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Gender discrimination: A review of legislation in Vanuatu

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Introduction

A review of the legislation of Vanuatu was undertaken at the Emalus Campus of the University of the South Pacific, in Port Vila, over a period of three weeks in December 1999. The initiative for the review came from the Office of the Ombudsman and was undertaken as part of a Good Governance Project of VANWIP (Vanuatu Women in Politics, a branch of the Vanuatu National Council of Women). The review was commissioned as part of a wider programme focusing on governance and accountability in Vanuatu, sponsored by the United Nations. It was undertaken by two Ni-Vanuatu law graduates of the University of the South Pacific, Betty Zinner-Toa and Velma Wano, under the author's supervision.

The purpose of the review was to identify legislation which contained provisions which were either directly or indirectly gender discriminatory, so that future recommendations could be made to propose changes or reforms to legislation.

At the outset it was recognised that such a review would not necessarily identify all forms of gender discrimination in the laws of Vanuatu, or in the application of such laws. This is partly because legislation reflects only part of the total legal picture, and also because law on paper and law in practice can be two very different things. It was also recognised that redrafting legislation, while a positive move, would be unlikely to remedy gender discrimination because such discrimination stems from something more than the way laws are drafted. The findings endorse this view. The review was, therefore, seen as a very small, although important, step in dealing with gender discrimination.

The review

The Constitution of the Republic of Vanuatu provides for equal treatment under the law and for entitlement to the fundamental freedoms set out under the Constitution without discrimination on the grounds of, among other things, sex (s.5(1)). The Constitution also provides that no laws which make provision for the 'special benefit, welfare, protection or advancement of females, child and young persons, members of under-privileged groups or inhabitants of less developed areas' (s.5(1)k) shall be deemed to be inconsistent with equal treatment.

All legislation in force on 23 November 1999 was reviewed to see if it complied with the principles of equal treatment, and if it appeared not to, why this was so. The main areas in which discrimination on the basis of gender was found to exist were:

marriage and the family; citizenship and nationality; employment and labour; and sexual offences.

Marriage and family

Legislation found to be discriminatory under this heading included the Control of Marriage Act (CAP 45); the Maintenance of Children Act (CAP 46); the Maintenance of Family Act (CAP 42); and the Matrimonial Causes Act (CAP 192).

The law of marriage establishes different ages for males and females, the latter being 16 years and the former, 18 years – which is the age of majority. In a society where family involvement in marriage is still common, this means that at present females are of marriageable age before they reach the age of majority. Their legal incapacity to contract seems to be ignored for the purposes of marriage.

Moreover, where a person wishes to be married according to custom, the choice appears to be that of the man, who must fulfil the premarital requirements. This provision in the Marriage Act (CAP 60) may be misleading in as much as customary marriages are likely to involve both families, if not wider kin groups. It should also be noted that many customs relating to marriage are not controlled by legislation and that discriminatory practices would not emerge from a review of this sort.

Where a marriage is entered into, under the Matrimonial Causes Act, it may be declared voidable if the wife was, at the time of the marriage, pregnant by someone other than the (husband) petitioner. This provision only affects women. Provided the husband was unaware of the pregnancy at the time of the marriage and provided he refrains from sexual intercourse with his wife once the discovery is made, a decree of nullity may be granted. In a society where premarital sex is not unusual, this provision seems to take a one-sided view of sexual fidelity. It should also be pointed out that DNA testing or other scientific methods of establishing paternity are not available in Vanuatu.

The grounds for terminating a marriage are equal as far as desertion or continuous absence is concerned, but only a wife may petition for divorce on the grounds of her husband's conviction for rape or other unnatural offences. Unnatural sexual acts of women are not considered.

Differential sexual mores are also apparent in the provisions of the Maintenance of Children Act, where a claim for maintenance for children will not be available if there is evidence 'that during the normal period of conception the mother was of

a notorious loose behaviour' (s.4(a)). Not only does this punish the children of women labelled in this way but, also, the lack of any reference to loose male behaviour means that only the behaviour of women is sanctioned.

While most societies make provision for establishing legitimacy for succession to title, particularly to land, certain rights and titles also pass matrilineally. Customary adoption of children is also recognised. Nevertheless, the current state of legislation suggests a patriarchal structure in which paternity is all-important.

This emphasis on the ascendancy of males can be a disadvantage, especially when viewed against some of the material changes taking place in Vanuatu. For example, under the Maintenance of Family Act, only men have to pay maintenance for their children or alimony to their spouse, although a mother may be fined or imprisoned for deserting her children. There is, therefore, no indication that the financial responsibilities of the joint household or upbringing of children should be shared, or that the parent who is earning – who may in some cases be the mother rather than the father – should pay. Actual care is clearly the responsibility of the mother, even if she is not earning or receiving maintenance. Traditionally, this might not cause problems, but these days children do not just require food from the gardens but also school fees, books and clothes. Women may be better able to find paid employment, even if it is relatively unskilled. Moreover, more women are receiving education and are therefore able to move into paid employment. The current legislation does not reflect these changes or accommodate the possibility of considering the earnings of both partners to a marriage.

Citizenship and nationality

Discrimination in the operation of the laws relating to citizenship was the subject of a public report published in May 1999 by the Office of the Ombudsman.

Under the Citizenship Act, rights to citizenship are determined according to gender and marital status. A woman married to a Ni-Vanuatu man is entitled to apply for Vanuatu citizenship. The converse does not apply, so the only way a man who is not a citizen can become one is after fulfilling a residency requirement of ten years. Adopted children who are not citizens similarly can derive their citizen rights from the male adopter.

Where a male applicant becomes a citizen by naturalisation, his wife or any children are automatically entitled to citizenship, although the wife must indicate in writing that she wishes to do so. A woman who becomes a citizen through naturalisation does not confer a similar automatic right on her husband and children. On the other hand, a woman who gives up her Ni-Vanuatu citizenship on marriage to a citizen of another country may regain that citizenship on the breakdown of her marriage.

In a region where movement between different Pacific countries is a regular feature – for example, for education or

employment – citizenship rights are important. They confer a number of benefits denied to non-citizens. Discrimination in the conferral of citizenship necessarily means discrimination in other indirect ways.

Employment and labour

Under the Employment Act (CAP 112), there are provisions which discriminate against women by prohibiting them from employment in certain sectors or at night. These provisions are no doubt intended for the better protection of women and, as such, may fall within the permitted exceptions to the equal treatment principles of the Constitution. However, such provisions can also have a negative impact on the employability of women and the employment opportunities open to them. These provisions are also contrary to Article 11.1(c) of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) – to which Vanuatu is a signatory – which states that women should have 'a free choice of profession and employment' (11.1(c)).

The other area in which discriminatory measures apply to women in employment is with regard to maternity leave. Inevitably, maternity leave is discriminatory in as much as it can only apply to women. However, under the provisions for annual leave in s.29(1) of the Employment Act, maternity leave is listed along with absence due to accident or illness as being a period counting towards continuous employment for annual leave entitlement purposes. Moreover, maternity is also listed under sick leave under s.36 which prohibits an employer from permitting a woman to work six weeks prior to or six weeks after her confinement. While the analogy with sick leave is itself open to debate, the further problem is that a woman on sick/maternity leave is only entitled to be paid less than half of the remuneration she would have been entitled to had she not been absent. This is despite the fact that her absence on the grounds of pregnancy is counted as being continuous employment. Logically, her maternity leave should be on full pay. There is no indication that men who are absent from work for sickness reasons are only paid less than half pay. There are also no provisions regarding job security, so that a woman who breaks off employment to have a baby may well find that she has no job to come back to.

One positive aspect of the employment legislation is that it does allow women to nurse a child for half-an-hour twice a day during her working hours, and such time can be counted as working hours.

Where an employee is accompanied to his place of employment by his family, if he is repatriated or dies while working away from his homeland, he and his family will be repatriated (s.59). The expression 'family' is specified as meaning the wife and dependent minor children of the employee. There is no provision for the repatriation of the minor children and/or spouse of a female employee in similar circumstances.

Sexual offences

The law relating to sexual offences in Vanuatu is still firmly based on heterosexual intercourse, in which the victim is generally female and the perpetrator, male. The definition of rape, for example, is still gender specific and focuses on the lack of consent of the woman and penetration by the man. Failure to prove either will result in acquittal.

There is, however, clearly a perceived need to protect women from sexual violence. The law against abduction mentions only females (s.92), as does the law against intercourse with a girl under care or protection (s.96) and the law against unlawful sexual intercourse which refers only to under-age girls.

Conclusion

The areas in which discrimination was found to exist are not dissimilar to those that have been highlighted, and in many cases addressed, in other legal systems. Most of the examples of discrimination found in the legislation were against women, although not all. Some of this could be quite easily changed by minor drafting amendments, or by cross-reference to the Interpretation Act which provides that 'words and expressions importing the masculine gender shall include the feminine and vice versa' (s.3(2)).

However, as might have been anticipated, gender discrimination is particularly apparent in those areas of the law which deal with the family, personal status, and sexual behaviour. These are complex and controversial areas which are not easy to reform. There is, moreover, the exception – allowed by the Constitution – that protective or special benefit laws affecting women are not contrary to the equal treatment principle.

While both the Constitution of Vanuatu and its commitments under international treaties such as the CEDAW reflect acceptance of policies of non-discrimination, particularly against women, how this is to be brought about creates difficult challenges for a society where introduced ideals and values exist alongside and compete with traditional ones.

The findings of the review (which are public but unpublished) have been submitted to a workshop to be attended by delegates drawn from many different sectors. Recommendations, with various drafting suggestions, will then be put before Parliament for reforming the law. What these recommendations will be remains to be seen. Certainly, it can be anticipated that there will be those who are opposed to change, especially if those changes go to the very heart of social structures, traditional gender based roles, and long-held views on the acceptable behaviour of men and women.