



# FIJI HUMAN RIGHTS COMMISSION

GPO Private Mail Bag  
SUVA, FIJI ISLANDS

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## **Bill of Rights in the 1997 Constitution: 19<sup>th</sup> century constitutional foundations**

By **Dr Shaista Shameem**,  
Chairperson,  
Fiji Human Rights Commission.

### **Introduction**

In our quest for local origins and sources of Fiji's human rights laws and principles, we were recently able to obtain copies of the 1871 and 1873 Constitutions of the Kingdom of Fiji. These Constitutions were remarkable, not only for establishing the basis of rights in pre-Cession Fiji, but also for the careful way in which rights provisions, particularly those in the 1873 Constitution, were drafted, debated by parliament, and adopted by consensus. In view of discussions currently taking place among Fiji's people on civil rights, democratic representation and the place of traditional leadership in the modern world, we need to remind ourselves of the importance of these 19<sup>th</sup> century constitutional documents, and to carefully consider their relevance to the Bill of Rights provisions in the 1997 Constitution.

### **The 1871 Constitution Act**

Fiji's written history often presumes that European influence underpinned traditional Fijian leadership in the 19<sup>th</sup> century, which in turn determined the formation of central governments between 1860 and Cession. However, an analysis of Fiji's past from a constitutional standpoint indicates quite the opposite. The issue of indigenous sovereignty was really at the heart of constitutional developments during this turbulent decade. Despite all efforts to dislodge him from his position, King Cakobau nevertheless consolidated his authority in Fiji through the development of the concept of constitutional monarchy. He thus outwitted the Ku Klux Klan, among others, who wanted a 'white republic'.

The Constitution Act of 1871 confirmed Fiji's status as a constitutional monarchy. Articles XXVI- XLI of the Constitution firmly established the position of King Cakobau as sovereign. This was explicitly expressed in Article XXXV:

The King is Sovereign of all the Chiefs and of all the People. The Kingdom is his.

Yet, despite such authoritative vesting of sovereignty in the person of the King, the most remarkable aspect of the 1871 Constitution were the series of Articles describing civil and political rights of individuals. These might have been derived from the American Bill of Rights, the Magna Carta, the 1689 Bill of Rights of Great Britain, and the French Declaration of the Rights of Man and of the Citizen, but the Kingdom of Fiji's own unique constitutional flavour was thrown in as well.

The following, Articles II –XIV of the 1871 Constitution Act, which was later replaced by the (similarly rights-based) 1873 Constitution, shows the remarkable range of rights that were available in the Kingdom of Fiji just before Cession:

**Article II**

God hath endowed all men with certain inalienable rights; among which are life liberty and the right of acquiring, possessing and protecting property, and of pursuing and obtaining safety and happiness.

**Article III**

All men are free to worship God according to the dictates of their own consciences; but this sacred privilege hereby secured shall not be so construed as to justify acts of licentiousness, or practices inconsistent with the peace or safety of the Kingdom.

**Article IV**

All men may freely speak, write and publish their sentiments on all subjects, being responsible for the abuse of that right, and no law shall be enacted to restrain the liberty of speech, or of the Press, except such law as may be necessary for the protection of His Majesty the King and the Royal Family.

**Article V**

All men shall have the right, in an orderly and peaceful manner, to assemble without arms, to consult upon the common good, and to petition the King or Legislative Assembly for redress of grievances.

**Article VI**

The privilege of the writ of Habeas Corpus belongs to all men, and shall not be suspended, unless by the King in Council when in cases of rebellion or invasion the public safety shall require its suspension.

**Article VII**

No person shall be subject to punishment for any offence, except on due and legal conviction thereof, in a Court having jurisdiction of the case

**Article VIII**

No person shall be held to answer for any crime or offence (except in cases of impeachment or for offences within the jurisdiction of a Police or District Justice, or in summary proceeding for contempt), unless upon indictment, fully and plainly describing such crime or offence; and he shall have the right to meet the witnesses who are produced against him face to face; to produce witnesses and proofs in his own favour; and by himself or his counsel, at his election, to examine the witnesses produced by himself, and cross-examine those produced against him, and to be fully heard in his defence.

**Article IX**

No person shall be required to answer again for an offence, of which he has been duly convicted, or of which he has been duly acquitted upon a good and sufficient indictment

**Article X**

No person shall be compelled in any criminal case to be a witness against himself nor be deprived of life, liberty or property without due process of law

**Article XI**

No person shall sit as judge or juror in any case in which his relative is interested either as plaintiff, or defendant, or in the issue of which the said judge or juror may have either directly or through a relative, any pecuniary interest.

**Article XII**

Involuntary servitude, except for crime, is forever prohibited in this Kingdom; whenever a slave shall enter the Kingdom of Fiji he shall be free

**Article XIII**

Every person has the right to be secure from all unreasonable searches and seizures of his person, his house, his papers, and effects; and no warrants shall issue but on probable cause, supported by oath or affirmation, and describing the place to be searched, and the persons or things to be seized.

**Article XIV:**

The King conducts his Government for the common good; and not for the profit, honor or private interest of any one man, family, or class of men among his subjects.

The rest of the Articles in the 1871 Constitution set out technical provisions on taxation guidelines, representation in the Legislative Assembly, judicial matters, and so on.

## **1873 Constitution**

Neither the 1871 Constitution nor, more particularly, its successor, the 1873 Constitution, seems to have been drafted merely to protect the rights of Europeans in a fragile indigenous Kingdom as is commonly assumed, though views of people such as David Wilkinson and JB Thurston were undoubtedly held in high esteem by King Cakobau and other senior chiefs.

An extract in the Fiji Times of October 1<sup>st</sup> vividly described the intricate process involved in adopting the ‘new Constitution’ of 1873. It reported that the chiefs fully discussed the Fijian language version of the 1873 before formally adopting it on 27<sup>th</sup> September 1873. The Times recounted the event thus:

“The new Constitution, after having been elaborately discussed- and a good deal altered in some respects- by the Privy Council, was finally adopted by that body and assented to by the King...The Council was attended by fifteen of the great chiefs- the ruling princes under the old state of things of the Fijian nation....When the King had taken his seat, the Constitution was presented to him for his assent, by the Governor of the Central Province (Ratu Savenaca) but His Majesty directed that it should be first read from beginning to end... After the reading was over, nearly all the high chiefs addressed the King, and the King wound up by himself addressing the assembled chiefs...The speeches consisted chiefly of comment upon past events, upon the failure of the old Constitution, the aggressive spirit of the whites, the threats and attempts to deprive the native race of their civil rights, and the insult given to the King by the men who forced their way into his presence and threatened to de-throne him unless he did just what they wished, the threats of foreign interference and ‘annexation’, and the better prospects which were afforded by the new Constitution, which they (the chiefs) had themselves revised, section by section, and thoroughly understood.”

The 1873 Constitution contained civil rights provisions which were identical in most respects to those contained in the Constitution of 1871. The only significant deletion from the 1873 Constitution was the provision on freedom of the Press. This had been specifically protected under Article IV of the 1871 Constitution but was pointedly missing from the general freedom of expression provision, Article III, of the 1873 Constitution. We can only speculate about the reasons for its deletion!

## **Constitutions of the Kingdom of Fiji 1871/1873 and the 1997 Constitution of the Republic of Fiji: comparison of rights provisions**

The Bill of Rights provisions in the 1997 Constitution are remarkably similar to those in the Constitutions of 1871/1873. A simple comparison between our (republican) Constitution of 1997 and that of 1871 (reference is made only to this Constitution for convenience) shows the following Articles and Sections to be nearly identical in form, scope and function:

<b><u>1871 Constitution</u></b>	<b><u>1997 Constitution</u></b>
Article II	Sections 22, 23, 40
Article III	Section 35
Article IV	Section 30
Article V	Section 31
Article VI	Section 27
Article VII	Section 29
Article VIII	Section 28
Article IX	Section 28
Article X	Section 28
Article XI	Section 29
Article XII	Section 24
Article XIII	Section 26

Other elements of the 1871/1873 Constitutions have also found their way into the 1997 Constitution. For example, the duty of the King to conduct his Government for the common good, established by Article XIV of the 1871 Constitution and Article XIII of the 1873 Constitution, is similar in scope and function to the sovereign status of the President of Fiji contained in section 86 of the 1997 Constitution. The fact that the President of Fiji is appointed by the Council of Chiefs is an important constitutional consideration. Even more to the point, Article XXVII of both 1871 and 1873 Constitutions provided the King of Fiji with status of Commander in Chief of the Army and Navy. Section 87 of the 1997 Constitution provides the President of Fiji with the same designation.

In fact, the 1997 Constitution of the Republic of the Fiji Islands is similar in so many significant respects to the Constitutions of the Kingdom of Fiji pre-cession that one wonders if there was any meaningful break at all in our constitutional development, notwithstanding Cession, or indeed the Independence Act of 1970.

As far as Bill of Rights protection of the people and the duty of the Head of State to act in the common or public good are concerned, such resemblance should not be disregarded or overlooked. It provides a solid constitutional foundation for our modern Bill of Rights provisions, and links them to an important sovereign precedent.