

Human Rights and the Transparency of Government Action in Vanuatu - a Comment

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Issues of dubious governance often involve secrecy of actions. Secrecy makes comment upon actions difficult and government accountability impossible. However, where secrecy of actions is at the heart of the issue one can only comment upon known facts whilst highlighting problems of information deficit. This paper illustrates the difficulties faced by researchers in trying to uncover government policy in one particular area where information was not forthcoming and it provides some comments on what this might mean in terms of government administration, constitutional rights and human rights generally. The appropriateness of judging South Pacific cultures in terms of 'Western liberal human rights' is, we acknowledge, problematic. However, in this case, the government concerned, namely Vanuatu, has adopted a Constitution and system of government which is described as 'democratic' and which seeks to protect certain "rights". These constitutionally entrenched rights are surely worthy of open public scrutiny and debate.

The facts relate to a situation in Vanuatu leading to the revocation of a residency permit. Information is taken from an article in Vanuatu's independent newspaper, the Trading Post, (issue 223), dated 1st March, 1997. This source is particularly relevant as government departments and agencies have either refused to comment or have failed to respond to requests for further information.

Peter Douglas, a lawyer recruited through the Canadian Volunteer Organisation, CUSO, was appointed to a job as a legal advisor in the Ombudsman's Office in Vanuatu. Following advice to CUSO from the Expatriate Affairs Officer in the Department of Public Service, Douglas and his partner Tom Davis received full approval for residency permits prior to their arrival in the country in December, 1997.

However, three weeks after he had arrived, Tom Davis had his residency permit revoked. The revocation letter, from the Director of Public Service, stated that,

"I regret to advise you that after careful consideration between the Ombudsman's [sic] office, the Attorney General's [sic] Office and my office, it is quite clear that in a country like Vanuatu which is founded on Faith in God and Christian Principles, the spouse of Peter Douglas will therefore not be allowed to stay any longer."

The Ombudsman was represented in the news article as believing that the action of the government was justified as the application for the residency permit had misrepresented the facts by saying that Mr Davis was the spouse of Peter Douglas. Her reasoning was based on the idea that "*the dictionary definition of a spouse is someone of the opposite sex.*" She agreed that the government should make its position more clear on the subject as "*the law does not discriminate*".

The Attorney General was unavailable for comment in the news article. However, on March 15 1997 a letter to the editor from (the then) Attorney General Saksak, writing in his capacity as Pastor, appeared in the Trading Post (issue 227). It stated that "*The fundamental rights guaranteed in the Constitution are founded on among other things, Christian principles.... God certainly does not condone marriage(s) between consenting males let alone homosexuality no matter how legalistic the matter may be provided for under any laws.*"

Further requests for information made by the authors to the three offices involved met with no positive response, although the Attorney General (in a letter of 21 March 1997) stated that the information was classified under the Official Secrets Act of Vanuatu, cap 111.

The revocation letter, as reported, suggests that the basis for the decision was 'Christian Principles'. It can be assumed from this that the underlying reason for the revocation was that 'Christian Principles' do not

condone homosexuality, and that this was considered to be a sufficient ground upon which to base an administrative action. Such an assumption is further supported by Mr Saksak's letter to the editor that appeared in issue 227 of the Trading Post.

Although in the news report the Ombudsman did present a different reason for the revocation of the permit, being that misrepresentations were made in the application form, this reason was not reflected in the letter of revocation. The drawing of the veil of secrecy makes it impossible to consider whether it was in fact used as a reason for the revocation, when it was not officially stated to have been so used. No comment as to the legitimacy of this reason is therefore possible.

However, there is cause to speculate on the soundness of the stated use of 'Christian Principles' in the making of this decision. The issue of immediate concern is that so called Christian Principles appear to have been used to frustrate various Constitutional rights.

Although there may be other Constitutional rights which have been violated by this action only three rights, that suffer the most obvious violations, will be commented upon. It needs to be pointed out that Article 5(1)(f) and the relevant part of Article 5(1)(j) have not been tested in a Vanuatu Court and our interpretations are put forward without the benefit of judicial determination. The rights (contained in Article 5 of the Constitution of Vanuatu) are:

- 5(1)(f) freedom of conscience and worship
- 5(1)(j) protection for the privacy of the home...
- 5(1)(k) equal treatment under the law or administrative action

The right to freedom of conscience and worship includes both the right to choose one's own belief and the right to not have someone else's beliefs forced onto you. This principle has been enshrined in rights documents since the late 18th century in order to protect (amongst other things) the separation of church and state. Courts that enforce the common law system have long recognised that the fact that breaching an ecclesiastic duty does not equate to a violation of the law. (ie *Baldwin v Pascoe* 9 LRNZ 759, *Abington Township, Pennsylvania School District v Schempp* (1963) 374 US 203)

If this right is to be meaningfully upheld, administrative decisions cannot be based upon religious opinion or 'Christian Principles'. Otherwise, one person's interpretation of their religion could be imposed upon others through administrative actions. The authority of the State may then be used as a tool to punish those who choose not to live their lives by the rules of any particular religious code. If this were allowed to occur freedom of conscience and worship would not be achieved.

Article 5(1)(j) guarantees, amongst other things, *protection for the privacy of the home*. The scope of this provision is not clear as there has been no judicial consideration of this phrase in Vanuatu. However, given the natural meaning of the phrase, one would think that the right would be used to stop unwarranted interference with private practices that occur inside one's home. It could be argued that one should be able to choose with whom one lives as this is an issue of "home life". Basing an administrative decision on disapproval of what one chooses to do in the privacy of one's own home, provided that no crime, abuse, harassment or grounds for civil liability occurs in this private sphere, appears to violate this right.

Whether the right to equal treatment under the law or administrative action has been violated is a matter that is to be decided by comparing the treatment of one person to the treatment of others. The individuals affected by this administrative action have not been treated just like any other long term de facto couple. Indeed, as only one residency permit was revoked, it follows that one rule applied to one person and a different rule to another. The reasons given for this inequality of treatment are not consistent with the recognition of Constitutional rights. Unless other valid reasons for the differential treatment existed then this right has also been violated.

The Constitutional rights mentioned here are not absolute. They are expressed to be "*subject to respect for rights and freedoms of others and to the legitimate public interest in defence, safety, public order, welfare and health.*" (Article 5) Therefore, even though administrative action may limit an individual's rights, such action will be valid if it is exercised to protect legitimate public interest or the rights and freedoms of others.

It appears that the reason for revoking the residency permit was that Vanuatu is founded upon Faith in God and Christian Principles, and that such principles do not condone homosexuality. The Constitution is founded on traditional Melanesian values, faith in God, and Christian Principles. However these founding principles

are only to be found in the preamble of the Constitution. They may be used as an interpretive aid, but are not in themselves law and do not in themselves have the power to override other Constitutional Provisions. Subject to any legal restriction on non citizens, of which there are currently none, only legitimate public interest or the interference with the rights and freedoms of others can properly be used to limit one's constitutional rights. (Article 5(1)) It must be considered whether 'Christian Principles' fall within either of these categories.

To say that upholding Christian principles is in itself in the legitimate public interest and can therefore justify limiting one's Constitutional rights is inconsistent with the principle that freedom of conscience and worship is to be protected. Rather, other reasons must be given stating why the public interest in limiting rights is legitimate. As no other reasons were given in the revocation letter it does not appear that the legitimate public interest has been properly used to limit Davis's Constitutional rights.

Similarly there was no suggestion in the revocation letter that the administration thought it appropriate to limit Davis's rights in order to prevent interference with other people's rights and freedoms. Such a suggestion would be difficult to promote given that one's sexuality does not force other people to behave in any particular manner. Such behaviour does not have to be prevented in order to allow others the freedom to indulge in their rights.

In Vanuatu homosexual acts between consenting adults who are over the age of 18 is not a crime (s 99 Penal Code). This would create a further difficulty for the administration if it were to try to use either the legitimate public interest or the prevention of interference with others' rights as reasons for not guaranteeing Constitutional rights for people who are homosexual. If homosexuality is not a crime, then, at the very least, it indicates that the legislature does not consider that such behaviour needs to be deterred. From this it follows that, if a particular behaviour does not need to be deterred, then it is not considered to be harmful to society. If homosexuality is not harmful, then to use the fact that someone is in a homosexual relationship as a reason for limiting their Constitutional rights on the basis of legitimate public interest is inconsistent.

From the above discussion it can be concluded that Davis's Constitutional rights have been illegitimately restricted. However, the fact that it appears that in this instance an individual's rights have been violated only touches upon the surface of this issue. Deeper concerns that are raised by this situation are that the decision was shrouded in secrecy and that a review of the decision is difficult. The administrative structure that appears to allow for such an easy violation of rights must therefore be examined.

Firstly, the Immigration Act, Cap. 66 gives the Minister in Charge of Immigration very wide discretionary powers to revoke a residency permit. Section 17(1) states that "*the Minister need not give any reason for his order, which shall not be challenged in any court in any proceedings whatever*". It appears that this provision was used to revoke Tom Davis's residency permit, although this was not made clear in the revocation letter.

Although the Immigration Act appears to give the Minister total freedom to revoke a residency permit, the courts can still intervene. It has been decided that the procedural requirements of natural justice - the right to know the case against you and be given a reasonable opportunity to reply - must be followed by Ministers when exercising their discretion. If there is a claim of denial of natural justice then the courts can examine the matter. This approach is confirmed by *Re Coombe* [1980-88] 1 VLR 383 where the Court accepted that

*"it is the duty of the court to review orders made under section 17 of the Joint Regulation concerning immigration in spite of its preclusive wording. It seems to this court that this principle was made clear in *Anisminic Ltd v The Foreign Compensation Commission v [sic] Another* (1969) 2 AC 147."*

Further, the Constitution is the supreme law of Vanuatu and as such its provisions take precedence over other Acts. The courts may intervene if one complains that one's constitutionally guaranteed rights have been violated.

Although the courts can thus fetter the wide discretion of the Minister of Immigration this is not necessarily practical. One may only have, according to s.17(1) of the Act, 14 days in which to leave the country. It may be difficult to gather evidence for an appeal if the Government classifies information pertaining to the matter as secret under the Official Secrets Act, Cap 111.

Further, unless the Ombudsman initiates an investigation into administrative actions, only the immediately affected parties have standing to call the constitutionality of the Government's actions into question. Even

though one is asking the courts to examine whether rights have been violated - and one would think that upholding Constitutional rights is in the interests of all the public - no one else is able to bring an action claiming that actions are Constitutionally invalid.

Secondly, the scope of what can be kept hidden under Vanuatu's Official Secrets Act is not clear. Material can be classified as secret *if the use or possession of (it) without lawful authority would or might, by virtue of the nature or contents of the material, directly or indirectly prejudice the safety or interests of the Government or the Republic.*(s 1) The phrase 'interests of the Government' is capable of being construed very widely. It appears that a liberal interpretation has indeed been used in this instance.

Both of these Acts give rise to similar problems. They can both be used to hide the reasons for, and the methods used, in making a decision. Procedural stability, which requires, amongst other things, that there should be known procedures by which a government will operate, is threatened when a Minister is not only given unfettered discretion, but can use that discretion in secret. This in turn threatens the operation of the principle of accountability. If people are not aware of how the government is making decisions, how can the democratic process truly allow for any sort of accountability?

The entire Constitutional basis of the legal system is rendered questionable, if it is easy for a government to ignore its provisions. What changes might mitigate against the marginalisation of Constitutional rights must therefore be considered.

The Immigration Act could be simply amended so that, rather than relying upon judicial review, principles of natural justice are incorporated into the Act as mandatory procedures. This would ensure that the procedure to be followed in making decisions is clear to all, and would ensure that decisions could not be made in secrecy.

The Official Secrets Act is vague as to what is able to be classified as secret. A more comprehensive Act which closely defines what can be classified and which covers procedures by which requests for information must be handled would be beneficial in that the public would know what the procedural requirements are for classifying something under the Official Secrets Act. People would therefore not only be able to seek and gain information with more certainty, but would be in a better position to identify instances in which procedures have not been followed, which in turn could indicate misuse of the secrecy provisions.

Lastly, the general method of protection of Constitutional Rights needs careful consideration. Taking a matter to court involves time and expense, and causes difficulty in terms of proving issues which may be shrouded in secrecy. Further, the matter of standing means that only directly affected people could bring an action, although the fact that Constitutional rights are being ignored is a matter of concern for every citizen. Although the President must refer any bills that appear to be inconsistent with the Constitution to the Supreme Court (Article 16(4)) this is not in itself adequate to ensure protection of rights, as it can be difficult to predict the rights implications that a bill will have when considering something in the abstract. Effective ongoing review in relation to concrete situations is also needed.

A better system than the current method of review through the courts might be the formation of an independent Rights Commission - or perhaps, due to resource constraints, a Rights Commissioner attached to the Public Solicitor's Office - with wide powers of investigation. "Independent" in this context would mean that the Commission(er) would not have any role to play in the making of administrative decisions. Although the Ombudsman should fulfil this role due to Constitutional obligations with regard to administrative review, (Articles 63(2)) this paper shows that this is not always practicable. Involvement by the Ombudsman's Office in administrative decisions, for example the revocation of residency permits, makes it impossible to fulfil review obligations impartially. Issues relating to the standing of complainants could be alleviated by allowing the Commission(er) to initiate its own investigations, and take complaints from concerned people not just limited to those who are directly having their rights violated in any particular instance. The extent of its authority -whether it could just make recommendations, whether it could enforce those recommendations in court, or have some sort of enforcement power in itself - is an issue which would have to be considered. However, such issues need to be explored and there are adequate models in other jurisdictions for Vanuatu to consider.

Such action would ensure that Constitutional Rights are more than mere paper guarantees and are effectively recognised and upheld. It could help to ensure that government and its agencies do not to hide behind a wall of silence, and thereby frustrate concepts of transparency and accountability which must necessarily be upheld in a healthy democracy.

