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**GENERAL:**

**HUMAN RIGHTS AND NATURAL JUSTICE**



# 1 Introduction

The *Constitution* sets out a number of fundamental rights and freedoms that are guaranteed to all persons in Vanuatu.

It is the responsibility of all Judges and Magistrates to ensure that these rights are respected in the administration of justice. Any person who believes his or her guaranteed rights have been, are being or are likely to be infringed may apply to the Supreme Court to enforce that right: *Article 6(1) Constitution*.

With the exception of legal restrictions placed on non-citizens, all persons are entitled to the following rights and freedoms set down in the *Constitution* without discrimination on the grounds of race, place of origin, religious or traditional beliefs, political opinions, language or gender:

- the right to life;
- the right to liberty;
- the right to security of the person;
- the right to protection of the law;
- freedom from inhuman treatment and forced labour;
- freedom of conscience and worship;
- freedom of expression;
- freedom of assembly and association;
- freedom of movement;
- the right to protection for the privacy of home and other property and from unjust deprivation of property;
- the right to equal treatment under the law or administrative action, except if the law makes provision for the benefit, welfare protection or advancement of females, children, young persons, members of under-privileged groups or inhabitants of less developed areas: *Article 5(1) Constitution*.

The scope of these rights and freedoms are only subject to the rights and freedoms of others in Vanuatu and to the legitimate public interest in defence, safety, public order, welfare and health: *Article 5(1) Constitution*.

## 2 Right to Personal Liberty

In criminal cases, the individual's right to personal liberty is often an issue. While the *Constitution* does not specifically mention situations where the deprivation of personal liberty is permissible, you must start from the presumption that the individual be allowed to exercise his or her free liberty unless, by operation of law, the individual loses that right.

The situations when an individual may be deprived of his or her liberty include, but are not restricted to, the following:

- in execution of the sentence or order of a Court in respect of a conviction for a criminal offence;
- in execution of a Court order punishing him or her for contempt of Court;
- in execution of a Court order made to secure the fulfilment of that person's obligations under the law;
- for the purposes of bringing the person before a Court in execution of a Court order;
- upon reasonable suspicion of the person having committed or being about to commit a criminal offence under the law of Vanuatu.

### 2.1 Procedure on Arrest

The protections of personal liberty in Vanuatu require certain procedural steps to be followed during arrest or detention. You should make yourself aware of these so that you can ensure that all Police and Court procedures obey the *Constitution*.

Any Police officer when making an arrest without a warrant must always without unnecessary delay take the arrested person to a judicial officer or before an officer in charge of a Police Station: *s15 CPC*.

Any person who as been taken into custody without a warrant must, within 24 hours, be released if the offence is not of a serious nature.

*Section 51 CPC* authorises the officer executing the warrant to inform the person of the substance of the warrant. *Section 52 CPC* requires a Police officer or other person executing a warrant must, without unnecessary delay bring the person to Court.

With regards to bail, *s60 CPC* allows for temporary release if the offence is not one punishable by life imprisonment and the person is prepared to enter a bond in writing.

If a bond has been entered in writing, the person, if in custody, must be released as stated at *s63(1) CPC*.

Under *s66*, if the Court refuses bail, the Magistrate Court must state the grounds for such refusal and must read out the following statement:

“Your application for release from custody on bail having been refused by this Court, you now have the right to make a fresh application for bail to the Supreme Court. If you so desire, the matter will be referred immediately by this Court to the Supreme Court which will be review your application as soon as possible. You will remain in custody in the meantime but will suffer no disadvantage by reason of making a further application to the Supreme Court. Do you wish the Supreme Court to consider your application for release from custody on bail?”

If the application for bail informs the presiding Magistrate that the person in custody wishes to have the Supreme Court hear the application then that Magistrate must make sure that the file is sent to the Supreme Court with the report as to why bail was refused. Any decision made by the Supreme Court must be in writing and served without delay to the Magistrate and any other parties concerned.

### **3 Right to Protection of Law**

The right to protection of the law in *Article 5 Constitution* has within it a number of rights which are crucial to ensuring justice in all criminal cases. For this reason, you should become familiar with *Article 5* and the important rights it confers. These relate to:

- the right to a fair hearing within a reasonable time by an independent and impartial Court and right to a lawyer for a serious offence;
- the presumption of innocence;
- the right to be informed promptly of the offence with which the accused is charged in a language he or she understands;
- the right, if necessary, to an interpreter during proceedings;
- the right to not be tried in his or her absence without consent, unless he or she makes it impossible to proceed in his or her presence;
- the protection against retrospective laws;
- the protection against greater penalties than existed at the time of the offence; and
- the right to not be tried twice for the same offence: *Article 5(2) Constitution*.

#### **3.1 The Right to a Fair Hearing**

Everyone charged with an offence shall have a fair hearing, within a reasonable time, by an independent and impartial Court and be afforded a lawyer if it is a serious offence: *Article 5(2)(a) Constitution*.

This right captures four very important aspects of all criminal trials:

- a fair hearing;
- within a reasonable time;
- by an independent and impartial Court; and
- the right to a lawyer for serious offences.

What will be fair, reasonable or independent are matters which depend largely on the circumstances of each individual case. For example, what would be considered a reasonable time for concluding the trial of a very simple offence will likely be much less than for a very complex case involving multiple accused on trial for serious offences.

In fact, by putting too much emphasis on a speedy trial, it is possible that the fairness of the trial itself may be compromised by not allowing the accused adequate time to prepare a defence. Rather, you should try to balance these interests and ensure that overall the hearing is as fair as possible for the accused.

For a discussion of the meaning of a reasonable time, see *Public Prosecutor v Tagahi* [2000] VUSC 32; Criminal Case No 057 of 1999.

### **3.2 The Presumption of Innocence**

Everyone is presumed innocent until a Court establishes his or her guilt according to law: *Article 5(2)(b) Constitution*.

See *Public Prosecutor v Simon* [2003] VUSC 58; Criminal Case No 043 of 2002.

While the accused is presumed to be innocent, he or she may still have the burden of proving particular facts. For example, the defence of insanity requires the accused to produce some evidence to make out the defence.

### **3.3 The Right to be Informed of the Offence Charged**

Everyone charged shall be informed promptly of the offence with which he or she is being charged in a language he or she understands: *Article 5(2)(c) Constitution*.

This is an important right because only by knowing and understanding the offence with which he or she is charged, may an accused be able to properly provide a defence.

### **3.4 The Right to an Interpreter**

If an accused does not understand the language used in the proceedings, he or she shall be provided with an interpreter throughout the proceedings: *Article 5(2)(d) Constitution*.

The right to an interpreter is very important because, without the ability to understand the proceedings, the accused will be unable to mount a proper defence. If you believe that an accused does not sufficiently understand the proceedings, stop the proceedings and find an interpreter to help the accused.

### **3.5 The Right to be Present During Trial**

A person shall not be tried in his or her absence without his or her consent unless he or she makes it impossible for the Court to proceed in his or her presence: *Article 5(2)(e) Constitution*.

In order for the Court to proceed in the absence of the accused, the accused's conduct must be such as to make the continuance of the proceedings in his or her presence impracticable. Whether to exclude the accused is a matter for you to decide but you should only exclude the accused after warning him or her and as a last resort.

### **3.6 Protection Against Retrospective Laws**

No person shall be convicted in respect of an act or omission which did not constitute an offence under written or custom law at the time it was committed: *Article 5(2)(f) Constitution*.

This rule against retrospective laws prevents a person from being held criminally liable for an act which was not criminal at the time the act was done.

### **3.7 Protection Against Greater Penalty**

No person shall be punished with a greater penalty than that which exists at the time of the commission of the offence: *Article 5(2)(g) Constitution*.

Justice demands that individuals know or be able to find out the penalty for an offence beforehand. For this reason, if legislation increases the penalty for a particular offence between the time it was committed and the time of sentencing, the earlier lesser penalty must be applied to the offender.

### **3.8 The Right Not to be Tried Twice for the Same Offence**

No person who has been pardoned, or tried and convicted or acquitted, shall be tried again for the same offence or any other offence of which he or she could have been convicted at his or her trial: *Article 5(2)(h) Constitution*.

Often referred to as the “rule against double jeopardy”, a person convicted or acquitted of a criminal offence must normally not be tried again for the same offence.

If several charges stem from the same set of facts or form part of the same series of offences, a person may be tried for one offence after being convicted or acquitted of one of the other offences.

## **4 Protection from Inhuman Treatment and Forced Labour**

Every person has the right to freedom from inhuman treatment and forced labour. The only permissible exceptions to this right are respect for the rights and freedoms of others and the legitimate public interests of defence, safety, public order, welfare and health: *Article 5(1)(e) Constitution*.

It is a good idea to keep this particular right in mind so that you can ensure that police and prisons officers treat all persons in accordance with the *Constitution*.

## **5 Freedom of Movement**

As with freedom of liberty, every person in Vanuatu has freedom of movement unless that freedom is taken away in accordance with the law: *Article 5(1)(i) Constitution*.

The most common examples of restraining freedom of movement are Domestic Violence Protection Orders. Often these orders will include an order for exclusive occupation of the family home and/or an order restraining a person from coming within a certain number of metres of the home, workplace or school of family members.

When granting these orders, keep in mind the guaranteed right to freedom of movement and ensure that the order is broad enough only to accomplish the legitimate task of ensuring the safety and well-being of the claimant without overly infringing on the rights of the defendant.



## 6 Protection for Privacy of Home and Property and from Unjust Deprivation of Property

The right of individuals to the protection for privacy of home and other property will most commonly arise when dealing with search warrants. For this reason you should be mindful when granting search warrants. Demand a high level of professionalism from the Police in applying for and executing search warrants and ensure all proper procedures are followed.

## 7 Equal Treatment Under the Law

Every person in Vanuatu is guaranteed equal treatment under the law or administrative action. No law is inconsistent with this right insofar as it makes provision for the special benefit, welfare, protection, or advancement of females, children and young persons, members of under-privileged groups or inhabitants of less developed areas: *Article 5(1)(k) Constitution*.

This right underlines your duty to treat all parties to civil or criminal proceedings with equality and give each person the full benefit of the law.

## 8 Natural Justice

### 8.1 Principle that Affected Parties have the Right to be Heard

It is a well established principle of natural justice, evolved from the common law, that parties and the people affected by a decision should have a full and fair opportunity to be heard before the decision is made.

This principle focuses on the **procedural** steps implemented by the Court. The purpose of the principle is to ensure that you consider all relevant information before making a decision.

To give effect to this principle, you have to consider what has to be done to allow a person to be heard. This extends to:

- allowing the person sufficient notice to prepare his or her case;
- allowing sufficient time to enable the person to collect evidence to support his or her case;
- allowing sufficient time to enable the person to collect evidence to be able to rebut or contradict the other party's submissions.

Note that a person may be heard, but the view they have expressed need not prevail. You are entitled to reject it for what might be a good reason. The relevance and weight of their submissions are to be determined by you.

There are three aspects to the principle of being heard:

### **Prior Notice**

- You should be satisfied that adequate notice has been given, as prescribed by law.
- If the accused or respondent does not take any steps or appear at the hearing, you will need some evidence that the documents have been served before proceeding with the hearing.
- You will need proof of service of any warrant or summons.
- Notice must be sufficient to allow the person to prepare their case. Where you are not satisfied that a party has been given sufficient notice for this, adjourn the matter to allow him or her more time.

### **Fair Hearing**

- The way the hearing is managed and the way witnesses are examined is extremely important for ensuring that the parties have the opportunity to be heard.
- The general rule is that you should hear all sides of a matter. This includes allowing a party the opportunity to hear, contradict and correct unfavourable material, and allowing further time to deal with any new and relevant issues that arise.
- The principle always requires you to ensure you have all the relevant facts and materials before deciding a case.

### **Relevant Material Disclosed to Parties**

- Generally, all relevant material should be disclosed to the parties. Those likely to be affected by a decision must have the opportunity to deal with any unfavourable material that you propose to take into account.

Before a hearing is concluded, you should ask yourself, “has each party had a fair opportunity to state his or her case?”

## **8.2 Principle that No Person Should Be a Judge in His or Her Own Cause**

It is another well established principle of natural justice, evolved from the common law, is that no person should be a judge in his or her own cause. This principle relates to independence.

For more detail, see Chapter 5 Judicial Conduct. Briefly:

- Magistrates should not allow their decision to be affected by bias, prejudice or irrelevant considerations.
- They must not have an interest in the matter from which it might be said that they are biased.
- It is not necessary to show actual bias, the appearance of bias is sufficient.
- Bias might be inferred where there is a relationship to a party or witness, a strong personal attitude that will affect a Magistrate's decision, or a financial interest in the matter.