

# UNDERSTANDING THE CONSTITUTION

When it comes to HIV/AIDS, law and human rights, you might hear a lot of talk about your “constitutional rights”. But what are constitutional rights and where do they come from? This fact sheet will attempt to answer some of the questions you might have about the Constitution in your country.

## What is a “Constitution”?

Most Pacific Island nations have a Constitution. The Constitution is a law that sets out the basic values and structure of a country as an independent and democratic nation.

## Why is the Constitution so important?

The Constitution does a lot of things! For example, most Constitutions establish how government will work, how the courts will be set up, how citizenship is established and what values will form the basis of good governance and daily life. These values can be viewed as a promise made by the government as to how all people living in the country ought to be treated.

These values are often included in the Constitution as list of **political rights** (like the right to vote) and **fundamental rights** (like the right to equality).

Both political rights and fundamental rights are rights that belong to all people in the Pacific. All people deserve to have their constitutional rights respected.

The Constitution is the “supreme law” in most Pacific Island countries which means that ALL other laws must comply with it.

## What are fundamental rights and freedoms?

Fundamental rights and freedoms are rights and freedoms that each and every person possesses, including people living with HIV/AIDS. Most Constitutions in the Pacific set out similar rights.

There are also limits to our fundamental rights. Sometimes Constitutions set out limits attached to each specific right. Sometimes there is just a general proviso that all rights and freedoms can be limited “to the extent that the limitation is reasonable and justifiable in a free and democratic society”. It is up to a court to decide when a limit on a right is justified.

## What are some examples of fundamental rights and freedoms?

### (a) The Right to Equality

One of the most important rights for people living with HIV/AIDS is the right to equality. Most Pacific Island Constitutions have a provision which states something like:

**All persons are entitled to equal protection of and equal treatment under the law.**

This means that all people, including people living with HIV/AIDS (PLWHA), are equal and should be treated the same as everyone else.

See, for example:

- *Fiji - Constitution (Amendment) Act 1997, Section 38*
- *Constitution of Kiribati [Cap 1], Section 15*
- *Constitution of the Cook Islands, Section 64(b)*
- *Constitution of the Independent State of Western Samoa 1960, Section 15*
- *Constitution of the Republic of Vanuatu, Sections 5(1)(d) & (k)*
- *Constitution of the Solomon Islands, Section 15*

Some Constitutions also explicitly say that every person has the right not to be discriminated against based upon certain grounds.

### What is a “ground”?

“Ground” is a fancy way of saying “reason”. Usually Constitutions specifically list the grounds or reasons you are NOT allowed to discriminate against another person.

For example, many Constitutions say that you cannot discriminate against any person because of:

- sex or gender
- race
- colour
- place of origin
- disability
- religious beliefs
- political opinion (unless those beliefs or opinions harm others or infringe upon the rights and freedoms of others).

It is important to note that not all countries’ Constitutions list the same prohibited grounds of discrimination. For example, sex or gender is often excluded.

The Constitution of Fiji is also the only country which explicitly includes disability (the ground most applicable for people living with HIV/AIDS). No constitution in the Pacific specifically includes HIV/AIDS as a prohibited ground of discrimination.

## **What does it mean when it says that you cannot discriminate against another person?**

Anti-discrimination provisions in the Constitution generally mean that no person, including PLWHA should be treated in a discriminatory manner when going to a hotel, shops, restaurants, or in any other public place. This means that people living with HIV/AIDS should NOT be treated differently than other people on account of their HIV status. PLWHA should be treated the same as everyone else. Persons living with HIV should not be denied entry, refused service or lose their job because they are HIV positive. This is discrimination.

### **(b) The Right to Life**

The right to life means just that: Every person has the right to life and no person has the right to take away another person's life.

It may be possible to argue that laws, rules or actions which prevent access to important information about HIV/AIDS, prevent access to HIV testing, and/or prevent access to medical care infringe a PLWHA's right to life.

### **(c) The Right to Liberty**

Most Constitutions have a provision which says that all persons have the right to personal liberty. This right is mostly applicable to people who are accused of a criminal offence. The Constitutions say that such people cannot be deprived of their liberty without due process of law. This means that proper criminal procedures - like having a trial - must be followed before a person can be put in jail.

Outside of the criminal context, the right to liberty means that you should have the right to make your own decisions about yourself and your body. This should include:

- the right to refuse an HIV test;
- the right to say no to unsafe sex;
- the right to control your own medical treatment; and
- the right to have a family.

Most Constitutions in the Pacific say that a person cannot be deprived of personal liberty except as authorized by law "for the purpose of preventing the spread of disease".

See for example:

**Kiribati, Section 5 (1):** No person shall be deprived of his personal liberty save as may be authorised by law in any of the following cases, that is to say-

(h) for the purpose of preventing the spread of an infectious or contagious disease;

**Solomon Islands, Section 4, Due Process and Fair Trial:**

(1) No person shall be deprived of life, liberty, or property without due process of law.

(10) No person shall be preventively detained, involuntarily committed, or otherwise deprived of liberty outside the criminal process, except pursuant to Act, subject to fair procedures, and upon a clear showing that the person's release would gravely endanger his own health or safety, or the health, safety, or property of others.

Some people might think that this means that laws can be made to detain, limit the movements of, or quarantine people living with HIV/AIDS.

However, HIV is not the same as other infectious diseases. It is not spread through casual contact. Infection is easily prevented when everyone takes a few simple precautions like using a condom during sex. A person living with HIV should not have their rights to liberty infringed because they have HIV.

#### **(d) The Right to Privacy**

The 'right to privacy' is the right to be let alone. This is very important to people living with HIV/AIDS who may want to keep their HIV positive status and other medical information private. Gossip about PLWHA can be very hurtful and sometimes causes discrimination.

Most Constitutions in the Pacific have a provision which establishes a right to privacy of the home and other property. Generally this is a provision which protects against unreasonable searches of the home or seizures of personal property by the State. Few countries have a more general "right to privacy". Fiji and the Marshall Islands are the notable exceptions. However, it is not clear what types of intrusions of privacy will be found to violate the Constitution in these countries.

#### **(e) Freedom of Expression**

Most Constitutions include the right to freedom of expression which means that you have the right to express yourself and no one should be able to interfere with that right. Your right to freedom of expression should also include the right to receive or give out information or ideas. When it comes to HIV/AIDS, this right is important because it protects the right to give and receive information about HIV/AIDS and how to prevent the spread of infection.

## **What are Socio-economic Rights?**

Most of our Constitutional rights give us the right to be free from something like the right to be free from discrimination or the right to be free from limits on our personal liberty. Socio-economic rights are rights that give you something - like

the right to education or the right to health care. Most Constitutions in the Pacific do not offer much in the way of socio-economic rights.

### **(a) Health and Education**

While few if any Pacific Island nations recognize socio-economic rights, in the Marshall Islands, Art. 11, s. 15 of the Constitution recognizes the right to health care, education and legal services. In Fiji, s. 39 of the Constitution recognizes the right to basic education and equal access to educational institutions.

### **(b) Social Justice and Affirmative Action**

Fiji is the only country that has made a constitutional commitment to social justice.

Section 44 of the Constitution requires that the Government design programs to help disadvantaged people access education, training, land, housing and employment.

## **What role does Custom play?**

In many Pacific Island nations, the role and importance of customary law is constitutionally recognized. In some countries custom is considered a primary source of law. Different human rights organizations in the Pacific have expressed concerns that customary law may be discriminatory, especially against women. While customary law should still be subject to the Constitution, this may not always happen in practice.

## **Do I have constitutional duties?**

Most Constitutions do not impose individual responsibilities or duties except to say that the rights and freedoms of one person cannot hurt or harm other people or prevent other people from exercising their rights and freedoms.

However, in Vanuatu, the Constitution contains a unique provision which says that all persons have fundamental duties in addition to having fundamental rights. Fundamental duties include the duty to respect the Constitution, the duty to respect the rights and freedoms of others and the duty for parents, to support, assist and educate their children and in particular to educate them about rights, freedoms, custom and culture in Vanuatu.

## **What do I do if I think my Constitutional rights have been violated?**

If you think that your constitutional rights have been violated, you can talk to a lawyer and/or apply to the courts of your country for a remedy.

Unfortunately, the Constitutions of the Pacific may not always be the most effective tool for enforcing human rights protections. Discrimination still occurs

and some Constitutions only apply to government action and do not apply to the actions of private individuals (like for example, your employer).

Another problem is the lack of enforcement mechanisms in the Pacific for recognizing, promoting and protecting a person's rights and freedoms.

## Who can I talk to if my constitutional rights have been violated?

### Ombudsman

You can talk to the Ombudsman in your country. The Constitutions of some Pacific nations establish an Ombudsman who can hear complaints about government actions. There is an Ombudsman in the Cook Islands, Fiji, Samoa, Solomon Islands and in Vanuatu.

#### Contact the *Ombudsman's Office* at:

Cook Islands	P.O. Box 748 Rarotonga, Cook Islands Tel: (682) 20605
Fiji	2 <sup>nd</sup> Floor, Civic Tower GPO Box 982 Suva, Fiji Islands Tel: (679) 3314488 Email: <a href="mailto:ombudsmn@itc.gov.fj">ombudsmn@itc.gov.fj</a>
Samoa	Old Fono House P.O. Box 3036 Mulino Apia, Samoa Tel: (685) 21 862/25394
Solomon Islands	Kalala House, P.O. Box 535 Honiara, Solomon Islands
Vanuatu	Pilioko House PMB 081 Port Vila, Vanuatu Tel: (678) 27200 Email: <a href="mailto:ombud.vt@vanuatu.com.vu">ombud.vt@vanuatu.com.vu</a>
Papua New Guinea	PO Box 1831 PORT MORESBY 121 National Capital District Papua New Guinea Tel:(675) 308 2600 or (675) 320 3255 Email: <a href="mailto:supports@ombudsman.gov.pg">supports@ombudsman.gov.pg</a>

### Human Rights Commission

The Constitution of Fiji is the only Constitution that establishes a Human Rights Commission. The Commission serves the purpose of: educating the public about human rights; investigating human rights complaints; and making recommendations to government about compliance with human rights matters. Sometimes the Commission can take cases to court.

**Contact the FHRC at:**

Level 2, Civic Towers  
Victoria Parade  
Suva, Fiji Islands  
Tel: (679) 330 8577  
Email: [info@humanrights.org.fj](mailto:info@humanrights.org.fj)  
Website: [www.humanrights.org.fj](http://www.humanrights.org.fj)

**Public Solicitor**

Lawyers are expensive and many PLWHA may not be able to afford a private lawyer to help enforce their Constitutional rights. In some jurisdictions the Constitution establishes the office of the Public Solicitor. Vanuatu, Tuvalu and Solomon Islands each have such an office. The Public Solicitor provides free legal assistance and may be able to help if you think your constitutional rights have been violated. In Vanuatu, you can also contact the Community Legal Centre for free legal advice.

**Contact the *Public Solicitor's Office* at:**

**Vanuatu**

**Public Solicitor's Office**  
Rue Emile Mercet (opposite Town Hall)  
PO Box 794, Port Vila, Vanuatu  
Ph: + (678) 23450 and Fax: + (678) 23451

**USP Community Legal Centre**  
PMB 072, Port Vila, Vanuatu  
Tel: (678) 27026

**Tuvalu**

**Office of the People's Lawyer**  
Private Mail Bag  
Funafuti, Tuvalu  
Telephone: (688) 20721  
Fax: (688) 20730

**Solomon Islands**

**Public Solicitor's Office**  
Auki - Telephone 40 175  
Gizo - Telephone 60 175  
Honiara - Telephone 22 348

PIAF

You can also talk to a lawyer with PIAF's Legal and Human Rights Task Force.

For more information contact:



PIAF Legal and Human Rights Task Force

P.O. Box 888, Rarotonga, Cook Islands

Ph and fax: (682) 23102

Email: [lhrtf@pacificaid.org](mailto:lhrtf@pacificaid.org)

Website: [www.pacificaid.org/rights](http://www.pacificaid.org/rights)

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