of the convention,
- (iii) Take affirmative action^[18]. This is the taking of positive steps by means of legislative reform and management programmes to achieve demonstrable progress towards equal employment opportunity^[19].

Implementing a convention.

Procedures for implementing a convention are, for example, in the Fiji Island government's implementation of CRC as follows^[20]:

Fiji accedes to the Convention ratifying CRC by depositing an instrument of ratification with the United Nations.

- i. The convention comes into force after 30 days.
- ii. The Fiji Government is required under Article 44 of the Convention submit to the Secretary general of the United Nations on the measures the Fiji Government has adopted within two years of the entry into force of the convention^[21] and thereafter every five (5) years^[22].
- iii. Government may transform the convention into national law by passing new legislation.
- iv. Government can incorporate^[23] the convention into national law^[24].

APPLICATION OF HUMAN RIGHTS CONVENTIONS TO DOMESTIC LAW.

We will now examine ways in which the United Nations Human Rights Conventions (UNHRCs) can be adopted as national law through their application by the courts.

The UNHRCs may effect Domestic Law in the following ways^[25]:

a. Effect on Constitutions^[26]:

(i). Ratified treaties provide a legitimate guide in interpreting constitutional provisions^[27].

An illustration can be seen in Article 43(2) of the 1997 Constitution of Fiji, which states:

*a. In interpreting the provisions of this Chapter, [Chapter 4 - Bill of Rights] 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.***

The High Court of Fiji applied this provision in the *State v. Mark Lawrence Mutch*^[28] where after having cited the provision stated: "*The CRC forms part of the body of law known as public international law on human rights.*"^[29]

(ii) Where two Constitutional provisions conflict and can not be harmonised, the Court must favour the realisation of fundamental rights^[30].

In the Vanuatu case of *John Noel and Others v. Obed Toto*^[31], there was a conflict between constitutional provisions relating to customs and those relating to fundamental rights with respect to land. The Supreme Court held:

"In interpreting the Constitution, it must be presumed that when the Constitution was adopted, it was known that customary law discriminated against women with respect to land ownership. This being so, if it were intended to make an exception, the exception would have been specifically referred to. In the absence of this, there was no difficulty in ruling that customary land ownership was subject to the fundamental rights recognised."

b. Effect on Legislation^[32]:

(1). Where a statute is capable of two interpretations, the courts will presume that parliament intended to legislate consistently with the UNHRC.

In the English case of *R v. Home Secretary "ex parte" Venebles and Thompson*^[33], the court had to consider the lawfulness of applying the *Children and Young Persons Act 1993* to a detained child. The court said that even though the CRC was not incorporated into English Law, his conclusion had been reinforced by the CRC:

"...It is legitimate in considering the nature of detention during Her Majesty's pleasure... to assume that parliament has not maintained on the statute book a power being capable of being exercised in a manner inconsistent with the treaty obligations of this country."

(2) When construing statutes enacted to fulfil a Convention obligation, courts will assume the Act achieves that end.

This is a rule of construction which, on the faith of it, is capable of producing a liberal interpretation of the legislation in question. Interpretation is guided by a presumed general intention to implement the legislation in question.

c. Effect on Common Law^[34].

(1) If the common law is uncertain, unclear or incomplete, courts will rule where possible in a manner, which conforms to the convention.

The Samoan case of *Wagner v. Radke*^[35] involved child abduction. In 1994, the father applied to the courts in Germany to withdraw the rights of the mother to determine the child's place of residence and revoke her parental custody. The German Court dismissed his application, and later his appeal, and ordered that the child be returned to his mother.

After this court order, the father abducted the child taking it to Samoa where the husband lived with his new wife. It was not until 1996 that the mother found out that the child was in Samoa. The mother applied to the High Court in Samoa that the order granted to her in Germany be enforced and for the child to be returned to her.

The Court held:

"Even though Samoa is not a signatory or party to the Hague Convention on the Civil Aspects of International Child Abduction of 1980, the court must have regard to the principles and the philosophy of the convention in applying common law principles to this case".

It was added that: *"...as a tool to guide and aid the court, it could use the Conventions."*

(2). Where courts have a discretion, they seek to act in a way, which does not violate the Convention.

In Hong Kong case of *Yin v. Director of Immigration*^[36], it was held that *"...when exercising a discretion, the obligations of ratifying a treaty has to be a factor to be taken into account."*

In the case of *Molu v. Molu*^[37], the Supreme Court of Vanuatu, in exercising its discretion, *"...referred to the CRC to which Vanuatu is bound by virtue of its ratification in 1992."*

(3). When courts have to decide what public policy demands, regard will be had to international obligations as a source of guidance.

In *Tavita v. Minister of Immigration*^[38], the New Zealand Court of Appeal had to decide between the enforcement of a deportation order and human rights. The question was whether the Minister should have taken into account ICCPR^[39] and CRC in considering an application for a residence permit by a father, in the lights of the rights of a child who was a New Zealand citizen.

The court observed that the Minister's argument that he was entitled to ignore the international rights was "deeply unattractive" as it implied that New Zealand's adherence to various international instruments had been at least partly window dressing.

(4) In matters covered by the law of the UNHRC, courts may be bound to give effect to Convention rights where they are recognised as part of United Nations.

This was demonstrated in the Samoa case of *Wagner v. Radke*^[40], where the Court, in recognition of the United Nation principles applied Hague Convention even though it was not party to or a signatory of the Convention.

THE UNHRC AND CUSTOMS.

Pacific Islands Customs.

The Pacific Island States are rich in diverse customs, which they will not easily part with because of their wish to maintain their identity, traditions and culture^[41]. Whenever there is an introduction of foreign laws that challenges the special privileges of the elite, there is always opposition. Customary law is based on hierarchy and discriminates in the sense that power is bestowed upon the hands of a few members of society^[42].

International Customs

International human rights customs are the practices^[43] that uphold and enforce human rights. These were brought about through the coming together of nation states to form the United Nations, to draft conventions that promote, protect and enforce human rights and the ratification, adoption, and incorporation of the conventions^[44] into domestic laws.

In the case of *Wagner v. Radke*^[45] Samoa demonstrated its recognition of an international human rights customs when it applied a convention merely on its principles and philosophy even though it was not a signatory to the Convention^[46]

Conflicts.

Discussion will now focus on a comparison between the laws of the UNHRC and customs of the Pacific Islands as in the areas of:

- i. Communal and individual rights, and
 - ii. Male domination and gender equality.
- i. Communal and individual rights.

In the Pacific, it is arguable there are two aspects of human rights. These are the *rights of peoples as a group* and the *rights of peoples as individuals*. It is traditional that only certain members could hold and express opinions in any community discussions and these rights were often denied to women and children.

Human rights do not oppose communal living but the denial of certain privileges to some members of the community. A closer examination of the UDHR finds that Article 29 highlights the duties of the individual toward his community^[47].

Western societies focus on rules and individual rights and are less inclined to place values personal responsibilities. This view often leads to the argument that human rights are culturally relative and that a universal code amounts to cultural imperialism^[48]. However, any opposition to human rights has to account for the fact that all human beings are entitled to human rights and aspire to these rights. To allow for differences in cultures and political patterns is *the basic universal code of human rights*. It has to be remembered that Human Rights policy can be strengthened in an intercultural context by seeking shared principles. Furthermore, international human rights norms protect the diversity of cultures unless cultural practices violate the international standard^[49].

Some courts have been willing to decide in favour of individual rights as opposed to communal and customary rights as illustrated in the following cases:

A. *Public Prosecutor v. Kota and Others*^[50]. (Supreme Court of Vanuatu)

The custom chiefs of Tanna forced a woman to leave Port Vila and return to her husband. She argued that the action by the chiefs had violated Vanuatu's Constitutional guarantee of an individual's freedom of movement^[51]. It was held that the chiefs must realise that any laws they wish to exercise in customs are subject to the individual's fundamental rights and their freedom of movement as guaranteed under Article 5(1) of the Constitution and Section 105 of the Penal Code.

In the above decision, the court has recognised communal living by recognising customs and chiefs as custom leaders as leaders of the community. However, the court refused to allow chiefs as community leaders the privilege of having to violate one's individual rights.

A. *Sukutaona v. Houanihou*^[52]. (High Court, Solomon Islands)

This is a custody case in which the magistrate relied upon custom rules when he refused an application of a wife, custody of her children. On appeal, it was held that:

"Whilst custom was part of the law of the Solomon Islands, the interest of the children remained of paramount interest.

This decision has shown that whilst the court has recognised the Solomon Islands communal values and customs as a source of law^[53], it refused to allow the father's customary right to interfere with the interest of the children^[54].

(ii) Male dominance and Gender Equality

In a region where male dominance has prevailed and jealously guarded, the UNHRC is said to conflict with and destroy the structure of traditional societies. The Convention for the Elimination of all forms of Discriminations Against Women (CEDAW) has been ratified widely in the Pacific^[55] and the Courts have tried to rule against the discrimination against women.

One example of this was in *The State v. Filipe Bechu*^[56] which was heard in the Magistrate's Court in Fiji. Bechu was charged with raping her ex-girlfriend and admitted that he: "...started punching her as she refused to go. I then dragged her and forced her to lie down. I then lay on top of her. When sentencing the accused, the court stated its opposition to norms that discriminate against women when it stated:

"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 convention, the state shall ensure that all forms of discrimination against women must be discriminated at all costs. The old school of thoughts, that women were inferior to men,...is now obsolete and no longer accepted by our society..."

The position of customs and gender equality in the Fiji Courts is well established. The above case illustrates that in recognition of UNHRCs gender discrimination is no longer an accepted norm.

B. Customary and traditional practices or religion are at times used to justify violations of the fundamental rights and freedoms^[57]. This is illustrated in the case of *John Noel v. Obed Toto*^[58]. (Supreme Court of Vanuatu) This was a case concerning customary land rights. Crero Toto, the father of Obed Toto and grand father of John Noel had been custom owner of a piece of land known as Champagne beach. Crero had two wives. His eldest child from his first wife was a female called Julie and his first child from his second wife as a male called Obed. John Noel is one of Julie's children. Customs evidence had established

that Crero's eldest male child was head of the family and as Crero's female children lose their rights on marriage, Julie has lost her land right on marriage, so as her children one of which is John Noel.

The issue before the Court was: Article 5 of the Constitution grants equal rights to men and women. Article 72 says the: "...the rules of custom shall form the basis of ownership of land use." It was held that whilst customary law is the basis of land ownership in Vanuatu, it can not be applied if it discriminates against women and this fundamental principle overrides any law or custom contrary to it.

Vanuatu does recognise the international human rights customs that has outlawed the old Pacific Island customs that discriminate against women. The court also recognised and gave effect to its obligation to the United Nations as Vanuatu had ratified CEDAW^[58].

However, not all attempts to use the UNHRCs have succeeded. This is as shown in the Kiribati case of *R v. Timiti & Robuti*, (High Court of Kiribati, Criminal case 43/97). In this case, Prosecution submitted that the requirement for corroboration in a rape case was violates the rights of women in that it denies them the protection of the law guaranteed by section 3 of the Constitution. Section 15, which, affords protection from discrimination on the grounds of sex. When interpreting the law, the principles of CEDAW. The judge however stated that he saw no problems with corroboration and avoided CEDAW altogether. This shows. For one thing, that even though CEDAW have been applied in Fiji and Vanuatu to address the issue of gender equality, it was not successful in Kiribati.

APPLICATION OF UNHRC BY COMMONWEALTH COURTS.

Human Rights need the promotion by government, the protection of the laws and the enforcement by the courts. The former Chief justice of India^[59] stated that:

"...more specifically, constitutions, conventions or governments do not confer human rights. They are the instruments, the testaments, of their recognition; they are important, sometimes essential, elements of the machinery for the protection and enforcement of human rights, but they do not give rise to human rights."

In light of promotion, protection and enforcement, this paper will now explore how some Commonwealth courts have applied the UNHRCs.

The United Kingdom Approach

Even though the International human rights laws have not been enacted as part of English Law, the English Courts had regard to UNHRCs^[60].

R v. Home Secretary "ex parte". Venebles and Thompson^[61]. (Court of Appeal)

When considering the lawfulness of applying to a detained child the provisions under the Children and Young Persons Act 1993, the court had to consider the relevant provisions of CRC^[62]. The court held that its conclusion had been reinforced by the CRC even though the CRC was not incorporated into English Law:

"...It is legitimate in considering the nature of detention during Her Majesty's pleasure... to assume that parliament has not maintained on the statute book a power being capable of being exercised in a manner inconsistent with the treaty obligations of this country."

From the above, it can be seen that in the UK, UNHRCs are readily applied to domestic law even though

they have not been enacted locally. This is a very persuasive authority for the Pacific Islands courts because they tend to continue to follow the UK developed common law.

The Australian Approach.

Even though Australia has developed its laws in the form of Constitution, Statutes and Common Law, its position on the application of the UNHRCs is the same as in the UK and other Commonwealth courts. This is illustrated in:

Minister of Immigration and Ethnic Affairs v. Teoh^[63]. (High Court of Australia)

The High Court of Australia analysed its national responsibility as a country that has ratified an international convention. The concern was whether the CRC, which had not been formally made a part of the national law, could be applied to a particular child in Australia.

The court held ratifying a convention was a positive statement to the world and to the people of Australia that the government of Australia and its agencies will act according to the convention.

"...But the fact that the convention had not been incorporated into Australian Law does not mean that its ratification holds no significance for Australian Law...because government intends to give effect to Australia's obligations under international law^[64]."

The New Zealand Approach

In *Tavita v. Minister of Immigration*^[65], the Court of Appeal had to decide on the issue of whether the Minister and the Immigration service should have regard to the international obligations concerning the child and the family in considering how to enforce a deportation order.

The court held that the relevant provisions of the ICCPR and CRC called for a balancing exercise with the basic rights of the family and the child as the starting point.

The Hong Kong Approach

In the case of *Yin v. Director of Immigration*^[66] the Court of Appeal observed that:

"...It is at least potentially arguable...that where Hong Kong has treaty obligation not to expel stateless persons except on the grounds of national security or public order, then, even though that obligation has not been incorporated into our domestic law, it is, nevertheless a factor which our immigration authorities ought to take into account when exercising a discretion..."

The above cases indicate that even though Courts tend to develop their Common Law to suit their jurisdictions, approaches towards the UNHRC have been the same. They have been cautious but willing to apply the UNHRCs.

APPLICATION OF UNHRC BY PACIFIC ISLAND COURTS (PIC).

Before exploring how Pacific island Courts have applied the UNHRC, it has to be mentioned that the adoption of the UNHRC should be an indication of legal development which is in line with the Pacific Islands' quest for economic social, and political development.

Development is only achievable if it is *human oriented*^[67]. When development is human oriented, human

rights are promoted, protected and enforced. The British Foreign Secretary Mr. Robin Cooke on this stated that:

"Countries with the strongest authoritarian rule are more often than not countries whose economies have stagnated as backwaters in the global economy that has passed them by. Conversely, the World Bank has concluded that the economies with the faster growth were those where political equality has produced the fairest incomes"^[68].

Discussion will now explore cases in which Pacific Island Courts have applied the UNHRC.

Fiji

State v. Filipe Bechu^[69] (Magistrate's Court)

Bechu was charged with raping her ex-girlfriend and admitted that: *I started punching her as she refused to go. I then dragged her and forced her to lie down. I then lay on top of her.*

When sentencing the accused, the court stated:

*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 convention, the state shall ensure that all forms of discrimination against women must be discriminated at all costs.*

***The Court shall be the watchdog of this obligation.** The old school of thoughts, that women were inferior to men, or part of your personal property, that can be discarded or treated unfairly at will, is now obsolete and no longer accepted by our society.*

Even though this is a Magistrate Court's decision, it illustrates the Fiji Islands' commitment to its obligations in the conventions.

Vanuatu

John Noel v. Obed Toto^[70] (Supreme Court of Vanuatu). The facts of this case have been discussed earlier in this paper^[71]. The issue before the Court was: Article 5 of the Constitution grants equal rights to men and women. Article 72 says the: *"...the rules of custom shall form the basis of ownership of land use."* It was held that whilst customary law which favours males is the basis of land ownership in Vanuatu, it can not be applied if it discriminates against women and this fundamental principle overrides any law or custom contrary to it. A decision giving more rights to men than to women would be contrary to CEDAW, which Vanuatu has recently adopted.⁷² The position of the Supreme Court of Vanuatu is clear as it shows its commitment to the government's obligations to the conventions.

Samoa

Wagner v. Radke^[73] is a case of international abduction involving an 8 year old boy and his German parents. One of the issues before the court was whether the court should comply with the Hague Convention on the Civil Aspects of International Child Abduction of 1980 although Samoa is not a party to that Convention? The court held that: *"...eventhough Samoa is not a signatory or party to the Hague Convention, the court must have regard to the principles and the philosophy of the convention..."* in applying common law principles to this case and that Conventions can be used by the courts as a tool to guide and aid the court.

Samoa has readily applied the convention and appears to be leading the Pacific island courts in the

application of the conventions. Whilst most courts refer to their obligations to ratified treaties, Samoa went beyond that and applied the convention on its principles and philosophy in applying common law principles to international customary law.

Cook Islands

Cases explored so far have had the Conventions readily applied the but below is one in which the Judge refused to go with the current trend. In *R v. Ewan Francis (In the Matter of the Declaratory Judgement Act and In the Matter of the Income Tax Act 1997*^[74]) an application was made for a declaration under the Declaratory Judgement Act 1994 as to the powers of the Collector of Inland Revenue on the case of persons about to leave the Cook Islands. Section 201 of the Income tax Act allows the "Collector" to detain a person in the Cook Islands. The High Court held that on behalf of the Applicant's reference to the International Covenant on Civil and Political Rights, which New Zealand ratified for New Zealand, the Court cannot apply the Convention because "**...That Covenant has not been enacted as part of the law of the Cook Islands and so has no legislative effect.**"

In the Kiribati case of *R v. Timiti & Robuti*, the court refused to address CEDAW when it was submitted in the proceedings but in this Cook Island case, the Court ruled against it. This could be owing to the traditional view of non-enforceability of international laws until they are enacted locally. It was discussed earlier that the principle of non-enforceability does not apply to Human Rights Conventions and should only be followed in the UK where the Constitution is not Supreme.

THE CONVENTION ON THE RIGHTS OF THE CHILD (CRC).

Concept of Children's Rights^[75].

The basic concept of the rights of the child is that society has an obligation to satisfy the fundamental needs of the child's personality, talents and abilities. The Convention on the Rights of the Child (CRC) provides an internationally agreed framework of minimum standards necessary for the well being of the child and to which every child is entitled.

The CRC incorporates the whole spectrum of human rights – *civil, political, economical, social and cultural* – and provides the full development of the potential of the individual child in an atmosphere of freedom, dignity and justice^[76].

It is universal, applying to young children everywhere. In addition, it defines some like refugee children as having rights to special care. It is unconditional, which means that children's rights are not to be seen as relative. Different countries do not have different levels of responsibility for them.

b. Background on the Convention.

In 1923, Eglantyne Jebb, founder of the Save the Children Fund, drafted a 5 point declaration on the Rights of the Child called *The Geneva Declaration*. This was agreed by the General Assembly of the International Save the Children Union (ISCU) and was adopted by the League of Nations in 1924^[77].

After much debate and a lot of hard work from NGOs a draft text of the CRC was submitted to the General Assembly and 30 years after the 1959 Declaration, the CRC entered into force as international law following ratification by the necessary states on 20 September 1990^[78].

c. What are Children's rights?

The general principles of the CRC are contained in the following 4 articles:

- a. The *best interest of the child*, Article 3
- b. Participation in judicial and administrative proceedings, Article 12
- c. Non-discrimination, Article 2
- d. Survival and Development, Article 6
- d. The welfare principle, "*the best interest of the child*"^[79]

One of the fundamental philosophies behind the Convention is that children have the same inherent values as adults and are their equals. The affirmation of the right to play, underlines that childhood has a value itself and that these are not merely a training period for life as an adult. The idea that children have equal value may sound like a truism but is in fact a radical concept in the Pacific Island countries which is not often respected^[80].

Even though they hold these equal value, children are vulnerable and need special support to enjoy their rights to the fullest extent. How can children be granted equal rights and the necessary protection at the same time? It is here that the principle of the child's best interest helps provide the answer^[81].

e. CRC and PI Customs.

The UNICEF produced Situation Analysis of Children and Women in Fiji^[82] stressed that there is a *subculture of violence in Fiji in which...Children are the victims*. This could mean that it is customary for Children to be victims of violence. Violence against anybody is a criminal offence. Violence against children is not only criminal but contradicts the Pacific Islands' obligations to the conventions.

The subculture of violence exists in most Pacific Island states and is in conflict with the CRC. This will be examined in detail below.

f. Application of CRC in Pacific Islands Courts.

Discussion will now focus on the application of the CRC in the Pacific Island Courts with a focus on Fiji in light of Article 43(2) of the 1997 Constitution

(i) *State v. Mark Lawrence Mutch*^[83] (Fiji High Court.)

This is a landmark case concerning *paedophilia*^[84]. Mr. Mutch picked up children who were still in primary school and lured them to his home. He was convicted of two counts of rape and four counts of indecent assault

The judge emphasised the importance of CRC, which forms the body of public international law on human rights. He also highlighted Article 3 (1)^[85] of the CRC where it is stated "***that in all actions concerning children... undertaken...in courts of law...the best interest of the child shall be primary consideration***".

Article 19(1) of CRC gives the power to State parties to ensure that all measures have been taken to protect the child from all forms of abuse^[86]. Emphasis was also made on Article 34 of CRC that gives the ... Judiciary the jurisdiction to protect children from all forms of sexual exploitation and sexual abuse

The accused was sentenced to a total of 7 years imprisonment.

The position in the Fiji Islands is that the Conventions can be applied through the interpretation provision in Article 43(2). In doing that the court adopted human rights values in the CRC.

(ii) *Semi Voliti v. Peni Seniloli & AG Fiji*

On 28th march 1998, the Police questioned the Plaintiff's son Poasa, a 14-year-old boy. The police constable thought that Poasa was walking in a suspicious manner. The constable then stopped and questioned Poasa. After the questioning, Poasa was then searched. Food items were found on him and were taken by the police. He was then handcuffed to a post inside the police post and was released when one of the police officers requested that the handcuffs be taken off.

The magistrate found that Article 37 of the Convention of the Rights of the child had been breached finding that the plaintiff had been subjected to cruel treatment contrary to section 37(a) and that he was deprived of his liberty arbitrarily. She stated in her judgement that the police had breached Article 37 of the CRC. According to the magistrate, Poasa had been subjected to cruel treatment contrary to Article 37(a)^[87]. She added that his detention did not conform to the law and the detention was not used "only as a measure of last resort and for the shortest period of time"^[88].

The magistrate awarded \$10,000 aggravated damages to the plaintiff because of the "gross abuse of power" by the police. She also awarded punitive damages of \$5,000.

After having referred to the plaintiff's Constitutional Rights under Section 25, 26, and 27, the Magistrate **directly applied the facts of the case to the CRC**. In her deliberations, the Magistrate stated:

"Article 37 of the Convention on the rights of the Child, and which I have applied to the facts of this case has also been breached by the defendants. Poasa was subjected to cruel treatment, contrary to Article 7(a)"

It has to be stated as an observation that this decision did not refer to Article 43(2) of the Constitution, which would provide the authority for the application of the CRC as in the *Mutch case*. The Magistrate did not link Article 25, 26, and 27 to the CRC through Article 43(2).

(iii). *Patricia Molu v. Cidie Molu*^[89] (Supreme Court of Vanuatu)

The petitioner/wife and respondent/husband were married in August 1992 and by September 1996, the marriage was dissolved by *decree nisi*. The custody of the 3 children was disputed along with child maintenance and matrimonial property.

When exercising its discretion in interpreting what is just with regards to custody matters, reference was made to the Convention on the CRC to which Vanuatu is bound by virtue of having ratified the convention in 1992^[90].

Unlike the Fiji Island case of *Semi Voliti v. Peni Seniloli & AG* where the facts were directly applied to the CRC, the Vanuatu court in the above case referred to the CRC when exercising its discretion.

(iv). *Louise Nauka v. Seth Kaurua*^[91] (Supreme Court of Vanuatu)

In this Custody case, the court used the *best interest of the child* provision from the CRC^[92], which has been ratified by the Vanuatu Parliament by Ratification Act^[93] to decide on which parent should be given custody of the children.

ANALYSIS OF THE DECISIONS THAT DISREGARDED CRC

In the "*Commonwealth Declarations and Strategies for Action*", it is stated that Judges and Lawyers have a duty to familiarise themselves with the growing international jurisprudence of human rights^[94]. It further stated that judicial officers should be guided by the UNHRC when interpreting and applying the provision of the national constitutions and laws including the common law and customary laws when making the decisions.

The Fiji Islands has adopted this in Article 43(2) of its current Constitution. However, not all courts have adopted the conventions^[95].

a. Decisions based on wrong principles of law.

It is possible that some Pacific Island courts have not applied the CRC is owing to the public international law principle of non-enforceability. There has been the tendency where states see UNHRC as instruments that are not *directly* enforceable domestically^[96]. Other courts could be trying to hold on to their sovereignty and refuse the intrusion of foreign laws and values. Whilst these principles may be applicable to other public international laws, it should not be adopted in the application of human rights conventions^[97].

(i). *The State v. Peter Anthony Jenkins*^[98].

Mr. Jenkins was a New Zealand tourist holidaying in Fiji. Whilst staying in a hotel he was interrupted in his sleep by three children who went knocking three times on his door at around 1a.m. Mr Jenkins was charged with assault and admitted to having banged the heads of two children and also kicking two of them in the posterior. The victims were Australian tourists whose ages were 6, 13 and 14 years.

Held: I have

"...considered the mitigating circumstances of the accused as pleaded by his counsel as well as the circumstance leading up to the commission of the offence. I am of the opinion that the accused was somehow provoked into committing this offence. The children are not entirely blameless. It is an act done in the spur of the moment without any element of pre-meditation. In my view this is an appropriate case to apply section 44 [of the Penal Code]. Accused is discharged without conviction

The parents of the victims stated they were going to appeal.

Discussion.

As to why the Magistrate did not consider the CRC is unknown^[99]. Below are some considerations the Magistrate could have made:

i. Direct application.

In *Semi Voliti v. Peni Seniloli & AG* (Magistrate's Court, Suva), the court directly applied the facts of the case to the CRC where as in this case, it did not consider it at all.

ii. Ratification.

In the case of *The State v. Bechu* (Magistrate's Court, Fiji) the court referred to Fiji's obligation to the convention^[100] which the court saw as its duty to watch.

iii. Discretion.

1. Under the common law, it was decided in *Yin v. The Director of Immigration*^[101], that when exercising a discretion, the obligation of ratifying a treaty has to be a factor to be taken into account.

2. Another persuasive authority is *Molu v. Molu*^[102] (Supreme Court of Vanuatu) In exercising its discretion, reference was made to the CRC to which Vanuatu is bound by virtue of its ratification in 1992.

The magistrate in the *State v. Jenkins* obviously in exercising its discretion under Section 44 of the Penal Code did not consider Fiji's obligation after having ratified the CRC.

i. *Kini Uhila v. The Kingdom of Tonga*^[103] (Supreme court of Tonga)

Kini 'Uhila (the Plaintiff'), a nine year old schoolboy was attending Nuku'alofa Primary School in Primary 4. He did not attend a test so the teacher decided to administer corporal punishment.

Given the Statutory provisions in Tonga, the Supreme Court held that **10 strokes inflicted upon a nine year old for gross disobedience and wilful misconduct may be excessive abroad but not in Tonga!** However, to hit a child on the thighs with a solid object, as the teacher did, whether deliberate or negligently, is an actionable injury if measurable injury results. It did in this case and the Plaintiff was entitled to an award of damages in his favour.

This case was decided in 1990 when Tonga had not ratified the CRC but a universal declaration of human rights had been made. Article 9 of the Declaration stated that: *The child shall be protected from all forms of cruelty and exploitation.*

The words used by the Supreme Court tend to suggest that it was aware of such declaration and it wanted to make the point that it **does not apply to Tonga**. It could have been influenced by the old public international law of *non-enforceability*.

b. Decisions based on wrong interpretations of facts.

(i). *Regina v. Rose*^[104] (High Court of the Solomon Islands)

A ten-year-old boy was involved in a disturbance at school assembly so the headmaster, caned him in sight of other children. At the trial in the magistrate's Court, the Director of Public Prosecution contended that punishment had been excessive. The magistrate acquitted on the grounds of reasonable punishment. The DPP appealed to the High Court, arguing that the punishment in this case as unreasonable.

In allowing the appeal, the High Court held that:

1. Corporal Punishment does not constitute either torture or inhuman punishment *per se*; whether it is degrading is a matter of degree.

2. Reasonable punishment is a possible defence under section 226(4) of the penal code and at common law.

The inflicting of the caning in public rendered it degrading and thereby unreasonable so that the defence of reasonable punishment could not help the accused.

Discussion:

The point of interest in the above decision is that, despite the injuries sustained by the victim from the punishment inflicted, the court only objected to it because it was in public. Can this mean that *teachers can inflict any form and amount of punishment* as long as it is not done in public?

The High Court refused to consider the excessiveness, which amounted to the bruising, admitted in court. Bruises indicate that the body has rejected the contact and as a consequence has been injured. The infliction of such punishment should amount to physical assault, an actionable case in civil and criminal law.

Eventhough the CRC had not been drafted then, the court referred to and applied the European Court of Human Rights test to determine its position on *inhuman and degrading treatment*. However, Article 9 of the Universal Declaration of Human Rights stated that: *The child shall be protected from all forms of cruelty and exploitation*. Bruising may not be inhuman and degrading but is an indication of cruelty in the way the punishment was applied.

c. International trend.

In the UK, government has placed human rights at the heart of foreign and international development policy^[105]. It is making a serious effort to turn the principles of UDHR into reality. It argues that this can only be brought about through a commitment with other governments and NGO communities committed to Human Rights^[106].

Canada's government policy is to ensure the will and capacity of developing country societies to respect the rights of children, women and men and to govern effectively and in a democratic manner¹⁰⁷.

The New Zealand^[108] position is that the UDHR the UNHRC point out the human rights standard of the international community^[109]. It adds that these international standards underpin the philosophy and aims of international development assistance programmes.

Keeping in line with developmental goals and policies, Pacific Island Courts are aware of human rights. Some have applied them cautiously whilst some have been reluctant. That some courts have applied them freely to the extent even it is not a signatory to a convention^[110], shows that Pacific Island States are not only developing economically, politically and socially but legally as well.

In this modern age, to ignore human rights would be unjust; something the judicial system can not be seen to be doing. As in the words of the former Chief Justice of India^[111]:

"The judiciary has to administer justice according to law but the law must be one that commands legitimacy with the people and legitimacy of the law would depend upon whether it accords with justice."

Should there be a Human Rights Charter for the Pacific? It is common knowledge that the Pacific lacks the inter-governmental structures to protect human rights^[112]. It would therefore be proper to use existing groups like the South Pacific Forum or the South Pacific Community to address human rights issues. The advantage of using these groupings in existence is because of their closeness in terms of cultural affinity, a good degree of political understanding, historical involvement, trading relationships, and movement of people of a direct and continuous nature.

The realisation of this possibility is yet to eventuate but is not within the scope of this paper.

CONCLUSION.

When exploring the application of the UNHRCs in the Pacific Island Courts, the paper has identified that UNHRCs are not bound by the old public international law of non-enforceability. UNHRCs can be applied and they affect domestic laws in the following ways:

a. Effect on the Constitution:

1. Ratified treaties provide a legitimate guide in interpreting constitutional provisions. In *The State v. Mark Lawrence Mutch*, the High Court of Fiji used the CRC when interpreting the Bill of Rights provision of Chapter 4 of the 1997 Constitution.

2. Where two Constitutional provisions conflict and can not be harmonised, the Court must favour the realisation of fundamental rights. This was illustrated in the Vanuatu case of *John Noel v. Obed Toto* where the court preferred the Constitutional provisions of Fundamental Rights over Customary law.

i. Effect on Legislation.

1. Where a statute is capable of two interpretations, the courts will presume that parliament intended to legislate consistently with the UNHRCs^[113].

2. When construing statutes enacted to fulfil a Convention obligation, the courts will assume the Act achieves that end.

(iii) Effect on common law.

3. If the common law is uncertain, unclear or incomplete, the courts will rule where possible, in manner, which conforms to the convention. In the Samoa case of *Wagner v. Radke*, the court had regard to the principles and the philosophy of the convention in applying common law rules.

4. Where the courts have discretion, they seek to act in a way, which does not violate the Convention. The case of *Molu v. Molu* had the Supreme Court of Vanuatu take into account the obligations of ratifying a treaty when exercising its discretion.

5. When courts have to decide what public policy demands, regards will be had to international obligations as a source of guidance.

6. In matters covered by the law of UNHRCs, courts may be bound to give effect to Convention rights where they are recognised as part of the United Nations. In recognition of the United Nation's principles and philosophies, the court in the Samoa case of *Wagner v. Radke* applied Convention principles which Samoa was not a signatory.

a. On the application of the CRC, the following applications were discussed:

i. State v. Mark Lawrence Mutch, the High Court of Fiji applied the CRC when interpreting the Bill of Rights provision of Chapter 4 of the 1997 Constitution^[114].

ii. Semi Voliti v. Peni Seniloli & AG, the Magistrate Court in Fiji **directly applied** the facts of the case to the CRC.

iii. Molu v. Molu. When exercising its discretion, the Vanuatu Supreme Court made reference to the CRC when determining the best interest of the child.

iv. Louse Nauka v. Seth Kaurua. The Vanuatu Supreme Court referred to the CRC and directly applied its *best interest of the child* provision

The paper also analysed cases that did not use any of the above applications when dealing with children. However, it is found that a majority of the Pacific Island Courts are in line with international legal development. It is important for the Pacific Island to come to terms with the human rights values for its dynamism makes it a potentially powerful tool for the promotion of social justice and the dignity of all people.

NOTES

[1] The CRC incorporates the whole spectrum of civil, political, economical, social, and cultural rights.

[2] Schule and Thomas Eds: 1997, 8

[3] Justice PN Bhagwati, Former Chief Justice of India. Creating a Judicial Culture to promote the enforcement of Women's Human Rights. In *Advancing the Human Rights of Women: Using human rights standard in civil litigation*. Hong Kong, 20 - 22 May 1996, p.21.

[4] In the Fiji Times of November 1st 1999.

[5] Interview with Imarana Jalal at RRRT on 28 January 2000

[6] Interview with Ms Durutalo, December 1999.

[7] As in the Bill of Rights in Fiji's Chapter 4 of the 1997 Constitution.

[8] As in the Human Rights Conventions like the CRC, CEDAW, ICESCR, and ICCPR

[9] As in certain provisions of the Universal Declarations on Human Rights. (UDHR)

[10] The initial attempt at codifying such standards was in the form of a declaration drafted in 1947. It was not until December 10th of 1948 when the General Assembly of the United Nations adopted the UDHR.

[11] The International Human Rights obligations are rooted in the Charter of the United Nations. This was following the trauma of the Second World War, which saw the widespread of abuses of people, and groups including genocide, mass killing and other forms of violence against humanity. These motivated governments to demand and set standards for the treatment of people by their own governments.

[12] From UN website <http://www.hrb.org/legal/undocs.html>

[13] It will be discussed later that unlike other forms of international law, local courts have readily applied human rights conventions.

[14] Human Rights Handbook: 1998,

[15] Background to the Convention, 199. 19.

[16] Hornby: 1974,

[17] When the Fiji Islands ratified the CRC, one method of the amendment of national laws was the inclusion of Bill of Rights and in particular Article 43(2) which, will be discussed later.

[18] On Social Justice and Affirmative action, Article 44(1) of the 1997 Constitution of Fiji states: "*The Parliament must make provision for programmes designed to achieve for all groups or categories of persons who are disadvantaged effective equality of access to education and training...*"

[19] Jalal: 1998, 528.

[20] Articles 44 and 45 of CRC

[21] Article 44(a) of CRC.

[22] Article 44(b)

[23]. Incorporation of conventions into national laws can be done in many different ways. Some of these ways are:

(i). Pass certain pieces of legislation that cover certain principles of the convention making the legislation in line with the convention provided that it does not conflict with the Constitution

by passing certain pieces of legislation to fully cover provisions of the convention

(ii). If a country finds that the convention is in line with its current Constitution, it can adopt the whole provision of the Constitution as part of its national legislation.

Other countries might find that its legislation is as good as the convention and find no need to create new legislation.

[24] Jalal: 1998, 575

[25] From Lord Bingham's maiden speech to the House of Lords in *Hunt: 1999, 10*.

[26] Ibid.

[27] Stevens: 1998, 12.

[28] Criminal Trial No. 8 of 1998.

[29] Paragraph 3 on page 3 of the Judgment.

[30] Stevens: 1998, 18

[31] (1995) Supreme Court Luganville, Santo. Case 18/1994.

[32] From Lord Bingham's maiden speech to the House of Lords in *Hunt: 1999, 10*.

[33] [1997] 3 WLR 23 at 49F – 50B

[34] From Lord Bingham's maiden speech to the House of Lords in *Hunt: 1999, 10*.

[35] (1997) Supreme Court of Samoa (Misc.) 20701

[36] [1995] 2 LRC 1.

[37] Supreme Court of Vanuatu, Civil Jurisdiction No. 30 of 1996.

[38] [1994] 2 NZLR 257

[39] International Convention on Civil and Political Rights.

[40] (1997) Supreme Court of Samoa (Misc.) 20701

[41] Whilst it is good to maintain one's identity, traditions and culture, discriminating values have to be discarded.

[42] Commonwealth Secretariat: 1997, 14.

[43] Wallace: 1992, 9

[44] Bhagmati, the former Chief justice of India in 1996 stated that conventions and governments protect and enforce human rights.

[45] (1997) Supreme Court of Samoa (Misc.) 20701

[46] It was a case of international abduction involving an 8-year-old boy and his German parents. One of the issues before the court was whether the court should comply with the Hague Convention on the Civil Aspects of International Child Abduction of 1980 although Samoa is not a party to that Convention.

The court held that: "...*even though Samoa is not a signatory or party to the Hague Convention, the court must have regard to the principles and the philosophy of the convention...*" in applying common law principles to this case and that Conventions can be used by the courts as a tool to guide and aid the court.

[47] Article 29 in short states:

1. Everyone has duties to the community in which alone the freedom and full development of his [or her] personality is possible.

In the exercise of his [or her] rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others...

[48] However, experience has shown that people who hold and control the power base of society are those who raise the issue of conflicts. This has been the case since *the French and American revolutions* where the idea of freedom came about.

[49] Discussion Paper by the Advisory Committee on External Aid and Development on Governance, Human Rights and Participation in the NZODA Programme, Wellington, 1998, 7

[50] [1988 – 1994] 2 Van LR 661; Criminal Case 58/1993.

[51] Jalal: 1998, 586

[52] Civil Appeal Case No. 7 of 1981, 9th December 1981.

[53] "...and that the father has secured custody rights through the payment of the bride price" in Jalal, Proposal for DFID presentation in 2000.

[54] This decision is in line with the provisions of the CRC's Article 3(1) and even though the CRC had not been drafted then, its first principle of **the best interest of the child** had been in existence and applied widely in custody cases.

[55] See Appendix 1 for the list of countries that have ratified CEDAW.

[56] In the First Class Magistrate's Court at Levuka Fiji, Criminal Case No. 79/84.

[57] Commonwealth Secretariat: 1997, 14.

[58] *Case 18(1994) Supreme Court in Vanuatu, Luganville, Santo*, cited in Jalal: 1998 65.

[59] Bhagmati

[60] Lord Lester of Herne Hill, QC: *Developing Human Rights Jurisprudence*, Vol. 7- Seventeen Judicial Colloquial on Domestic Application of International Human Rights Norms, page 19.

[61] [1997] 3 WLR 23 at 49F – 50B

[62] Hunt: 1999, 4.

[63] (1995) 183 CLR 273

[64] Paragraph 26 of the judgement.

[65] [1994] 2 NZLR 257

[66] [1995] 2 LRC 1

[67] UNDP *Human Development Report 1998*, page 16.

[68] In *Human Rights: Making the Difference*: 1998, 1

[69] the First Class Magistrate Court at Levuka, Criminal case No. 79/94

[70] *Case 18(1994) Supreme Court in Vanuatu, Luganville, Santo* cited in Jalal: 1998 65.

[71] See the discussion on Male dominance and Gender Equality.

[72] Jalal: 1998, 66

[73] (1997) Supreme Court of Samoa (Misc.) 20701

[74] High court of Cook Island held at Rarotonga, Civil Division, O.A. 3/98

[75] Materials from National CRC Workshop, 4th – 8th October 1999, Organised by UNICEF/RRRT, Fiji

[76] It is an international law, which defines and upholds basic rights for all the world's young people up to the age of 18. It is comprehensive and represents an important attempt to present all children's rights in one document: as citizens, and as integral part of the life of their countries.

[77] The horrors of the Second World War which, amongst other things, resulted in the human rights declarations, saw the International Union for Child Welfare (IUFCW) succeeding the ISCU in 1946. Whilst the United Nations concentrated on the UDHR, there was not much done specifically for the right of the child until 1959 when the UN adopted the second declaration on the rights of the child. The declaration contained 10 articles and incorporated the guiding principle of working in the best interest of the child.

[78] In 1993, Fiji ratified the CRC following which, a National Co-ordinating Committee on Children (CCC) was established

[79] Article 3 of the CRC states:

In all actions concerning children, whether undertaken by public or social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interest of the child shall be a primary consideration. From training manual of the UNICEF/RRRT conducted workshop for Magistrates in October 1999, Fiji.

[80] Training Manual of UNICEF/RRRT Magistrates' training workshop, October 1999, Fiji.

[81] Ibid.

[82] 1996 at p.15.

[83] Criminal Trial No.8 of 1998

[84] Paedophilia means sexual attraction to children of either sex, the condition caused by psychological and social factors, which affect the development of sexuality.

[85] In all action concerning children, whether undertaken by public, private or social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interest of the child shall be primary consideration.

[86] ...neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parents, legal guardians, or any other person who has the care of the child.

[87] Article 37 of the CRC states: *State Parties shall ensure that: (a) No child shall be subjected to torture or other cruel, inhuman, or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below 18 years of age.*

[88] Article 37(b) *No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be used only as a measure of last resort and for the shortest appropriate period of time.*

[89] Vanuatu Supreme Court (Civil Jurisdiction) No. 30 of 1996.

[90] Citing **the best interest of the child** provision at Article 3(1) of the CRC, the court added that in determining questions concerning children, the court will not consider if the if the point of view of the father is superior to that of the mother or the other way around.

[91] In the Supreme See Note 22, Lord Bingham's maiden speech to the House of Lords in Hunt: 1999, 10 Court of Vanuatu (Civil Jurisdiction) Matrimonial Case No. 06 of 1996.

[92] Article 3(1)

[93] No. 26 of 1992.

[94] Commonwealth Secretariat: 1997, 9

[95] See the comparative discussions on *The Mutch Case and The Peter Anthony Jenkin's case*.

[96] What some courts fail to realise is that the doctrine of non-enforceability of international treaties is inherent from Britain, a country that does not have any constitution or Bill of Rights. In the Pacific Islands, it is the Constitution that is the Supreme Law where as in the UK, Parliament is supreme and fundamental rights relegated to residual protection under the common law where parliament has no tread." Under common law, the principle of non-enforceability should not be adopted in the Pacific Islands.

[97]. See note 22, *Lord Bingham's maiden speech to the House of Lords* in Hunt: 1999, 10

[98] Sigatoka Criminal Case No. 703/99, 28/12/1999

[99] Both magistrates attended the RRRT Magistrates Training Workshop from 20th – 22nd November 1999. During the workshop, the leading *Mutch Case* was discussed. In the *State v. Mark Lawrence Mutch*, the High Court of Fiji in passing judgement highlighted Article 19(1) which states: ***State parties shall take all appropriate...legislative ...measures to protect the child from all forms of physical or mental violence...***

[100] In this case, it was CEDAW.

[101] [1995] 2 LRC 1,

[102] Supreme Court of Vanuatu, Civil Jurisdiction No. 30 of 1996.

[103] Civil case 145/91, Supreme Court of Tonga.

[104] (SILR) 1987/45 High Court of the Solomon Islands

[105] Annual Report on Human Rights, DFID, April 1998, p7.

[106] The Regional Rights Resource Team (RRRT) under DFID is one.

[107] As cited Guidelines for National plans of Action for Human Rights Education – UNDP, 24 February 1999.

[108] Discussion paper on *Governance, Human Rights and Participation in the NZODA Programme*

[109] 1998, 8

[110] As in the Samoan Case of *Wagner v. Radke*

[111] Bhagwati in Byrnes Ed: 1996, 21.

[112] Jefferies in Hunt Ed: 1998, 30

[113] In the English case of *R v. Home Secretary "ex parte" Venebles and Thomson*, the Court interpreted the Children and Young Persons Act 1993 with regard to the CRC.

[114] Ratified treaties provide a legitimate guide in interpreting constitutional provisions

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