

# INVIGORATING ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN THE SOUTH PACIFIC: A CONCEPTUAL APPROACH

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*A quick glance at the human rights landscape across the South Pacific region reveals problems for economic, social and cultural rights. Despite global efforts towards mainstreaming these rights, coupled with increasing regional and national embrace of these rights elsewhere, the South Pacific largely presents a picture of resistance to the formal recognition of these rights. This paper accentuates a gaping lacuna in the South Pacific approach to economic, social and cultural rights and examines the rationalisations for this scenario. Highlighting the human development and poverty challenges in the smaller states of the South Pacific, this paper contends that economic, social and cultural rights constitute veritable platforms for addressing some of these critical challenges. Despite deep rooted conceptual, normative and institutional obstacles to enhancing the status of these rights, this paper canvasses a multidimensional approach towards invigorating these rights and identifies some trajectories for securing their goals in the South Pacific.*

By their very nature, economic and social rights imply that conditions of poverty and deprivation will be satisfied. By recognising these rights, the eradication of poverty becomes not merely a policy choice for the State, but a legally binding responsibility for which it is accountable.<sup>1</sup>

## I INTRODUCTION

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<sup>1</sup> S Liebenberg and K Pillay, *Poverty and Human Rights: National Speak Out On Poverty Hearings* (SANGOCO, 1998) 2.

More than half a century after human rights appeared on the global political agenda, the scope and content of human rights is still being developed. A particularly notable aspect of this debate relates to the status of economic, social and cultural rights *vis-à-vis* civil and political rights,<sup>2</sup> which deepened in the early years of the United Nations (UN), as states became polarised along philosophical and ideological lines. On one side was the United States, who saw economic, social and cultural rights as communist manifestoes, while to the other, led by the defunct Union of Soviet Socialist Republics, they were as urgent and vital as civil and political rights.<sup>3</sup> As a result, economic, social and cultural rights were marginalised within the UN arena, within regional systems, and across diverse national legal systems.<sup>4</sup>

Other reasons for this marginalisation exist, aside from the ideological dissensions of the Cold War era. Colonialism had also made an impact on the post-independence attitude of many states. In states of the British Commonwealth in particular, it had become an established pattern for the Bills of Rights in most independence constitutions to enumerate only civil and political rights (usually named 'fundamental human rights') to the total exclusion of economic, social and cultural rights. As I have shown elsewhere, where economic, social and cultural rights norms were included in constitutional provisions, they were included under a label different from civil and political rights and couched as 'directive principles'.<sup>5</sup> The resultant effect had been an age-long lack of judicial recognition or a body of jurisprudence for these rights in a vast number of countries around the world, many of the smaller states of the South Pacific inclusive.<sup>6</sup>

In its thematic outlook, this paper highlights the international human rights frameworks relating to economic, social and cultural rights and assesses the constitutional, legal or policy responses of states of the South Pacific to these frameworks. This paper notes that despite the increasing efforts at the international level towards mainstreaming these rights, coupled with growing regional and national embrace of these rights elsewhere, the South Pacific represents the last bastion of resistance to the formulation of

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<sup>2</sup> See D Warner, 'An Ethics of Human Rights: Two Interrelated Misunderstandings' (1996) 24 *Denver Journal of International Law and Policy* 395, 400.

<sup>3</sup> C Raj Kumar, 'International Human Rights Perspectives on the Fundamental Right to Education: Integration of Human Rights and Human Development in the Indian Constitution' (2004) 12 *Tulane Journal of International and Comparative Law* 237, 247.

<sup>4</sup> See 'The Realisation of Economic, Social and Cultural Rights: Final Report on the Question of the Impunity of Perpetrators of Human Rights Violations, prepared by Special Rapporteur El Hadji Guisse' UN Commission on Human Rights, 49th Session, ch 16, UN Doc E/CN.4/Sub.2/1997/8 (1997).

<sup>5</sup> See 'D Olowu, 'Human Rights and the Avoidance of Domestic Implementation: The Phenomenon of Non-Justiciable Constitutional Guarantees' (2006) 69(1) *Saskatchewan Law Review* 39, 42. See also Chinonye Obiagwu and Chidi Anselm Odinkalu, 'Combating Legacies of Colonialism and Militarism' in Abdullahi Ahmed An-Naim, *Human Rights under African Constitutions: Realising the Promise for Ourselves* (2003) 220.

<sup>6</sup> I am aware that the phrase 'South Pacific' has been used by various writers and institutions in different contexts with varying meanings. For the purposes of this paper, however, I am employing the term to refer to all the sixteen independent and self-governing states in the Pacific Ocean region that make up the 'Pacific Islands Forum', excluding Australia and New Zealand. See Australian Government, Department of Foreign Affairs and Trade, *Pacific Islands Forum* [2]-[3] <[http://www.dfat.gov.au/geo/spacific/regional\\_orgs/spf.html](http://www.dfat.gov.au/geo/spacific/regional_orgs/spf.html)> at 27 October 2006. The territories covered are, therefore, those of the Cook Islands, Federated States of Micronesia, Fiji, Kiribati, Republic of the Marshall Islands, Nauru, Niue, Palau, Papua New Guinea, Samoa, Solomon Islands, Tonga, Tuvalu, and Vanuatu.

appropriate legal frameworks for the recognition of these rights. Apart from the incidence of institutional apathy and the impediment of non-justiciability, this paper posits that the very low level of awareness, promotion and implementation of economic, social and cultural rights in the South Pacific – critical to national and human development processes – have largely been the result of the under-theorised and under-explored profile of economic, social and cultural rights within discourses on constitutionalism and human rights in the South Pacific.

The dearth of material in this area is telling. In the course of researching this article, this author discovered that neither the Suva nor Port Vila libraries of the University of the South Pacific (a regional university serving twelve Pacific island countries) hold any volume on economic, social and cultural rights in the region. Recourse to Lexis-Nexis, Westlaw, Hein-Online, the Australian Legal Information Institute and the New Zealand Legal Information Institute databases, among others, was equally futile in generating useful academic or advocacy materials on the theme of this essay. It may be argued, therefore, that economic, social and cultural rights as *legal* entitlements in the South Pacific, in theoretical and practical terms, do not really exist.

This is where this article makes its entry point. The essence of this paper is to sensitise human rights researchers and activists on the need to appropriately conceptualise South Pacific human rights discourses in an integrative, all-encompassing way. A caveat needs to be entered here, however. This paper does not seek to provide answers to every human rights-related question pertaining to the South Pacific. That should be a task for future scholarly explorations. In any event, there exists a broad assemblage of scholarly works on various human rights issues relating to the South Pacific.<sup>7</sup> In its own distinct context, this paper does no more than lay a *conceptual* premise for the inclusion of economic, social and cultural rights in human rights education and research as well as the development and poverty reduction discourses in the South Pacific region.

Extrapolating from the peculiar socio-economic challenges in the smaller states of the South Pacific, therefore, this paper contends that economic, social and cultural rights constitute a veritable platform for tackling some of the most pronounced challenges in these states and makes a strong case for their integration into constitutional review processes as well as debates pertaining to human rights, governance and democratisation in the South Pacific. Acknowledging deeply-rooted historical, conceptual, normative, institutional and structural obstacles to enhancing the status of

<sup>7</sup> Many of such works include: A Angelo, 'Lo Bilong Yumi Yet' (1992) 22(2) *Victoria University of Wellington Law Review* 33; S Farran, 'Custom and Constitutionally Protected Fundamental Rights in the South Pacific Region: The Approach of the Courts to Potential Conflicts' (1997) 21 *Journal of Pacific Studies* 103 <[http://www.usp.ac.fj/editorial/jpac\\_new/Farran.PDF](http://www.usp.ac.fj/editorial/jpac_new/Farran.PDF)> at 27 October 2006; Leulua'iali'i Tasi Malifa, 'The "Rights" Conflict in the Constitutions of the South Pacific: Seeking Toleration into the 21<sup>st</sup> Century' in Nin Tomas (ed), *Collective Human Rights of Pacific Peoples* (1998) 119, 120; C Wickliffe, 'Human Rights Education in the Pacific: A Paper Prepared for the UNESCO Asia/Pacific Meeting on Human Rights Education' (1999) 3 *Journal of South Pacific Law* 1, [10] <[http://www.vanuatu.usp.ac.fj/journal\\_splaw/working\\_papers/wickliffe1.htm](http://www.vanuatu.usp.ac.fj/journal_splaw/working_papers/wickliffe1.htm)> at 27 October 2006; M Wilson and P Hunt (eds), *Culture, Rights, and Cultural Rights: Perspectives from the South Pacific* (Huia Press, 2000); 'D Olowu, 'When Unwritten Customary Authority Overrides the Legal Effect of Constitutional Rights: A Critical Review of the Tuvaluan Decision in *Mase Teonea v. Pule O Kaupule & Another*' (2005) 9(2) *Journal of South Pacific Law* <<http://www.paclii.org/journals/jspl/current/commt1.html>> at 27 October 2006; and S Farran, 'Human Rights in the Pacific Region — Challenges and Solutions' [2005] *LAWASIA Journal* 39.

these rights in the South Pacific, this paper emphasises the integrative human rights approach and canvasses multidimensional legal, policy and strategic responses that would lay the foundation for the promotion and realisation of these rights in the region.

## II THE INTERNATIONAL REGIME OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS

The notion of international human rights, as it is known today, emerged with the adoption of the *Universal Declaration of Human Rights* ('UDHR')<sup>8</sup> in 1948. A treaty of 30 articles, the UDHR opens with unequivocal provisions on equality and non-discrimination, two vital principles that have become hallowed concepts in defining every other human right.<sup>9</sup> Articles 3 to 21 cover the traditional civil and political rights<sup>10</sup> while articles 22 to 27 deal with economic, social and cultural rights.<sup>11</sup> What is particularly outstanding about the UDHR, at least from the perspective of this study, is that it is devoid of any language of hierarchy among human rights. On the same footing and with equal potency, the UDHR guarantees the protection of civil and political rights and economic, social and cultural rights. Notwithstanding divergent arguments on the legal status of the UDHR, an incontrovertible fact is that it is an instrument that has become the most influential and most authoritative global reference for human rights, considering the multitude of UN and regional human rights treaties, national constitutions, municipal cases and statutes, and even private sector initiatives that have unabashedly drawn inspiration from it.<sup>12</sup>

To translate the principles of the UDHR into legal obligations, two treaties were developed in 1966, creating certain obligations for states parties. These two treaties are

<sup>8</sup> *Universal Declaration of Human Rights*, GA Res 217 A (III), UN Doc A/810 (1948). For a vivid insider description of the drafting processes and political intrigues that culminated in the adoption of the UDHR on 10 December 1948, see M A Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (Random House, 2001). See also J Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent* (University of Pennsylvania Press, 1999) 1-88; Peter Meyer, 'The International Bill: A Brief History' in Paul Williams (ed), *The International Bill of Human Rights* (1981) xxiii-xl.

<sup>9</sup> See UDHR, arts 2 and 3, respectively. Virtually all human rights treaties since WWII emphasise the cardinal principles of equality and non-discrimination. See EW Vierdag, *The Concept of Discrimination in International Law with Special Reference to Human Rights* (Nijhoff, 1973) 1, 83-139. See also A Eide and T Opsahl, *Equality and Non-Discrimination* (Norwegian Institute of Human Rights, Publication No 1, 1990) 17-25 (showing how these two core UN principles have found acceptance and application within various regional human rights systems).

<sup>10</sup> Right to life, liberty and personal security (art 3); prohibition of slavery and servitude (art 4); prohibition of torture, cruel, inhuman or degrading treatment or punishment (art 5); recognition as a person (art 6); equal protection before the law (art 7); right to effective judicial remedy for violations (art 8); freedom from arbitrary arrest, detention or exile (art 9); right to free and fair trial (art 10); presumption of innocence in criminal proceedings (art 11); right to privacy and family life (art 12); freedom of movement (art 13); right to seek and enjoy asylum (art 14); right to a nationality (art 15); right to marry and found a family (art 16); right to property (art 17); freedom of thought, conscience and religion (art 18); freedom of opinion and expression (art 19); freedom of peaceful assembly and association (art 20); and, right to political participation (art 21).

<sup>11</sup> These are the rights to social security (art 22); to work and to free choice of in employment and employment standards and conditions (art 23); to rest and leisure, including holidays with pay (art 24); to adequate living standards (art 25); to education (art 26); and, to cultural life (art 27).

<sup>12</sup> For discussions on the legal significance and influence of the UDHR at global, regional and national levels, see R E Asher et al, *The United Nations and the Promotion of the General Welfare* (The Brookings Institution, 1957) 674-7; L B Sohn and T Buergenthal, *International Protection of Human Rights* (Bobbs-Merrill, 1973) 514-22; H J Steiner and P Alston, *International Human Rights in Context* (Oxford University Press, 2<sup>nd</sup> ed, 2000) 139.

the *International Covenant on Civil and Political Rights* ('ICCPR')<sup>13</sup> and the *International Covenant on Economic, Social and Cultural Rights* ('ICESCR').<sup>14</sup> The two came into force in 1976, and together with the *UDHR* and the optional protocols, are jointly referred to as the 'International Bill of Rights.'<sup>15</sup>

By the antecedents of UN politics, the two treaties emerged in an atmosphere of controversy: principally as the offshoot of the ideological polarities at the onset of the Cold War.<sup>16</sup> During the drafting of the international bill of rights, the UN General Assembly eventually decided that two separate covenants should be prepared, one on civil and political rights, and the other on economic, social and cultural rights because it was reasoned that the two sets of rights were of different nature, requiring different instruments.<sup>17</sup> One long-standing consequence of that differentiation had been the marginalisation of economic, social and cultural rights in human rights implementation and discourses. It had therefore become commonplace for some lawyers and legal academics to refer to 'hierarchies', 'generations', 'categories' or 'classification' of human rights.<sup>18</sup> This is of course reflective of perceptions about the evolution, content and degree of enforceability of human rights, not only at the international realm, but also at regional and national levels.

It is worthy to note that the *UDHR* made no distinction among the rights it proclaimed. The two covenants have the same legal status. In fact, the two covenants overlap in respect of certain rights. For instance, both covenants recognise and protect the core principles of self-determination and non-discrimination in identical wordings.<sup>19</sup> Similarly, trade union rights are found in the *ICESCR* even though these rights share many similarities with traditional civil and political rights of freedom of association and

<sup>13</sup> *International Covenant on Civil and Political Rights*, opened for signature 26 December 1966, 999 UNTS 171, GA Res 2200A (XXI), UN Doc A/6316 (1966) (entered into force on 23 March 1976).

<sup>14</sup> *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3, GA Res 2200A (XXI), UN Doc A/6316 (1966) (entered into force on 3 January 1976).

<sup>15</sup> For further discussions about the 'International Bill of Rights', see International Human Rights Internship Programme (IHRIP), *Ripples in Still Water: Reflections by Activists on Local- and National- Level Work on Economic, Social and Cultural Rights* (IHRIP 1997) 1; Krzysztof Drzewicki, 'Internationalisation of Human Rights and Their Juridization' in Rajja Hanski and Marku Suski (eds) *An Introduction to the International Protection of Human Rights: A Textbook* (2nd ed, 1999) 25, 32-5; M Robinson, 'Making Human Rights Matter: Eleanor Roosevelt's Time Has Come' (2003) 16 *Harvard Human Rights Journal* 4.

<sup>16</sup> See L M Keller, 'The American Rejection of Economic Rights as Human Rights and the Declaration of Independence: Does the Pursuit of Happiness Require Basic Economic Rights?' (2003) 19 *New York Law School Journal of Human Rights* 557, 559.

<sup>17</sup> An extensive discussion of the ideological intrigues that fuelled the separation of the adoption of two distinct covenants is found in K Arambulo, 'Drafting an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: Can an Ideal Become Reality?' (1996) 2(1) *University of California at Davis Journal of International Law and Policy* 111. See also Meyer, above n 8.

<sup>18</sup> See G Wilner, 'The Status and Future of the Customary International Law of Human Rights: Reflections on Regional Human Rights Law' (1996) 25 *Georgia Journal of International and Comparative Law* 407, 418.

<sup>19</sup> See arts 1(1) and 2(2) *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3, GA Res 2200A (XXI), UN Doc A/6316 (1966) (entered into force on 3 January 1976) and arts 1 (1) and 2(1) *International Covenant on Civil and Political Rights*, opened for signature 26 December 1966, 999 UNTS 171, GA Res 2200A (XXI), UN Doc A/6316 (1966) (entered into force on 23 March 1976) respectively.

freedom of assembly. Language is considered to be part of culture, yet language rights and other cultural rights are included in the *ICCPR* as well as in the *ICESCR*.<sup>20</sup>

Despite these and some other cross-cutting linkages between these two human rights treaties, the argument yet persists, rather inaccurately, that while civil and political rights emphasise freedom from State interference, a major element of economic, social and cultural rights is the perceived claim on the State for protection and assistance in attaining these rights.<sup>21</sup> It will therefore be worthwhile to examine the *ICESCR* in some detail here.

The kernel of the obligations created for the protection of the rights in the *ICESCR* is the provision of article 2(1) which states:

Each state party to the present covenant undertakes to take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

The above provision encapsulates the nature of states parties' obligations under the *ICESCR* and determines how they must approach the implementation of the substantive rights contained in articles 6 to 15.<sup>22</sup> The wording of article 2(1) of the *ICESCR* has remained a subject of great controversy among government officials, scholars and human rights activists, in diverse geo-political settings. There have been robust arguments suggesting that rather than constituting binding obligations for states parties, the rights in the *ICESCR* are but mere 'aspirations' or idealistic goals to be achieved over the course of time.<sup>23</sup>

By the textual interpretation of this, article 2, states parties have expressly undertaken to be legally bound to take steps, to the *maximum* of their *available resources*, to *achieve* progressively the full realisation of the rights in the *ICESCR*. One critical

<sup>20</sup> Art 27 *International Covenant on Civil and Political Rights*, opened for signature 26 December 1966, 999 UNTS 171, GA Res 2200A (XXI), UN Doc A/6316 (1966) (entered into force on 23 March 1976) and art 15 *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3, GA Res 2200A (XXI), UN Doc A/6316 (1966) (entered into force on 3 January 1976).

<sup>21</sup> See Interights, *Building Bridges for Rights: Inter-African Initiatives in the Field of Human Rights* (Interights, 2001) 20.

<sup>22</sup> By virtue of arts 26 and 31 of the *Vienna Convention on the Law of Treaties*, opened for signature on 23 May 1969, 8 ILM 679 (1969) UN Doc A/CONF 39/28 (1969) (entered into force 27 January 1980), the provisions of the *ICESCR* are binding on all parties to it and must be performed in good faith. See M W Janis, *An Introduction to International Law* (Aspen Publishers, 3<sup>rd</sup> ed, 1999) 27-30.

<sup>23</sup> See generally, EW Vierdag, 'The Legal Nature of the Rights Granted by the International Covenant on Economic, Social and Cultural Rights' (1978) 9 *Netherlands Yearbook of International Law* 69, 80 (contending that the use of such phrases like 'undertake to take steps', 'undertake to ensure', 'undertake to guarantee', and 'recognise the right' makes the eventual 'assurance' of the foreseen benefits to be 'dependent on steps that must first be taken'). See also I Brownlie, *Principles of Public International Law* (Oxford University Press, 4th ed, 1990) 572 (contending that the obligation for rights such as those laid down in the *ICESCR* are merely 'programmatic and promotional'). For others like Sunstein, civil and political rights are negative in that they only require abstention by states whereas the Committee on Economic, Social and Cultural Rights (CESCR) are positive because they demand expenses by states. See C R Sunstein, 'Against Positive Rights: Why Social and Economic Rights Don't Belong in the New Constitutions of Post-Communist Europe' (1993) 2(1) *Eastern European Constitutional Review* 35-8.

misconstruction that has resulted from the language of that provision is that the actualisation of economic, social and cultural rights strictly necessitates fiscal provisions by states. This perhaps explains why many writers like Vierdag and Cranston berated economic, social and cultural rights on the assumption that the rights are costly, would undermine creativity, would remove incentives, and would lead to bloated State apparatus.<sup>24</sup>

While there remains a lot of work to be done in the elaboration of the exact scope and content of article 2, a clearer understanding of the obligations of a state party to the *ICESCR* has increasingly crystallised over the years. Human rights experts and scholars have, by growing consensus, identified the tripartite levels at which the obligations of a State operate in regard to any human right. These are that the State must *respect, protect and fulfil*. The obligation to fulfil further contemplates the duty to facilitate, to provide and to promote.<sup>25</sup> This typology applies to every kind of human rights and thus demystifies the protracted resource constraint argument against economic, social and cultural rights. It essentially means that every human right has its positive and negative connotation. For instance, the right to vote (a political right) entails making fiscal provisions for a credible electoral process and the right to fair trial (a civil right) connotes appropriate staffing and funding for a credible judicial system just as the right to housing requires that government must not take away what is available for shelter without providing an alternative. The same principle applies to the right to water which

<sup>24</sup> See Vierdag, above n 23. See also M Cranston, *What Are Human Rights?* (Bodley Head, 2<sup>nd</sup> ed, 1973) 65-71. However, see, Committee on Economic, Social and Cultural Rights, *General Comment No 3: The Nature of States Parties' Obligations (art 2, para 1, of the Covenant)*, 5<sup>th</sup> sess, para 3, UN Doc E/1991/23 (1990), where the treaty monitoring body of the *ICESCR*, the UN CESCR stated that: 'The means which should be used in order to satisfy the obligation to take steps are stated in art 2 (1) to be "all appropriate means, including particularly the adoption of legislative measures"'. The Committee recognises that in many instances legislation is highly desirable and in some cases may even be indispensable. For example, it may be difficult to combat discrimination effectively in the absence of a sound legislative foundation for the necessary measures. In fields such as health, the protection of children and mothers, and education, as well as in respect of the matters dealt with in arts 6 to 9, legislation may also be an indispensable element for many purposes.'

<sup>25</sup> Although the idea of a 'tripartite typology' was originally conceived by Henry Shue in 1980, the idea has been advanced by many human rights scholars and experts in subsequent years. While there are variants of the levels of obligations, such as those proposed by Van Hoof (1984), the *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, 1997, and Steiner and Alston (2000), the most elaborate and most influential are those found in the pronouncement of the CESCR in its General Comment No 14, *The Right to the Highest Attainable Standard of Health (art 12)*, UN Doc E/C12/2000/4 [hereinafter GC No 14]. For a thorough scholarly analysis of these typologies, their variants, significance and connotations, see M Sepulveda, *The Nature of the Obligations Under the International Covenant on Economic, Social and Cultural Rights* (Antwerp Intersentia Uitgevers, 2003) 157-248. The CESCR's typology has itself found further development in the works of the UN Special Rapporteur on the Right to Food (Asbjørn Eide). See Asbjørn Eide, *The Right to Adequate Food as a Human Right*, UN Sales No S89XIV2 (New York), 1989; A Eide, A Oshaug and W Barth Eide, 'Food Security and the Right to Food in International Law and Development' (1991) 1(2) *Iowa Journal of Transnational Law and Contemporary Problems* 415-67; *Report Updating the Study on the Right to Food prepared by Mr A Eide*, UN Doc E/CN4/Sub.2/1998/9; *The Right to Adequate Food and to be Free From Hunger, Updated Report by Special Rapporteur Mr Eide*, paras 51-2, UN Doc E/CN4/Sub2/1999/12; and A Eide, *The Right to Food in Theory and Practice* <<http://www.fao.org/docrep/W9990E/W9990E00.htm>> at 27 October 2006. See Henry Shue, 'Rights in the Light of Duties' in Peter G Brown and Douglas McLean (eds), *Human Rights and US Foreign Policy* (1979) 65, 66-78, where he had identified the three correlative duties to *forbear*; to *protect*; and to *aid*.

demands that the State should refrain from permitting the pollution of available sources of potable water.

While efforts intensify within the international human rights arena on how best to promote and strengthen economic, social and cultural rights around the globe, focus must not be lost on the status and efficacy of these rights at regional and national levels. The questions then emerge: how has the recognition of economic, social and cultural rights fared across world regions? To what extent has the divergence in the conceptualisation of economic, social and cultural rights impacted the outlook of these rights within the existing regional human rights systems? A reflection on the outlook of the three existing regional human rights systems will be appropriate at this juncture as it would facilitate the background against which the subject should be understood in the South Pacific context.

### III ECONOMIC, SOCIAL AND CULTURAL RIGHTS WITHIN REGIONAL HUMAN RIGHTS SYSTEMS

Regional human rights mechanisms are commonly thought to be potentially more effective than UN human rights mechanisms, because they are able to take better account of peculiar regional conditions.<sup>26</sup> In another significant way, the UN itself has always encouraged the creation of regional mechanisms to deal with security, development, and human rights issues, which should complement UN mechanisms.<sup>27</sup> The three existing regional human rights systems are, therefore, region-specific, and should naturally be expected to take into consideration those values and customs peculiar to their respective territories.<sup>28</sup>

The Council of Europe (now incorporated into the European Union), the Organisation of American States (OAS), and the defunct Organisation of African Unity (OAU) (which preceded the current African Union), being the apex regional organisations for

<sup>26</sup> See Dinah Shelton, 'The Promise of Regional Human Rights Systems' in Burns H Weston and Stephen P Marks (eds), *The Future of International Human Rights* (1999) 351. See also Allan Rosas, 'Economic, Social and Cultural Rights in the External Relations of the European Union' in Asbjørn Eide, Catarina Krause and Allan Rosas (eds), *Economic, Social and Cultural Rights: A Textbook* (2nd ed, 2001) 479, 484-7 (explaining the increasing commitment to the 'human rights clause' in the European Union policies as a notion founded on the desire to advance and reinforce the 'commonly shared values and principles, as laid down in [the UN human rights system]').

<sup>27</sup> See B H Weston, R A Lukes, and K M Hnatt, 'Regional Human Rights Regimes: A Comparison and Appraisal' (1987) 20(4) *Vanderbilt Journal of Transnational Law* 585.

<sup>28</sup> The only existing three regional human rights systems are the European, the Inter-American, and the African. None yet exists for Asia, the Pacific, or Asia-Pacific. The idea of establishing a regional human rights system for Asia or the Pacific remains a matter of optimistic debate. For some of the pertinent literature on this matter, see W M Reisman, 'Practical Matters for Consideration in the Establishment of a Regional Human Rights Mechanism: Lessons from the Inter-American Experience' (1995) *St Louis-Warsaw Transatlantic Law Journal* 89; V Muntarhorn, 'Asia, Human Rights and the New Millennium: Time for a Regional Human Rights Charter?' (1998) 8 *Transnational Law and Contemporary Problems* 407, 413-18; Pamela A Jeffries, 'The Case for a Human Rights Charter for the Pacific?' in Paul Hunt (ed), *Human Rights - How are They Best Protected?* (1998) 30-5; S R Harris, 'Asian Human Rights: Forming a Regional Covenant' (2000) 17(1) *Asia-Pacific Law and Policy Journal* 1; and M Robbins, 'Powerful States, Customary Law and the Erosion of Human Rights through Regional Enforcement' (2005) 35 *California Western International Law Journal* 275.

the European, Inter-American, and African regions, respectively, had adopted a number of human rights instruments largely based on the UN human rights model.<sup>29</sup>

The main human rights instruments of the European regional arrangement are the *European Convention for the Protection of Human Rights and Fundamental Freedoms* ('*European Convention*'),<sup>30</sup> and the *European Social Charter* ('*Charter*').<sup>31</sup> While the *European Convention* primarily protects civil and political rights, the Charter seeks to protect socio-economic rights. Both instruments establish supervisory machinery for the rights guaranteed. However, there are marked differences between the two. Whereas the provisions of the *European Convention* must be accepted in entirety, the Charter permits states to accept its guarantees selectively, and it uses a complicated system of reporting as the means of supervision instead of a complaints procedure.

There has been a pervading notion that the impact of the Charter is generally less than that of the *European Convention*, reflecting the previous lack of enthusiasm within the European regional system for creating a strong framework for economic, social and cultural rights.<sup>32</sup> In more recent times, however, protocols have been concluded to extend the range of the rights protected and improve the supervisory machinery while further measures are also being contemplated.<sup>33</sup> From the ongoing developments within the European regional human rights arrangement, the prospect is manifest that the value of the protection available for economic, social and cultural rights as rights capable of implementation would further appreciate over the course of time.<sup>34</sup>

<sup>29</sup> For the comparative distinctions between the *UDHR*, the *African Charter*, the *European Convention* and the Inter-American treaties, see B Obinna Okere, 'The Protection of Human Rights in Africa and the African Charter on Human and Peoples' Rights: Comparative Analysis with the European and American Systems' (1984) 6(2) *Human Rights Quarterly* 141-59; Philip Kunig, 'Regional Protection of Human Rights: A Comparative Introduction' in Philip Kunig, Wolfgang Benedek and Costa R Mahalu (eds), *Regional Protection of Human Rights by International Law: The Emerging African System* (1985) 31-58; T Buergenthal, 'International Human Rights Law and Institutions: Accomplishments and Prospects' (1988) 63 *Washington Law Review* 1-19; G M Wilner, 'The Status and Future of the Customary International Law of Human Rights: Reflections on Regional Human Rights Law' (1995-1996) 25 *Georgia Journal of International and Comparative Law* 407-26.

<sup>30</sup> *European Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (1950) ETS 5 (entered into force on 3 September 1953), amended by Protocol No 13 of 2002, ETS 187 (2002).

<sup>31</sup> *European Social Charter*, opened for signature 18 October 1961, ETS 35 (1961) (entered into force on 26 February 1965), revised by ETS 163 (1996).

<sup>32</sup> JG Merrills, 'Promotion and Protection of Human Rights Within the European Arrangements' in Raija Hanski and Marku Suski (eds) *An Introduction to the International Protection of Human Right: A Textbook* (2nd ed, 1999) 279.

<sup>33</sup> See AW Heringa, 'The European Social Charter: New Initiatives for the Improvement of Basic Social Rights Protection Within the Framework of the Council of Europe' in APM Coomans et al (eds), *The Increasing Importance of Economic, Social and Cultural Rights* (1994) 30, (for an analysis of the development of jurisprudence on economic, social and cultural rights in the European regional arrangement). Under the *Additional Protocol No 3 to the European Social Charter*, adopted on 9 November 1995, there is a collective complaint mechanism that would allow complaints to be submitted by employers' organisations, NGOs and trade unions. For a critical analysis of the economic, social and cultural rights profile envisaged under this procedure, see A Hendriks, 'Revised European Social Charter' (1996) 14(3) *Netherlands Quarterly of Human Rights* 341-2. See also David Harris, 'The Council of Europe (II): The European Social Charter' in Raija Hanski and Marku Suski (eds) *An Introduction to the International Protection of Human Right: A Textbook* (2nd ed, 1999) 325.

<sup>34</sup> See generally, H P Graver, *Welfare State and Constitutionalism under the EEA Agreement, in The Welfare State and Constitutionalism in the Nordic Countries* (The Nordic Council of Ministers, 2001) 95 (pointing out the tremendous positive impact that the *European Economic Area Agreement*

In the Inter-American regional human rights system, the main instruments are the *American Declaration of the Rights and Duties of Man*,<sup>35</sup> the *Inter-American Convention on Human Rights* ('*Pact of San Jose*'),<sup>36</sup> and the *Additional Protocol of San Salvador*,<sup>37</sup> which deals with economic, social and cultural rights.

The *Pact of San Jose* clearly concentrates on civil and political rights, paying only modest attention to the observance of economic, social and cultural rights.<sup>38</sup> It does become obvious that the *Pact of San Jose* retained the classification stereotype.

The supervisory machinery for economic, social and cultural rights in the Inter-American regional system was later strengthened through the adoption of the *Protocol of San Salvador* which makes elaborate provisions for state reporting as the principal implementation and monitoring mechanism for the rights contained therein.<sup>39</sup> This Protocol also provides for a petition system albeit only in respect of limited rights.<sup>40</sup> It must be mentioned that the positive trend towards an effective protection of economic, social and cultural rights in the Inter-American regional system is primarily anchored on the Inter-American Commission on Human Rights (the Inter-American Commission) as

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and the *European Community Treaty* would have on the re-development of rights-based welfarism in applicable member states). See also Klaus Fuchs, 'The European Social Charter: Its Role in Present-Day Europe and Its Reform' in Krzysztof Drzewicki, Catarina Krause and Allan Rosas (eds), *Social Rights as Human Rights: A European Challenge* (1994) 151-2, 156 (discussing the long-term implications of the European Social Charter for economic, social and cultural rights jurisprudence in an enlarged Europe). For an extensive discussion of the emerging concept of 'autonomous' economic, social and cultural rights in the European regional human rights system, see Olivier de Schutter, 'The Protection of Social Rights by the European Court of Human Rights' in Peter Van der Auweraert, Tom De Pelsmaeker, Jeremy Sarkin and Johan Vande Lanotte (eds), *Social, Economic and Cultural Rights: An Appraisal Of Current European And International Developments* (2002) 207-39.

<sup>35</sup> *American Declaration of the Rights and Duties of Man*, OAS Res XXX, adopted by the 9th International Conference of American States (1948), reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev1 at 17 (1992).

<sup>36</sup> *Inter-American Convention on Human Rights*, opened for signature 22 November 1969, 1144 UNTS 123, OASTS 36 (1969), OEA/Ser.C/II.5 (entered into force on 18 July 1978).

<sup>37</sup> *Additional Protocol of San Salvador*, opened for signature 17 November 1988, OASTS 69 (1988) (entered into force in 1999).

<sup>38</sup> Art 26 of the *Inter-American Convention on Human Rights*, opened for signature 22 November 1969, 1144 UNTS 123, OASTS 36 (1969), OEA/Ser.C/II.5 (entered into force on 18 July 1978), directs states to adopt measures with a view to achieving the 'progressive realisation' of the rights while art 42 enables the commission to 'watch over' the promotion of the rights.

<sup>39</sup> See art 19, *Additional Protocol of San Salvador*, opened for signature 17 November 1988, OASTS 69 (1988) (entered into force in 1999).

<sup>40</sup> See art 19(6), *Additional Protocol of San Salvador*, opened for signature 17 November 1988, OASTS 69 (1988) (entered into force in 1999). The individual petition system here only relates to the right of workers to organise trade unions and to join the union of their choice (art 8) and the right to education (art 13).

well as the Inter-American Court on Human Rights (the Inter-American Court),<sup>41</sup> as well as some quasi-ministerial bodies.<sup>42</sup>

Unmistakably, the elaborate structures for human rights implementation monitoring within the Inter-American regional human rights system have been quite active in the promotion and protection of economic, social and cultural rights.<sup>43</sup> It is worthy of mention, however, that apart from the abounding regional human rights instruments that have become helpful in the remarkable movement of the Inter-American regional system towards stronger economic, social and cultural rights protection, the consistent stance of the monitoring bodies has been much more the result of the sensitivity of these bodies to the stark and harsh realities of mass poverty and the grim social conditions particularly across the Latin American region.<sup>44</sup>

Within the African regional human rights system, the foremost instrument is the *African Charter on Human and Peoples' Rights* ('*African Charter*'),<sup>45</sup> which covers civil and political as well as economic, social and cultural rights within the same context, and with equal force.<sup>46</sup> It has been pointed out that the African model represents a significantly new and challenging normative framework for the implementation of economic, social and cultural rights, placing the implementing institutions of the *African Charter* and human rights advocates in a position to pioneer imaginative approaches to the realisation of these rights.<sup>47</sup>

<sup>41</sup> See generally, Sepulveda, above n 25, 50-1 (observing that while the Inter-American Commission has consistently addressed 'the realisation of [economic, social and cultural rights] in its country reports, and takes into consideration the [economic, social and cultural rights] contained in the Declaration when dealing with individual cases', the Inter-American Court has adopted a gradualist approach). Cf H Van der Wilt and V Krsticevic, 'The OAS System for the Protection of Human Rights' in Rajja Hanski and Marku Suski (eds) *An Introduction to the International Protection of Human Rights: A Textbook* (2nd ed, 1999) 384.

<sup>42</sup> These are the Inter-American Economic and Social Council, and the Inter-American Council for Education, Science and Culture. See art 19(2), *Additional Protocol of San Salvador*, opened for signature 17 November 1988, OASTS 69 (1988) (entered into force in 1999).

<sup>43</sup> See Adalid Conteras Baspineiro, 'Inter-American Tools for the Enforceability of Economic, Social and Cultural Rights' in Berma Klein Goldewijk, Adalid Conteras Baspineiro and Paulo César Carbonari (eds), *Dignity and Human Rights: The Implementation of Economic, Social and Cultural Rights* (2002) 99-110; B Thiele, 'Litigating Against Forced Evictions under the American Convention on Human Rights' (2003) 21(3) *Netherlands Quarterly of Human Rights* 463.

<sup>44</sup> See Baspineiro, above n 43, 101-3 (identifying 'utter poverty', 'rapidly deteriorating' healthcare systems, 'rural exodus' leading to suffocating food and housing crises, and the constant threats to social security systems by 'neo-liberal reforms' as pivotal indices that have made the 'enforceability' of economic, social and cultural rights non-negotiable within the region). See also Jasmine Gideon, 'Economic and Social Rights: Exploring Gender Differences in a Central American Context' in Maxine Molyneux and Shakra Razavi (eds), *Gender Justice, Development, and Rights* (2002) 173, 186-92 (discussing policy efforts toward the implementation of economic, social and cultural rights on gender-biased structures to help women in Latin America).

<sup>45</sup> *African Charter on Human and Peoples' Rights*, opened for signature 26 June 1981, 21 ILM 58 (1982) OAU Doc CAB/LEG/67/3 rev 5 (1981) (adopted by the OAU Assembly of Heads of State and Government 27 June 1981) entered into force 21 October 1986.

<sup>46</sup> Arts 46-54 confer the mandate of protective functions, in respect of all rights guaranteed, on the commission through state reporting and complaints procedures.

<sup>47</sup> C Odinkalu, 'Analysis of Paralysis or Paralysis by Analysis? Implementing Economic, Social and Cultural Rights under the African Charter on Human and Peoples' Rights' (2001) 23 *Human Rights Quarterly* 327, 335. For a more recent in-depth analysis of the application of the economic, social and cultural rights in the African Charter, see 'D Olowu, 'Emerging Jurisprudence on Economic, Social and Cultural Rights in Africa: A Critique of the Decision in *SERAC & Another v Nigeria*' (2005) 2(1) *Turf Law Review* 29, 37-8.

While the foregoing discussion reveals varied approaches to economic, social and cultural rights by the existing regional human rights system, the moral it portends for the conceptualisation of human rights in any future regional human rights system for the South Pacific must not be overlooked. In the ongoing political and scholarly discourses on the establishment of either a Pacific or an Asia-Pacific charter-based regional human rights system, the spotlight should shift towards integrating all human rights into a single instrument. The effectiveness which such an approach has facilitated in building a body of jurisprudence on these rights within the existing regional human rights systems makes this a viable option for the South Pacific.

Having explored the philosophy, content and promise of economic, social and cultural rights as expressed through the *ICESCR*, and the variegated responses across diverse geo-political regions, thus far, it is crucial to evaluate what the attitudes of states have been towards this treaty and its normative contents. In other words, since 1966 when this treaty was adopted, how much recognition has it garnered among states in terms of ratification? What has been the response of South Pacific states towards this treaty? At the regional and national levels, what is the status of economic, social and cultural rights in normative terms? What efforts are being made to squarely place economic, social and cultural rights on human rights agenda? In the light of the peculiar socio-economic challenges of the South Pacific states, what are the implications of economic, social and cultural rights and what should be the approach to these rights? These are some of the questions that this paper addresses in the ensuing segments.

#### IV OVERVIEW OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN THE SOUTH PACIFIC

As at the time of the most recent annual update of UN treaty databases, in 2006, there were a total of 153 states parties to the *ICESCR*.<sup>48</sup> Out of these, only Solomon Islands was a state party to this treaty among all the smaller states of the South Pacific, a dismal rendition of the profile of this treaty in the region.<sup>49</sup>

At the South Pacific regional level, no specific human rights system or normative framework exists. It must be mentioned that while there has been a series of initiatives towards the establishment of a regional human rights system for the broader Pacific/Asia-Pacific region since the 1980s, these initiatives have not translated into concrete institutional structures. Apart from the *Draft Pacific Charter of Human Rights* that was adopted in 1989 under the auspices of the Law Association for Asia and the Pacific (LAWASIA), efforts towards the materialisation of a regional human rights system have largely remained at low ebb. The numerous factors responsible for this situation have recently been explored elsewhere.<sup>50</sup>

At the national levels, a survey of the constitutions of South Pacific states proves quite revealing. Apart from Fiji Islands whose 1997 Constitution contains a sprinkling of

<sup>48</sup> See United Nations, *Status of Ratifications of the Principal International Human Rights Treaties As of 14 July 2006* (2006) < <http://www.ohchr.org/english/bodies/docs/status.pdf> > at 27 October 2006.

<sup>49</sup> By way of succession, Solomon Islands became a state party to the *ICESCR* on 17 March 1982. See *ibid.* It must be noted that Australia and New Zealand are both states parties to the *ICESCR*.

<sup>50</sup> 'D Olowu, 'The United Nations Human Rights System and the Challenges of Commitment and Compliance in the South Pacific' (2006) 7(1) *Melbourne Journal of International Law* 155, 170-2.

economic, social and cultural rights,<sup>51</sup> the overwhelming number of other constitutions in the South Pacific exclusively guarantee only civil and political rights. These are the Constitutions of the Cook Islands, 1980;<sup>52</sup> Marshall Islands, 1989;<sup>53</sup> the Federated States of Micronesia, 1975;<sup>54</sup> Kiribati, 1979;<sup>55</sup> Nauru, 1968;<sup>56</sup> Samoa, 1960;<sup>57</sup> Solomon Islands, 1978;<sup>58</sup> Tonga, 1875;<sup>59</sup> and Tuvalu, 1978.<sup>60</sup>

Another model of constitutionalism manifests in Papua New Guinea and Vanuatu where beyond securing civil and political rights as 'Basic Rights',<sup>61</sup> and 'Fundamental Rights',<sup>62</sup> respectively, these two constitutions created a set of 'Directive Principles' and 'Fundamental Duties'. The Constitutions of both states explicitly pronounce those provisions as 'non-justiciable'.<sup>63</sup> Consequently, on the very few occasions when the Directive Principles in the *Constitution of Papua New Guinea* were ever called into question, the apex court in Papua New Guinea unequivocally pronounced that these provisions are not enforceable.<sup>64</sup>

The question that confronts the analytic mind, therefore, is: why has there been so much palpable apathy and reluctance towards economic, social and cultural rights in the South Pacific, more so when the vast majority of them were not significant role actors in the ideological controversies of the earlier UN human rights treaty formulation days? This

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- <sup>51</sup> Articles 33 (labour and trade union rights), 39 (education), *Constitution of the Republic of the Fiji Islands 1997* (1997) <[http://pali.org.vu/fj/legis/num\\_act/ca1997268/](http://pali.org.vu/fj/legis/num_act/ca1997268/)> at 27 October 2006.
- <sup>52</sup> Part IV (Fundamental Human Rights and Freedoms), *Constitution of the Cook Islands*, as amended by the *Constitution Amendment (No 9) Act 1980-81* (Cook Islands) <[http://www.pali.org/ck/legis/num\\_act/cotci327/](http://www.pali.org/ck/legis/num_act/cotci327/)> at 27 October 2006.
- <sup>53</sup> Article II (Bill of Rights), *Constitution of the Marshall Islands* <[http://www.pali.org/mh/legis/consol\\_act/cotmi363.html](http://www.pali.org/mh/legis/consol_act/cotmi363.html)> at 27 October 2006.
- <sup>54</sup> Article IV (Declaration of Rights) *Constitution of the Federated States of Micronesia 1975* <[http://www.pali.org/fm/legis/consol\\_act/cotfsom468.html](http://www.pali.org/fm/legis/consol_act/cotfsom468.html)> at 27 October 2006.
- <sup>55</sup> Chapter II (Fundamental Rights and Freedoms of the Individual), *Constitution of Kiribati 1979* <[http://pali.org.vu/ki/legis/consol\\_act/cok257/](http://pali.org.vu/ki/legis/consol_act/cok257/)> at 27 October 2006.
- <sup>56</sup> Part II (arts 3-15) (Protection of Fundamental Rights and Freedoms), *Constitution of Nauru*, 29 January 1968 <[http://pali.org.vu/nr/legis/num\\_act/con256/](http://pali.org.vu/nr/legis/num_act/con256/)> at 27 October 2006.
- <sup>57</sup> Part II (arts 3-18) (Protection of Fundamental Rights and Freedoms of the Individual), *Constitution of the Independent State of Western Samoa 1960*, <[http://pali.org.vu/ws/legis/consol\\_act/cotisows1960535/](http://pali.org.vu/ws/legis/consol_act/cotisows1960535/)> at 27 October 2006.
- <sup>58</sup> Chapter II (ss 3-19) (Protection of Fundamental Rights and Freedoms of the Individual), *Constitution of Solomon Islands 1978*.
- <sup>59</sup> Part I (ss 1-29) (Declaration of Rights), *The Constitution of Tonga 1875*, as amended up to the Act of the Constitution of Tonga, 31 December 1988, <[http://pali.org.vu/to/legis/consol\\_act/cot238/](http://pali.org.vu/to/legis/consol_act/cot238/)> at 27 October 2006.
- <sup>60</sup> Part II (Bill of Rights) ss 9-28) *The Constitution of Tuvalu 1978* <[http://pali.org.vu/tv/legis/consol\\_act/cot277/](http://pali.org.vu/tv/legis/consol_act/cot277/)> at 27 October 2006.
- <sup>61</sup> Division 3 (ss 32-37), *Constitution of the Independent State of Papua New Guinea (Consolidated to Amendment No 22) 1975* <[http://www.pali.org/pg/legis/consol\\_act/cotisopng534/](http://www.pali.org/pg/legis/consol_act/cotisopng534/)> at 27 October 2006.
- <sup>62</sup> Part I, ch 2 (Fundamental Rights and Duties), *Constitution of the Republic of Vanuatu 1980* <[http://www.pali.org.vu/legis/consol\\_act/cotrov406/](http://www.pali.org.vu/legis/consol_act/cotrov406/)> at 27 October 2006.
- <sup>63</sup> Section 25(1), *Constitution of the Independent State of Papua New Guinea 1975*; s 8, *Constitution of the Republic of Vanuatu 1980*.
- <sup>64</sup> See *Simbu Provincial Executive* [1987] PNGLR 151 (10 April 1987); and *Re: The Leadership Code* [1992] PNGLR 336 (31 July 1992). Both cases relate to the question of whether the Directive Principles were to be considered in considering the validity of actions under a provincial government and under the country's Leadership Code, respectively. The equivalent provisions in the Constitution of Vanuatu have not been tested. It is uncertain, for now, how the courts will respond to them.

paper opines that the answer lies in the constitutional and political history of many of these states.

At the birth of the UN in 1945, and still in 1948 when the *UDHR* was adopted as 'a common standard of achievement' for all human beings,<sup>65</sup> only one of the small South Pacific states – Tonga – was free from overt colonial domination.<sup>66</sup> From the constitutional outlook of economic, social and cultural rights in the former colonies of the prominent colonial power in the Pacific region – Britain, few among them have justiciable constitutional provisions on economic, social and cultural rights. Since so many volumes of scholarly works have been produced assessing the impact of colonialism on constitutionalism, democratisation, governance and the challenging process of evolving a human rights culture in many of states of the modern world, including those in the South Pacific,<sup>67</sup> this paper does not intend to scrutinise the abounding wealth of literature in that regard, and it suffices to state that extrapolating from the extensive gamut of scholarly writings and other observable traits, the preponderance of South Pacific states had adopted constitutional rights that fitted their respective colonial legal orientations, at the dawn of their political independence. It had thus become inevitable for them to have the Bills of Rights in their independence constitutions closely modelled after the *European Convention*. One must call to mind that the *European Convention* only guarantees civil and political rights.

The four-fold hypotheses from which any meaningful analysis of the profile of economic, social and cultural rights in the South Pacific should proceed are therefore as follows:

- a) that at independence, the first constitutional frameworks on which an overwhelming majority of South Pacific states were founded resulted from the constitutional ideas dictated or arranged by their erstwhile colonial overlords, devoid of significant local participation;<sup>68</sup>
- b) that since the prevalent human rights thinking within the realm of British constitutionalism was about rights expressed as civil and political rights, it was inevitable for the new independence constitutions to follow that pattern;<sup>69</sup>

<sup>65</sup> Preamble para 8, *Universal Declaration of Human Rights*, GA Res 217 A (III), UN Doc A/810 (1948).

<sup>66</sup> See generally, Emeliana Afeaki, 'Tonga: The Last Pacific Kingdom' in Ron Crocombe and Ahmed Ali (eds), *Politics in Polynesia* (1983) 57-8.

<sup>67</sup> Some of the insightful scholarly works include: J M Van Dyke et al, 'Emerging Legal Regimes in the Pacific' (1988) 82 *American Society of International Law Proceedings* 351; C Tremewan, 'Human Rights in Asia' (1993) 6 *Pacific Review* 17, 27; D Mcdougall, *The International Politics of the New Asia Pacific* (Lynne Rienner Publishers, 1997); N Thomas and T Tai Haruru (eds), *Collective Human Rights of Pacific Peoples* (International Research Unit for Maori and Indigenous Education, University of Auckland, 1998); R De Vere, D Colquhoun-Kerr and J Kaburise (eds), *Essays on the Constitution of Papua New Guinea* (Government Printing Office, 1985); G Powles, 'Changing Pacific Island Constitutions: Methods and Philosophies' (1992) 22 *Victoria University of Wellington Law Review* 63-83.

<sup>68</sup> See I Jennings, *The Commonwealth in Asia* (Oxford Clarendon Press, 1951) 57-61; Peter Fitzpatrick, 'Popular Participation' in Ross de Vere, Duncan Colquhoun-Kerr and John Kaburise (eds), *Essays on the Constitution of Papua New Guinea* (1985) 17-20.

<sup>69</sup> See Justice Sailosi Kepa, 'Law-Based and Culture-Based Human Rights' in Nin Thomas and Te Tai Haruru (eds), *Collective Human Rights of Pacific Peoples* 101 (1998) (identifying the Bill of Rights of the constitutions of Pacific states as reflecting 'British caution' concerning enforceable individual rights); Fitzpatrick, above n 68, 21.

- c) that consequent to (a) and (b) above, economic, social and cultural rights were alienated from imperial constitutional history, and thus, the growth and development of coherent jurisprudence for these rights have been arduous and stunted; and
- d) that the manner of the emergence of imposed constitutional rights norms during the colonial transition in many newer states in the South Pacific disrupted indigenous political thought processes and caused a disjuncture in rights prioritisation, the consequences of which reverberate till the present day.<sup>70</sup>

The emphasis on the constitutional and legal history of the smaller states of the South Pacific in this paper must not becloud the holistic focus of this study. As crucial as the constitutionalisation of human rights can be in advancing the status and relevance of economic, social and cultural rights, the connective argument here is that the existence of a constitutional (legal) order within national systems provides an auspicious setting to stimulate the protection and promotion of *all* human rights through the in-built institutions and frameworks established under constitutional norms.

Critical to this study, therefore, is the question of the prevailing environment that makes the enhancement of the status of economic, social and cultural rights imperative for the smaller states of the South Pacific. The foregoing thesis is of no little significance for the small island states of the South Pacific where tremendous constitutional, social, economic, cultural and political changes are taking place simultaneously.

## V CONTEXTUAL CHALLENGES FOR SOUTH PACIFIC COUNTRIES

While the aggregation of national growth rates in the overall conditions of world populations in the years that followed the Cold War led to the hasty suggestion that most developing states had recorded 'rapid improvement' in human development indices,<sup>71</sup> a more thorough analysis reveals sharp contradictions. Since the end of the Cold War, a dull picture of human development indices for the small states of the South Pacific has consistently radiated through all the scientific standards of measuring human growth and progress around the world. A quick look at any of the *Human Development Reports* produced by the United Nations Development Programme (UNDP) since 1990 shows that the plight of most people in these states has remained parlous in terms of the overall trends of poverty and human privations.<sup>72</sup>

<sup>70</sup> There have been robust arguments that among the peoples of the Pacific Islands, collective or group rights had for long been held in high esteem before the advent of British-model constitutionalism. In contemporary human rights conceptualisation, however, these are now regarded as 'third generation rights' that are not to be found in most constitutions of newer states. See Konai Helu Thaman, 'A Pacific Island Perspective of Collective Human Rights' in Nin Thomas and Te Tai Haruru (eds), *Collective Human Rights of Pacific Peoples* (1998) 1, 3-4. While this paper is not essentially indulging in the escapist tradition of buck-passing, the above is only to place the present-day marginalisation of economic, social and cultural rights in its proper historical, political and socio-economic context for analytical purposes only.

<sup>71</sup> See generally R A Easterlin, 'The Globalisation of Human Development' (2000) 570 *Annals* 35-8 (comparing world averages of human development between 1950 and 2000).

<sup>72</sup> The UNDP *Human Development Reports* are based on certain key indicators namely, human development index (which measures life expectancy at birth, adult literacy rate, combined primary, secondary and tertiary gross enrolment ratio, and GDP per capita); human development index trends; human and income poverty; demographic trends; commitment to health; technological diffusion and creation; economic performance; structure of trade; flows of foreign aid; flows of private capital and debt; priorities in public spending; unemployment; energy and the environment; refugees and armaments; gender-related development; gender empowerment measures; gender

In the *Pacific Human Development Report 1999* published by the UNDP, focussing exclusively on 'fifteen Pacific highland countries',<sup>73</sup> the UN agency had noted the significant effect of globalisation on the states of the Pacific region in many respects. Apart from issues related to booming populations, unemployment, declining economic viability, labour migration and poverty,<sup>74</sup> the UNDP had pointed out that the maintenance of sustainable livelihood in the smaller states of the Pacific was becoming critical and central issues.<sup>75</sup>

That observation could not have been more accurate even almost a decade after. In the most recently published UNDP *Human Development Report 2005*,<sup>76</sup> among all the smaller Pacific States, Tonga was the only one listed among nations in the 'High Human Development Index' ranking.<sup>77</sup> All the others were listed under the 'Medium Human Development Index' ranking.<sup>78</sup> While there was considerable improvement in the life span of the peoples of the smaller states of the South Pacific between 1970-75 and 2000-05,<sup>79</sup> the fiscal commitments of the governments of these states to health resources,<sup>80</sup> to water and nutritional needs;<sup>81</sup> and to education<sup>82</sup> have remained largely negligible.

Beyond the foregoing statistical rendition lies the unmistakable relegation of economic, social and cultural rights in the work of the few civil society and human rights advocacy groups in the South Pacific region. What more? In the work of the Fiji Human Rights Commission, the only national human rights commission in the South Pacific, these species of rights do not feature prominently and are tangentially referred to in the course of litigating civil and political rights.<sup>83</sup> In its overall assessment of human rights in the region, the Amnesty International in its 2006 Report had found that State economic

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inequality in education; gender inequality in economic activity; and women's political participation. See UNDP, *Human Development Reports, 1990-2005*, New York, Oxford University Press. All these Reports are available at <http://www.undp.org/>. Other instruments of global human development measurement include the *World Development Reports* and *World Development Indicators* (both produced annually by the World Bank), available at <http://www.worldbank.org/>; United Nations Educational, Scientific and Cultural Organisation (UNESCO) *Statistical Yearbook*; United Nations Children's Fund (UNICEF) *State of the World's Children*; and the World Health Organisation (WHO) *World Health Report*, among others. See, in particular, UNDP, *Human Development Report 2002: Deepening Democracy in a Fragmented World*, (2002) 48-9 (Table A1.3, Progress towards Millennium Development Goals), available at <http://www.undp.org/>.

<sup>73</sup> See UNDP, *Pacific Human Development Report 1999* (1999) 1.

<sup>74</sup> Ibid 2-6.

<sup>75</sup> Ibid 17-20. See also B Hughes, 'Report on the South Pacific Countries' (2005) 2 *New Zealand Yearbook of International Law* 271, 275-7.

<sup>76</sup> UNDP, *Human Development Report 2005, International Cooperation at Crossroads: Aid, Trade and Security in an Unequal World* (2005) <[http://hdr.undp.org/reports/global/2005/pdf/HDR05\\_complete.pdf](http://hdr.undp.org/reports/global/2005/pdf/HDR05_complete.pdf)> at 27 October 2006.

<sup>77</sup> Ibid 219-20 (Table 1: Human Development Index).

<sup>78</sup> Ibid 220-1.

<sup>79</sup> Ibid, see Table 10 (Survival: Progress and Setbacks) 250-3.

<sup>80</sup> Ibid, see Table 6 (Commitment to Health: Resources, Access, and Services) 236-9.

<sup>81</sup> Ibid, see Table 7 (Water, Sanitation, and Nutritional Resources) 240-3.

<sup>82</sup> Ibid, see Table 11 (Commitment to Education: Public Spending) 254-7.

<sup>83</sup> See generally P Imrana Jalal and J Madraiwiwi, *Pacific Human Rights Law Digest Volume I* (Pacific Regional Rights Resource Team, 2005) xiii. When this author sought information on the profile of economic, social and cultural rights in the context of the Fiji Human Rights Commission work, its Senior Legal Officer, Nilesh Bilimoria, admitted the paucity of these rights in the work of the Commission. See Nilesh Bilimoria, <[nilesh.bilimoria@humanrights.org.fj](mailto:nilesh.bilimoria@humanrights.org.fj)>, email (26 October 2006).

development initiatives do 'not prioritise [the] realisation of economic, social and cultural rights.'<sup>84</sup>

It is in the context of the above indices that this paper, therefore, contends that the engagement of economic, social and cultural rights in the smaller states of the South Pacific should no longer a policy option but be translated into a collective legal and ethical imperative.

## VI TRENDS IN THE CONCEPTUALISATION OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS: IMPLICATIONS FOR ACTION AND STRATEGIES IN THE SOUTH PACIFIC

One significant area where international law is undergoing dynamic changes is in the universalisation and integration of all human rights. At the level of the UN, it is noticeable that its other key human rights treaties give equal protection to the civil and political rights as well as the economic, social and cultural rights of their provisions on equal footing. Significant here are the *Convention on the Elimination of All Forms of Racial Discrimination* ('CERD');<sup>85</sup> the *Convention on the Elimination of All Forms of Discrimination against Women* ('CEDAW');<sup>86</sup> the *Convention on the Rights of the Child* ('CRC');<sup>87</sup> and the *Convention on the Rights of All Migrant Workers and Members of their Families* ('MWC').<sup>88</sup>

In an upward swing from the situation of human rights in the Cold War years, international human rights development has undergone remarkable growth in terms of the consensus on the broader obstacles to a global human rights agenda. The decapitation of the apartheid system in South Africa, democratisation in many states of the developing world, the disintegration of communist *apparatchik* in Central and Eastern Europe and their steady accession into the European regional human rights

<sup>84</sup> Amnesty International, *Amnesty International Report 2006: Regional Overview – Asia-Pacific* (2006) [33] <<http://web.amnesty.org/report2006/2as-summary-eng>> at 27 October 2006.

<sup>85</sup> *Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 7 March 1965, 60 UNTS 195, GA Res 2106, UN Doc A/6014 (1965) (entered into force 4 January 1969). These include the right to marry and choice of spouse (art 5(d)(iv)); right to property (art 5(d)(v)); right to freely chosen employment conditions and standards (art 5(e)(i)); right to form and join trade union (art 5(e)(ii)); right to housing (art 5(e)(iii)); right to social security (art 5(e)(iv)); right to education (art 5(e)(v)); and right to equal participation in cultural activities (art 5(e)(vi)).

<sup>86</sup> *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 13, GA Res 34/80 (1979) (entered into force 3 September 1981). These include the rights to own land and property (art 16 (1)(h)); to education (art 10); to health (art 12); to freely chosen employment conditions and standards (art 11(a)); to marry and equality in marriage (art 16(1)(a)-(c)); to reproductive health services (art 12(2)); to social security (art 11); and to cultural life (art 13(c)).

<sup>87</sup> *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3, GA Res 44/25 (1989) (entered into force 2 September 1990). These include the right to own land and property (art 16 (1)(h)); right to education (art 10); right to health (art 24); right to healthy environment (art 24); right to food (art 24)(2)(c)); right to reproductive health services (art 24(1)(d) and (f)); right to social security (art 26); and right to cultural life (art 30-31).

<sup>88</sup> *Convention on the Rights of All Migrant Workers and Members of their Families*, opened for signature 2 May 1991, 30 ILM 1517 (1991), UN Doc A/Res/45/158 (1990) (entered into force on 1 July 2003). These include the right to privacy and family life (art 14); right to property (art 15); right to freely chosen employment conditions and standards (art 26(e)(i)); right to form and join trade union (art 26); right to social security (art 27); right to education (art 30); and right to equal participation in cultural activities (art 31).

scheme, have all contributed in huge measures to the emergence of a new global outlook to the promotion of *all* human rights for *all* human beings in *all* places.<sup>89</sup>

Perhaps no better reflection of the invigoration of human rights can be seen than in the text of the *Vienna Declaration and Programme of Action* ('*Vienna Declaration*'), adopted at the World Conference on Human Rights held in Vienna, Austria, in June 1993. The declaration provides that: 'All human rights are universal, *indivisible* and *interdependent* and *interrelated*.'<sup>90</sup> The *Vienna Declaration* has had far-reaching effects in repositioning economic, social and cultural rights as rights whose attainment must be immediately pursued. The establishment of the Centre for Economic and Social Rights in New York in 1993, and of the Economic, Social and Cultural Rights Violations Project, in 1996 by the American Association for the Advancement of Science and Human Rights Information and Documentation Systems, as well as the activities of the People's Decade for Human Rights Education, and the work of the Maastricht Conference have been cited among pointers to this assertion.<sup>91</sup> Today, all regional groupings, except Asia and the Pacific, have regional instruments recognising and protecting both civil and political rights and economic, social and cultural rights.

It is of great importance to note that the stereotype of human rights dichotomy is fast crumbling at national levels with some States incorporating both sets of rights into their Constitutions without qualification or distinction. The *Constitution of Philippines 1987* includes elaborate provisions on economic, social and cultural rights.<sup>92</sup> One other remarkable constitution that has given unparalleled importance to economic, social and cultural rights is the *Constitution of the Republic of South Africa 1996*. On the same footing with civil and political rights, the constitution provides for an elaborate range of economic, social and cultural rights.<sup>93</sup> The integration of these rights into the fundamental laws of these States is fast becoming a veritable platform for developing a vibrant body of jurisprudence on economic, social and cultural rights as the courts now have the opportunity to scrutinise governmental programmes *vis-à-vis* the legitimate expectations of the people.<sup>94</sup> The innovative judicial approaches adopted in some of the

<sup>89</sup> Irwin Cotler, 'Human Rights as the Modern Tool of Revolution' in Kathleen Mahoney and Paul Mahoney (eds), *Human Rights in the Twenty-First Century: A Global Challenge* (1993) 7-11.

<sup>90</sup> See *The World Conference on Human Rights: Vienna Declaration and Programme of Action*, pt 1, paragraph 5 (emphasis added) UN Doc A/CONF.157/23 (1993).

<sup>91</sup> B Klein Goldewijk and B de Gaay Fortman, *Where Needs Meet Rights Economic, Social and Cultural Rights in a New Perspective* (WCC Publications, 1999) viii.

<sup>92</sup> For a discussion on this point, see Matthew Craven, 'An Historical Perspective on ESC Rights' in International Human Rights Internship Programme (IHRIP) *Circle of Rights: Economic, Social and Cultural Rights Activism: A Training Resource* (2000) 40.

<sup>93</sup> These include the rights to an environment that is not harmful (art 24), access to adequate housing (art 26), access to health care services, sufficient food and water, and social security (art 27), basic education (art 29) and to use language and participate in the cultural life of their choice (art 30).

<sup>94</sup> A landmark decision on economic, social and cultural rights is the decision of the South African Constitutional Court in *Government of the Republic of South Africa v Irene Grootboom* 2000 (11) BCLR 1169 (CC), where the apex court considered the legality of the conduct of a local authority in evicting a group of squatters who had moved onto land that had been earmarked for low-cost housing. A magistrate court had ordered the squatters to vacate the land by a certain date or face eviction. However, the eviction, under the control of the municipality, took place a day earlier and in circumstances that got the squatters' homes bulldozed, their building materials and many of their possessions deliberately destroyed. This was, according to the court, a violation of the obligations in the constitutional guarantees. In its analysis of s 26 which guarantees the right of access to adequate housing, the court re-asserted the international obligation that the State must not only restrain itself from interfering in the enjoyment of economic, social and cultural rights but also specifically that

pertinent cases certainly portend enviable implications for constitutionalism in the South Pacific.

The notion of interconnectedness has also gained robust appreciation beyond bureaucratic platforms. One can venture to say that in the light of escalating mass poverty, homelessness, diseases and deprivations across the globe, linkages for inclusionary rights-based approaches to these challenges were inevitable. The 1990s witnessed a redirection of the efforts of many otherwise conservative human rights non-governmental organisations (NGOs) towards addressing human rights violations in holistic fashion at their various levels of activism. The New York-based Human Rights Watch and the London-based Amnesty International are now championing the protection and promotion of economic, social and cultural rights across the world. The World Bank and the UN Development Programme have also acknowledged the relevance of these species of rights in the global agenda.<sup>95</sup> The underpinning premise for this change of attitude is the realisation of the mutually enhancing capacity of all human rights as well as the agreement on the basic idea that: 'All human rights are related to each other and are important for maintaining human dignity.'<sup>96</sup>

The growing consensus towards the interconnectedness principle is being manifested in the application of human rights to human experiences in diverse societies around the

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the State has a duty to 'create the conditions for access to adequate housing for people at all economic levels' of society, 'including those who cannot provide themselves with housing.' Ibid paras 35-6. In considering whether the housing policies and programmes of the State and its agencies met the obligations in s 26(2), the court held that those programmes adopted by the State fell short of the requirements of that section in that no provision was made for relief to the categories of people identified as being in desperate need. Ibid paras 67-9. In yet another celebrated case, *Minister of Health v Treatment Action Campaign* (2002) (10) BCLR 1033 (CC) the applicants, a coalition of South African HIV/AIDS NGOs, had sought, *inter alia*, orders for the provision of Nevirapine drugs and the establishment of a comprehensive national programme for the prevention of mother-to-child HIV transmission. The Constitutional Court held that the subsisting programme was inflexible, unreasonable and amounted to 'a breach of the state's obligations under section 27(2) read with section 27(1) of the Constitution.' Ibid para 80. The government was ordered to 'remove the restrictions' that prevent the use of Nevirapine, without delay to 'permit and facilitate' its use, and to 'take reasonable measures to extend the testing and counselling facilities at hospitals and clinics throughout the public health sector to facilitate and expedite the use of Nevirapine for the purpose of reducing the risk of mother-to-child transmission of HIV.' Ibid para 135. The Supreme Court of the Philippines added its own forward-looking dimension to the integrative human rights approach in the celebrated case of *Minors Oposa v Department of Environmental and Natural Resources* 33 ILM 173 (1994). The petitioners had instituted the action complaining that the continuous issuance of timber logging licenses was a violation of 'the right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature' as guaranteed by s 16 of the *Philippines Constitution 1987*. The petitioners contended that the incessant tree felling led to deforestation and would not only impair the rights of the present generation of human beings but also their succeeding generations. The Court held that the government of the Philippines must cease the provision of logging licenses to the corporate body in order to preserve the health of present and future generations of Filipinos. In its judgment, the learned court declared that: '[i]t must...be emphasised that the political question doctrine is no longer the insurmountable obstacle to the exercise of judicial power or the impenetrable shield that protects executive and legislative actions from judicial inquiry or review.' Ibid para 3 (Rosario, PJ).

<sup>95</sup> See UN High Commissioner for Human Rights and the Committee on Economic, Social and Cultural Rights, 'Plan of Action to Strengthen the Implementation of the International Covenant on Economic, Social and Cultural Rights' [3]-[5] <<http://www.unhchr.ch/html/menu2/6/action.htm>> at 27 October 2006.

<sup>96</sup> A McChesney, *Promoting Economic, Social and Cultural Rights: A Handbook* (AAAA Science and Human Rights Program, 2000) 21.

world. As Buergenthal points out, the years that followed the *Vienna Declaration* have witnessed 'considerable progress...as far as the implementation of human rights is concerned'.<sup>97</sup> To buttress his point, he points to the transformations that have been recorded in the monitoring activities of the various regional human rights mechanisms that had in the Cold War years been bogged down by ideological cleavages that often veiled impunity.<sup>98</sup> Indeed, it is a trend rapidly gaining acceptance that economic, social and cultural rights secure the rights that are essential for the full enjoyment of all other rights. In the words of Henry Shue: 'No one can fully, if at all, enjoy any right that is supposedly protected by society if he or she lacks the essentials for a reasonably healthy life.'<sup>99</sup>

One of the principal reasons for the apparent under-development of economic, social and cultural rights had been the perceived lack of clarity in the content of many of these rights, and the lack of authoritative international case law pertaining to them. In this regard, NGO initiatives like the *Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, 1986*, and the *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, 1997*, have sought to break down the legal obligations under the *ICESCR* for both states and non-state actors.<sup>100</sup>

These developments are salutary in deepening the cause of integrative human rights protection and promotion in the South Pacific states of the 21st century. It is however not sufficient to incorporate human rights language into constitutions or policy statements, the crucial task lies in implementation. Although human rights treaty monitoring committees may exist to clarify and apply the provisions and to communicate with states parties, monitoring is only one element. Implementation has to do, not only with the reception of the rights, but also with their further interpretation and application. This process of implementation is what must become the preoccupation of human rights groups and advocates in this new era of integrative approach to human rights.

The thrust of this analysis is that the age-long artificial dichotomy is fast fading into oblivion. It is therefore important for human rights and development activists, scholars and policy makers in the South Pacific to realise the challenges of advancing these rights beyond their present neglect, exclusion and constitutional non-justiciability, and to deepen the empirical research, intensify the innovative litigation skills and generate policy options towards this objective.

Furthermore, since it is at the national and regional levels that the efficacy of global standards will be tested, this paper strongly advocates that the regional clamour for a coherent legal and policy approach in the Pacific must begin at the Pacific Islands Forum ('the Forum').<sup>101</sup> Since the Forum recognises and proclaims that 'unity in

<sup>97</sup> Thomas Buergenthal, 'International Human Rights in an Historical Perspective' in Janusz Symonides (ed), *Human Rights: Concepts and Standards* (2000) 18.

<sup>98</sup> Ibid 19.

<sup>99</sup> H Shue, *Basic Rights: Subsistence, Affluence and US Foreign Policy* (Princeton University Press, 2<sup>nd</sup> ed, 1980) 24-5.

<sup>100</sup> Interights, above n 21, 20.

<sup>101</sup> The 'Pacific Islands Forum' (previously known as the South Pacific Forum) is the foremost political organisation in the Pacific. It holds an annual meeting of all the heads of government of the sixteen independent and self-governing states in the Pacific region. See above n 6.

securing shared interests contributes to the national, regional and global good',<sup>102</sup> it becomes imperative that the Forum translates this rhetoric into reality. When the Forum articulates its commitment to the rights of human beings within the Pacific region, it would have provided a springboard for civil society groups to follow-up through lobbying within the appropriate political and legislative arenas of its member-states. While the Forum is yet to consider human rights treaty ratification as a topical issue, the member-states of the Forum cannot continue to ignore this subject while the rest of the world is moving on. In this age and time, no State can successfully play a game of denial with the multidimensional implications of globalisation for its people. The danger of not having coherent legal and policy responses to the ratification of all the key UN human rights treaties in the Pacific region far outweighs whatever political gains would be scored through an ostrich approach. Lessons from the adverse consequences of the erratic approach of States in other regions of the world surely indicate implications for more pragmatic initiatives in the Pacific region.

On a cautionary note, however, advocacy for economic, social and cultural rights should not fall into its own trap of perpetuating the dichotomy stereotype that was exacerbated by Cold War tensions. Focusing on economic, social and cultural rights does not mean that these rights are more important than, or independent from, civil and political rights. They only warrant specific focus and attention in the South Pacific because they have been ignored for so long, and so, little work has been done to elaborate and popularise them as human rights. In strategic terms, the implications of all the above is for NGOs to be more pragmatic in their approach to the promotion of all human rights. It is important for human rights activists and indeed all legal practitioners and academic lawyers in the South Pacific to vigorously affirm that all human rights are interdependent and indivisible. It is crucial that all human rights be recognised as essential to human survival and dignity. It is in this regard that the innovative lawyering skills of human rights advocates and few judges in Fiji Islands deserve commendation. In *PAFCO Employees Union v Pacific Fishing Co Ltd*,<sup>103</sup> the High Court of Fiji Islands applied article 8 of the *ICESCR* to interpret a lacuna in the *Trade Disputes Act 1978* and for the purpose of determining the content of the Fiji Constitution's Bill of Rights relating to the right of workers to organise and to bargain collectively.

Apart from litigation, however, South Pacific NGOs must stimulate economic, social and cultural rights by providing information and advice to legislatures; influencing budgets through data-based research and analysis; use of other institutional structures such as national human rights institution, where available, to help publicise, prevent and remedy violations; education for the bar and bench; partnership with the media; mass mobilisation and awareness strategies; networking with trade unions and the civil service; monitoring violations by providing expert knowledge of socio-economic conditions; influencing national foreign policies; and networking with other NGOs and international NGOs. They will also have to develop broad-based strategies for filing alternative reports before international treaty monitoring bodies in respect of those human rights treaties to which South Pacific States are parties.

It is equally worthy to mention that while a rights-based focus had largely been elusive in the two previous *Pacific Human Development Reports* (1994 and 1999), the participation of a wide range of interdisciplinary researchers, civil society groups and

<sup>102</sup> Pacific Islands Forum Secretariat, *Pacific Islands Forum Vision Statement, Issued at Madang, Papua New Guinea* (14 September 1995) <<http://www.forumsec.org.fj/>> at 27 October 2006.

<sup>103</sup> Civil Action No HBC543 of 2000, 25 January 2002 (Byrne J).

human rights organisations such as the Pacific Regional Rights Resource Team, among others, indicates a positive trend towards the integration of human rights into the final production of the 2006 edition of the Reports. This is a salutary development.

One must also commend the recent colloquium on economic, social and cultural rights held in Suva, Fiji Islands, in June 2006, which witnessed the participation of 21 judges and four lawyers from 12 Pacific island countries.<sup>104</sup> Perhaps that opportunity for interactive discussions on these rights will signal the prospect of their enhanced promise and realisation for South Pacific peoples.

All the above issues and approaches contemplate that the peoples of the South Pacific desire an effective delivery of the promises of *all* human rights. It goes without saying that this will undoubtedly entail sustained commitment and result-oriented planning, mobilisation and execution.

## VII CONCLUSION

This paper has shown that from a rather hazy and humble beginning, economic, social and cultural rights have grown to become significant norms on the global human rights and human development agenda. The need for concerted activism as well as the modalities for galvanising these rights into greater relevance in the South Pacific has been discussed, with greater emphasis on the notion of the interconnectedness of all human rights.

It has been shown here that the principles which must inform approaches to human rights activism in the South Pacific must encompass the interdependence and indivisibility of rights, the applicability of economic, social and cultural rights to all individuals on the basis of equality and non-discrimination; the indication of these rights for certain governmental obligations; the constitutional justiciability of economic, social and cultural rights; and the desirability for their vertical and horizontal effect. All these must be pursued in tandem within the wider human rights context.

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<sup>104</sup> See 'Conclusions and Recommendations of the Colloquium and Workshop for Judges and Lawyers on the Justiciability of Economic, Social and Cultural Rights in the Pacific Region, Suva, Fiji, 1-3 June 2006' (on file with author).