

# THE RESPONSE TO COVID-19 AND HUMAN RIGHTS' CHALLENGES IN FIJI AND VANUATU: WERE THE MEASURES PROPORTIONATE?

*Morsen Mosses\* and Talitha-Kumi Geparo\*\**

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*Pacific island countries reported their first cases of COVID-19 during the month of March 2020. While some countries like Vanuatu declared a national state of emergency, some others like Fiji imposed evening curfews and used location-specific lockdowns around areas where reported cases emerged. Pacific governments subsequently put in place measures aiming to protect the public health from the coronavirus. Some of the laws and regulations made include restriction on freedom of speech and expression, and also on freedom of movement. This article focusses on the measures introduced in Fiji and Vanuatu.*

*Les Etats insulaires du Pacifique ont recensé leurs premiers cas de COVID-19 au courant mars 2020. Alors que certains Etats, comme le Vanuatu, ont instauré l'état d'urgence national, d'autres, comme les Fidji, ont préféré adopter des périodes de couvre-feux en soirée et des mesures de confinement spécifiques uniquement limitées aux seules zones où des cas avaient été signalés. Les gouvernements de ces Etats ont ensuite mis en place des mesures spécifiques visant à protéger la population contre le coronavirus. Parmi les lois et règlements adoptés figurent des dispositions restreignant la liberté d'expression ainsi que la liberté de circulation. Cet article est consacré plus particulièrement aux mesures qui ont été instaurées aux Fidji et au Vanuatu.*

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\* Lecturer, School of Law, University of the South Pacific.

\*\* Graduate Student, School of Law, University of the South Pacific.

## I INTRODUCTION

During declared states of emergency<sup>1</sup> or natural disaster,<sup>2</sup> states are empowered to introduce extraordinary measures, some of which may limit fundamental human rights.

Article 154 of the Constitution of Fiji provides that the Prime Minister may declare a state of emergency in Fiji and may make regulations relating to a state of emergency if there are reasonable grounds to believe that the security and safety of all or part of Fiji is threatened, and if it is necessary to declare a state of emergency to deal effectively with the threatening circumstances. As stated, under the state of emergency, the government has the power to adopt measures limiting fundamental rights and freedoms. However, these limitations are not absolute. Article 43 of the Constitution of Fiji provides for instance that:

any law enacted or promulgated in consequence of a declaration of a state of emergency under this Constitution —

- (a) may limit a right or freedom set out in this Chapter...only to the extent that —
  - (i) the limitation is strictly necessary and required by the emergency; and
  - (ii) the law is consistent with Fiji's obligations under international law applicable to a state of emergency; and
- (b) takes effect only when it has been published in the Gazette.

Similarly, Chapter 11 of the Constitution of Vanuatu provides for the emergency powers of the government. Under the same chapter, article 69 provides that:

the Council of Ministers may make regulations dealing with a public emergency whenever —

- (a) the Republic of Vanuatu is at war; or
- (b) the President of the Republic acting on the advice of the Council of Ministers declares a state of emergency by reason of natural calamity or to prevent a threat to or to restore public order....

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1 Vanuatu first declared a state of emergency in response to Covid-19 on 26 March 2020 <<https://www.rnz.co.nz/international/pacific-news/412660/vanuatu-declares-state-of-emergency-over-covid-19>>.

2 Fiji declared a state of natural disaster in response to Covi-19 on 16 March 2020 <<https://www.health.gov.fj/statement-by-the-prime-minister-hon-voreqe-bainimarama-on-latest-covid-19-case/>>.

However, it should be noted that the restrictions on fundamental rights imposed under the state of emergency should not be absolute. Article 71(2) of the Constitution of Vanuatu provides that the "regulations made by the Council of Ministers in accordance with Article 69 shall be such as are reasonably necessary in the circumstances of the emergency to which they relate and as are justifiable in a democratic society".

This paper begins by identifying the specific measures introduced against COVID-19 including the punishments against individuals who violate such measures. It then discusses the international standards for human rights regarding the circumstances in which specific human rights can be justifiably limited. Finally, the paper applies those measures against these international standards to answer the question of whether such measures could be considered proportionate. The paper argues that some of the measures introduced in Fiji and Vanuatu were not proportionate to the aim they are seeking to achieve.

## ***II MEASURES INTRODUCED IN RESPONSE TO THE SPREAD OF COVID-19***

In Fiji, on 23 June 2020, the Permanent Secretary for Health and Medical Services published the following Notice:<sup>3</sup>

I hereby give notice of the following orders, which were made pursuant to section 69(3) of the Public Health Act 1935 for the protection of public health, approved by the Minister for Health and Medical Services and publicly announced on 21 June 2020.... Except for the purpose of travelling for work, seeking medical care or an emergency, a curfew from 11 pm until 4 am now applies to the whole of Fiji, with effect from 22 June 2020.

This order was issued by the Permanent Secretary in accordance with s 69(3)(v) of the Public Health Act 1935 which reads:

The Permanent Secretary shall have power —

...

- (v) to prohibit, order, and regulate conditionally or unconditionally movement of persons, animals, goods, vehicles and vessels on sea or on land, including the assembling together whether habitual or occasional, of either adults or children....

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3 Extraordinary Gazette No 59 published on 23 June 2020.

The above curfew order was issued under Public Health (Infectious Disease) Regulations 2020. Regulation 2 provides that:

Any person who fails to comply with an order, prohibition, declaration or directive issued pursuant to section 69(1) (c) or (3) of the Public Health Act 1935 commits an offence and is liable on conviction to fine not exceeding \$10,000 or imprisonment for a term not exceeding 5 years or both.

Moreover, there have been multiple news articles by varying news agencies shared online that address the issue of press freedom being stifled by the Government of Fiji<sup>4</sup> as well as multiple arrests of individuals who have posted on social media criticising or commenting on the Government's effort of tackling COVID-19. These individuals have been arrested and charged under s 15(a) of the Public Order Act [Cap 20] 1976<sup>5</sup> which provides:

Any person who —

- (a) maliciously fabricates or knowingly spreads abroad or publishes, whether by writing or by word of mouth or otherwise, any false news or false report tending to create or foster public alarm, public anxiety or disaffection or to result in the detriment of the public;

...

shall be guilty of an offence and shall be liable on conviction to imprisonment for a term not exceeding one year or to a fine not exceeding one thousand dollars or both such imprisonment and fine.

Section 16 of the same Act provides:

Any person who, without lawful excuse, the burden whereof shall lie upon him, utters, spreads or publishes any words or does any act or thing, knowing or implying that it

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- 4 Brigadier-General Ratu Jone Kalouniwau "The Paradox of our Rights During Perilous Times" <<https://fjijisun.com.fj/2020/04/22/the-paradox-of-our-rights-during-perilous-times/>>. Kevin Anthony "Fijian military leader defends government's right to 'stifle' press during Covid crisis" The Guardian <<https://www.theguardian.com/world/2020/apr/27/fijian-military-leader-defends-governments-right-to-stifle-press-during-covid-crisis>> and David Robie "Pacific governments accused of using coronavirus crisis as cover for media crackdown" <<https://theconversation.com/pacific-governments-accused-of-using-coronavirus-crisis-as-cover-for-media-crackdown-137700>>.
- 5 Fiji's Opposition Whip and Member of Parliament Lynda Tabuya has been charged by the Police with one count of Malicious Act Contrary to Section 15(a) of the Public Order Act. Inoke Rabonu "Tabuya Charged, Bainivalu Questioned" <<https://fjijisun.com.fj/2020/03/28/tabuya-charged-bainivalu-questioned/>>.

is or may be desirable to do, or omit to do, any act, the doing of or the omission to do which is calculated —

...

- (c) to prevent or defeat by violence or by other unlawful means the execution of or the enforcement of any written law or to lead defiance or disobedience of any such law,

shall be guilty of an offence and shall be liable on conviction to imprisonment for a term not exceeding two years or to a fine not exceeding one thousand dollars or to both such imprisonment and fine.

In addition to the measures taken, harsh punishments have been created for any violation of a COVID-19 related order. These punishments are contained in the amendment of Public Health Act 1935 - the Public Health (COVID-19 Response) (Amendment) Act 2020. Below are some of the amendments related to punishments.

Section 69(5)(b) of this amendment Act provides:

Every person who wilfully disobeys an order under this subsection or who obstructs or delays or in any way interferes with the prompt execution thereof commits an offence and shall be liable to a fine not exceeding \$10,000 or a term not exceeding 5 years imprisonment or both.

Section 83 of the same Act states that:

- (1) The Minister may from time to time make regulations for the protection of the public health from infectious disease and may deal with and include therein any matter and action which the Minister may deem necessary for that purpose.
- (2) The regulations shall prescribe penalties not exceeding a fine of \$10,000 or imprisonment for a term of 5 years or both.

Section 69(5)(b) initially provided a \$40 fine for violation and s 83(2) provided the limits to a fine under any regulation; the limit was a fine of \$200 or imprisonment for 6 months. However, the amendments raised the penalties.

As for Vanuatu the measure that will be the subject of discussion is the State of Emergency Regulation Order No 35 of 2020. Order 6 reads:

All media outlets are not to publish any article on COVID 19 unless it has received the authorization of the National Disaster Management Office after consultation with the World Health Organization.

The State of Emergency Regulation Order No 35 was made by the President of the Republic of Vanuatu in accordance with art 69(b) of the Vanuatu Constitution which reads:

the President of the Republic acting on the advice of the Council of Ministers declares a state of emergency by reason of natural calamity or to prevent a threat to or to restore public order.

Article 71(2) of the Constitution recognises the importance of necessity in making regulations. It states that:

Regulations made by the Council of Ministers in accordance with Article 69 shall be such as are reasonably necessary in the circumstances of the emergency to which they relate and as are justifiable in a democratic society.

The important and relevant question that needs to be addressed is this: Are the above measures compatible with the international standard respecting the justifiable limitation of human rights? Before this question can be answered, it is important to identify what the international standards are.

### ***III INTERNATIONAL STANDARDS RESPECTING THE JUSTIFIABLE LIMITATIONS OF FUNDAMENTAL RIGHTS***

Like other fundamental rights and freedoms, freedom of movement and freedom of expression are provided for under international human rights treaties and also under domestic constitutions.

#### ***A Freedom of movement***

Article 12 of the International Covenant on Civil and Political Rights (ICCPR) states that:

- (1) Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
- (2) Everyone shall be free to leave any country, including his own.
- (3) The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.

Section 21(1) and (4) of the Constitution of Fiji states that:

- (1) Everyone has the right to freedom of movement.

....

- (4) Every citizen, and every other person lawfully in Fiji, has the right to move freely throughout Fiji and the right to leave Fiji.

The limitation of this right is provided in s 21(7):

- (7) To the extent that it is necessary, a law may limit, or may authorise the limitation of, the rights mentioned in this section —
- (a) in the interests of national security, public safety, public order, public morality, public health or the orderly conduct of elections;
  - (b) for the purpose of protecting the rights and freedoms of others;
  - ....
  - (d) for the purpose of imposing a restriction on the person that is reasonably required to secure the fulfilment of an obligation imposed on the person by law;
  - ....

Article 5 of the Constitution of Vanuatu, which provides for fundamental rights and freedoms also includes protection of the freedom of movement.

Under the state of emergency, governments may be empowered to limit the freedom of movement and, in the situation of COVID-19, this is done to prevent the spread of the virus. However, one also needs to consider the reasonableness of the punishments provided for the violations of the measures limiting freedom of movement. This analysis will be done in Part IV of this paper.

## ***B Freedom of Expression***

Freedom of expression like other human rights plays an important role in any democratic society. In the case of *Chavunduka v Minister of Home Affairs*<sup>6</sup> Justice Gubbay stated that:

freedom of expression has four broad special objectives to serve: i) it helps an individual to obtain self-fulfilment; ii) it assists in the discovery of truth, in promoting political and social participation; iii) it strengthens the capacity of an individual to participate in decision making; iv) it provides a mechanism by which it would be possible to establish a reasonable balance between stability and social change.

Article 19 of the ICCPR contains not only the right to freedom of expression, but also the limitation to this right. It states that:

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<sup>6</sup> *Chavunduka v Minister of Home Affairs* (2000) JOL 6540 (ZS).

- (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.

Freedom of expression is a rule under international law and exceptions to this rule can only be permitted under certain circumstances. These exceptions are only legitimate if they fall within the parameters of the narrow conditions identified in art 19(3) of the ICCPR:<sup>7</sup>

- (1) The limitation must be provided by law [meaning that]... the right to freedom of expression can be limited based on...a law or regulation that is formally recognized by the body entrusted to make law (legislature). The law or regulation, which limits the right must be [so] clear and precise that people can foresee the [consequences of their actions just by reading the law].
- (2) There must be a legitimate aim to limit the right to freedom of expression. The list of legitimate aims cannot be changed or added because it is exclusive. Article 19(3) of the ICCPR clearly identifies the legitimate aims and they are (a) For the respect of the rights or reputations of others (b) For the protection of national security or of public order, or for public health or morals.
- (3) Any limitation to the right of freedom of expression must be truly necessary for the protection of the legitimate aim. This is to ensure that the limitation does not fundamentally affect the right. In a great majority of cases international court have ruled that national laws do not permit the limitations on the right to freedom of expression duly because it was deemed not "necessary".

In case of *Lohe Issa Konate v Burkina Faso*<sup>8</sup> the African Court of Human and Peoples' Rights decided that the penalties/punishments imposed on the defendant in

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7 USP LW331 Human Rights Lecture, Semester I 2020.

8 *Lohe Issa Konate v Burkina Faso* Application No 004/2013 (5 December 2014).

a defamation lawsuit violated his right to freedom of expression because the penalties imposed were disproportionate and not necessary to achieve the purpose of the law. The defendant wrote two articles in which he accused a state prosecutor of corruption. He then was sued for defamation and the Court found him guilty and sentenced him to one year's imprisonment and a fine of US\$300 to be paid to the prosecutor. In determining the case, the Court posed three questions or requirements that needed to be satisfied in order to conclude whether the limitation of the right was justified under law. The requirements are: 1) Is the language of the domestic law clear enough that parties can easily conform to it? 2) Does the restriction serve a legitimate purpose? 3) Is the limitation in the law necessary to achieve that purpose? The Court found that the first two requirements were met but the third requirement was not.

Furthermore, the Human Rights Committee has emphasised the importance of the proportionality of restrictions by stating that:<sup>9</sup>

restrictive measures must conform to the principle of proportionality; they must be the least intrusive instrument amongst those which might achieve their protective function; they must be proportionate to the interest they protect.... The principle of proportionality must be respected not only by the law that framed the restrictions but also by the administrative and judicial authorities in applying the law.

In addition to that the Court in *R v Oakes*<sup>10</sup> created a two-step balancing test to determine how a government can justify a law which limits a Charter right [or fundamental right]. 1) The government must establish that the law under review has a goal that is both "pressing and substantial." The law must be both important and necessary; 2) The court must conduct a proportionality analysis using three sub-tests.

- (a) Firstly, the court must assess whether the government has established that the provision of the law which limits a Charter right (fundamental right) is rationally connected to the law's purpose.
- (b) Secondly, the limitation must minimally impair the violated Charter right (fundamental right). A provision that limits a Charter right (fundamental right) will be constitutional only if it impairs as little as possible or is "within a range of reasonably supportable alternatives.
- (c) Finally, the court must examine the law's proportional effects. Even if the government can satisfy the above steps, the effect of the provision (law created to

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9 Office of the Human Right Commissioner for Human Right, General Comment No 27, 1999.

10 *R v Oakes* [1986] 1 SCR 103.

limit the right) on Charter rights may be too high a price to pay. Even for the advantage the provision would provide in advancing the law's purpose.

Vanuatu's and Fiji's Constitutions also provide for the protection of the freedom of speech. Fiji's Constitution also provides for the circumstances in which the freedom of speech can be justifiably limited.

Section 17(1) of Fiji Constitution states:

Every person has the right to freedom of speech, expression, thought, opinion and publication, which includes —

- (a) freedom to seek, receive and impart information, knowledge and ideas;
- (b) freedom of the press, including print, electronic and other media;

....

Section 17(3) states:

To the extent that it is necessary, a law may limit, or may authorize the limitation of, the rights and freedoms mentioned in subsection (1) in the interest of —

- (a) national security, public safety, public morality, public health or the orderly conduct of elections;
- (b) protection or maintenance of the reputation, privacy, dignity, rights or freedoms of other persons including —
  - (i) the right to be free from hate speech, whether directed against individuals or groups; and
  - (ii) the rights of persons injured by inaccurate or offensive media reports to have a correction published on reasonable conditions established by law....

Article 5(1) of the Vanuatu Constitutions provides:

Subject to restrictions imposed by law on non-citizens, all persons are entitled to the following fundamental rights and freedoms of the individual without discrimination on the grounds of race, place of origin, religious or traditional beliefs, political opinions, language or sex but subject to respect for the right and freedoms of others and to the legitimate public interest in defence, safety, public order, welfare and health —

- (g) freedom of expression.

## ***IV WERE THE MEASURES AND PUNISHMENTS HIGHLIGHTED COMPATIBLE WITH INTERNATIONAL STANDARDS?***

### ***A Fiji***

#### ***1 Freedom of movement***

The purpose of the Order announced by the Prime Minister of Fiji was to 'minimize non-essential movement of Fijians, in Fiji's bid to contain Coronavirus'<sup>11</sup> and to limit contact with people. This Order on the face of it, without consideration of technicalities, is a violation of the right to freedom of movement. However, under the state of emergency, the government is empowered to impose curfews and limit the freedom of movement so as to prevent the spread of the coronavirus and protect the lives of the people.

Nevertheless, the limitation of any human rights must be done in accordance with the law. As mentioned above, there are grounds identified in the ICCPR, the constitutions and case law that allows for limitation of fundamental human rights.

Article 12(3) of the ICCPR states that the right to freedom of movement can be restricted under law if it is necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others. Based on this there are three important questions that need to be answered: 1) Is the limitation provided by law? 2) Does the limitation serve a legitimate purpose? 3) Is the limitation necessary to achieve that purpose?

The answer to the first question seems to be positive. The limitation is provided by the Public Health Regulations. Although not specifically, the Regulation states that failure to comply with an order or directive will result in a conviction. The curfew order falls under this Regulation which means it is provided or authorised by law. However, some questions were raised about whether the law was authorised by relevant authorities. A case that made headlines on May 2020 in Fiji is a relevant example.<sup>12</sup> On 9 April 2020 in Nadi, without lawful excuse, Lal and Chand failed to comply with the Order of the Prime Minister by breaking the curfew hours. The Order was deemed necessary for the protection of public health from the coronavirus. The judge who heard the case ruled that even though the two individuals had pleaded guilty, they did so to a charge that was bad in law and that the prosecution was

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11 Ministry of Health and Medical Services—Fiji "Protocol for Nation-Wide Curfew" <<https://www.health.gov.fj/media-release-protocol-for-nation-wide-curfew/>>.

12 The case is not published, but various media outlets reported it <<https://www.rnz.co.nz/international/pacific-news/414552/fiji-magistrate-s-ruling-on-curfew-breakers-set-aside>>; <<https://www.fijitimes.com/pandemic-law-a-whole-drama-series/>>; <<https://fijisun.com.fj/2020/05/09/magistrate-turagas-contract-not-renewed-acting-cj/>>.

prosecuting the two accused on a non-existing law. He stated that the prosecution was relying on a declaration by the Prime Minister, but not by the Minister of Health pursuant to his powers provided for in s 69(1) of the Act nor made pursuant to the Public Health (Infectious Diseases) Regulations 2020. On 16 April 2020, the Fiji High Court exercised its revision jurisdiction and quashed the acquittal of the two accused.

This case shows the importance of making sure that the limitation of human rights such as freedom of movement is provided for clearly by the law and that the law is enacted by the relevant authorities. In this case, the judge was not sure whether the Order was taken by the Permanent Secretary of Health or the Prime Minister. In fact, while officially the Notice was made by the Permanent Secretary of Health, and this is what should be done in accordance with the parent law, it appears that the Prime Minister also made an announcement in Parliament and in the media about the curfew order that needed to be implemented as part of the measures against COVID-19.

The answer to the second question is positive. The curfew order served a legitimate purpose or goal, that is, the nationwide-curfew was put in place to limit contact with people so as to prevent the spread of the coronavirus and protect public health. This is both pressing and important because without a curfew order during a global pandemic there will be no safety, and a public health crisis may ensue.

The last question is whether the limitation was necessary to achieve that purpose. The limitation was necessary because without it, people would lead a 'normal' life, which can be harmful to everyone. For example, in the case of *State v Vakalala* [2021] FHC the defendants were charged with three counts, one of which was failure to comply with an order contrary to the Public Health (Infectious Disease) Regulations 2020, reg 2. Failure to comply carries a penalty of \$10,000 or 5 years in prison. In this case, the defendants were out stealing when they were caught and were sentenced to 2 years imprisonment, suspended for 7 years.

Careful consideration must be given to the above penalty for violation of the curfew order. One can argue that the penalty imposed was too harsh and not proportionate to the aim the order is seeking to achieve.

In May 2020, various media outlets reported that one particular judge in Fiji, Justice Sailosi Temo, overturned one conviction decided by a lower court and quashed 48 sentences imposed by Magistrates on coronavirus rule breakers.<sup>13</sup> He ordered the Magistrates to re-examine the sentences because they were too harsh. He ruled that the harsh sentences breached people's constitutional rights, particularly the right that every person has under s 11 of the Constitution to be free from degrading or disproportionately severe treatment or punishment. Justice Temo indicated that some people who were fined hundreds and even thousands of Fijian dollars could not afford these fines as they had few sources of income and also had family to support. He explained that the Magistrates could have resorted to other available options such as suspended jail sentences.

## 2 *Freedom of expression*

The second measure to examine is related to the limitation of the right of freedom of expression. The Fiji government did not create new regulation or law to address this limitation. The Government relied on existing law – the Public Order Act [Cap 20] 1976 – and that is problematic because that legislation does not justify restrictions in COVID-19 situations. However, as noted, the requirements that must be met in order for a limitation to be justified are found in the ICCPR art 19(3) and the case of *R v Oakes*.

A court must ask itself two important questions related to the necessity: the minimal impact of the measure adopted and the proportionality of the measure.

First, is the law necessary and is the limitation rationally connected to the purpose of the law? The government relied upon the Public Order Act to curtail free speech and free press in order to restrict people from questioning and commenting on its policies put in place to battle COVID-19.<sup>14</sup> In some cases, the limitation was necessary. As noted, a 24-year-old man was charged under s 16 of the Public Order Act for a comment he posted on social media calling to people to breach the curfew order. The comment seemed to encourage the breach of curfew order and can be interpreted as a comment encouraging people to disobey the law. Therefore, the restriction placed on his right to free speech was appropriate. In some other cases however, the limitation is questionable.

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13 These cases have been reported by various media outlets <<https://www.fijivillage.com/news/Justice-Temo-quashes-sentences-in-49-breach-of-curfew-and-social-gathering-cases--fr8x54/>>; <<https://www.fjitimes.com/pandemic-law-a-whole-drama-series/>>.

14 Brigadier-General Ratu Jone Kalouniwau "The Paradox of Our Rights During Perilous Times" <<https://fjisun.com.fj/2020/04/22/the-paradox-of-our-rights-during-perilous-times/>>.

Is it necessary to restrict people from sharing their views and providing information about COVID-19? Is it necessary to limit freedom to comment, question and criticise the government's efforts? On 30 March 2020, Lynda Tabuya, a member of Parliament, was charged by the Police for her post on social media in relation to COVID-19. She posted the following on her Facebook page: 'Let's get one thing straight Fiji, the government brought Coronavirus to Fiji #StopBlamingThePeople #CriminalNegligence'.<sup>15</sup> Her social media post 'commented on the government's response to the virus and criticised the people engaged in victim blaming of the first person known to contract Covid-19'.<sup>16</sup> The social media post was an opinion shared on social media after observing the state and environment that people were in and what the government had done. It is difficult to interpret this post as malicious. Therefore, one can argue that the restriction of her right to free speech was not only unnecessary but it is also not rationally connected to the purpose of the Public Order Act.

Second, is the impairment of the right affected minimal? The government has the responsibility to ensure that the limitation or restriction does not greatly affect the right or right holder. The impact of the restriction is not minimal if it is unreasonable. In this discussion, it is not reasonable to curtail free speech and free press solely on the basis that the government is criticised. According to multiple news agencies, the government of Fiji has curtailed press freedom to avoid criticism of the policies it has made against COVID-19. This restriction makes it impossible for new agencies to provide information to the public and to offer scrutiny of the government. Freedom of speech is the cornerstone of democracy and once it is taken away without following the proper procedures there is no telling if the country is democratic or not. The curtailing of free press and speech in this situation appears to impact the right and the right holder. The impairment of the right is not minimal because the measure taken is unreasonable. The press is not free to publish articles as it should and people are not free to speak their opinion without fear of criminal charges.

Third, is the effect of the restriction proportional to the purpose of the law? The purpose of the law as identified already is to maintain public order. The sharing of COVID-19 related information, news or comments in response to the policies made by the government will not disrupt public order. Additionally, part of the discussion surrounding proportionality is the punishment regime concerning violations of order

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15 Semi Turaga "Lynda Tabuya granted bail but ordered to deactivate Facebook account" <<https://www.fijivillage.com/news/Lynda-Tabuya-granted-bail-but-ordered-to-deactivate-Facebook-account-x4r5f8>>.

16 Amnesty International Public Statement "PACIFIC: PACIFIC COUNTRIES MUST NOT USE COVID-19 TO REGRESS ON HUMAN RIGHTS" <<https://www.amnesty.org/en/documents/asa05/2144/2020/en/>>.

or law restricting a fundamental right. With respect to the curfew, the penalty is a \$10,000 fine or 5 years imprisonment or both and in the case of suppressing free speech under s 15 of the Public Order Act the penalty is \$1,000 or 1 year imprisonment or both; under s 16 the penalty is a \$2,000 fine or 2 years imprisonment. Are these penalties proportionate to the violation, offence or crime? Take for example the case of curfew violation, putting aside the fact that the violation was because they were out committing theft and focussing only on the fact that their right to freedom of movement was restricted. Under the international standard, is it proportionate to sentence someone to one year's imprisonment for "failure to comply with an order"?<sup>17</sup> As for freedom of expression, take the example of the Fiji Member of Parliament who criticised the government on Facebook. Did she deserve to pay a fine or be put in prison for the post she made on social media? Is this proportionate? It is clear from the discussion above that her post was genuine and she had the right to express herself. The punishments imposed were not proportionate to the offence because they are too harsh. They violate not only the rights to freedom of movement and freedom of expression but also the right not to be punished unfairly or disproportionately under s 11 of the Constitution.

## ***B Vanuatu***

The measure of interest is the Vanuatu State of Emergency Regulation Order No 35, in particular Order 6 which provides that 'All media outlets must not publish any article on COVID-19 unless it has received authorization of the National Disaster Management Office after consultation with the World Health Organization.' This Order places a restriction on the right to freedom of expression recognised in art 19(2) of the ICCPR and art 5(1) of the Vanuatu Constitution. The Vanuatu Government informed Pacific Beat that the measure was targeting fake news shared on social media, rather than mainstream media organisations.<sup>18</sup> Whether or not this is the case, the Order appears to be problematic.

The first challenge concerns the language or wording of the law. Order 6 specifically mentions 'all media outlets'. The language or the wording of the law is not clear. The order does not identify exactly what type of media platforms it is referring to and what kinds of COVID-19 information. Because the wording of the law is unclear, it is arguable that people will not know how to abide by it so they will abstain from exercising their right to express themselves. It is also arguable that this measure contravenes unnecessarily people's right to be informed of and about the

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17 *State v Vakalala - Sentence* [2021] FJHC 195.

18 Tahlea Aualiitia "Concerns about press freedom as Pacific governments try to tackle coronavirus misinformation" <<https://www.abc.net.au/radio-australia/programs/pacificbeat/press-freedom-concern-as-pac-govs-tackle-covid-misinformation/12105174>>.

coronavirus. In the case of *Chavunduka v Minister of Home Affairs*,<sup>19</sup> the Supreme Court of Zimbabwe ruled that a law criminalising 'false news' was unconstitutional on the ground that it was too vague to constitute a law. The editor and senior journalist of a local newspaper were arrested and charged with publishing 'false news' after they published an article describing a failed coup d'état. The Court stated that the offence of 'false news' is unnecessary, overbroad, and not reasonably justifiable in a democratic society.

The second challenge is that the law is written vaguely and provides no punishment regime for breach. People need to know the consequences of their actions; the Order does not provide for that. It is therefore argued that the limitation of the freedom of speech imposed by the Order is not compatible with the Constitution and international human rights standards in that it is not reasonably justified under the law.

## ***V CONCLUSION***

To prevent the spread of COVID-19 and protect the public health, the governments of Vanuatu and Fiji introduced a number of measures, some of which restricted fundamental human rights such as freedom of speech and freedom of movement. This paper shows that some of these measures may have not been reasonably justified under the law and/or were not proportionate to the aims these measures sought to achieve and therefore may have been in contravention of the international human rights standards and the national constitutions of these two countries. Although the governments are empowered under the state of emergency or natural disaster to take extraordinary measures, which may impose limitations on fundamental rights and freedoms, the Constitutions of Fiji and Vanuatu, the international human rights instruments and the case law clearly provide that the measures taken, even during the pandemic crisis, must be reasonably necessary and justifiable.

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19 Above n 6.