

# NGO Coalition on Human Rights

## *Towards a Fiji that respects and protects human rights*

### NGOCHR Public Order (Amendment) Bill 2016 Submission

5 October 2016

The NGO Coalition on Human Rights (hereafter ‘the Coalition’) is a coalition of civil society organisations that works towards a Fiji that respects and protects human rights and fundamental freedoms within the framework of the rule of law.

The Coalition acknowledges the State’s proposed Public Order (Amendment) Bill 2016 (hereafter ‘the Bill’), and welcomes the opportunity provided by the Justice, Law & Human Rights Standing Committee to present a submission. While the Coalition recognises the need for legislation such as the Public Order Act, including the Bill before the Standing Committee, we submit herein suggestions for the improvement of the principle act, as well as a brief analysis of the proposed Bill, highlighting issues and an overview of recommendations for both the proposed Bill and the Principle Act.

Firstly, in calling for a review of the Public Order Act [Cap 20], our hope is that the Standing Committee will also take into account considerations raised within this submission. Particularly in the effort of ensuring that legislation pertaining to public order is balanced and pragmatic in its approach to safeguarding public order and citizen’s fundamental rights to *Freedom of Speech, Expression & Publication, Freedom of Assembly* and *Freedom of Association*, enshrined in sections 17, 18 and 19 respectively within Fiji’s 2013 Constitution. Secondly, by highlighting the issues from a human rights perspective of the proposed Bill we submit herein strong recommendations to improving its compliance to maintaining a balance between public order and the safeguard of Fiji’s human rights obligations.

The NGOCHR Secretariat, the Fiji Women’s Rights Movement makes this submission on behalf of the Coalition. This submission is made up of three parts: (1) brief highlight of concerns of the Public Order Amendment Decree 2012 in comparison to the 2013 Constitution and the International Covenant on Civil and Political Rights, (2) brief analysis of the proposed Bill and (3) recommendations to improving the compliance of the principle act as well as the proposed Bill.

#### **I. Brief highlight of concerns of the Public Order Amendment Decree 2012 in comparison to the 2013 Constitution and the International Covenant on Civil and Political Rights**

In making this submission, it would be remiss of the Coalition not to highlight the recent political arrests where several prominent political figures were detained over the weekend for political opinions shared at a NGO-organised panel, the week prior.

Your honourable Chair and fellow committee members, we submit herein that the restriction on political speech or on debates of questions of public interest, where there is no reasonable proof of incitement to violence, undermines true democracy. These recent arrests have highlighted this concern and brought public scrutiny on the Public Order Act and its Amendment made by decree in 2012 (Amendment decree in 2014 repealed sections 8,9, 11 and 11A of the Principle Act). Moreover it has highlighted that while the Principle Act and its amendments personify limitations to fundamental freedoms outlined in the 2013 Constitution- these restrictions need to be reasonable and proportionate in its application, to avoid contravening the spirit of the Bill of Rights, within the 2013 Constitution.

The Prime Minister, Frank Bainimarama, has made public remarks of Fiji's return to a true democracy.<sup>1</sup> The Public Order Amendment Decree (POAD) 2012, including that in 2014 provided substantive additions and changes to the Principle Act. As the arrests recently have indicated, some of the changes have been perceived as arbitrary in nature and in direct contravention to fostering a democratic culture in Fiji.

A democratic society calls for an environment that fosters a democratic culture. This calls for the respect of civil and political rights, encompassed in the International Convention on Civil and Political Rights (ICCPR), particularly Articles 19, 21 and 22, which are similar to sections 17, 18 and 19 (previously mentioned) in the Bill of Rights.

### ***The International Convention on Civil and Political Rights:***

#### ***Article 19***

- 1. Everyone shall have the right to hold opinions without interference.*
- 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.*
- 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:*
  - (a) For respect of the rights or reputations of others;*
  - (b) For the protection of national security or of public order (ordre public), or of public health or morals.*

#### ***Article 21***

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<sup>1</sup> The Fijian Government (2016) **HON PM BAINIMARAMA SPEECH AT THE WELCOME BANQUET FOR NZ PRIME MINISTER JOHN KEY** (6/9/2016) <http://www.fiji.gov.fj/Media-Center/Speeches/HON-PM-BAINIMARAMA-SPEECH-AT-THE-WELCOME-BANQUET-F.aspx> (Accessed 18/9/16)

*The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.*

## **Article 22**

*1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.*

*2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.*

*3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.*

These rights adhere to mutual respect and are bound by special duties and responsibilities. We respect the need for statutory powers on public order but reiterate an emphasis on rule of law subjected on the principle of necessity on the citizens that it governs.

## **II. Brief Analysis of the proposed Bill from a human rights perspective**

- a) Essentially States have a responsibility to protect people from becoming victims of a crime, including so-called acts of ‘terrorism’.
- b) While we acknowledge that States should investigate criminal offences including acts of ‘terrorism’ through a fair trial process, we note too that this is a highly politicised and emotional term. And rather it should suffice that it is covered under the criminal justice system.
  - Section 12P(2) which provides that the court must deal with the Minister’s application ex-parte (including other private administrative sittings) threatens the right to a fair trial safeguarded under sections 14-16<sup>2</sup> of the 2013 Constitution Bill of Rights.
  - Section 12P(3) lowers the burden of proof for serious crimes, which can foreseeably result in an arbitrary curtailment of freedom of expression, movement and association, to satisfied on reasonable grounds’ rather than the usual criminal threshold of ‘beyond reasonable doubt’.<sup>3</sup>

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<sup>2</sup> Section 14 *Rights of Accused Persons*, Section 15 *Access to Courts or Tribunals* and Section 16 *Executive and Administrative Justice*.

<sup>3</sup> The recent arrests of political commentators is an indicator of this.

- There is no specific section within the Bill that provide for clarity and process where an affected individual or organisation under section 12 can seek review of orders. This ambiguity can severely restrict rights of accused individuals or organisations.

The main challenge with ‘terrorism’ related offences is often they are considered thought (or spoken) crimes- relying on threats, or expressed intentions, regardless of capacity to carry out criminal acts. This can lead to the imposing of heavy, unnecessary and disproportionate penalties based on fear associated with such crimes. In essence, they should be treated as ordinary criminal acts, where the state has a duty to protect people within its territory from violence.

There is also a concern that the proposed Bill is too vague and overly broad for example- section 12K on hijacking a ship. This could apply to environmental activist groups that board ships in order to stop whaling, as much as it could to a ‘terrorist organisation’.

### **III. Recommendations**

The Coalition, strongly calls for following recommendations to be taken into consideration:

In relation to the Principle Act:

1. Reconsider imposing the proposed Bill as there is limited technical support or clarity on governance structure to its enforcement.
2. Include clear provisions as to the definition of what constitutes a ‘public meeting’. This provision should not be so overt as to contravene the Bill of Rights, of the 2013 Constitution.
3. Include provisions that guides and gives clear police operational procedures to be based on the principle of proportionality. Taking into consideration the following:
  - Is the purpose sufficiently important to justify the restriction (i.e., are there relevant and sufficient reasons to justify the restrictions)?
  - Will the measures proposed achieve that purpose?
  - Are the measures to be taken the least restrictive to achieve the intended purpose?
  - Are the restrictions to their constitutional rights necessary to meet the legitimate aims set out in the Bill of Rights concerned?
4. Include provisions that provide clear guidelines of necessity for enforcement.

In relation to the Proposed Bill:

1. Reconsider provision section 12P(2) as it threatens the right to fair trial safeguarded under sections 14- 16<sup>4</sup> of the 2013 Constitution Bill of Rights or amend this provision to reflect its fair compliance to sections aforementioned in Fiji Constitution 2013's Bill of Rights.
2. Reconsider the change of burden of proof for serious crimes under section 12P (3).
3. Provide a specific section within the proposed Bill that provide for clarity and process where an affected individual or organisation under section 12 can seek review of orders.

ENDS

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<sup>4</sup> Section 14 *Rights of Accused Persons*, Section 15 *Access to Courts or Tribunals* and Section 16 *Executive and Administrative Justice*.