

## South–South policy transfer: the case of the Vanuatu Ombudsman’s Office

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The issue of policy transfer has become of increasing interest to the wider development community in the last few years, as is witnessed by the emergence of a growing body of literature dealing with the phenomenon (Dolowitz and Marsh 1996). This body of literature has, however, focused almost exclusively on North–North and North–South forms of policy transfer (Minogue 2002). While North–North policy transfer is often largely successful, North–South transfer has a far less attractive track record. The supposed failure of democracy, and the associated problem of failed states in the Pacific region would appear to stem directly from the failure of just this form of policy transfer. Here an alternative policy transfer mechanism is proposed. Using the example of the establishment of the Vanuatu Ombudsman’s Office in the early 1990s, this paper explores the potential of South–South forms of policy transfer. The use of this mechanism seems to provide an opportunity to avoid the problems of state capacity and cultural misfit that plague North–South forms of transfer. The use of South–South transfer in the creation of the Vanuatu Ombudsman’s Office provides a novel

example of the way in which anti-corruption activity may be successfully promoted in other Pacific island states, while at the same time maintaining the distinctively Pacific origin of these ideas.

### South–South policy transfer

Developed initially to explore North–North transfer, the concept of policy transfer has been extended in recent years to the analysis of North–South transfer.<sup>1</sup> This analysis has been useful in exploring the reasons behind the success or failure of the transfer of institutions such as the Westminster Constitutional system to non-Western states (Larmour 2002). One of the key questions powering these investigations is why have transferred systems generally failed to function effectively in new environments?

On reflection, it would seem that there are two main reasons behind the failure of North–South forms of policy transfer. The first is the problem of capacity. The disparity in levels of state capacity between developed and developing countries has long been seen as a reason behind the failure of various development schemes to ‘take-off’ in

developing countries (Evans 1995; Migdal et al. 1994). Institutions created in developed countries are often designed, implicitly or explicitly, with certain levels of state capacity in mind. When these institutions are transferred to less developed countries with much lower levels of state capacity, they often do not work as well as initially expected<sup>2</sup> (Rose 1993). The second problem concerns the cultural misfit that sometimes accompanies the transfer of institutions developed in one cultural context to a different context (Rose 1993).

An obvious, although to this point little-studied, solution to these problems is the use of South-South forms of policy transfer. The disparity between state capacity in developing countries is generally much less than that between developed and developing countries. Also, whilst the problem of cultural misfit may still apply in South-South transfer between disparate cultural regions, within cultural regions such as Melanesia or Polynesia its effect may be very limited. A fascinating case of just this form of successful South-South policy transfer occurred with the establishment of the Vanuatu Ombudsman's Office in the early 1990s.

### Ombudsman in the Pacific

In the lead up to Independence, a number of Pacific islands states adopted various supplementary mechanisms designed to control the exercise of parliamentary and executive power. These included, amongst others, provisions for the establishment of independent 'watchdog' institutions such as electoral commissions, public service commissions, Auditor-General's offices and Ombudsman commissions. In Papua New Guinea the establishment of these institutions took on a decidedly local flavour and it is towards the development of these institutions that we now turn.

The construction of the PNG constitution was largely the result of the efforts of indigenous groups working together in the Constitutional Planning Committee (CPC), with the colonial power having little say in the process. One of the key aims of this committee was that the new state of Papua New Guinea be based on indigenous principles and ideals (CPC 1974:2/12-15). This was not, however, to be at the expense of useful foreign ideals. The CPC thus argued that

... it is inevitable that we should make intelligent use of foreign ways. But we should do so only after we have set our national goals and priorities. The second step is to determine and make sound use of our own resources, both human and material. We should use foreign ways only to supplement our own resources (CPC 1974:2/13/105).

The constitution was thus to be based on the promotion of 'traditional ways such as participation, consultation and consensus and a willingness of privileged persons to voluntarily forgo benefits to enable those who are less privileged to have a little more' (CPC 1974:2/13/106). These ideals were operationalised in the establishment of a number of independent institutions at Independence, such as the Ombudsman Commission, in order to ensure the accountability of public offices.<sup>3</sup> The establishment of the Ombudsman Commission is a particularly interesting example of the way in which the CPC modified external institutions through the infusion of local concerns and traditions.

From its inception, the PNG Ombudsman Commission has taken on a role very different from that normally attributed to Ombudsman offices. In addition to the usual focus on issues of maladministration, the PNG Ombudsman Commission has the additional role of policing the PNG Leadership Code.

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This development has meant that under its Leadership Code jurisdiction, and 'in the absence of an independent, adequately resourced anti-corruption body [the PNG Ombudsman Commission...has also become a *de facto* anti-corruption agency' (Cannings 2001:197; Toop 2001:228). In doing this the PNG Ombudsman Commission

...has been able to combine its extensive powers under the Leadership Code, together with the exercise of powers as a traditional Ombudsman institution, in the overall fight against corruption in Papua New Guinea (Cannings 2001:197).

One of the key results is that despite the criticism of what is seen as a weak and faulty leadership code, the PNG Ombudsman Commission (as well as the other independent authorities and judiciary) is seen as one of the 'redeeming features of Papua New Guinea's constitutional system', and 'has prevented the decline of the executive and Parliament into total irresponsibility and unaccountability' (Ghai 2001:53).<sup>4</sup> The PNG Ombudsman model is thus particularly well suited to the lower levels of state capacity that typically characterise developing countries. Incorporating an implicit anti-corruption function, the PNG Ombudsman model provides developing countries a form of two-for-one institution, thereby replacing the need for two separate institutions—something that would generally require more money to establish and maintain and require greater levels of state capacity.<sup>5</sup>

Three other Pacific island states included the establishment of Ombudsman institutions in their independent constitutions.<sup>6</sup> In recent years Fiji and Solomon Islands—which have had functioning Ombudsman Commissions since not long after their Independence—have explored the possibilities of adopting broader powers for their Ombudsman institutions. Vanuatu was the only Pacific island state that

did not establish an Ombudsman Commission within a few years of independence. Instead, it formed its Ombudsman Commission in the early 1990s, largely with the help of the PNG government.

### Vanuatu's Ombudsman

In Vanuatu, the institution of the Ombudsman was provided for in the 1980 constitution but for various reasons it was never established.<sup>7</sup> The inclusion of the institution of an Ombudsman and discussion of a Leadership Code in the Vanuatu constitution is, in itself, an example of an earlier form of South–South policy transfer. Advisors in the construction of the PNG constitution in the early 1970s also acted as advisors in the construction of the Vanuatu constitution.<sup>8</sup> However, in the decade and a half following Independence, the issue of the Ombudsman remained on the 'to do' list of the new Republic. When the Union of Moderate Parties (UMP) came to power in the 1991 election, Maxime Carlot Korman became the first francophone Prime Minister of Vanuatu. In the build up to the election he had discussed the possibility of establishing the post of Ombudsman if he came to power. In the first two years of his government's term, little was done towards this goal. However, in the wake of a trip by the Prime Minister to Papua New Guinea, during which he visited the PNG Ombudsman Commission, the Prime Minister decided to send a local magistrate, Vincent Lunabeck, to the 1993 Annual Regional Ombudsman Meeting.<sup>9</sup> On his return Lunabeck wrote a report, which was favourably received by the Prime Minister.<sup>10</sup> The UMP government decided in late 1993 and early 1994 to press ahead with the establishment of a Vanuatu Ombudsman Office.

Judicial cooperation already existed between Papua New Guinea and Vanuatu

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and so it was decided that the Vanuatu Ombudsman Office would be established through the extension of this existing program. A Memorandum of Understanding (MOU) was signed between the two governments in Port Moresby in October 1994 in which it was agreed that the PNG Ombudsman Commission would assist in the creation of the Vanuatu Ombudsman Office through the provision of aid in the drafting of the Ombudsman Act legislation and in providing the Ombudsman Office with an advisor from the PNG Commission. Two staff from the Papua New Guinea Ombudsman Commission were sent to Port Vila to start this process: Greg Toop to act as Legal Council and lead the drafting of the Ombudsman Act, and an Investigator, Peter Kape, to establish the office and train staff. This assistance was paid for by the PNG government.

Under the first phase of the MOU the Vanuatu Ombudsman legislation was to be drafted and presented to Parliament. In the second phase, officers from the Vanuatu office were to be sent to the PNG Ombudsman Commission for a period of 6–12 months for on-the-job training. In October 1995 the Ombudsman Act (No. 14) was passed into law by the Vanuatu Parliament. The second phase of the MOU, however, was never enacted, as almost as soon as it was established, the Vanuatu Ombudsman Office was flooded with complaints and the staff that would have been sent to Papua New Guinea were set straight to work.<sup>11</sup>

The influence of the PNG model in the drafting of the Vanuatu Ombudsman Act meant that it contained the added dimension of the Office of the Ombudsman being responsible for the enforcement of the country's Leadership Code. Unfortunately, even though the Ombudsman Act (1995) made explicit reference to this power, the failure to pass a Leadership Code Act meant that this power was largely unable to be

exercised.<sup>12</sup> However, even given the lack of an explicit Leadership Code Act the Office was still able to inquire into the conduct of leaders through the use of powers vested in the office of Ombudsman by the relevant sections of the constitution.<sup>13</sup> However, the form of Leadership Code present within the constitution was very weak and it made no recourse for punishment of offenders. Thus, leaders who breached the Code could be investigated but no prosecution could proceed. In this respect the Vanuatu Ombudsman Office had fewer formal powers than the PNG Commission. Throughout this period both the Vanuatu Ombudsman Office and the PNG Ombudsman Commission continued to press Vanuatu's politicians for the passage of a Leadership Code Act. However, the issue continued to be deferred.

The lack of a Leadership Code continued to plague the Vanuatu Ombudsman Office. In September 1996 the Vanuatu Parliament finally decided to debate the Leadership Code bill but at the last minute it was deferred again until December. However, other events—not the least of which was the large number of complaints that the Office was investigating—kept it very busy. The original MOU expired in November 1996, however it was renewed for a further two years in March 1997 during a visit by then Minister of Foreign Affairs, Willie Jimmy, to Papua New Guinea. The extended MOU provided for further assistance for the Vanuatu Office from the PNG Commission—particularly to help press for the creation of a Vanuatu Leadership Code.

Political problems with regard to the functioning of the Ombudsman led in November 1997 to the Vanuatu Parliament repealing the Ombudsman Act (1995).<sup>14</sup> The repeal was challenged on the grounds of being unconstitutional; but in May 1998 the Supreme Court upheld the original act of repeal and so in June 1998 the Ombudsman Act was officially repealed. With the repeal

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of the Act the Office of the Ombudsman was forced to operate under the auspices of its mandate as presented in the constitution. In the wake of this political upheaval the Vanuatu Leadership Code Act was finally passed in August 1998 and was immediately backdated to the 1 July. However, without an accompanying Ombudsman Act the new Leadership Code Act was largely useless, although some work was able to continue through the powers vested in the Ombudsman Office by the constitution.

In November 1998 a new Ombudsman Act was debated in Parliament and passed into law in January 1999. The new Act differed from the original in several ways. First, a mediation function was included in an attempt for complaints to be resolved through a consensual rather than adversarial approach. The second major change was that the public was encouraged to approach the department, body or person that they wished to make a complaint about before approaching the Ombudsman Office. Under the new Act, the Ombudsman would not normally initiate an enquiry unless a direct complaint had first been made and if no other options were available to resolve the matter.<sup>15</sup> The new Act also clarified the action to be taken to give effect to the Ombudsman's recommendations. Finally, under the Act the Office's staff became public servants, whereas previously they had been staff of the Office itself.<sup>16</sup>

Some of these changes would appear to be for the good. The more consensual approach to problem solving may be appropriate given the Vanuatu socio-cultural context.<sup>17</sup> Others, such as the staffing of the Ombudsman Office by the Public Service Commission would appear to be more problematic. Nevertheless, with the passage of the Ombudsman Act (1999) all the necessary sections for a fully functioning Ombudsman Office, based on the PNG model, are now in place. Despite this, however, an independent review of the

Ombudsman Office in early 2001 found that the Office was not functioning as well as it might and that many of Vanuatu's political leaders were blatantly ignoring the Leadership Code. Moreover, where breaches of the Code were being uncovered, penalties were not being enforced (Wiltshire 2001:30). Nonetheless, despite its inability to function as effectively as it could, the presence of the Ombudsman Office in Vanuatu would appear—to paraphrase the words of Yash Ghai quoted above—to be a redeeming feature of Vanuatu's constitutional system that could help prevent the decline of the Executive and Parliament into total irresponsibility and unaccountability that many in the region see as the fate of the Melanesian states.

### Discussion

The establishment of the Vanuatu Ombudsman Office is an example of the many positive aspects of South–South forms of policy transfer. South–South forms of policy transfer seem to provide an answer to the problems of disparities between state capacity and cultural context that often bedevil North–South policy transfer. The issues raised in this paper also present a number of other opportunities and policy recommendations.

### Best practice

One of the policy recommendations that can be derived is the case for the use of best practice institutions in South–South forms of policy transfer. Institutions in developing countries are often the result of North–South policy transfer. These introduced institutions are often unsuccessful. Some, such as the Australian Government's community-based approach to HIV/AIDs prevention and treatment, function exceptionally well, while others such as the recent push for increased

decentralisation are much less successful.<sup>18</sup> As the case of the Vanuatu Ombudsman has shown, South–South transfer can be a relatively efficient form of institutional transfer. Therefore, if a North–South transfer has been successful, it may be efficient for a South–South transfer mechanism to be used in spreading this institution to other developing countries. Previously, if a North–South institutional transfer was effective, the original Northern model would be transferred directly to developing countries.

However, the original North–South transfer may have been successful for reasons that are not present in other developing countries, and so the second wave of transfers may not be as successful. A way around this problem may be for the successful institution in the developing country to act as the template for later transfers.

The institution in the original recipient country may have been modified by local influences (such as the way in which the PNG Ombudsman Commission was modified by the CPC) which then acted to influence the later success of the institution. This process is occurring in the Pacific, as the evidence of the establishment of the Vanuatu Ombudsman Office and the latest moves by the Fijian and Solomon Islands governments demonstrate.<sup>19</sup>

### South–North policy transfer

The final issue raised is the possibility of other forms of policy transfer. Three forms have so far been discussed—North–North, North–South and South–South. However, there is another option—South–North policy transfer. Though much rarer than other forms, this form of policy transfer has taken place. Two recent examples are the establishment of the Independent Commission Against Corruption (ICAC) in New South Wales, which drew from a model developed in Hong Kong, and the Truth and Reconciliation Committees and the associated adoption of

restorative justice programs in many Western countries.<sup>20</sup> The expansion of the powers of the Ombudsman through the policing of a leadership code provide an option for anti-corruption campaigners in Australia and New Zealand.

### Conclusion

South–South policy transfer has been a useful alternative to North–South transfer in the quest for economic and social development in developing countries. The failure of many North–South examples of policy transfer provides us with a development problem that the use of South–South forms of policy transfer may help alleviate, especially in regards to the issue of low levels of state capacity and cultural misfit. The best practice use of South–South transfer is just one of the ways in which this particular form of policy transfer could be used—especially in the spreading of anti-corruption agencies based on the PNG Ombudsman Commission model. Also, the success of South–South forms of transfer raises the issue of the usefulness of the fourth possible type, South–North transfer. All too often countries of the North are seen as having little to learn from developing countries. As the adoption of the ICAC model by New South Wales shows, this is patently not the case. In-depth studies of South–South and South–North forms of policy transfer would thus appear to be important areas of research.

### Notes

- <sup>1</sup> The first major work to look at the concept of policy transfer explored the spread of Keynesianism amongst Western countries in the first half of the twentieth century (Hall 1989).
- <sup>2</sup> To claim this, however, is not to confuse the process of initial transfer with the later

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process of consolidation and expansion. While both processes require a degree of state capacity, the second process is in general the more capacity intensive.

<sup>3</sup> The Papua New Guinea Ombudsman Commission is itself in part a result of South-South policy transfer, in this case from East Africa, specifically Tanzania. For more information on this see Goldring (1978).

<sup>4</sup> More work is needed to measure whether the actions of the Papua New Guinea Ombudsman Commission are leading to a decrease in corrupt activity.

<sup>5</sup> This anti-corruption function is limited by its inability to deal with infractions that do not involve 'leaders' or the more general issue of maladministration. Despite this weakness, however, the anti-corruption function that it fulfils provides a useful institutional deterrent against some forms of corruption. Nonetheless, Victor Ayeni of the Commonwealth Secretariat has voiced concerns that this two-for-one function leads to the dilution of the effectiveness of the Ombudsman in dealing with its 'traditional' functions.

<sup>6</sup> Two other Pacific island countries have an Ombudsman—Samoa and Cook Islands. These offices, however, have no constitutional standing and exist by virtue of statute. In this regard, the Samoa and Cook Islands Ombudsman follow the traditional Ombudsman model much more closely.

<sup>7</sup> The relevant sections of the Vanuatu Constitution are Chapter Nine, Part Two, for the institution of the Ombudsman, and Chapter 10 for the Leadership Code. It should be noted that in addition to the policing of maladministration and the Leadership Code, the Vanuatu Ombudsman legislation also gives the Ombudsman's office the power to police language policy and thereby protect Vanuatu citizens' language rights (Chapter Nine, Part Two, Section Four). It has been suggested that this power of language protection is one of the key reasons why the post of Ombudsman was not filled at Independence (Crossland 1999:49–50). Following Independence, and especially in the wake of the failed Santo uprising, divisions between the francophone and anglophone sections of Vanuatu were very

strong, and it has been suggested that the predominantly anglophone Vanua'aku party chose not to pursue the creation of the Ombudsman Office so as to allow the anglophone government to pursue pro-anglophone policies. This explanation also suggests why the Office of Ombudsman was instituted when it was, since the first francophone government under the UMP party coalition had long been opposed to what it saw as the blatantly pro-anglophone policies of successive anglophone governments. The creation of the Ombudsman Office can thus be explained in terms of the coalition's desire for an institution to ensure the language rights of the francophone population.

<sup>8</sup> The most important example here is Professor Yash Ghai, who was largely responsible for many of the innovative features of the Ombudsman systems in both countries.

<sup>9</sup> The importance of regional institutions such as the Annual Regional Ombudsman meeting should not be ignored due to the role that they can, and have, played in the policy transfer process.

<sup>10</sup> Interview with Marie-Noelle Patterson on Sunday 24 August 2003 in Canberra, Australia.

<sup>11</sup> Interview with Marie-Noelle Patterson on Monday 25 August 2003 in Canberra, Australia.

<sup>12</sup> The main reason behind the inaction of Vanuatu's politicians in the passage of a Leadership Code Act would appear to be self-interest. Without a Leadership Code Act the Office of the Ombudsman was limited in its ability to police infractions of the Leadership Code as outlined in the constitution. As discussed elsewhere in this paper, operating under the Leadership Code provisions of the Constitution the Office of the Ombudsman was able to investigate possible infractions of the Code but was unable to prosecute these infractions.

<sup>13</sup> Articles 66 (1)(2) of the Vanuatu Constitution.

<sup>14</sup> It has been suggested that the reason behind the repealing of the Ombudsman Act (1995) had much to do with what was seen by some as the excessive zeal of the first Ombudsman (Hill 2003). Whether this is a positive or negative point is up for debate.

- <sup>15</sup> This change would appear to be an attempt to prevent what was seen by some as the excessive production of reports and over-investigation of Vanuatu society that had characterised the term of the first Ombudsman. While the efficiency aspects of this move can be understood, its long-term effects may turn out to be negative, as many people may have found it easier to contact the Ombudsman Office directly, thereby removing the element of personal confrontation that sometimes accompanies what can be seen as a weak form of whistle blowing. More than anything else, the decline in complaints to the Ombudsman Office that followed this change may be attributed to a fear of having to deal privately with the institution to be investigated before being able to involve the Office of the Ombudsman.
- <sup>16</sup> This is not necessarily a troubling move considering that the majority of the Ombudsman Offices around the world draw their staff from the Public Service. However, in the intensely personal and politicised bureaucracies characteristic of small island states, the added level of insulation between the public service and the Office of the Ombudsman may have been a useful buffer against this politicisation. For an interesting discussion of the forces that impact on bureaucrats in small states see Farugia (1993).
- <sup>17</sup> The second Ombudsman, appointed in 1999, has been a driving force behind the adoption of increasingly consensual forms of dispute mediation within the Ombudsman Office. While this may be useful in cases of maladministration, its usefulness, *qua* Leadership Code infractions, is still to be discerned; but the lack of prosecutions in this particular area would appear to demonstrate otherwise.
- <sup>18</sup> AusAID has been at the forefront of the transfer of community-based approaches to HIV/AIDS prevention and treatment—originally developed within Australia—to developing countries in the region (AusAID 1999).
- <sup>19</sup> There are also moves underway in Fiji for the creation of an ICAC. This is possibly another example of North–South or South–South policy transfer in process but discussion of this is beyond the remit of this paper.
- <sup>20</sup> The notion of restorative justice has been extremely influential in academic and policy discussions concerning criminal punishment. Drawn largely from traditions extant within indigenous Australasian and Pacific societies, these ideas have been picked up by agencies and governments both within the Pacific region and in the wider world.

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