REFLECTIONS ON SOME PACIFIC CONSTITUTIONS

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My justification for addressing such a large topic is that over the last 50 years I have, from time to time but certainly not on a consistent basis as others have, struggled directly with particular issues relating to Pacific Constitutions. That began with work in the Department of External Affairs in the early 1960s as Western Samoa moved towards independence and I helped prepare a provisional list of treaties to which it might be party on independence. I was often involved in discussions with those who had helped prepare the Constitutions of Western Samoa, the Cook Islands, Niue and the Marshall Islands (Colin Aikman, R Q Quentin-Baxter and Alison Quentin-Baxter) and those who wrote the histories (notably Mary Boyd), I advised the New Zealand Government concerning the international position of the Cook Islands, and more than 30 years ago first sat as a judge in Apia in the Western Samoan Court of Appeal. Over the next 20 years, I sat from time to time as a member of the Courts of Appeal of the Cook Islands, Niue and Fiji and in the Supreme Court of Fiji, for the most part in constitutional cases.

From the wide range of material, I select three matters:

(1) The international context

(2) Litigation relating to constitutional matters

(3) The clash between universal values and local custom

I THE INTERNATIONAL CONTEXT

From the sixteenth to twentieth centuries island countries in the Pacific came under the sovereignty, protection or supervision of six European States (Spain, Portugal, the Netherlands, the United Kingdom, France and Germany), the United States, Japan, Australia and New Zealand. This happened in a number of ways. I mention three of them. In many cases, particularly in the nineteenth century,

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treaties of cession or protection were concluded. Tom Bennion has prepared a splendid survey of those treaties.[1] He considers treaties of cession or protection relating to Hawaii (the United States), Tahiti (France), Samoa (the United States and Germany with Britain a party), Fiji (Britain), Tonga (Britain), Niue (Britain), New Caledonia (France), the Marquesas (France), and the Marshall Islands (Germany); some of those countries had earlier concluded treaties with a number of States.

Such treaties were often seen as suspect. According to a widely held view, reflected in late nineteenth century text books, treaties could be concluded only between "civilised" nations, essentially those "Christian" nations to be found on the two sides of the Atlantic. This position raised serious questions about the position of Turkey, China and Japan, among others. On the other side, it was often said that the treaties were not negotiated on an equal footing or were not understood. It was commonly said in New Zealand, when I was a student and indeed a good deal later, that the Treaty of Waitangi was not a treaty. The words of Chief Justice Prendergast and Richmond J in 1877 were often repeated, not always accurately. So far as it purported to transfer sovereignty the treaty was, they said, "a simple nullity" because "no body politic existed capable of making a cession of sovereignty".[2]

How do those late nineteenth century positions relate to the facts? Recall the T H Huxley line that many a beautiful theory is slain by an ugly fact. The facts were that the treaties were published in a range of treaty series along with "regular" treaties. Some were the subject of diplomatic exchanges, such as the 1899 Treaty relating to Samoa in the 1920s, a predecessor to which was considered recently by the Samoan Court of Appeal.[3] The Treaty of Waitangi itself was described by an international tribunal dealing in the 1920s with a claim by the United States on behalf of descendants of an American citizen, William Webster, against the United Kingdom as a "treaty ... whereby sovereignty was ceded to the British Crown". The argument on behalf of the descendants that the title of the British Crown was derived from the same source as the title which Webster had obtained – by conveyances from native chiefs – was rejected:

> All those who had any claim to represent the aboriginal natives, as politically organized, entered into a treaty ceding sovereignty to Britain. The treaty ceded

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1 "Treaty-Making in the Pacific in the Nineteenth Century and the Treaty of Waitangi" (2004) 35 VUWLR 165.

2 *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) 72, 78, 1 NZLRLC 14, para 8.

3 *Sia'aga v O F Nelson Properties Ltd* [2008] WSCA 14.

> sovereignty in article I. In article II, possession was guaranteed to the chiefs and tribes in all which they possessed individually or collectively. This is a clear declaration of the nature of native property as it existed at the time of the cession. It is far from recognizing the sort of proprietary system which Webster's claim presupposes. In addition an exclusive right of pre-emption of lands was given to the crown. This was a matter of sovereignty. It was a legal regulation of alienation, not a conveyance of property.[4]

And the Court of which I am now a member has, over the past 50 years, regularly considered, interpreted and, as appropriate, applied treaties concluded in the nineteenth and early twentieth century and indeed earlier in cases coming from the subcontinent, North Africa, the Gulf and South East Asia.[5]

The diplomatic exchanges just referred to were between the United States and the United Kingdom or really New Zealand in respect of what the United States saw as discriminatory tariffs imposed on US imports into Western Samoa which had come under a New Zealand mandate from the League of Nations, as discussed in the next part of this paper. This action, in the American view, was in breach of the obligation in the 1899 Treaty that US goods be granted complete equality of treatment with British goods (an argument which assumes that New Zealand, although not sovereign over Western Samoa, had succeeded to Germany's obligations under the 1899 Treaty and that that treaty was still in force, notwithstanding the outbreak of war in 1914 and 1917 between the three original Parties.)

New Zealand responded by calling for a specific assurance by the US that the same provision of the 1899 Treaty ensures British commerce and commercial vessels national treatment in that part of Samoa under US administration. The New Zealand position was also presented more broadly, raising issues about the rights of British ships to be able to carry goods and passengers from American Samoa to the US under the same conditions as US ships. The formal New Zealand position deferred to the view that the obligations of the Treaty were still imposed on Western Samoa notwithstanding its transition from German sovereignty to mandatory authority. But, in its view, the Treaty was equally binding on the US:

> If the Government of the United States definitely concede that New Zealand ships and all British ships are entitled to carry goods and passengers between American ports and ports of American Samoa, and that British shipping will receive exactly the

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4 *William Webster* case (1925) 6 UNRIAA 166, 168-169.

5 Eg Right of Passage over Indian Territory (*Portugal v India*) 1960 ICJ Reports 6 and Sovereignty over Pedra Branca/Pulau Batu Puteh (Malaysia/Singapore) 2008 ICJ Reports 12.

> same treatment in all other respects in such trade as American ships, both in American Samoa and the United States ports, then the New Zealand Government will reciprocally legislate to place American imports in the same position as the British imports in Western Samoa.[6]

There followed legal opinions from the Solicitor to the State Department and the Attorney-General concerning the relationship in US law between the Treaty provisions and a later statute, with the former interpreting the legislation in conformity with the Treaty and the latter concluding that the legislation overrode the Treaty provision as a matter of US Law.[7] The last word that I have seen in the one source I have used is from the Secretary of State to the Secretary of the Navy. He says this about the opinion of the Attorney-General:

> I need not emphasize here the seriousness of the situation from the point of view of international relations where a country enacts a statute in conflict with the provisions of a treaty to which it is a party; nor need I mention the evident fact that the enactment of such a statute does not relieve the country enacting it from that country's obligation under the treaty.[8]

I now move to the second and third means of foreign supervision which I wish to mention. They are linked – the mandate system of the League of Nations (which I have anticipated) and the trusteeship system designed to replace it when the United Nations was created. These were legal instruments devised by the international community for the future administration of colonies or territories of the defeated enemies – Germany and the Ottoman Empire after World War I and Japan after World War II. These instruments did not involve the transfer of sovereignty to the administering powers and were promoted, in 1919, in the context of President Woodrow Wilson's advocacy of the right to self-determination and, after 1945, of the move towards self-government and self-determination, strongly supported among others by Prime Minister Peter Fraser at the San Francisco Conference setting up the United Nations and not only for trust territories but for all non-self governing territories.

I mention two aspects of Western Samoa's progress to independence and the preparation of its Constitution. I come back to them later. One was the suffrage:

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6 Foreign Relations of the United States 1924, Vol II, pp 241-245, 245.

7 Foreign Relations of the United States 1927, Vol II, pp 760-775.

8 Foreign Relations of the United States 1928, Vol II, pp 982-984, 984. The Secretary of State was Frank B Kellogg, soon to be a member of the PCIJ in succession to Charles Evans Hughes, the Secretary earlier in this history when Kellogg was US Ambassador in London; the solicitor to the State Department was Green H Hackworth, one of the 15 original members of the ICJ.

the various UN bodies pressed for universal voting rights, the Western Samoan authorities and New Zealand as the administering power, resisted recommendations to that effect, a proposal to the Constitutional Convention that universal suffrage be included in the Constitution was rejected, and the Constitution was endorsed by a referendum in which, as recommended by the General Assembly, all adult Samoans could vote. The second matter, which is related, was the inclusion in the Constitution on the recommendation of the Trustee Council, late in the drafting process, of a Bill of Rights which gave a general guarantee of equality before the law. The inclusion of the Bill may be seen as a parallel to similar action being taken in respect of former British administered territories as they moved to independence. It was in sharp contrast to the prevailing opposition in many common law countries to taking such a step. (The Deifenbaker Bill of Rights of 1959 in Canada was seen at the time as something of an aberration and it had almost no effect.) The Samoan Bill was largely based on the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights being some years from completion.

In 1981 a Bill of Rights including a broad guarantee of equality before the law was added to the Cook Islands Constitution. That Constitution, like others in the Pacific, also regulated in some detail the formation of governments, especially after elections, a matter which was left to convention in some of the longer established constitutional systems. That brings me to my second heading – litigation relating to constitutional matters.

II LITIGATION RELATING TO CONSTITUTIONAL MATTERS

I do not begin with that matter of the incorporation of convention into the written constitution, but rather with one aspect of electoral law which is common to many electoral systems: the prohibition of corrupt practices, including treating. Treating is often defined in general terms as providing food or drink or making other provision for the purpose of corruptly influencing a vote. An electoral petition in Kiribati was based on the provision by the successful candidate for election as the Beretetindi (the President) of Kiribati of free tobacco to those present in the meetings as he went from island to island. Over the course of 22 days the Chief Justice, Richard Lussick (more recently a member of panel of the Special Court of Sierra Leone which convicted Charles Taylor, former President of Liberia, of various international crimes), heard 36 witnesses about the facts and customary practice. The Chief Justice made various rulings on custom. The provision of the tobacco, in the local language, the mweaka, was an offering rather than a giving. Moreover, such an offering was obligatory in moral terms. A visitor failing to present mweaka would suffer a loss of esteem. While the actions might in some countries lead to an irresistible inference of a corrupt practice there was no law in

Kiribati which required custom to be suspended at election times. He recalled that in the preamble to the Constitution, the supreme law of Kiribati, the people pledged to cherish and uphold the customs and traditions of their country. "The lessons of history show that the price to be paid for failure to do so is a heavy one – the loss forever of a national identity ad way of life." The respondent's actions respected customs and the petition was dismissed.[9]

Challenges to Samoan legislation limiting the right to be a candidate to petition and rights of appeal presented more familiar issues of law, even when based on the constitutional right, included in the Bill of Rights, to a hearing. They failed, with the court emphasising that Parliament had a broad power to legislate and that it would not overturn established precedent on no more than finely balanced arguments.[10] In those cases the judges may be seen as showing considerable deference to the assessment of the legislature and executive about the details of the electoral process.

The matter may however be different when the constitution regulates in some detail matters which in longer established constitutional systems are left to convention and practice. That may be seen in a Cook Islands case in which the Court ruled on the process to be followed in the formation of a government after an election: the steps involved the Queen's Representative dismissing the Prime Minister if he had not resigned by a particular time and a vote of confidence being taken in Parliament.[11]

While, in the Court's view, in a broad sense the Cook Islands' system of Cabinet Government chosen from and responsible to Parliament was based on the so-called Westminster system there was a danger in assuming that British, New Zealand or other precedents were automatically applicable. One immediate difference was that the Constitution regulates in some detail matters which earlier and elsewhere had been left to convention and practice. Further, the provisions distinguished between the different periods in which an appointment of a Prime Minister might be made. And they used different terminology in stating the powers of the Queen's Representative to be exercised at those different times. "The carefully drawn differences", the Court said, "must be seen as emphasising that when Parliament is in session it, in reality, and not the Queen's Representative, appoints Prime

9 *Teaanaki v Tito* 1996 KIHC 3; this judgment was given in February 1996 and the President of Kiribati referred to the role of custom at the opening of the PILOM Conference in October.

10 *Samoa Party v Attorney-General* 2010 WSCA 4, *Muritalo v Attorney-General* 2001 WSCA 8, and *Vaai v Lene* 1996 WSCA 8.

11 Reference by the Queen's Representative 1983 CKCA 3.

Minister if there is a vacancy". The Court gathered together other indications, from the Constitution, the drafting history and other Pacific Constitutions, which helped confirm that Parliament had the central role in selecting the Prime Minister. The Court also made use of decisions of the Privy Council in a Nigerian case and a Malaysian Court, taking care to underline the different wording of the constitutional provisions in issue and quoting this passage from the former:[12]

> while it may well be useful on occasions to draw on British practice or doctrine in interpreting a doubtful phrase whose origin can be traced ... it is in the end the wording of the Constitution itself that is to be interpreted and applied, and this wording can never be overridden by the extraneous principles of other Constitutions which are not explicitly incorporated in the formulae that have been chosen as the frame of this Constitution.

One provision common to many Pacific Constitutions reproduces the essence of a legal text which has been in English and later United Kingdom law since 1688, Article 8 of the Bill of Rights. That provision declares that freedom of speech or debates on proceedings in Parliament are not to be called in question in any Court or Place outside Parliament. The drafting may differ, the broader constitutional and social contexts may differ greatly but the core idea of free debate in Parliament, subject only to internal systems of sanctions, appears to produce a consistency of approaches and decisions in the cases which come before the courts. So the Niue Court of Appeal held that the bar on the questioning of the validity of any proceedings in the Niue Assembly did not prevent it holding invalid the action of the Chief Electoral Officer declaring three seats vacant in the Assembly. (The ground was that the members had not attended meetings of a committee allegedly called to consider the Appropriation Bill.) The Court drew this distinction:

> The rights they [the members] claim relate not simply to the internal workings of the Assembly or its Constitution or to actions taken by the Assembly to discipline members on some internal matter. Rather the rights they assert are rights under the general law of Niue and rights, moreover, of the highest importance in a democratic society.
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> The line between the areas of parliamentary privilege and public right and responsibility is recognised in the cases. For instance the Supreme Court of Zimbabwe ... held that it could not review the decision of the House of Assembly to suspend Ian Smith for one year. On the other hand, it could, and did, order the

12 *Adegbenro v Akintola* [1963] AC 614, 632. See also (1967) 16 ICLQ 542.

> recommencement of his salary and allowances. While the former was a matter within the privilege of the House, the latter penalty which took away statutory entitlements was not available to the House under the Constitution and relevant legislation, *Smith v Mutasa* [1990] LRC (Const) 87. Somewhat similarly the United States Supreme Court, while ruling that no proceedings could be brought against the Speaker John McCormack and other members of the House because of the Speech and Debate Clause (the equivalent of Article 9 of the Bill of Rights), reinstated Adam Clayton Powell Jnr after the House of Representatives had voted to exclude him and to declare his seat vacant; in so voting, the House had moved outside its area of exclusive authority, *Powell v McCormack* (1969) 395 US 486.

While constitutional details differ:[13]

> the cases all recognise that a line must be drawn between those matters which are intramural and which must be left to the judgment of the legislative bodies and those which engage the public law of the land and rights and duties arising under it.

The division has also been recognised over the years, to make a selection, in cases from Samoa, the Cook Islands, and Tonga, as well as in a New Zealand case which went to Privy Council.[14]

While I do not undertake an analysis of these judgments, I might mention four relevant features to be seen in them:

- the right or interest invoked by the applicant in the proceedings – the right to personal liberty in the Tongan case and to be a member of the legislature (including related rights of voters) in the Niue case compared with the more diffuse rights or interests in the Samoan case
- the type of issue raised in the proceedings – compare the relatively specific natural justice issues in the Tongan case with the range of procedural choices before the legislature in the Samoan case
- the language of the constitution relating to (1) the particular rights being claimed and the other matters in issue, (2) the protection of the proceedings of the house and (3) the role of the courts

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13 *Kalauni v Jackson* [1996] NUCA 1.

14 *Ah Chong v Legislative Assembly* [1996] WSCA 2; *Robati v Privileges Standing Committee* [1994] CKCA 2; *Eakalafi Moaki v Kingdom of Tonga* [1996] TOSC 6; *Jennings v Buchanan* [2004] UKPC 36 a judgment which drew on decisions from Ceylon (in the Privy Council), New South Wales, Ontario, the US, Queensland, Victoria and the European Court of Human Rights and a valuable UK Parliamentary report, noting that the Solicitor-General accepted that there was no difference between New Zealand and English law in this respect; compare *Lange v Atkinson* [1999] UKPC 46, paras 16-25.

- the overall attitude of the courts to the balance between the principle of non-intervention (legislatures are left free to regulate and determine their own internal procedures) and the judicial enforcement of the law (fundamental human rights especially those guaranteed by the constitution are to be upheld); sometimes the former position is in a sense adopted by a proceeding failing for lack of standing (*Tong v Taniera* [1987] LRC (Const 1) (Kiribati High Court)) or wrong choice of remedy (eg *Teburiro Tito v Kaiarake Taburuea* (Kiribati High Court, Civil Case 56/88, judgment of 28 October 1988).

III THE CLASH BETWEEN UNIVERSAL VALUES AND LOCAL CUSTOM

Clashes or apparent clashes between universal values and local custom or the requirements of the local situation can occur in many areas; consider the "treating" case discussed earlier, freedom of movement and customary orders of banishment,[15] freedom of religion and restraints on the registration of new churches[16] or freedom of expression and the protection of public order.[17] The resolution of such clashes frequently varies from one culture to another, a variation sometimes captured by the European Court of Human Rights in the expression "margin of appreciation". From that mass of material I consider two cases in which legislation was challenged as being in breach of the guarantee of equality before the law included in the Constitutions of Western Samoa and the Cook Islands.

The Samoan Electoral Act 1963, as indicated earlier, limited the suffrage to citizens who were chiefs, the *Matai*, or to those individuals on the European roll or children of such persons. Only *Matai* could be candidates for the Samoan constituencies. Did those limits breach the guarantee in the Constitution set out in Article 15 (1):

> All persons are equal before the law and entitled to equal protection under the law?

The Samoan Courts considered this question in 1982, about 20 years after Samoa became independent. At first instance the Chief Justice said the provisions did violate the constitutional guarantee and accordingly held them to be void. The Court of Appeal reversed. I mention three features of its reasoning.[18]

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15 *Laituala v Mauga* [2004] WSSC 9.

16 See AH Angelo "Steady as She Goes" 147 at 161 in this volume.

17 Eg Helen Aikman "Public Order and the Bill of Rights in Fiji" (1981) 11 VUWLR 169

18 *Attorney-General v Saipa'ia* [1982] WSCA 1, (1984) 14 VUWLR 275.

First, the judgment is founded on the Court's understanding of the *Matai* system and its place in the Samoan Constitution. For that purpose it quotes from the 1961 Report of the UN Plebiscite Commissioner for Western Samoa, a report which recalled the work of the 1959 Visiting Mission which

> had given considerable attention to the various views which were expressed to it by Samoan leaders and by deputations of the general public on the question of the electoral system existing in the Territory. In general, at its meetings with the members of the Legislative Assembly and in public gatherings throughout the Territory, the Mission met with little opposition to the existing matai suffrage, and found that spokesmen for these groups expressed determination to see this system of suffrage retained.

Later in the judgment the Court emphasized the importance, as it saw it, of the preamble to the Constitution. That text spoke of the Independent State being based on Christian principles and Samoan custom and tradition.

Second, the Court gave major weight to the fact that, by contrast to the Universal Declaration of Human Rights and other constitutions in the Pacific, the Samoan Constitution did not include, among the protected rights, the right to vote. (As already noted, such a comparison, this time of a feature common to other Pacific constitutions, appeared in the following year in the Cook Islands case about the appointment of the Prime Minister after a general election.)

The third feature I mention concerns the Court's approach to interpretation. The Court should act in the spirit counselled by Lord Wilberforce that human rights provisions in a constitution would be afforded a "generous interpretation avoiding what has been called 'the austerity of tabulated legation'" – a phrase first coined by Stanley de Smith in *The New Commonwealth and its Constitutions*. Primary attention still had to be given to the words used but being on guard against any tendency to interpret them in a mechanical or pedantic way. Next, in terms of a well-settled principle of interpretation, momentous constitutional changes are not to be brought about by a side wind or loose or ambiguous general words. In the final part of the judgment the Court records relevant parts of the proceedings of the Constitutional Convention which adopted the Constitution. As already indicated, the Convention expressly considered and rejected the very position which the respondents sought as a matter of constitutional interpretation. The Court made it clear that it examined this material – this drafting history – to confirm the interpretation which it had already reached by reference to the text and the wider context. The approach now would probably be less cautious; over the 30 years since that judgment was given common law courts, for instance in New Zealand, Australia, Canada and the United Kingdom, have been increasingly willing to use

such drafting history . On that matter, the Court in 1962 concluded with one possible restraint on the use of the Convention debates:

> The weight to be given [the respondents said] decline with the passage of time. This submission was based on the concept that the scope and significance of the Constitution – intended to be the basic law of a State over a long, unpredictable and changing period – may alter. While that may be so as a general proposition, we do not consider that, if it is ever right, it can apply to such a short period in the life of a people and a State as 20 years and to such a fundamental question as that which we are considering.

Constitutions, it has been wisely said, state principles for an expanding future rather than rules for the passing hour – or at least they should. In fact, in 1990, the people of Samoa in a referendum with universal suffrage did support universal suffrage and it was introduced, but it is still the case that only *Matai* may be candidates.

The Cook Islands Assembly in 1980 passed a statute reopening a title to land which had been settled in 1908. The preamble to the Act declared that there was widespread dissatisfaction with the title and that a rehearing was desirable. It was the only such statute ever enacted putting land title in question. On that basis those who held the title challenged the statute as denying their constitutional right to "equality before the law and to the protection of the law".[19] The judge at first instance agreed with the challenged and held the legislation to be void. Those who might benefit from the rehearing appealed. How was the Court of Appeal to approach the issue? On what basis was such an issue of equality to be decided? This was not a claim based, for instance, on discrimination on the basis of race or religion. No court had attempted or would attempt a comprehensive definition of what is meant by equality before the law in a constitutional context. Counsel for the Parties agreed that the object of the legislation and the means chosen to pursue it called for examination. Was the object constitutionally legitimate and were the means reasonable? But how was the Court to assess that? By reference to what evidence? How far should the Court go in questioning Parliament's action? The Court drew on the preamble and on affidavits filed by each side. Having referred to United States and Privy Council authority, it concluded that nothing arbitrary or unreasonable in a constitutional sense about the decision the legislature had made in the exercise of its wide responsibilities had been established. The appeal succeeded, and the rehearing was allowed to proceed.

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19 *Clarke v Karika* [1983] CKCA 5.

IV CONCLUDING COMMENTS

I conclude with five comments:

1. New Zealand lawyers as constitutional advisers and drafters, counsel and judges have had significant roles in a number of the matters discussed in this paper. They have also been the subject of university study and commentary. Quite apart from the value of that contribution to the countries in question – not a matter for me to assess – that experience has been helpful to thinking and actions on constitutional matters in New Zealand. One specific instance appears in the advice to exclude from the Bill of Rights a general guarantee of equality before the law.

2. Constitutions and the related arrangements draw both on the experience of others and of the ages and on local tradition and custom as it evolves. Local differences from widely accepted values found in other constitutions and international human rights instruments require justification in the terms which those instruments allow, terms which in some areas, may allow for difference.

3. Good constitutional and related arrangements are necessary, but they are not sufficient. Also necessary is the commitment by those with official responsibility to those principles and processes, and good knowledge of them, a matter recently emphasised by the New Zealand Law Commission in its Report on the Official Information Act. Also critical are those who exercise controls and influences over the exercise of official power, and not just the courts: the Ombudsman, the Auditor-General, electoral officers, parliamentary committees … the press and the public.

4. Distressing events in this region of the world, indeed in all regions over recent history, demonstrate all too clearly how essential the establishment, maintenance and application of good constitutional principle and process are.

5. Given the challenges in this part of the world, including the challenges of geography and of population, gatherings such as this very conference and others in the series and of the Pacific Islands Law Officers and even more the contacts that arise from them are of major importance. The contacts are now greatly facilitated by the electronic and information revolution which also bring with them valuable web sites. Notable among them are those of the Legal Information Institutes, including PACLII, established by Graham Greenleaf and his colleagues at the University of New South Wales. Among the international law sites, I may also mention the Audio-Visual Library of International Law established by the Codification Division of the Office of Legal Affairs of the UN Secretariat in New York. These developments are of huge importance, but I am very pleased to be back with you on this occasion, in person.