

**The Diversified or Strict Role of an Ombudsman:
A Comparison in the Roles of the Ombudsman in Vanuatu and Fiji**

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ABSTRACT

The Ombudsman of Vanuatu has been described as a "Superwoman" with too much power. She is under constant attack by Ministers and politicians, for having too much power. This paper examines the role of the Ombudsman in Vanuatu, and compares it to the role of the Ombudsman in Fiji, as Fiji has adopted the classical style of an Ombudsman.

The classical role of an Ombudsman is to investigate grievances against government administration. However the Ombudsman in Vanuatu has a wider role. In addition to the responsibilities of maladministration and breaches of human rights provisions by public officials, the Ombudsman is also responsible for: multilingualism; and administering the Leadership Code.

This paper illustrates how the law regulating the Ombudsman in both countries is essentially the same. The Ombudsman in Vanuatu simply has a wider role and a greater means of having her recommendations followed. But in essence both Ombudsmen only have powers of recommendation.

If the law regulating the Ombudsman in Vanuatu is largely similar to the law regulating the classical Ombudsman, as in Fiji, then why the constant attacks on the Ombudsman in Vanuatu, to the effect that she has too much power? This paper seeks to answer this question.

1. INTRODUCTION

This paper is the result of research into the role of the Ombudsman in Fiji and Vanuatu. Minor adjustments have been made to the original research proposal. Discussion in the third section of the paper, on areas of interest, relating to the scope of public officials subject to enquires by the Ombudsman has been excluded. This approach has been taken for two reasons, firstly due to the word limit imposed on this research and secondly my inquiry did not produce much of interest.

Adjustment has also been made to the fifth section of the paper. The discussion on the advantages and disadvantages of the roles of the Ombudsman in Fiji and Vanuatu has also been excluded. It has been replaced this with a conclusionary section, which draws together the research and gives the necessary latitude to express my own sentiments on the role of the Ombudsman. This brings the paper to a more appropriate end.

This paper is in five sections. The **first section discusses the classical role of the Ombudsman, as in**

Fiji. This role is found in s 135 and s 138 of the Constitution of the Sovereign Democratic Republic of Fiji 1990. (Hereafter referred to as the Constitution of Fiji) From these sections of the Constitution it becomes apparent that the role of the Ombudsman in Fiji **is restricted to the investigation of maladministration public officials, although there is scope for investigations as to breaches of Chapter II of the Constitution that deals with the Bill of Rights.** The second section of this paper discusses the role of the Ombudsman in Vanuatu. This role is found in s 62(1) of the Constitution of the Republic of Vanuatu. (Hereafter referred to as the Constitution of Vanuatu) Additional functions of the Ombudsman can be found in s 14 of the Ombudsman Act No. 14 of 1985. (Hereafter referred to as the Ombudsman Act Vanuatu.) From these provisions it becomes apparent that the role of the Ombudsman in Vanuatu is fourfold, as follows:

- (i) To investigate the maladministration of certain public officials;**
- (ii) To enquire into the defects in any law or administrative practice from any matter being enquired into;**
- (iii) To enquire into any case of alleged or suspected discriminatory practices;**
- (iv) To enquire into any case of alleged or suspected breach of the Leadership Code of the Constitution by a leader.**

The third section of this paper will compare the roles of the Ombudsman in Fiji and Vanuatu. From the comparison becomes clear that the role of the Ombudsman in Vanuatu is wider as compared to the role of the Ombudsman in Fiji. However the comparison reveals that the powers of the Ombudsman in Fiji and Vanuatu are essentially the same, being recommendatory in nature. Although the Ombudsman in Vanuatu can exercise this power in more ways than the Ombudsman in Fiji. The fourth section looks at two areas of interest in the role of the Ombudsman in Fiji and Vanuatu respectively; firstly the issue of enforcement by the Ombudsman, with particular emphasis on enforcement by the courts. This provision of enforcement by the courts does not exist in Fiji but is found in s 30 of the Ombudsman Act Vanuatu. From this provision it appears that the Ombudsman in Vanuatu can have the role of both the judge and the jury. It has the role of initially investigating the complaint then recommending the remedy. If this is not complied with the Act permits the Ombudsman to apply to the Court to enforce the Order. This provision will be examined to see whether it gives the Ombudsman too much power in Vanuatu.

Secondly the issue of own motion investigations as provided by both the Constitutions. The Ombudsman's Reports of Vanuatu reveal that, the Ombudsman exercises this power alot more often than the Ombudsman in Fiji. The Ombudsman appears to exercise this power as a matter of practice and not law. Consequently this has affected the types of cases that are investigated. They are usually more politically contentious in comparison to the cases investigated by the Ombudsman in Fiji. The fifth part of this paper is conclusionary in nature. It draws the discussions together to show that the law regulating the role of the Ombudsman in both countries is largely similar. It then discusses the concern that the Ombudsman in Vanuatu has too much power.

I have stated at the law at 6 June 1997, and at this date the Ombudsman of Fiji is Sailosi Kepa. The Ombudsman of Vanuatu is Marie Noelle Ferrieux Patterson.

2. THE ROLE OF THE OMBUDSMAN IN FIJI

2.1 Source of law

Matters relating to the Ombudsman in Fiji are found in the Constitution of the Sovereign Democratic

Republic 1990, the Ombudsman Act (Cap 3) (hereafter referred to as the Ombudsman Act Fiji), and the Ombudsman Decree 1987, (hereafter referred to as the Ombudsman Decree Fiji.)

Chapter X of the Constitution of Fiji deals wholly with the Ombudsman. It establishes the office of the Ombudsman and provides for his or her functions and powers. The Ombudsman Act Fiji contains procedural provisions with regard to the Ombudsman. The Ombudsman Decree Fiji was promulgated in 1987 after the abrogation of the 1970 Constitution to re-establish the office of the Ombudsman. This Decree appears to now be unnecessary as the 1990 Constitution made the necessary constitutional provisions for the Ombudsman.

2.2 Office of Ombudsman

Section 134(1) of the Constitution of Fiji establishes the office of the Ombudsman, as a public office. The Ombudsman is appointed by the President on the advice of the Prime Minister the Leader of the Opposition and any other leaders of parties in the House of Representatives for a term of four years. The Ombudsman cannot hold any other public office, be a member of the House of Representatives or the Senate or a member of any local authority. Neither can he or she without the approval of the Prime Minister hold any other office of emolument or engage in any other occupation for reward.

2.3 Function of the Ombudsman

The Constitution of Fiji does not set out the functions of the Ombudsman in clear terms. However these terms can be deduced from careful reading of sections 135 and 138 of the Constitution.

2.3.1 Section 135(1) sets out the basic function of the Ombudsman. It states:

[T]he Ombudsman may investigate any action taken by any officer or authority to which this section applies in the exercise of administrative functions of that officer or authority.

The key phrases here are "any action" taken by "any officer or authority" covered by this section, in the exercise of the "administrative functions" of that officer or authority. The phrase "any action" does not require much explanation but it does include any failure to act. The phrase "any officer or authority" is defined in s 135(2)(a)-(h) of the Constitution of Fiji. It is worth noting that paragraph (h) of this subsection allows Parliament to prescribe by another Act other "officers or authorities" which are not covered by this section. Thus the actions of the Ombudsman are limited to these officers and authorities only. Note however that section 135(2)(i)-(x) further lists the officers and authorities that the actions of the Ombudsman are exempt from. "Administrative functions" is a flexible term that covers any administrative action taken in the exercise of executive power. The term has also become defined by the practise of the Ombudsman, both in Fiji and all over the world.

2.3.2 It appears that under s 135(6)(b)(ii) of the Constitution of Fiji that the Ombudsman has the additional responsibility of investigating breaches of any fundamental rights protected by Chapter II of the Constitution of Fiji, in relation to administrative action.

2.3.3 According to the *Reeves Report*, s 138(2) of the Constitution of Fiji, in setting out the conclusions which the Ombudsman may reach to justify stating an opinion and making recommendations, indicates that "action" means "any act, omission, decision" or "recommendation". These are then the main forms of administrative action and this indicates the types of actions that an Ombudsman may investigate. This thus can be included in determining the function of the Ombudsman in Fiji.

2.4 Persons who may lodge complaints and the beginnings of investigations

Under s 135(3) of the Fiji Constitution any individual or body of persons whether incorporated or not may make a complaint to the Ombudsman if he has suffered injustice as a consequence of an administrative action. This is the first way ie under a complaint that an investigation by an Ombudsman can begin. Under s 135(1)(b) the Ombudsman can also begin an investigation if is invited to do so by any Minister or member of the House of Representatives or the Senate. Further still under s 135(1)(c) the Ombudsman can begin an investigation under his own initiative.

2.4.1 Investigations

Section 136 of the Fiji Constitution provides the procedure for investigations. Briefly, under ss 1 the Ombudsman is to put the allegations to the principal officer of the department or authority concerned, as well as to any person who is alleged to have taken or authorised the action in question. These parties are to be given the opportunity to comment on the allegations in line with the principles of natural justice. Subsection two provides the way that all the investigations should be conducted. Investigations should be in private, in accordance with the procedures of the Constitution, any Act passed by Parliament, and in accordance to a manner that the Ombudsman finds appropriate (This is however subject to the Constitution and any Act).

Under s 137(1) of the Fiji Constitution the Ombudsman can request a Minister, officer or any member of any department or authority concerned or any other person to furnish him with information or produce documents relevant to the investigations. Section 137(2) of the Fiji Constitution expressly gives the Ombudsman the same powers of the High Court in relation to attendance and examination of witnesses.

2.4.2 Proceedings after investigations

Section 138 (1) of the Fiji Constitution states that after the investigation is complete and the Ombudsman is of the opinion that the action that was either: contrary to law; based wholly or partly on a mistake of fact or law; unreasonably delayed; otherwise unjust or manifestly unreasonable, then he is empowered to report his opinion and make recommendations to the principal officer of the relevant department or authority as to the course of remedial action that should be taken. Section 138(2) of the Fiji Constitution specifically empowers the Ombudsman to give the principal officer an opinion as to the remedy that the officer should take. The Ombudsman can ask the principal officer to notify him within a specified period of the remedial steps that are proposed. Under s 138(2) of the Fiji Constitution the Ombudsman then has to send a copy of his report and recommendations to the Prime Minister and the Minister concerned.

2.5 Ombudsman's reports

2.5.1 Annual reports

Under s 139 (3) of the Fiji Constitution the Ombudsman has to make an annual report to the President concerning the discharge of his functions. This report has to be laid before the House of Representatives and the Senate.

2.5.2 Additional / periodic reports

The Ombudsman can make periodic reports which might be needed. However these reports do not have to be presented to the President or to the Parliament unless within a reasonable time after the report is made no action is taken which seems to be adequate and appropriate.

2.6 Ombudsman's discretion and immunity from review

Section 139(2) of the Constitution of Fiji gives the Ombudsman the absolute discretion to determine whether to initiate, continue or discontinue any investigation. It gives the Ombudsman the power to determine whether a complaint has been duly made in accordance with the constitutional requirements. The Ombudsman also has the limited discretion under s 135(6) and (8) to decline to investigate a complaint. It is however interesting to note s 135(9) which states that the Ombudsman is not to conduct an investigation if he is given notice by the Prime Minister that the investigation of that matter would not be in the interest of Fiji. Does this mean that the investigative powers of the Ombudsman are subject to the approval of the Prime Minister? The Ombudsman under s 139(1) of the Fiji Constitution has immunity of review from a court of law. Thus the actions of the Ombudsman are not subject to any legal review, including judicial review.

This brings the first section of the paper to an end.

3. THE ROLE OF THE OMBUDSMAN IN VANUATU

3.1 Source of law

Matters relating to the Ombudsman in Vanuatu are found in the Constitution of the Republic of Vanuatu and the Ombudsman Act No. 14 of 1995.

Chapter 9 Part II of the Constitution of Vanuatu deals wholly with the Ombudsman. It establishes the office of the Ombudsman and provides for his or her functions and powers. The Ombudsman Act of Vanuatu provides the powers, procedures and immunities of the Ombudsman in addition to those provided for by the Constitution. It also adds a dimension to the Constitution by appointing the Ombudsman as the person responsible for the enforcement of the Leadership Code that is established in Article 66 of the Constitution.

3.2 Office of Ombudsman

Article 61(1) of the Constitution of Vanuatu establishes the office of the Ombudsman, as a public office. The Ombudsman is appointed by the President after consulting with the Prime Minister, the Speaker of the Parliament, the leaders of political parties represented in Parliament, the chairman of the National Council of Chiefs, the chairman of the Local Government Councils and the chairman of the Public Service Commission and the Judicial Service Commission. The Ombudsman cannot hold any other public office, be a member of Parliament or a member of any local Government Council. He cannot be a member of the National Council of Chiefs or in a position of authority in a political party. He cannot engage in politics, a business trade or profession.

Section 5(3) of the Ombudsman Act of Vanuatu provides an interesting qualification for the appointment of the Ombudsman. It states:

The Ombudsman must be a person of high integrity with a university degree or similar educational level and suitable experience in the public or private sector; politically independent, capable of discharging his constitutional duties without fear or favour, independent of mind and of high standards in the eyes of the community.

This requirement is extremely difficult to determine. Who is of high integrity or politically independent, capable of discharging his constitutional duties without fear or favour. It is equally difficult to determine

who has an independent mind and of high standards in the eyes of the community. These are all subjective tests and very difficult to determine. What one views as being of high integrity, independence of mind and of high standards will vary from the next person. The issue being whose standard of integrity etc. This makes this qualification requirement open to much interpretation, which in turn will cause many problems. To save such a situation it is best to have qualification requirements such as a university degree or similar educational level and suitable experience in the private or public sector.

3.3 Function of the Ombudsman

The Constitution of Vanuatu and the Ombudsman Act of Vanuatu set out the functions of the Ombudsman in fairly clear terms. Articles 62, 64 and 66 of the Constitution of Vanuatu and s. 14 of the Ombudsman Act Vanuatu state the functions of the Ombudsman.

3.3.1 Article 62 of the Constitution of Vanuatu sets out the basic function of the Ombudsman. It states:

[T]he Ombudsman may enquire into the conduct of any person or body to which this article applies.

However Article 62 is not clear as to the type of conduct that the Ombudsman may enquire into. Section 14(1)(b) of the Ombudsman Act Vanuatu states that the Ombudsman may enquire into any defects of any law or administrative practice appearing from any matter being enquired into.

3.3.2 Article 64 of the Constitution of Vanuatu states an additional function of the Ombudsman. It provides a citizen of Vanuatu the right of being served in the official language that he chooses from the administration of the Republic of Vanuatu. If this provision is breached the citizen may complain to the Ombudsman who shall conduct an enquiry in accordance with Articles 62 and 63 of the Constitution of Vanuatu.

3.3.3 According to the Ombudsman of Vanuatu Article 66 of the Constitution of Vanuatu extends the jurisdiction of the Ombudsman to the enforcement of the Leadership Code. It allows the Ombudsman to enquire into the conduct of leaders and assess if there has been misconduct or breach of duties and responsibilities under the Leadership Code. There is however a view in Vanuatu that this function of the Ombudsman is not expressly stated in the Constitution of Vanuatu. But stated in s. 14(1)(d) of the Ombudsman Act Vanuatu, which states that the Ombudsman may enquire into a case of alleged or suspected breach of Chapter 10 (Leadership Code) of the Constitution by a leader. The later view brings to the forefront the question, as to whether there is a conflict of the laws, between the Constitution of Vanuatu and the Act. The argument being that the Constitution is supreme, making the Ombudsman Act void. Thus not giving the Ombudsman the jurisdiction to enforce the Leadership Code. However from the Ombudsman's position and that of the Government of Vanuatu it appears that the accepted view is that the Ombudsman through the Constitution has the function of enforcing the Leadership Code. This power can be found in Article 68 of the Constitution of Vanuatu which states that Parliament shall give effect to the principles of this Chapter. (This chapter being Chapter 10 on the Leadership Code) This means that the Ombudsman Act gives effect to the principles of the Leadership Code. This Act has been provided by Parliament. Therefore the power of the Ombudsman to enforce the Leadership Code comes from the Constitution.

3.3.4 Section 14(1)(c) of the Ombudsman Act states that the Ombudsman may enquire into any case of an alleged or suspected discriminatory practice. This provision allows the Ombudsman to deal with human rights violations by public officials.

3.4 Persons who may lodge complaints and the beginnings of investigations

Under Article 62(1)(a) of the Vanuatu Constitution which states that any member of the public who claims to have been the victim of an injustice as a result of a particular conduct may complain to the Ombudsman. This is the first way ie under a complaint that an investigation by an Ombudsman can begin. Under Article 62(1)(b) of the Vanuatu Constitution the Ombudsman can also begin an investigation if requested to do so by any Minister or member of Parliament, or member of the National Council of Chiefs or member of a Local Government Council. Further still under Article 62(1)(c) the Ombudsman can begin an investigation under his own initiative.

3.4.1 Investigations

Article 62(3)-(5) of the Vanuatu Constitution and s. 16(3)-(4) of Ombudsman Act provides the procedure for investigations. Briefly, under s. 16(3) of the Ombudsman Act the Ombudsman is to inform the person or body which is the subject of the enquiry of the intention to make the enquiry. Section 16(4) provides that a hearing is not necessary and no person has the right to be heard. However the Ombudsman must give the Head of a service body or authority, complained of, the opportunity to comment on the subject of the enquiry. The Ombudsman must give a person complained of the right to reply to the complaints made against him. Under Article 62(5) of the Constitution of Vanuatu enquires of the Ombudsman should be in private, in accordance with the procedures of the Constitution, any Act passed by Parliament, and in accordance to a manner that the Ombudsman finds appropriate (This is however subject to the Constitution and any Act).

The Ombudsman can request any Minister, public servant, administrator, authority concerned or any person likely to assist him to furnish him with information and documents needed for his enquiry. Although not expressly stated the Ombudsman in Vanuatu appears to have powers of a court of first instance in relations to attendance and examination of witnesses.

3.4.2 Proceedings after investigations

Article 63(1) of the Constitution and s 22(2) of the Act respectively state that after an enquiry if the Ombudsman concludes that the complaint was unjustified, he has to inform the complainant and the Prime Minister and the head of the public department or authority concerned. Under Article 63(2) of the Constitution and s 22(1) the Act, if the Ombudsman concludes that the conduct was contrary to the law, based on error of law or fact, delayed for unjustified reasons, or unjust or blatantly unreasonable and that consequently the decision should be revised, he has to forward his findings to the Prime Minister and to the head of the public authority or department concerned.

Under s. 23 of the Ombudsman Act if the Ombudsman was conducting an enquiry under Chapter 10 (the Leadership Code) and the Ombudsman is of the opinion that a leader has breached the Code imposed under Article 66 of the Constitution the Ombudsman has to forward the report (with appropriate recommendations) to the Prime Minister and the President, if the leader is an elected and identifiable member of the Government. If it is a case of an elected leader identified to be a member of the Opposition, the report (with appropriate recommendations) has to be forwarded to the President and the Leader of the Opposition. If the leader is unelected, the report (with appropriate recommendations) has to go the President, the Prime Minister and to the appropriate appointing authority.

Under s. 25(1) of the Ombudsman Act if after an enquiry the Ombudsman is of the opinion that the commencement of criminal proceedings or other disciplinary action should be taken, he should inform the appropriate authorities with the supporting documents.

Section 25(2) of the Ombudsman Act provides that the Prime Minister or the person incharge of the

relevant public authority has to, within a reasonable time as specified by the Ombudsman decide on the findings and notify the Ombudsman of the steps that he proposes to take to give effect to the Ombudsman's recommendations.

Section 30 of the Ombudsman Act gives the Ombudsman the power to apply to the Court for an order to give effect to the recommendations of the Ombudsman. This can only occur if the following three requirements are met. Firstly if the person responsible has failed to respond to the Ombudsman's report within a reasonable time, or the response was in a manner that failed to resolve the problems identified by the Ombudsman's report, or that there has been a response to the Ombudsman's report but there has been a failure or refusal to carry out the decision communicated in response after been given reasonable opportunity to do so. Secondly the breach was of a fundamental right or of the Leadership Code. Thirdly the application for the order has to be made within 24 months of the date of the recommendation.

3.5 Ombudsman's reports

3.5.1 Annual general reports

Under Article 63(5) of the Constitution of Vanuatu and s. 26(1) of the Ombudsman Act the Ombudsman has to present a general report to Parliament annually.

3.5.2 Additional reports

Also under Article 63(5) of the **Constitution of Vanuatu** and s. 27 of the **Ombudsman Act** Vanuatu the Ombudsman can present additional reports to the President for presentation to Parliament as he considers necessary to the discharging of his functions and actions taken on his findings.

3.5.3 Report on multilingualism

Under Article 64(3) of the Constitution of Vanuatu the Ombudsman has to make a special annual report to Parliament concerning multilingualism and the measures likely to ensure its respect. Pursuant to Article 63(3) of the Constitution of Vanuatu and s. 24 of the Ombudsman Act the reports of the Ombudsman are to be public unless they concern matters of public security and public interest.

3.6 Ombudsman's discretion and immunity from review

Article 65 of the Constitution of Vanuatu states that the Ombudsman is not subject to the direction or control of any other person or body in the exercise of his function. Section 29(2) of the Ombudsman Act gives the Ombudsman discretion as to the determination of his proceedings. The Ombudsman also has the limited discretion under s. 16(1) of the Ombudsman Act to decline to investigate a complaint. The Ombudsman under s. 33(1)-(2) of the Ombudsman Act has immunity from any proceedings either criminal or civil from the performance of his functions. Thus the actions of the Ombudsman are not subject to any legal review.

4. COMPARISON OF THE ROLE OF THE OMBUDSMAN IN FIJI AND VANUATU

4.1 Source of law

Matters relating to the Ombudsman in Fiji and Vanuatu are primarily located in the Constitutions of each respective country. The Constitution of each country establishes the office of the Ombudsman and provides for his functions and powers. The Ombudsman Act of each country contains the procedural provisions with regard to the Ombudsman. However in Vanuatu the Ombudsman Act adds to the

provisions of the Constitution. It provides for the immunities of the Ombudsman. It also adds a dimension to the Constitution by appointing the Ombudsman as the person responsible for the enforcement of the Leadership Code that is established in s 66 of the Constitution

4.2 Office of the Ombudsman

The Constitution of both countries establish the office of the Ombudsman as a public office. The Ombudsman is appointed by the President in both countries after the advice or the consultation of a certain group of people is sought. In Fiji this consists of the Prime Minister, Leader of the Opposition and any other persons who appear to be leaders of parties in the House of Representatives. In comparison, Vanuatu requires the consultation of an extensive group of people. In addition to those in Fiji, the list includes the Speaker of the House, chairman of the National Council of Chiefs, the chairman of the local Government Councils and the chairman of the Public service Commission and the Judicial Services Commission. With such an extensive group of people to consult it could take a long time to appoint an Ombudsman. This could have had something to do with the vacancy of the Office of the Ombudsman in Vanuatu continuing for fourteen years before the present Ombudsman was appointed.

Both Fiji and Vanuatu have a list of positions that the Ombudsman cannot hold. They are fairly similar, ie the Ombudsman cannot hold any other public office, cannot be a member of Parliament or local authority, or engage in a business or trade for reward or emolument. In addition the Ombudsman in Vanuatu cannot be a member of the National Council of Chiefs or in a position of authority in a political party. The Ombudsman cannot engage in politics. Thus there doesn't appear to be a substantial difference in the positions that the Ombudsman cannot hold while in office, however Vanuatu has an express prohibition for the Ombudsman to engage in politics.

Vanuatu has the unusual qualificational requirements in s 5(3) of the Ombudsman Act stating amongst other things that the Ombudsman must be of high integrity, politically independent, independent of mind and of high stand in the eyes of the community. This requirement is difficult to meet due to it's subjectiveness.

4.3 Functions of the Ombudsman

The function of the Ombudsman in Fiji is that of the classical Ombudsman. He basically investigates the maladministration of certain public officials and the breaches of the fundamental rights and provisions of the Constitution. The function of the Ombudsman in Vanuatu is wider. The Ombudsman's function in Vanuatu is fourfold. He is responsible for: maladministration by public officials; alleged or suspected discriminatory practices; alleged or suspected breaches of the Leadership Code; and the observance of multilingualism.

4.4 Persons who may lodge complaints and the beginnings of investigations

An investigation by the Ombudsman can begin by three ways in both countries. Firstly by complaint of a person or member of the public. Fiji also allows a body of persons that has suffered injustice to make a complaint. Both countries have requirements that the complaints have to meet before the Ombudsman is able to begin an investigation. These are similar except that each country has one or two peculiar requirements of it's own. In Fiji, the Ombudsman may not investigate any action which the Prime Minister certifies in writing was taken personally by a Minister in his or her own deliberate judgement. In Vanuatu there must not be complaints more worthy of attention and secondly the Ombudsman must have adequate resources for an enquiry. These two provisions are wide and can be used by the Ombudsman to avoid an investigation. This brings to mind the reasoning for such a provision as it can drastically reduces a persons rights to relief under the Ombudsman's powers.

The second way in which an investigation can begin is if the Ombudsman in Fiji is invited to do so by any Minister or member of the House of Representatives or Senate. In Vanuatu a similar provision exists, except that the Minister, or Member of Parliament, or the National Council of Chiefs, or of the Local Government Council have to request that the Ombudsman conduct an investigation. The third way in which an investigation can begin is by the of the Ombudsman in both countries.

4.4.1 Investigations

The procedure for investigations by the Ombudsman in Fiji and Vanuatu are similar. The Ombudsman in both countries has to give a person or body the right of reply to an allegation. The enquires in both countries are held in private. The Ombudsman in both countries has the constitutional power to request information from persons that can assist in the investigation. However one difference does appear, in that the Ombudsman in Fiji has the powers of a High Court with regard to the attendance and examination of witnesses. The Ombudsman in Vanuatu only has the power of a court of first instance.

4.4.2 Proceedings after investigations

After an investigation is complete the Ombudsman in Fiji reports his opinion to the principal officer of the department. This could include recommendations as he sees fit. The Ombudsman also has the power to ask the principal officer to notify him within a specified time of the steps proposed to be undertaken to give effect to the recommendations. A copy of the Ombudsman's report is also sent to the Prime Minister and the Minister concerned.

In Vanuatu the proceedings after investigations seem to give the Ombudsman a variety powers. If the Ombudsman feels that the decision taken should be annulled or changed, the Ombudsman has to forward his findings to the Prime Minister and to the head of the public authority or department directly concerned. If there has been a breach of the Leadership Code then the Ombudsman is required to make a report to the required person, usually the President and either the Prime Minister or the Leader of the Opposition. If the Ombudsman is of the opinion that the commencement of criminal proceedings or other disciplinary action is justified, he is to refer the matter to the appropriate authority.

In all the Ombudsman's reports he can give the Prime Minister or the authority concerned a specified period (that is reasonable) within which to respond to the report. The response must contain the steps proposed to give effect to the recommendations of the report.

The Ombudsman of Vanuatu's ultimate weapon is his power to apply for court enforcement of his recommendations.

Thus from the comparison it is apparent that the powers of the Ombudsman are varied in Vanuatu as compared to the Ombudsman in Fiji. The Ombudsman in Vanuatu has many more avenues to have his recommendations followed. The Ombudsman in Fiji has less methods to have his recommendations followed. However both Ombudsmen only have the powers to recommend.

4.5 Ombudsman's reports

The Ombudsman's reports in Vanuatu are to be made public unless they concern matters of public security and public interest.

4.5.1 Annual general reports

The Ombudsman in Fiji and Vanuatu are required to make an annual report to the President to be tabled in Parliament in the discharge of his functions.

4.5.2 Additional reports

The Ombudsman in Vanuatu can also make reports to the President for presentation to Parliament as he considers necessary. This is a very good power particularly for pressing and important matters that need to be addressed. We have seen the Ombudsman in Vanuatu exercise this power over and over again. This is particularly useful in a country like Vanuatu where there is considerable political instability and corruption amongst public officials. The Ombudsman in Fiji has this power to make additional reports but not to the President, for presentation to Parliament directly. He has to first give the report to the principal officer of the authority concerned with a copy to the Prime Minister and the Minister concerned. He can only make a report to Parliament if within reasonable time after the report is made, no action is taken which seems to be adequate and appropriate.

4.5.3 Report on multilingualism

The Ombudsman in Vanuatu has to make a special annual report to Parliament concerning multilingualism and the measures likely to ensure its respect. Fiji has no such report as the Ombudsman is not charged with the function of multilingualism.

4.6 Ombudsman's discretion and immunity from review

The Constitution of both the countries state that the Ombudsman is not subject to the direction or control of any other person or body in the exercise of his function. The Ombudsman in Fiji has the absolute discretion to determine whether to initiate, continue or discontinue any investigation. It gives the Ombudsman the power to determine whether a complaint has been duly made in accordance with the constitutional requirements. The Ombudsman in Vanuatu appears not to have this wide discretion but the limited discretion (as in Fiji) to determine his proceedings. The Ombudsman in both countries also have the limited discretion to decline to investigate a complaint. Thus it appears that the Ombudsman in Fiji has more discretion in comparison to the Ombudsman in Vanuatu.

5. AREAS OF INTEREST

5.1 Enforcement provisions in Vanuatu

The Ombudsman in Vanuatu has the unusual power to seek a court order to give effect to a recommendation. However this power is not unlimited. There are three qualifications that the recommendations must fulfil before an application can be made to the court to enforce the recommendation. Once the application is made to the court does not simply grant the order. The court uses its powers to give the person responsible the opportunity to be heard and can re-open issues decided by the Ombudsman, examine witnesses examined by the Ombudsman or other witnesses and generally conduct the proceedings in a manner required to do justice in the case. Once these procedures have been complied with the court "may" enforce an order.

On the outset when one speaks of enforcement powers of the Ombudsman, there is a little uneasiness. To give the Ombudsman the unilateral power of judge and jury could open up areas of gross injustice. However the legislation has given the Ombudsman the power to seek the enforcement of recommendations in certain instances. However the courts have the overriding power to decide whether to grant the order or not based on the merits of the case. This gives the Ombudsman of Vanuatu some credibility. Public officials and authorities that are investigated have to take the Ombudsman seriously as

the Ombudsman has the power to seek enforcement of a recommendation. In comparison to Fiji where this power does not exist the persons and bodies concerned do not seem to take the role of the Ombudsman as seriously. It is also worth mentioning that the Ombudsman in Vanuatu has never used this power in her time in office. It could thus be implied that, threat of the exercising this power may cause some public officials to comply with the Ombudsman's recommendations.

5.2 Own motion investigations

The Constitutions of both countries allow the Ombudsman to begin investigations under his own initiative. Upon examination of this power it becomes evident that the Ombudsman in Vanuatu exercises this power more often than the Ombudsman in Fiji. The statistics for Vanuatu show that for the 1996 period, 34% of investigations of the Ombudsman were on her own initiative. For the same period in 1995 the figure stood at 25%. In Fiji the Ombudsman appears never to exercise this power. The Ombudsman's reports up to 1996 show that the Ombudsman never ever exercises this power.

This has resulted in a marked difference in the types of cases that the Ombudsman investigates in Vanuatu as compared to the Ombudsman in Fiji. The Ombudsman in Vanuatu is often involved in more contentious and sensitive investigations compared to the Ombudsman in Fiji. For example the Ombudsman in Vanuatu has investigated, "The Provision of Bank Guarantees Given in the Sum of US\$100,000,000.00", or the "Nabawan Bottle Shop Case". These investigations involved top level parliamentarians, including the Prime Minister and Ministers of the Government of the day. The Bank Guarantee investigation was extremely sensitive as the whole scam had the potential to bring the country to its knees, making it bankrupt.

In stark contrast the Ombudsman in Fiji never investigates such volatile issues. His investigations are rather low key and of little importance and interest except for the parties concerned. A peruse of the Ombudsman's reports in Fiji reveals such investigations as, "Case 7595 - Cow dies of fright", or "Case 7509 Police fail to return suspect's property".

6. CONCLUSION

The role of the Ombudsman in Fiji is that of the classical Ombudsman. He is responsible for maladministration and breaches of human rights provisions by public officials. The Ombudsman in Vanuatu has a wider role. In addition to maladministration and breaches of human rights provisions, she is also responsible for administering the Leadership Code and guarantee of multilingualism from the Administration of Vanuatu. It is therefore clear that the role of the Ombudsman in Vanuatu has been widened from the role of the classical Ombudsman, as in Fiji.

If there is a breach of one of these constitutional guarantees, then the Ombudsman has the power to investigate the breach. However more importantly the Ombudsman in both countries only has the power of recommendation upon completion of the investigation. These recommendations cannot be enforced in either country, although in Vanuatu the Ombudsman may seek a court order for enforcement. Thus there isn't any significant difference in the laws of both the countries. In essence the role of the Ombudsman is the power of recommendation.

If the law is the same, and the Ombudsman in Vanuatu has essentially the same role as the classical Ombudsman, then why the constant attack. Why the constant remarks referring to the excessive power of the Ombudsman?

This attitude could be attributed to:

- (i) The Public Reports of the Ombudsman in Vanuatu;
- (ii) The administering of the Leadership Code;
- (iii) The funding of the Ombudsman's Office in Vanuatu;
- (iv) The character of the Ombudsman of Vanuatu.

Public Reports

The Constitution provides that the reports of the Ombudsman are to be made public unless they concern matters of public security and public interest. As a matter of practice the Ombudsman of Vanuatu always releases the reports to the public. She takes a very strong stand on this. She feels that the public has a right to the reports. Also a matter of practice she gives the reports to the Government at about the same time that she releases them to the public. As a result the Government are often not adequately prepared to answer questions regarding the report. This puts the Government in the "hot seat" especially if the press is hounding them. This puts a strain on the relationship between the Ombudsman and the Government, resulting in the constant calls for a reduction in her powers. This issue could be easily resolved. A compromise could be reached and the Ombudsman could release the report to the Government prior to releasing it to the public. This would give the Government time to respond to the report and this would improve the relationship between the two parties.

The improvement of the relationship between the parties is important, since the Ombudsman only has the power of recommendation. If the relationship between the parties is good then there is a better chance that the recommendations would be followed.

The Leadership Code

The Ombudsman in Vanuatu is in the unique position of administering the Leadership Code. This Code governs leaders of the Country Often these outbreaks are retaliation by these leaders who simply do not want to adhere to such a strict code of behaviour.

Funding of the Ombudsman's Office

The Ombudsman's Office in Vanuatu had a budget of 21 million vatu in 1996. The Ombudsman in Fiji had a budget of F\$231, 200. The Ombudsman's Office in Vanuatu had a staff of 17, as compared to 10 in the Ombudsman's office in Fiji. Vanuatu has a population of approximately 170,000 as compared to Fiji which has a population of approximately 800, 000. The Ombudsman's Office in Vanuatu has a higher operating budget, with more staff members and less people to cater for.

In addition to this the Ombudsman's Office is heavily funded by overseas donors. The budget of the Office is substantially increased by aid from overseas. This aid comes in many forms: financial; equipment; and staff from overseas. This also increases the resources of the Office, making it able to deal with more matters. However more importantly the Ombudsman becomes less answerable to the Government, giving the Office latitude in their investigations and the ability to "tread on peoples toes" without having to really worry about their funding.

The Personal Character of the Ombudsman of Vanuatu

The current Ombudsman of Vanuatu has a very strong character and personality. She is a very determined and assertive person, with extremely strong convictions. She has no qualms in "rocking the boat". Nothing

appears to daunt her, not even the thought of her own safety! It is obvious that her character contributes to the repeated calls to reduce her powers. Marie Noelle Ferrieux Patterson sees herself in a watch dog role in a country where administrators are largely not educated and corruption and politics have become a synonymous term. She is out to clean up, and its no wonder there are repeated calls to reduce her powers.

This paper clearly shows that the role of the Ombudsman in Vanuatu has been widened somewhat, from that of the classical Ombudsman. However the powers of the Ombudsman in Vanuatu have not been substantially widened. The Ombudsman in Vanuatu still only has recommendatory powers, as do all Ombudsmen who follow the classical style. Therefore any calls for a reduction in powers of the Ombudsman are unjustified.

7. STATUTES

The Constitution of the Sovereign Democratic Republic of Fiji 1990

The Ombudsman Decree 1987 (Fiji)

The Constitution of the Republic of Vanuatu

The Ombudsman Act No. 14 of 1995 (Vanuatu)

8. BIBLIOGRAPHY

Corrin Care J, *Citation and Style Guide*, School of Law, USP, 1996.

Harris M and Waye V (eds) *Australian Studies in Administrative Law*, The Federation Press with the Adelaide Law Review Association, Sydney, 1991.

"Helping the people of Fiji to fight against public injustice" Fiji Times, Suva, Fiji, 13 December 1975, Weekend Magazine.

Holborn G, *Legal Research Guide*, Butterworths, UK, 1993.

"Justice Tikaram in world body of Ombudsmen" Fiji Times, Suva, Fiji, 13 September 1976.

Keith-Reid R, 'First Ombudswoman' (1995) 21/1, *Island Business* 43.

Ombudsman of The Republic of Vanuatu, *First Annual Report 1995 to Parliament*.

Ombudsman of The Republic of Vanuatu, *First Special Report 1995 on The Respect of Multilingualism to Parliament*.

Ombudsman of The Republic of Vanuatu, *Second Special Report on the Observance of Multilingualism 1996*.

Ombudsman of The Republic of Vanuatu, *Public Report on The Provision of Bank Guarantees Given in the Sum of US\$ 100,000,000.00*, 3rd July 1996.

Ombudsman of The Republic of Vanuatu, *Public Report Complaint on The Alleged Misappropriation of Funds by the President of the SHEFA Province and Maladministration of SHEFA Provincial Council*, 23rd July 1996.

- Ombudsman of The Republic of Vanuatu, *Report on The Nambawan Bottle Shop Case*, 20th August 1996.
- Office of the Ombudsman, *Third Annual Report of the Ombudsman (March 1974-February 1975)*, Parliamentary Paper No. 17 of 1975 Fiji.
- Office of the Ombudsman, *Fourth Annual Report of the Ombudsman (March 1975- February 1976)*, Parliamentary Paper No. 24 of 1976 Fiji
- Office of the Ombudsman, *Fifth Annual Report of the Ombudsman (March 1976- February 1977)*, Parliamentary Paper No. 20 of 1977 Fiji.
- Office of the Ombudsman, *Eighth Annual Report of the Ombudsman (March 1979-February 1980)*, Parliamentary Paper No. 29 of 1980 Fiji.
- Office of the Ombudsman, *Fifteenth Annual Report of the Ombudsman (March 1986- February 1987)*, Parliamentary Paper No. 18 of 1987 Fiji.
- Office of the Ombudsman, *Sixteenth-Nineteenth Annual Reports of the Ombudsman (March 1987-February 1991)*, Parliamentary Paper No. 28 of 1991 Fiji.
- Office of the Ombudsman, *Twentieth Annual Report of the Ombudsman (March 1991-February 1992)*, Parliamentary Paper No. 35 of 1993 Fiji.
- Office of the Ombudsman, *Twenty-fourth Annual Report of the Ombudsman (March 1995-February 1996)*, Parliamentary Paper No. 30 of 1996 Fiji.
- "Ombudsman's call for a right to know" Fiji Times, Suva, Fiji, 13 February 1975, Editorial Comment.
- "Ombudsman Hamstrunged by Lack of Funds" Fiji Sun, Suva, Fiji, 4 December 1975.
- "Ombudsman ok" Fiji Sun, Suva, Fiji, 2 July 1986.
- "Ombudsman's report" Fiji Times, Suva, Fiji, 3 July 1986.
- "Ombudsman to release ten reports over the coming weeks", The Vanuatu Trading Post, Port Vila, 4 June 1997.
- "Path to justice through Ombudsman" Fiji Sun, Suva Fiji, 24 August 1979.
- "Prison Reforms Needed Now" Fiji Times, Suva, Fiji, 2 December 1978.
- Reeves P and Vakatora T and Lal B, *The Fiji Islands: Towards a United Future: Report of the Constitution Review Commission 1996*, Government Printer, Suva, 1996.
- Stott D *Legal Research*, Cavendish, London, 1995.
- "The silent bureaucracy" Fiji Times, Suva, Fiji, 29 April 1977.
- Woolf L and Jowell J, *de Smith, Woolf & Jowell: Judicial Review of Administrative Action*, (5ed), Sweet and Maxwell, London, 1995.

9. APPENDIX

9.1 Profile on the Ombudsman of Fiji

NAME: Sailosi Wai Kepa

BORN: November 1938

MARRIED: Adi Teimumu Tuisawau

CHILDREN: 4

EDUCATION: Draiba Fijian School, Lelean Memorial School, Nasinu Training College, Sydney University (Diploma in Teaching of English 1966)

Called to the Bar, Middle Temple 1972

Barrister and Solicitor, Fiji, 1974

Joined Judicial Department as Magistrate 1969; served Suva, Northern Div, Sigatoka, Nadi

Chief Magistrate July 1980

Director of Public Prosecutions November 1980

High Court Commissioner for Fiji in London, 1985-1988

Attorney General and Minister for Justice, Fiji 1988-92

Rugby player (rep. Fiji, Australia in 1961) Coach, Manager, Administrator. Chairman, Fiji Rugby Union 1983-85

President, Suva Rugby Union 1989

Ombudsman since 1996

9.2 Profile on the Ombudsman of Vanuatu

NAME: Marie-Noel Ferrieux Patterson

BORN: In Grenoble, France, not inclined to disclose the date

MARRIED: Douglas Patterson, Scottish husband of a successful real estate business.

CHILDREN: 2 young children

EDUCATION: Bachelors Degrees in: English; English Law; Linguistics; Masters in Urban and Rural Planning and Sociology; Diploma in Banking and Accounting.

Ombudsman since July 15th 1994.

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