**THE PROTECTION OF THE INTERETS OF INDIGENOUS FIJIANS IN THE SENATE ETHNICALLY-BASED ELECTORAL SYSTEM OF FIJI: EXAMPLES OF RACIAL DISCRIMINATION?**

**WATNA MORI**

This paper will address whether the protection of indigenous Fijians in the Senate and the ethnically-based electoral system of Fiji's House of Representatives amount to racial discrimination. This paper is only concerned with racial discrimination as it is defined in international human rights law.

In order to determine the two issues of possible racial discrimination, this paper will discuss the structure and background of Fiji's electoral and parliamentary system, followed by a definition of racial discrimination under international human rights law, and in conclusion an application of the law to the facts. Hence, a judgment as to whether the addressed aspects of Fiji's electoral system and Senate are in fact racially discriminatory.

## 1. The Facts: Fiji's Parliamentary and Electoral System

Before a discussion as to Fiji's electoral and parliamentary system is entered into, consideration must be given to its current ethnic makeup. The two biggest ethnic groups in Fiji are the indigenous Fijians (hereafter "Fijians") and the Indo-Fijians (or Indians). Fiji from the 25 August 1996 census[1] consists of 51.8 per cent Fijians, 43.6 per cent Indians and 5.3 per cent others, such as Chinese, Europeans and other Pacific Islanders.

Fiji's parliamentary and electoral systems are formed under the 1997 Fijian Constitution. This is Fiji's third constitution since it gained independence from Britain in 1970. The 1997 Constitution and the one previous to it in 1990 are both results of the ethnic tensions between the Fijians and Indians, which continues to exist in Fiji. These tensions were evidenced by the changes made to the electoral and parliamentary systems from Constitution to Constitution.

Fiji became a republic in 1990 with the President as its Head of State. Fiji's Government structure is based on the British Westminster system, therefore, it has a lower house; the House of Representatives, and an upper house; the Senate.

The current Fijian Constitution establishes that the House of Representatives is to comprise of 75 members, 46 of whom are elected by ethnic rolls and 25 by open rolls. The 25 open seats are available for candidacy by any ethnic group. As to the 46 communal seats, the break down is as follows; 23 Fijians, 19 Indians, 1 Rotumans and 3 others.

The Senate consists of 32 Senators who are appointed by the President. The Senators are appointed as such; 14 of the Senators are appointed by the President on the advice of the Great Council of Chiefs (Bose Levu Vakaturaga), 9 on the advice of the Prime Minister, 8 on the advice of the Opposition Leader and 1 from Rotuma, appointed on the advice of the Rotuma Island Council. The Senate does not have powers to create legislation or to block legislation originating from the lower house. It merely has power to 'debate

and delay'[2] legislation.

The Great Council of Chiefs in consultation with the Prime Minister appoints the President. The President must act on the advice of the Prime Minister and Cabinet, except where the Constitution states otherwise. However, these constitutional exceptions, such as the appointment of the Prime Minister, are only conventional powers. Therefore, the President has minimal practical effect on the governance of Fiji.

The Great Council of Chiefs is comprised of traditional Fijian Chiefs and several commoners in special fields. It appoints the Fijian President in consultation with the Prime Minister and advises the President on the appointment of 14 Senators. The Great Council of Chiefs is also instrumental in advising the Ministry of Fijian Affairs and the Fijian Affairs Board.

**The Evolution of Fiji's Electoral and Parliamentary System**

The basic structure of Fijian Government has been present since Independence and the first Constitution in 1970. The position of the Great Council of Chiefs and the communal voting system was a direct result of the British colonial era in Fiji, which instigated segregation between the Fijians and other ethnic groups, placing higher importance on Fijian interests than that of non-indigenous Fijians.

The self-proclaimed Chief of all Fiji, Cakobau, accessioned Fiji to Britain in 1874. The first Governor of Fiji, Sir Arthur Gordon, was intent on preserving the 'Fijian way of life'[3] but this proved difficult as the Fiji Islands consisted of a variety of groups both Polynesian and Melanesian. To create a unitary system, Gordon created and promoted a hierarchical order similar to that found in the traditions of the East Fijians, this included the creation of the Great Council of Chiefs. The system of governance under the Great Council of Chiefs was exclusive to the Fijians.

Part of preserving the Fijian way of life meant that Fijians were not to work for the colonialist, thus, Indian labour was imported and so too a very small number of Melanesian slaves. Colonial legislature allowed for representation of the different ethnic groups and it was here that the concept of racially-designated seats was first implemented in Fiji. Seats were reserved for Europeans, Indo-Fijians and Fijians; who were appointed upon the recommendations of the Great Council of Chiefs.

Gordon's intentions to protect Fijians from Europeans and colonial exploitation began the 'doctrine of Fijian paramountcy,'[4] which effectively meant Fijian interests and customary practices were inalienable. At first this was directed against the European settlers and colonisers, however, it soon turned towards Indo-Fijians. Due to the protective measures surrounding Fijians, which prohibited them from working, Indo-Fijians had come to dominate the economic and commercial sector. This led Fijians to perceive Indo-Fijians as an advantaged group.

By the time Independence was being contemplated, Indo-Fijians outnumbered Fijians, and combined with the Indo-Fijian economic domination, Fijians felt threatened and believed that if Indo-Fijians were to gain political domination too then they would threaten the 'doctrine of Fijian paramountcy.' This caused a strong push for the protection of Fijian rights and interests which resulted in the first Fijian Constitution of 1970, which though it made attempts to create an equally representative system, continued to segregate the indigenous and non-indigenous Fijians through its ethnically- based electoral system.

The second version of the Fijian Constitution came in 1990 after the military coups of 1987. The 1987 military coups led by Lieutenant Sitiveni Rabuka, a Fijian, occurred after The Alliance, a recognised 'Fijian' party as opposed to Indo-Fijian, lost power for the first time since Independence to a coalition, the majority of whose members were Indo-Fijians. In leading the coups, Rabuka expressed his objectives as 'maintaining Fijian supremacy.'[5]

The 1990 Constitution formed by Rabuka created a Fijian Republic and designated a smaller than proportionate number of lower house seats to Indo-Fijians while raising the number of Fijian seats. The 1990 Constitution did, however, provide for a Constitutional review and Rabuka followed through by appointing a Constitutional Review Committee whose findings led to the creation of the 1997 Fijian Constitution.

In 2000 there was another coup, this time led by Fijian businessman George Speight. The 2000 coup followed the election for the first time of an Indo-Fijian party to Government and an Indo-Fijian Prime Minister, Mahendra Chaudhry. In staging the coup and taking the Government hostage, Speight claimed his objectives were the same as that of Rabuka before him; to protect Fijian interests.

Commodore Frank Bainimarama initiated a military intervention and in order to gain the release of the hostages, Bainimarama agreed to Speight's demand to invalidate the 1997 Constitution. After Speight's capture an interim Government was set-up by the military and the creation of a new Constitution was discussed. However, following the Fijian Court of Appeals decision in *The Republic of Fiji v Prasad* [2001] FJCA 24, the 1997 Constitution was declared to have been invalidly abrogated and therefore still in force.

## 2. Law: What is Racial Discrimination?

Article 38(1) of the Statute of the International Court of Justice (ICJ)[6] lists the body of international law that the ICJ has jurisdiction over. These have become universally recognised as a basic constitution of all the sources of international law.[7] Article 38(1) of the Statute of the ICJ states:

> 1. The Court...shall apply:
>
> a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
> b. international custom, as evidence of a general practice accepted as law;
>
> c. the general principles of law recognized by civilized nations;
>
> d. subject to the provisions of Article 59[8], judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Professor Ian Brownlie, a leading international law expert, discussed Article 38 as forming a hierarchy of 'sources' in terms of importance as opposed to authority. Thus, (a) and (b) were the most important sources of international law.[9] Hence, human rights exist in international law primarily under:

a. treaties or
b. as part of international customary law

The right to racial non-discrimination is recognized under both instances as will be illustrated.

### Under International Conventions

Racial discrimination is said to be one of the main reasons modern human rights discourse was instigated. Following World War 2 and Hitler's terrifying pursuit of the Jews in Europe, the world realized that something had to be done to prevent such atrocities from re-occurring. Thus, the United Nations (UN) Commission on Human Rights was created and it proceeded to generate an 'International Bill of Rights.'

This would consist of the UN Declaration of Human Rights, which was drafted in 1948, and subsequent Conventions.[10]

UN declarations are not binding on any States and are merely persuasive and serve as a proclamation of the united values of the UN member states. UN conventions or treaties on the other hand can be binding on those states that choose to ratify it. Ratifying a convention requires the State to adopt the convention and have it reflected in their domestic legislation. Conventions cannot be binding on any State unless ratified; otherwise it would be a breach of the State's sovereignty. In ratifying conventions, however, States retain the right to make declarations and reservations.

The foremost international convention concerned with racial discrimination is the UN International Convention on the Elimination of All Forms of Racial Discrimination 1965 (hereafter "CERD"). CERD has a general approach to racial discrimination and as its preamble states, 'solemnly affirms the necessity of speedily eliminating racial discrimination *in all its forms and manifestations* and of securing understanding of and respect for the dignity of the human person.'

In Article 1(1) of CERD, racial discrimination is defined as:

> ...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.

There are four things to be noted here. Firstly, the term 'racial' is defined broadly to cover individuals with shared physical attributes as well as common ancestry. Second, discrimination involves *State* action that has the 'purpose or *effect'* of being discriminatory. Therefore, regardless of intentions, an act is racially discriminatory if it has that effect.[11] Thirdly, to amount to racial discrimination individuals must find that they're deprived of certain rights *due* to their race. Fourth, not 'any distinction' is prohibited but only that which is unreasonable and arbitrary. This has been the general consensus on subsequent interpretations of the phrase 'any distinction' and was confirmed in the *Costa Rican Naturalization Case*.[12]International cases such as *Zwaan de Varies v The Netherlands* and *Simunek, Hastings, Tuzilova and Prochazka v The Czech Republic*[13] though specifically concerned with Article 26 of the International Covenant on Civil and Political Rights 1976, can also be used as authorities on the definition of racial discrimination in Article 1(1) of CERD and more specifically the meaning of 'any distinction' in Article 1(1).

Articles 1(2)(3) of CERD qualify Article 1(1) by making an exception to State laws concerning citizenship. Article 1(4) makes a more contentious exception to the definition of racial discrimination by stating:

> 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.

Thus, 'affirmative action' is a recognised exception to racial discrimination so long as it is necessary, does not lead to separatism, and is conducted only for the limited required period.

Therefore, in determining whether an act is racially discriminatory there are four basic steps to take or questions to ask:

i. Does the act make a distinction based on race?
ii. Does the distinction impair the exercise of a fundamental human right or freedom?
iii. Is the distinction unreasonable or arbitrary?
iv. Are there any relevant reservations or declarations to be considered?[14]

**Under International Customary Law**

International customary law is defined as:

> Law, which has evolved from practice and customs of states. Customary international law is regarded as a foundation of international law. State practice may give rise to customary international law if it fulfils certain criteria. The practice must be consistent and widely adopted by states; there must be 'duration of practice,' although the length of time may vary; and the practice must be *opinio juris* (regarded as obligatory by states).[15]

In the *Columbian-Peruvian Asylum Case*[16] the ICJ stated that to prove customary law the party would have to 'prove that the rule invoked by it is in accordance with a constant and uniform usage practiced by the states in question...'[17] Thus, for a practice to be customary there has to be evidence of uniform and general practice. The *North Sea Continental Shelf Cases*[18] goes further in stating that:

> Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, or, the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitates.'*[19]

Hence, not only must there be general practice of certain acts but States must feel a legal obligation to practice these acts for them to be considered customary law.

Thus, to amount to customary law, a general practice has to be acknowledged as 'law' by a sufficient number of states. States can acknowledge this through:

i) International Court decisions (this is more persuasive as International Courts do not constitute State practice)
ii) Various UN resolutions/declarations stating it as Customary law
iii) Official statements and actions by States declaring they consider it part of customary law
iv) National Court decisions affirming certain rights as customary law
v) Expert research and findings that identify a right as part of customary international law (this illustrates that a sufficient number of States accept a general practice as law)[20]

The most significant feature of customary law is that it is binding on all parties whether they're accepting of it as a legal standard or not. Thus, even if a State refuses to ratify a treaty, which embodies recognized customary law it still remains bound by that customary law. This is confirmed in Article 43 of the Vienna Convention on the Law of Treaties 1969 which states that the denunciation of a treaty 'shall not in anyway impair the duty of any State to fulfill any obligation embodied in the treaty to which it would be subject under international law independently of the treaty.'

Under the body of evidence required to establish customary law, the right against racial non-discrimination qualifies as customary law. Firstly, some academics believe that the human rights contained in the UN Charter 1945 and the Universal Declaration of Human Rights 1948 have became widespread State practice and *opinio juris* and should, therefore, be considered as customary law.[21] This has been confirmed by the ICJ in the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*[22] where the

Court stated that the 'denial (by South Africa) of fundamental human rights is a flagrant violation of the purposes and the principles of the Charter.'[23] The ICJ went further in *United States Diplomatic and Consular Staff in Tehran*[24] to say that, specific to this case, a breach of freedom was not only against the principles of the Charter but 'the fundamental principles enunciated in the Universal Declaration of Human Rights.'[25]

Several national cases also confirm that human rights in the Charter and Universal Declaration are customary law. In *Filartiga, Rodriguez-Fernandez v Wilkinson*[26] a Federal US District Court cited several sources of international law, including the Universal Declaration, in making its decision. The Court found these instruments, 'indicative of the customs and usages of civilized nations.'[27]

The UK case of *Ahmad Inner London Education Authority*[28] specifically illustrated that the human rights contained in the UN Charter were binding regardless of State denunciation. In this case, Justice Scarman upon studying the obligations the UK had under the UN Charter stated:

> ...It is no longer possible to argue that because of the international treaty obligations of the United Kingdom do not become law unless enacted by Parliament our courts pay no regard to our international obligations (rather,) they will interpret statutory language and apply common law principles, wherever possible, so as to reach a conclusion consistent with our international obligations.[29]

That the human rights in the UN Charter is considered customary law is also illustrated by non-member states' behavior such as that of the former East and West Germany who had accepted the principles of the Charter prior to their UN membership.[30] The duty of States to comply with the UN Charter is also illustrated by UN resolutions in times of conflict, for example in the prolonged dispute between Israel and Palestine. [31]

The widespread consensus that human rights in the Universal Declaration are customary law was documented in 'A Survey of International Law'[32] prepared by the UN Secretary-General for the International Law Commission in which it was stated that the Declaration had become a yardstick by which to measure human rights standards and observations and that it had been re-affirmed in a series of other instruments. The report concluded that:

> Many national constitutions adopted since 1948 embody an endorsement of the Declaration or reflect its provisions, and numerous conventions include or refer to its articles. Besides being incorporated in acts of national legislation and cited before national tribunals, it has been used in United Nations resolutions and declarations, and in the constitutive instruments of international organizations.'[33]

Hence, there is a prevalent belief amongst States that the Universal Declaration on Human Rights and the human rights contained in the UN Charter are customary law.

The right to racial non-discrimination is contained in Article 55(c) of the UN Charter, which reads:

> With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote...(c) universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.

Article 2 of the Universal Declaration contains the right to racial non-discrimination in the following form:

> Everyone is entitled to all the rights and freedoms set forth in this declaration, without

> distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

Thus, if the human rights contained in the Charter and the Universal Declaration are customary law then it follows that the right to racial non-discrimination is also customary law.

The next question becomes, what is the scope of the right to racial non-discrimination as customary law. In following this paper's argument thus far, at a minimum, the scope and standard of the right to racial non-discrimination is as it appears in the UN Charter and the Universal Declaration, but there is some argument that CERD is in fact a codification of the customary right to racial non-discrimination and, thus, CERD sets the most appropriate standards for this human right in customary law.[34] However, this argument is beyond the scope of this paper as it concerns the relationship between international conventions in-general and customary law. Hence, for the purposes of this paper, the extent of the right to racial non-discrimination exists in customary law to the extent in which it exists in the UN Charter and the Universal Declaration of Human Rights.

## 3. Applying the Law to the Facts: Do aspects of Fiji's Parliamentary and Electoral Systems amount to Racial Discrimination

The question to be determined here is whether aspects of Fiji's parliamentary and electoral systems amount to racial discrimination. The aspects to be assessed are:

**A** Fiji's ethnically-based House of Representatives electoral system and
**B** The protection of Fijian interests in the Senate

First this paper will assess whether the above aspects of Fiji's parliamentary and electoral systems violate CERD, which is the foremost international convention concerning racial discrimination. Secondly, this paper will assess whether the mentioned aspects of Fiji's electoral and parliamentary systems violate international customary law.

### A.
### Is Fiji's ethnically-based electoral system racially discriminatory under the International Convention of Elimination of All Forms of Racial Discrimination (CERD)?

Fiji accessioned CERD in 1973. On accessioning CERD, Fiji made several reservations and declarations concerning Articles 2,3,4,5,6,15 and 20.

In order to determine whether Fiji's ethnically-based electoral system amounts to racial discrimination under Article 1(1) of CERD, the five questions identified previously, need to be asked.

***i. Does Fiji's ethnically-based electoral system make distinctions on the basis of race?***

Yes, Fiji's electoral system has a communal voting system and racially-designated seats. The current Fijian Constitution establishes that the House of Representatives is to comprise of 75 members, 46 of whom are elected by ethnic rolls and 25 by open rolls. The 25 open seats are available for candidacy by any ethnic group. As to the 46 communal seats, the break down is as follows: 23 Fijians, 19 Indians, 1 Rotumans and 3 others.

***ii. Does this distinction have the purpose or effect of impairing the exercise of a fundamental***

***human right or freedom?***

Equal political participation is recognized as a fundamental freedom by a number of international conventions and declarations, including Article 21 of the Universal Declaration of Human Rights and Article 25 of the International Covenant of Civil and Political Rights 1966. This is further re-iterated in Article 5 of CERD, which states that:

> ...State parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee to everyone, without distinction as to race, colour or national or ethnic origin, to equality before the law, notably in the enjoyment of...5(c) political 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 Government.

The numerical distribution of seats in Fiji's ethnically-based electoral system effectively inhibits equal participation in the political process. Of the racially-designated seats, Fijians are allocated 23 seats, Indians 19, Rotumans 1 and Others 3. Thus, non-indigenous Fijians cannot contest the same number of electorates nor vote in the same number of electorates as Fijians. Further, though these allocations may be proportional to the various ethnic populations, the nature of Fijian party politics means that Fijians are effectively given preference as to the formation of Government, at the disadvantage of all other ethnic groups.

Due to the implementation of an ethnically-based electoral system since colonialism and the ethnic friction in Fiji over the years, Fijian party politics is split along racial lines, especially between the two largest ethnic groups; the Fijians and the Indians. This reality means that Fiji's electoral system gives Fijian parties and, therefore, Fijian individuals (either directly or through their representatives) a higher probability of participating in Government than Indo-Fijian individuals. Hence, the Government in Fiji usually consists of Fijians while the Opposition of Indians. This means the political right of Indians and other minority ethnicities to partake in Government is rendered unequal through the operation of Fiji's electoral system.

Thus, the distinction made by Fiji's electoral system through its racially-designated House of Representative seats results in; firstly, the impairment of non-indigenous Fijians rights to stand for elections and vote in universal and equal suffrage as a larger number of seats are reserved for Fijian candidates and voters than non-indigenous ones. Hence, non-indigenous persons cannot stand for elections in as many electorates as Fijians and in voting along racial lines, non-indigenous persons do not have the same number of representatives as Fijians.

Secondly, Fiji's ethnically-based electoral system impairs non-indigenous Fijians' right to partake in Government. Communal seats have ensured that to get votes candidates need to endear themselves to their electorate, hence, resulting in race-specific policy. They have also meant that political parties are formed along race lines to capture electorates and with 50% of communal seats allocated to Fijians, Fijian parties are most likely to form Government. Since these parties create policies along racial lines, it follows that if a Fijian party is in Government then it strongly represents Fijian interests, thus, Indian Fijians and other non-indigenous groups are alienated from participating in Government.

***iii. Are these distinctions unreasonable and arbitrary?***

Following Fiji's submission in 2002 of its 6-15$^{th}$ Periodic Report[35] to the Committee on the Elimination of Racial Discrimination, Fiji's representative Mr Mataitoga was questioned by the Committee as to reasons for Fiji's ethnically-based electoral system. Mr Mataitoga stated that, 'The Government had many reasons to maintain the electoral system currently in place, since it was aware that the primary objective was to determine the political framework that was most suitable to the Fijian context in order to enable all ethnic and religious communities to co-exist in peace.'[36]

Mr Mataitoga then drew the Committee's attention to the 'very detailed report' about Fiji's electoral system that had been distributed to them. The 'detailed report' refers to Fiji's 6-15th periodic report where at paragraph 115 it states, 'This system of communal voting was established in colonial times and was continued in the 1970 Independence Constitution, through the 1990 Constitution and the 1997 Constitution.' In a footnote to paragraph 115 the report refers the reader to Fiji's Core Document[37] for a description of the sharing of seats in the House of Representatives on a communal basis. The Core Document discusses reasons for Fiji's ethnically-based electoral system at Independence but fails to articulate any reasons for its maintenance of the system, 30 or so years later. This leads to the assumption that the Government's maintenance of racially-designated seats for the House of Representatives are for much the same reasons as those articulated by Fiji at Independence.

The reasons for Fiji's ethnically-based electoral system at Independence were; firstly, fear that an open electoral system may result in extended power of the country's economically dominant ethnic group, the Indians, and that this would result in the marginalism of other groups, especially the Fijians. Secondly, fear that the so-called 'doctrine of Fijian paramountcy,' which makes Fijian land interests and customary practice inalienable, would be abolished.

Therefore, the question is; are the racially motivated provisions of Fiji's electoral system justified? That is, are they valid affirmative action or are they unreasonable and arbitrary. The test for what is 'unreasonable and arbitrary' is the proportionality test[38], which operates through the determination of two important questions:

a. Are the aims legitimate
b. Is differentiation appropriate to achieve those aims[39]

In this case the Fijian Government's aim as expressed by Mr Mataitoga is to allow all ethnicities within Fiji to exist in peace by ensuring equal representation and protecting Fijian land rights and customs. This is clearly a legitimate aim, however, the second question is the contentious one. Is the differentiation appropriate to achieve this aim. In other words, are ethnically-based electoral seats an appropriate way to create a more equal society within Fiji and protect indigenous rights?
Changes in Fiji since Independence have meant that Fijians are now the largest ethnic group in Fiji. Thus, racially-designated seats only consolidate Fijian dominance in the political system. Instead of creating a fairer system where there is no dominance by one group as was initially intended, the racially-designated seats only serve to protect Fijian political dominance. Also, the nature of Fijian politics means that Fijian representatives are most likely to form Government at the exclusion of other ethnic groups. Thus, the racially-designated electoral system is not proportional to the aim of equal representation of all Fijian ethnicities and can, therefore, be seen as unreasonable and arbitrary.

Though the protection of Fijian land rights and customs is a legitimate aim, the Fijian Constitution already protects indigenous traditions. In Chapter 2 of the Constitution, which establishes principles for the conduct of government, Section 6(j) states:

> In those negotiations, the paramountcy of Fijian interests as a protective principle continues to apply, so as to ensure that the interests of Fijian community are not subordinated to the interests of other communities.

This principle is applied subject to other Constitutional provisions and law and there are several such Constitutional provisions and legislation which protect Fijian interests. In law, Fijian interests are protected by the Native Title Land Trust Act 1941 (as amended in 2002) under which 80% of Fiji's land mass is owned under native title.[40] As to Constitutional provisions, Section 38(8) states that law or administrative actions may limit other rights and freedoms established in the same section for the purposes of protecting Fijian customs, especially relating to land and fishing rights. Further, Section 186 of the

Constitution states in relation to parliamentary legislation that, 'Parliament must make provision for the application of customary laws for dispute resolution in accordance with traditional processes' and have regard to indigenous customs when doing so. Fijian interests are further protected by the role of the Great Council of Chiefs, which is recognized under Section 116 of the Constitution.

Thus, Fijian interests are well protected in domestic law to an extent where enduring political dominance is not required for further protection; therefore, ethnically-designated seats in their effect can be seen as a disproportionate means to the objective of protecting indigenous interests. This renders Fiji's ethnically-designated electoral system unreasonable and arbitrary.

Fiji's racially-designated electoral system though legitimate in its aim, of creating a equal and harmonious society within Fiji and amongst its different ethnic groups, by ensuring equal political participation and protection of indigenous rights, has proven to be a disproportionate measure to the aim and, therefore, an unreasonable and arbitrary measure. Thus, differentiation in the form of a racially-designated electoral system in Fiji's case is not justifiable and is, on considerations made so far, racially discriminatory.

The conclusions drawn by this paper as to the racially discriminatory nature of Fiji's electoral system were also expressed by the Committee on the Elimination of Racial Discrimination at Fiji's submission of its 10-15$^{th}$ periodic. The appointed Rapporteur for Fiji, Ms January Bardill reported concern that the ethnically-designated seats in Fiji's electoral system were racially discriminatory in effect if not intent.[41] At the same meeting a member of the Committee Mr Tang Chengyuan recommended that in order to create equality in Fiji, Indians should be given more political power whilst Fijians should be helped to raise their standard of living. Mr Chengyuan further stated that it was not possible to claim that there is no racial discrimination in Fiji.

Ms January Bardill further stated, at a continuation of the review, that to enable equal power sharing among the different ethnicities in Fiji, that Fiji should allow greater participation by non-indigenous groups in the decision-making process. Ms Bardill stated that she feared that politicisation of ethnicity in Fiji 'would re-enforce the tendency towards ethnic hegemony.'[42] The concluding observations on Fiji's 10-15$^{th}$ periodic reports[43] by the Committee of Elimination of Racial Discriminations confirmed Ms Bardill's concerns, stating that it was particularly concerned with Fiji's reservations to CERD including that to Article 5 of CERD and recommended that Fiji withdraw its reservations. The Committee also encouraged Fiji to 'address perceptions that the State party continues to politicise culture, identity and ethnicity in order to maintain indigenous Fijian hegemony.'[44] None of the recommendations made by the Committee are binding.[45]

Fiji submitted its 16th periodic report in June of this year. It is yet to be considered by the Committee of Elimination of All forms of Racial Discrimination.

***iv. Are there any relevant reservations or declarations to be considered?***

On considerations made so far, Fiji's electoral system would amount to racial discrimination under CERD. However, a final consideration has to be given to any relevant reservations or declarations made to CERD by Fiji.

In ratifying CERD, Fiji made a reservation to Article 5(c) of CERD stating:

> To the extent, if any, that any law relating to elections in Fiji may not fulfill the obligations referred to in Article 5(c)...the Government of Fiji reserves the right not to implement the aforementioned provisions of the Covenant.

Fiji's reservations to Article 5(c) is valid as it does not violate Article 20(2) of CERD which states that; a

reservation considered incompatible with the objectives of the Convention will not be permitted nor a reservation that inhibited the operation of the bodies established by the Convention. A reservation was 'considered incompatible or inhibitive if at least two thirds of the States parties to this (the) Convention object to it.' There has been no such finding against the State of Fiji.

Fiji's reservation to Article 5(c) means that any finding of racial discrimination against Fiji's electoral system regarding political rights will be invalid under Fiji's ratification of CERD.

***Is Fiji's ethnically-based electoral system racially discriminatory under International Customary Law?***

Fiji's electoral system can, however, be challenged as racially discriminatory under international customary law. As previously stated, the exact standards of racial discrimination under customary law are vague, but on the evidence that the Universal Declaration of Human Rights and the human rights in the UN Charter are considered international customary, at a minimum, the right to racial non-discrimination exists as customary law under Article 55(c) of the UN Charter and Article 2 of the Universal Declaration.

Article 2 of the Universal Declaration states that everyone is entitled to the fundamental freedoms listed within the Declaration without any distinction of race. One of the fundamental freedoms contained within the Universal Declaration is that of political participation under Article 21. Thus, under the Universal Declaration everyone is entitled to political participation without discrimination as to race.

If the effect, rather than merely the purpose, of Fiji's racially-based electoral system is considered, then non-Indigenous Fijians are not afforded the equal right to participate in Government which would be a violation of both Articles 2 and 21 of the Universal Declaration.

In following this paper's argument of the Universal Declaration being part of customary law, a violation of Article 2 of this instrument means that Fiji's ethnically-based electoral system is racially-discriminatory under customary law.

Under the UN Charter, Article 55(c) provides for the respect of human rights and fundamental freedoms without distinctions as to race. Although the UN Charter itself does not enlist what it considers to be fundamental freedoms, it is fair to assume the same fundamental freedoms as those stated in the Universal Declaration as the Universal Declaration was built upon the Charter's affirmation of faith in fundamental human rights. This can be deduced from the Universal Declaration's preamble.

Again, political participation is a fundamental freedom under the Universal Declaration; therefore, Article 55(c) can be re-stated as providing freedom of political participation without distinction as to race. Upon this basis, Fiji's ethnically-based electoral system is in violation of Article 55(c) of the UN Charter in its operational effect as it fails to respect non-Indigenous Fijian rights to partake in Government.

As this paper has argued, the human rights contained in the UN Charter are considered customary law, therefore, Fiji's ethnically-based electoral system in violating Article 55(c) of the Charter, is racially discriminatory under international customary law.

***B.***

***Does the protection of Fijian interests in the Senate amount to racial discrimination?***

Fiji's Senate is said to protect Fijian interests due to the role of the Great Council of Chiefs. The Great Council of Chiefs is made up of traditional Fijian Chiefs and several qualified commoners. The Fijian

Constitution recognizes the Great Council of Chiefs under Section 116 and the Council has several Constitutional duties. They include, consulting with the Prime Minister to appoint the President and advising the President on the appointment of 14 Senators. It must be noted that the Fijian Senate only has the power to debate and delay legislation.

Whether the Council's role amounts to racial discrimination will be considered first under CERD and then under international customary law.

**Does the protection of Fijian interests in the Senate amount to racial discrimination under the International Convention of Elimination of All Forms of Racial Discrimination (CERD)?**

In order to determine whether the protection of Fijian interests in the Senate amounts to racial discrimination under Article 1(1) of CERD, the four main questions identified previously need to be asked:

***i. Does the protection of Fijian interests in the Senate system make distinctions on the basis of race?***

Yes, because Fijian interests are protected to the exclusion of other ethnicities.

This is because the Great Council of Chiefs, which consists only of Fijians, advises the Prime Minister as to the appointment of the President and then the President as to appointment of 14 of the 32 Senators in the upper house. Since the Great Council of Chiefs exists under the Fijian Affairs Act, its role is to represent Fijian interests, therefore, logically, in advising on the appointment of the President and Senators, the Council will recommend candidates that best represent Fijian interests. No similar considerations are afforded to other ethnic groups. Thus, Fijian interests are furthered and protected to the exclusion of other ethnicities, a clear distinction on the basis of race.

***ii. Does the distinction have the purpose or effect of impairing the exercise of a fundamental right or freedom?***

In advising the appointment of the President and 14 Senators of the upper house, the Great Council of Chiefs is most certain to appoint Fijians, thus, impairing non-Indigenous Fijians' right to equal political participation under Article 5(c) of CERD.

Also, due to the lower house electoral system, the Government is likely to be led by Fijians, thus, the 9 Senators appointed by the Prime Minister are likely to be Fijians, therefore, in a upper house of 32 Senators, 23 of those Senators are most likely Fijians. This also impairs non-Indigenous Fijians' political rights, in this instance, their right to equal political representation.

***iii. Are these distinctions unreasonable and arbitrary?***

To determine whether the protection of Fijian interests through the appointment of the President and 14 Senators on the advise of the Great Council of Chiefs is unreasonable or arbitrary, the proportionality test must be used. Therefore, are the aims of this act/s legitimate and is differentiation appropriate to achieve those aims?[46]

The main reason for the Great Council of Chiefs' role in appointing the President and Senators is the protection of Fijian rights. Prima facie, protecting Fijian or indigenous rights is a legitimate aim. However, is this differentiation appropriate to protect Fijian rights?

Fijian land rights and customs are sufficiently protected by the principle established in Chapter 2, Section 6(j) of the Fijian Constitution, which states that in Government negotiations, Fijian interests are to remain paramount. This principle is applied subject to other Constitutional provisions and law and there are several such Constitutional provisions and legislation which protect Fijian interests. In law, Fijian interests are protected by the Native Title Land Trust Act 1941 (as amended in 2002) under which 80% of Fiji's land mass is owned under native title.[47] As to Constitutional provisions, Section 38(8) states that law or administrative actions may limit other rights and freedoms established in the same section for the purposes of protecting Fijian customs, especially relating to land and fishing rights. Further, Section 186 of the Constitution states in relation to parliamentary legislation that, 'Parliament must make provision for the application of customary laws for dispute resolution in accordance with traditional processes' and have regard to indigenous customs when doing so.

Therefore, the role of the Great Council of Chiefs in appointing the President and Senators is in excess of the aim to protect Fijian interests. Thus, the protection of Fijian interests in the Senate is unreasonable and arbitrary and in being so, amounts to racial discrimination under Article 1(1) of CERD subject to any relevant reservation by Fiji.

***iv. Are there any relevant reservations or declarations to be considered?***

Final consideration must be given to Fiji's reservations to CERD. Again, Article 5(c) is not recognized by Fiji in relation to its electoral process. Therefore, under Fiji's ratification of CERD, violations of Article 5(c) are acceptable; hence, the protection of Fijian interests in the Senate does not amount to racial discrimination under Fiji's ratification of CERD.

**Does the protection of Fijian interests in the Senate amount to racial discrimination under Customary Law?**

In following this paper's argument that the Universal Declaration of Human Rights and the human rights in the UN Charter amount to customary law, the protection of Fijian interests in the Senate would be a violation of customary law if it breaches Article 2 of the Declaration and Article 55(c) of the Charter.

The facts are that in advising the appointment of the President and 14 Senators of the upper house, the Great Council of Chiefs is most certain to appoint Fijians, thus, impairing non-Indigenous Fijians' right to equal political participation. Also, due to the lower house electoral system, the Government is likely to be led by Fijians, thus, the 9 Senators appointed by the Prime Minister are likely to be Fijians, therefore, in a upper house of 32 Senators, 23 of the Senators are most likely Fijians. This further impairs non-Indigenous Fijians' political rights, in this instance, their right to equal political representation.

The right to equal political participation and representation is recognized as a fundamental freedom in Article 21 of the Universal Declaration. Therefore, its denial on the basis of race is a clear violation of Article 2 of the Universal Declaration, which prohibits the denial of fundamental freedoms on the distinction of race. Hence, by breaching the Universal Declaration, the protection of Fijian interests in the Senate is in violation of customary international law against racial-discrimination.

Under the UN Charter, Article 55(c) provides for the respect of human rights and fundamental freedoms without distinctions as to race. Assuming the same fundamental freedoms as those stated in the Universal Declaration, as the Declaration was built upon the Charter's affirmation of faith in fundamental human rights, the protection of Fijian interests in the Senate would violate Article 55(c), hence, a violation of the right to racial non-discrimination under customary law.

## 4. CONCLUSION

Racial non-discrimination is recognized in international law through both treaties and customary law.

Fiji's ethnically-based electoral system for the House of Representatives would amount to racial discrimination, as defined in Article 1(1) of the International Convention on the Elimination of all Forms of Racial Discrimination, but for Fiji's reservation to Article 5(c). However, on the argument that the human rights within the UN Charter and the Universal Declaration of Human Rights have become recognised as international customary law, Fiji's ethnically-based electoral system is in violation of the right to racial non-discrimination clauses in both the Charter (Article 55(c)), and the Universal Declaration (Article 2). Hence, Fiji's electoral system would amount to racial discrimination under customary law.

The Fijian Senate's protection of Fijian interests, through the Great Council of Chief's advice on appointment of the President and 14 Senators would also amount to racial discrimination under CERD but for Fiji's reservation to Article 5(c) of CERD. The protection of Fijian interests in the Senate does, however, violate Articles 2 and 55(c) of the Universal Declaration of Human Rights and the UN Charter, respectively. Therefore, on the argument that the human rights within these instruments amount to international customary law, the protection of Fijian interests in the Senate amounts to racial discrimination under international customary law.

---

[1] HRI/CORE/1/Add.122 (25 November 2002)

[2] ibid

[3] Lawson, S "Nationalism versus Constitutionalism in Fiji" (2004) 10(4) *Nations and Nationalism* 519, 524 ELECTRONIC *Expanded Academic ASAP* (6 May 2006)

[4] Id, 526

[5] Id, 528

[6] *Statute of the International Court of Justice*, 26 June 1945, 59 Stat. 1005, T.S. 993

[7] Martin, Francisco Forrest et al *International Human Rights Law and Practice* (The Hague, The Netherlands: Kluwer Law International, 1997) 26

[8] Article 59 states: The decision of the Court has no binding force except between the parties and in respect of that particular case.

[9] Bronlie, Ian, *Principles of Public International Law,* 1990, 3-4 quoted in Martin, Francisco Forrest et al *International Human Rights Law and Practice* (The Hague, The Netherlands: Kluwer Law International, 1997) 26

[10] Williams, S.A & de Mestral, A.LC *An Introduction to International Law* (Toronto: Butterworths, 1987) 306-321

[11] *Simunek, Hastings, Tuzilova and Prochazka v. The Czech Republic,* Communication No. 516/1992 (19 July 1995), U.N. Doc. CCPR/C/54/D/516/1992 (1995)

[12] *Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica,* Advisory Opinion OC-4/84 (19 July 1984), Inter-Amer. Ct. H.R. (Ser. A) No. 4 (1984)

[13] ***F. H. Zwaan-de Vries** v. **the Netherlands***, Communication No. 182/1984 **(**9 April 1987**),** U.N. Doc. Supp. o. 40 (A/42/40) at 160 (1987); ***Simunek, Hastings, Tuzilova and Prochazka v. The Czech Republic,*** above n 11

[14] *Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica,* Advisory, above n 12; The *North Sea Continental Shelf Cases (FRG/Den.; FRG/Neth.)* 1969 ICJ Rep. 3; *Belgium Linguistics Case,* 6 Eur. Ct. H.R. (Ser. A) (1968)

[15] Butterworths, *Concise Australian Legal Dictionary* 2nd Ed, 'Customary international law' [110]

[16] *Columbian-Peruvian Asylum Case* 1950 ICJ Rep. 266

[17] Id, 276

[18] The *North Sea Continental Shelf Cases (FRG/Den.; FRG/Neth.)* 1969 ICJ Rep. 3

[19] Id, 44

[20] *Military and Paramilitary Activities in and against Nicaragua* Merits 1986 ICJ Rep. 14; *Legal Consequences for States of the continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)* 1971 ICJ Rep. 16; Cassese, A, 'The Geneva Protocols of 1977 on the Humanitarian Law of Armed Conflict and Customary International Law' (1984) 3 *UCLA Pac. Basin LJ* 55, 67; Schachter, Oscar *International Law in Theory and Practice* (The Netherlands: Martinus Nijhoff Publishers, 1991) 335-342

[21] Sohn, L. B, The *New International Law: Protection of the Rights of Individuals Rather Than States* 32 AM.U.L Rev. 1 (1982) quoted in Martin, Francisco Forrest et al *International Human Rights Law and Practice* (The Hague, The Netherlands: Kluwer Law International, 1997) 26; Schachter, Oscar, 'International Law Implications of U.S Human Rights Policies' (1978) 24 *NYL School of Law Review* 63, 68 quoted in Martin, Francisco Forrest et al *International Human Rights Law and Practice* (The Hague, The Netherlands: Kluwer Law International, 1997) 26

[22] Above, n 20

[23] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970),* above n 20, 57

[24] *United States Diplomatic and Consular Staff in Tehran* 1980 ICJ Rep. 3

[25] Id, 42

[26] *Filartiga, Rodriguez-Fernandez v Wilkinson* 1981 654 F. 2d

[27] Id, 797

[28] *Ahmad Inner London Education Authority* [1977] 3 WLR 396

[29] Id, 406

[30] Czapliński, W, "Sources of International Law in the Nicaragua Case" (1989) 38(1) *The International and Comparative Law Quarterly,* 151, 157Electronic *JSTOR* (8 September 2006)

[31] Ladah, Michael S, Ailouni, Suleiman I, "Mr Bush, What about Israel's defiance of UN Resolutions: An open letter to George Bush," *Media Monitors Network* (September 29 2002) < http://www.mediamonitors.net /michaelsladah&suleimaniajlouni1.html> (8 September 2006)

[32] UN Doc. A/CN.4/245 (23 April 1971)

[33] Id, 196-197

[34] Sohn, L.B, 'Generally accepted International rules' (1986) 61 *Wash. L. Rev.* 1073, 1077-1078 quoted in Martin, Francisco Forrest et al *International Human Rights Law and Practice* (The Hague, The Netherlands: Kluwer Law International, 1997) 86

[35] HRI/CORE/1/Add.122 (25 November2002)

[36] CERD/C/SR.1567 (1July 2003) para 24

[37] HRI/CORE/1/Add.122 (25 November 2002)

[38] *Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica,* Advisory Opinion OC-4/84 (19 July 1984), Inter-Amer. Ct. H.R. (Ser. A) No. 4 (1984)

[39] Fredman, Sandra (ed), *Discrimination and Human Rights* (New York: Oxford University Press, 2001) 30

[40] HRI/CORE/Add.122 (25 November 2002) para 58

[41] CERD/C/SR.1566 (17 March 2003) para 16

[42] CERD/C/SR.1567 (1July 2003) para 29

[43] CERD/C/62/CO/3 (2 June 2003)

[44] Id, para 13

[45] Ingles, J, *Study on the Implementation of Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination,* 1983, para 224 quoted in Meron, Theodor, *Human Rights and Humanitarian Norms as Customary Law* (New York: Oxford University Press, 1989), 22

[46] Fredman, Sandra (ed), *Discrimination and Human Rights* (New York: Oxford University Press, 2001), 30

[47] HRI/CORE/Add.122 (25 November 2002) para 58