

PROVIDING SUPPORT FOR INDEPENDENT JUDICIARIES AND CONSTITUTIONAL GOVERNMENTS

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Since 1972, Chief Justices from Pacific island communities have met biennially at the Pacific Judicial Conference. These meetings have played a significant part in reinforcing the commitment to independent judiciaries and constitutional governments in the Pacific. This article describes the issues addressed by the meetings as well as the accomplishments of the Conference. It also highlights issues that still require attention.

Les chefs de Cours du Pacifique se sont rencontrés de manière régulière depuis 1972 dans le cadre des Conférences Judiciaires du Pacifique. Ces rencontres ont joué un rôle important dans le renforcement de l'indépendance du pouvoir judiciaire et ont assuré la promotion de l'instauration de gouvernements démocratiques dans le Pacifique Sud. Cet article dresse le bilan des problématiques traitées lors de ces réunions et des résultats obtenus.

I INTRODUCTION

The first South Pacific Judicial Conference took place in Samoa in 1972, as a result of the ingenuity and perseverance of Donald C Crothers (Chief Justice of the High Court of American Samoa from 1968 to 1972), Barrie C Spring (Chief Justice of the Supreme Court of Western Samoa from 1966 to 1972), and Richard H Chambers (Judge of the US Court of Appeals for the Ninth Circuit from 1959 to 1994). Since then, the chief justices of the Pacific Island communities have met about every two years, and these meetings have played an important role in

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reinforcing the commitment to independent judiciaries and constitutional governments in the diverse (and mostly small) islands of the Pacific. These meetings – now called the "Pacific" Judicial Conference instead of "South Pacific" – are a biennial "ad hoc collegiate forum of Chief Justices and their delegates from the Pacific Region," which assembles to discuss matters of mutual interest.¹ This narrative is designed to describe the issues addressed and accomplishments of these meetings, and to examine the issues that continue to need attention.

II THE FIRST SOUTH PACIFIC JUDICIAL CONFERENCE

The idea of the South Pacific Judicial Conference was formulated in September 1970 by Chief Justice Crothers of the High Court of American Samoa. He wrote to Chief Justice Spring at the Supreme Court of Western Samoa and proposed, instead of holding a judicial conference between the two Samoas as had been suggested by Justice Spring, that an enlarged gathering of chief justices from around the Pacific be held. Chief Justice Spring supported the idea, and thus the concept of a South Pacific Judicial Conference was given life.

For the next year, Chief Justice Crothers dedicated much of his time to the organization of this Conference. Determined to bring a dream into reality, the Chief Justice explained later in a letter to Chief Judge Chambers that for the following year, he did "virtually nothing else but devote much of my time ... trying to get this South Pacific Judicial Conference off the ground." During this process, Chief Justice Crothers received "encouragement, assistance, and advice" from Chief Judge Chambers.

After a year of planning, on Monday, January 10, 1972, in Apia, Samoa, the First South Pacific Judicial Conference was opened. It marked the first time in history that judicial representatives assembled from the three cultural regions of the Pacific – Polynesia, Melanesia, and Micronesia – and the meeting included the President of the Court of Appeal in French Polynesia (Y Pegourier), the Chief Justice of the Hawaii Supreme Court (William S Richardson), as well as judges from the Trust Territory of the Pacific and US federal courts.² On the second day, the Conference moved to Pago Pago, American Samoa, and it closed there on Thursday, January 13, 1972.

This meeting provided the first opportunity for the judges of the Pacific, both native and expatriate, to share experiences and knowledge. The early 1970s was a time when many of the islands were emerging as independent states, and were

1 Seventeenth Pacific Judicial Conference, Introductory Note, available at <www.paclii.org/PJDP/resources/PJC/Introductory_Note.pdf>.

2 The list of participants is attached in the appendix at the end.

adapting to self-governance under new constitutions, and it was useful to have an opportunity to discuss different adaptations to the constitutional and political changes they were experiencing. Chief Justice Barrie Spring of the Supreme Court of Samoa was elected Chair by the delegates in attendance and he opened the conference with a presentation on the judicial system of Samoa, including its relationship to the executive branch. Justice C C Marsack of Suva, Fiji addressed the group next on cultural and ethnic disparities and their effect on the judicial process in Fiji. At this meeting, as at many that followed, a central focus was on customary legal traditions and how to incorporate them into Western law under the new constitutions that governed the independent countries. The participants in the First Conference agreed that preservation of the cultural heritage of the peoples of the Pacific was vital to successfully establishing the rule of law. Other subjects discussed at this First Conference included a proposal for a South Pacific Regional Court of Appeal, immigration and extradition, the narcotics problem in the South Pacific, and a comparison of court systems.

III THE STRUGGLE TO KEEP THE CONFERENCE ALIVE

This First South Pacific Judicial Conference was a success but problems arose when the issues of when, where, and who would be responsible for a Second Pacific Judicial Conference were discussed. Chief Justice Crothers, who was scheduled to return back to the United States in the following month, suggested that Chief Justice Spring be appointed as "sort of a guardian to get the thing together again." But five months later, in June 1972, Chief Justice Spring opted to return home to Auckland, New Zealand, and "tossed the ball" to the Honorable John Minogue, Chief Justice of the Supreme Court of Papua, New Guinea. This handoff proved problematic because Australia was in the process of disengaging itself from its United Nations trusteeship over Papua New Guinea, creating considerable uncertainty in the judiciary. As the Papua New Guinea Supreme Court tried to transition from the Australian judicial world to the newly-independent Papua New Guinean judiciary, Chief Justice Minogue announced in March 1974 his intention to resign. He suffered a heart attack that same month and formally retired in May of 1974.³ The task of organizing the Second South Pacific Judicial Conference then fell to the new Chief Justice of Papua New Guinea, the Honorable Sydney Frost.

At this point, Chief Judge Chambers, building on his long-standing interest in the Pacific, stepped back into the picture. Several years earlier, in 1968, he had

3 Sir John Minogue participated again in the Fifth South Pacific Judicial Conference in 1982, which was held in Canberra, listed as "former Chief Justice, Papua New Guinea," as part of the Australian delegation.

visited various Pacific Islands and was "shocked by the state of the judiciary" in the islands he visited, especially by the lack of basic judicial resources. Judge Chambers then began a "hands across the sea" project to encourage courts in the Ninth Circuit to send copies of basic legal publications, such as the American Law Reports, to the courts in the Pacific.

In September 1974, Chief Judge Chambers wrote to Sir Garfield Barwick, Chief Justice of the High Court of Australia, that "Justice Minogue is shopping for a successor and as soon as he gets one, we hope to prevail on him to call the Second Pacific Judicial Conference to be held in Honolulu either just before or just after our [Ninth Circuit] conference and also, we would hope to have some joint sessions. Justice Minogue has indicated he thinks our plan is a good one."

As a result of Chief Judge Chambers' suggestion, and with the able assistance of both William S Richardson, Chief Justice of the Hawaii Supreme Court, and Samuel P King, Chief Judge of the US District Court for the District of Hawai'i, the Second South Pacific Judicial Conference was convened in Honolulu on July 16, 1975. This meeting, unlike the First Conference, was not limited solely to judicial officers, but also included others involved in the administration of justice. In attendance were representatives from Papua New Guinea, French Polynesia, American Samoa, the Trust Territory of the Pacific Islands (TTPI), Western Samoa, Australia, and the United States. Chief Justice Richardson set the tone at the beginning of the Conference by observing that:

We are a family of nations, a gigantic circle of humanity, a living ring of intense activity...In the ancient past, our ancestors had frequent contact with each other, but these relations have almost disappeared, and we have become isolated by war and nationalism. Today, we've chosen to end this isolation, at least in the judicial field, knowing that the peoples of the world could attain peace and harmony by meeting and exchanging ideas regarding our legal systems... "

Although occasionally three years have passed between meetings, the Conference has almost always convened every two years. The location shifts each time, and many of the island communities have played host, with two of the 18 Conferences having been held in Australia, French Polynesia, Hawaii, Papua New Guinea, and Samoa. The number of participants has varied from a low of 17 at the Third South Pacific Judicial Conference in Papua New Guinea in 1977, to a high of 89 at the Fifteenth Pacific Judicial Conference, also in Papua New Guinea, in 2003. At the Tenth Conference in Fiji in 1993, Gordon Ward, then Chief Justice of Tonga, urged the Conference not to grow too large, because its value has always

been to allow for intimate conversations among participants.⁴ The number of observers has always been kept small and the media is usually authorized to report only on the opening speeches and social events.

The organizers have always focused on ensuring representation from all the diverse regions and cultures of the Pacific. Judges from French Polynesia have played an active role, and have been at all the Conferences except the Fourth (1979, Cook Islands), the Thirteenth (Western Samoa, 1999), and the Fourteenth (New Caledonia, 2001); and judges from New Caledonia have attended all the Conferences since the Seventh South Pacific Judicial Conference in Auckland. Some of the Conferences, including the Fourth, in the Cook Islands in 1979, and the Eighteenth, in Tahiti in 2009, have offered simultaneous translation so that participants can listen in either English or French. At least one judge (and frequently two or more) from the US Court of Appeals for the Ninth Circuit has participated in every Conference, except the Fifth, in Canberra in 1982, and the Thirteenth, in Apia, Samoa in 1999. Judges from the Hawaii Supreme Court were regular participants in the early Conferences, but did not attend the 1993 Conference in Fiji and have not sent any participants since the 1995 Conference in Guam. A judge from Canada came to the Ninth Conference in Tahiti in 1991, and judges from Taiwan and the Philippines came to the Eleventh Conference in Guam in 1995. Between the Fourteenth Conference in New Caledonia in 2001 and the Fifteenth Conference in Papua New Guinea in 2003, the name of the Conference evolved from "South Pacific Judicial Conference" to "Pacific Judicial Conference."

The tradition of the Conferences has been to refrain from adopting any formal resolutions. At the Eighth Conference, on Kauai in 1989, for instance, a motion in favour of judicial independence was proposed by Judge Robert Hefner of Palau and seconded by Judge Alex Munson of Saipan, but it was later withdrawn, not because of any disagreement on its substance, but because the participants felt that if the group passed resolutions for external consumption, the nature and value of the meetings would change. Similarly, at the Seventeenth Conference, in Tonga in 2007, many judges wanted to voice support for the judges in Fiji who were attempting to act impartially in a difficult situation. Because of the tradition against passing resolutions, the group decided to encourage the Chair of the Conference, Chief Justice Anthony Ford of Tonga, to issue a statement reflecting the concerns voiced during the Conference discussions. The only votes that have ever been taken at a Conference have been to determine where the next meeting should be held.

4 Tenth South Pacific Judicial Conference, Fiji, May 23-28, 1993.

Among the judges that have been particularly active at these Conferences are Olivier Aimot (who has attended six Conferences, three from New Caledonia and three from French Polynesia), Arnold K Amet (six Conferences, from Papua New Guinea), Andon Amaraich (seven Conferences, from the Federated States of Micronesia), William C Canby (four Conferences, from the US Ninth Circuit), Richard Chambers (the first four Conferences, from the US Ninth Circuit), Jose S Dela Cruz (four Conferences, from the Commonwealth of the Northern Mariana Islands), James Douglas Dillon (six Conferences, from the Cook Islands, Fiji, Nauri, and Niue), Gavin Donne (four Conferences, from the Cook Islands, Nauru, Niue, and Tuvalu), Gerard Fey (four Conferences, from New Caledonia), Soukichi Fritz (four Conferences, from Chuuk), Harry Gibbs (five Conferences, three from Australia and two from Kiribati), Alfred T Goodwin (four Conferences, from the US Ninth Circuit), Robert A Hefner (four Conferences, from the Trust Territory of the Pacific and later the Commonwealth of the Northern Mariana Islands), Judah Johnny (from Pohnpei), Mari Kapi (seven Conferences, from Papua New Guinea and, in 1993, from Fiji), Anthony M Kennedy (five Conferences, three from the US Ninth Circuit and two from the US Supreme Court), Edward C. King (seven Conferences, from the Federated States of Micronesia), Michael Kruse (five Conferences, from American Samoa), M Vincent Lunabeck (four Conferences, from Vanuatu), Robin Millhouse (four Conferences, from Kiribati), Alex Munson (nine Conferences, from the Trust Territory of the Pacific and later the Commonwealth of the Northern Mariana Islands), Arthur Ngraklsong (six Conferences, from Palau), William S Richardson (the first four Conferences, from the Hawaii Supreme Court), Lyle Richmond (five Conferences, from American Samoa), Edwel H Santos (four Conferences, from Pohnpei), Tiavaasu'e Falefotu M Sapolu (eight Conferences, from Samoa), Timici Tuivaga (eight Conferences, from Fiji), Clifford Wallace (ten Conferences, from the US Ninth Circuit), and Frederick Gordon Ward (five Conferences, three from the Solomon Islands and two from Tonga).

IV THE PACIFIC ISLANDS COMMITTEE

Shortly after the Second South Pacific Judicial Conference, Chief Judge Chambers recommended to US Supreme Court Chief Justice Warren Burger that a committee should be formed to address matters relating to the Pacific Islands affiliated with the United States. On June 9, 1976, Chief Justice Burger wrote approvingly to Chief Judge Chambers, appointing Chambers to chair what was to become the Pacific Islands Committee. This Committee was to "deal with matters relating to Guam, American Samoa, the Northern Marianas and the remaining Trust Territory of the Pacific." In 1977, Committee members attended the Third South Pacific Judicial Conference, held in Papua New Guinea, where they had the

opportunity to meet with judges from throughout the Pacific. Two years later, Committee members attended the Fourth South Pacific Judicial Conference, held on Rarotonga, Cook Islands, and recommended that the practice of sending surplus law books to Pacific Island judicial officers be continued.

In 1982, Chief Judge Chambers resigned from the Pacific Islands Committee for personal reasons and was replaced as chair by US Ninth Circuit Judge Anthony M. Kennedy, who noted that the geography of the Pacific "underscores the value of continued judicial interest in what is now a vast frontier for the evolution of constitutional government."

Kennedy was appointed to the US Supreme Court in 1988, and in 1990 he recommended to Chief Justice William Rehnquist that the future work of the Pacific Islands Committee be assigned to the US Ninth Circuit's Judicial Council. The Pacific Territories Committee of the Ninth Circuit was thereby chartered on April 19, 1991, and instructed to liaison with "Pacific jurisdictions in joint endeavours to improve the administration of justice in the Pacific Basin."

Initially chaired by Ninth Circuit Judge Alfred T. Goodwin, the Pacific Territories Committee focused on providing legal resources for the Pacific Island courts and securing better training for island judges. In 2000, Ninth Circuit Judge Clifford Wallace assumed the duties of chair of the Committee, and he later changed the name of the Committee from the Pacific Territories Committee to the Pacific Islands Committee. Judge Wallace was able to secure funding for judicial training to enable Pacific Island judges to attend courses at the National Judicial College of Reno, Nevada.

V KEY CONCERNS AND ISSUES

Between 1972 and 2009, 18 Pacific Judicial Conferences have been held.⁵ The conferences have provided a forum for members of the judiciary throughout the Pacific to come together and discuss common issues. Among the recurring themes have been (1) the independence of the judiciary; (2) education of the judges; (3) sharing of materials; (4) a Pacific Island regional court of appeals; (5) the use of expatriate judges versus indigenous judges; and (6) the reconciliation of customary law and Western law.

A The Independent Judiciary

Sir Timoci Tuivaga, then Chief Justice of Fiji, explained in 2001 that the judiciary is physically and financially the weakest of the three branches of

⁵ Eighteenth Pacific Judicial Conference in Papeete, French Polynesia, June 15-18, 2009.

government, because it holds neither the sword nor the purse.⁶ Its strength, he said, is the confidence, which is placed in it by the people. In 1993, Justice Ian Sheppard, of the Federal Court of Australia, stressed that judicial independence is fragile even in stable communities.⁷ It can be undermined, he explained, in a number of ways, including: (a) failure to provide sufficient resources for the court to function, (b) reduction of salaries to the point that qualified people are not attracted to the bench, (c) political appointment of unqualified or biased justices, and (d) removal or dilution of jurisdiction.

The independence of the judiciary has been discussed at nearly all the Conferences.⁸ Numerous speakers have emphasized that courts must be perceived as being independent, and that this perception is the key to ensuring public confidence in the justice system. Panelists have addressed seven subtopics: (1) tension between the executive and legislative branches; (2) failure to provide sufficient salaries; (3) judicial appointment; (4) removal or dilution of jurisdiction; (5) lack of tradition; (6) role of the media and free press; and (7) detecting judicial corruption.

1 Tension between the executive and legislative branches

The Honorable Ian Sheppard of the Federal Court of Australia, speaking at the Tenth South Pacific Judicial Conference in Fiji in 1993, explained that judicial independence involves both individual and institutional relationships to the legislative and executive branches. If an individual judge enjoys independence, but the court the judge presides over did not, then the judge's court could not be said to be an independent tribunal. The perception of independence, he noted, is as important as the reality.⁹

At the Fifteenth Conference at Papua New Guinea in 2003, Gordon Ward, then Chief Justice of Tonga, described the challenges of maintaining an independent judiciary in a constitutional monarchy. He explained that the Privy Council (which was authorized to enact legislation when Parliament was not in session) had passed a measure forbidding the publication of material that disparaged the King or his ideas, and was considering a measure that would remove the power of the courts to review any enactment of the Privy Council or Parliament. The independence of the courts was limited, he said, because the judges were selected by the executive

6 Fourteenth Pacific Judicial Conference, Noumea, New Caledonia, Sept. 24-28, 2001.

7 Tenth South Pacific Judicial Conference, Suva, Fiji, May 23-28, 1993.

8 A panel discussion on the independent judiciary has been held at ten of the first 16 conferences, and this topic formed the central focus of the Seventeenth Conference, in Tonga in 2007.

9 Tenth South Pacific Judicial Conference, Suva, Fiji, May 23-28, 1993.

branch and could be removed through impeachment by the executive and legislative branches.¹⁰

Chief Justice Timoci Tuivaga of Fiji explained at the 2001 Conference in New Caledonia that "[j]udicial independence is very fragile. It is not safe even in countries where one would imagine it is safe and secure."¹¹ He cited incidents in other countries, including the United Kingdom, involving threats from a high government functionary to restrict judicial review by statute if the judges did not exercise what the official termed self-restraint, and in the United States, where a staffer to US President Bill Clinton reportedly told a federal judge that if he did not change his ruling, the President would call for his resignation.

Chief Justice Tuivaga also pointed out that threats to judicial independence do not always come from the executive. Sometimes, for example, powerful business or criminal interest groups can influence judges, undermining judicial impartiality. Chief Justice Tuivaga gave the example of Colombia where 122 judges, lawyers, and prosecutors were murdered between 1979 and 1995, apparently by the drug cartels.

The experiences of the judiciary in Fiji have dominated discussion at several of the Conferences. At the 1989 Conference in Kauai, Chief Justice Tuivaga described how he and his colleagues survived the two military coups of 1987.¹² The first coup, in May, left some of the judiciary in place, but when the military stepped in again several months later, all judges were removed.¹³ Chief Justice Tuivaga told the participants that when the military government realized how difficult it was to run a government, it dissolved itself and brought back those with experience in governance, and brought him back to start a completely new judiciary. It has taken a while, he assured his colleagues, and a tremendous amount of effort, but, as of 1989, the new government had kept a distance from the new judiciary.¹⁴

In more recent years, the challenges facing the Fiji judiciary have increased. The 1997 Constitution vested judicial power in a High Court, a Court of Appeals,

10 Fifteenth Pacific Judicial Conference, Papua New Guinea, June 23-27, 2003.

11 Fourteenth South Pacific Judicial Conference, Noumea, New Caledonia, Sept 24-28, 2001.

12 Eighth South Pacific Judicial Conference, Kauai, Hawai'i, May 1-3, 1989.

13 Sir Vijay R Singh, A Diminished Judiciary, *Fiji Times*, 17 October 2000, <www.vanuatu.usp.ac.fj/journal_splaw/Special_Interest/Fiji_2000/Fiji_Singh1.html>.

14 The Honorable Sir Timoci Tuivaga, Chief Judge of the Supreme Court of Fiji, at the Eighth Pacific Judicial Conference, Kauai, Hawai'i, May 1-3, 1989.

and a Supreme Court,¹⁵ and ensured judicial independence.¹⁶ Judges were to be appointed by the President upon recommendation of the Judicial Service Commission and were to serve to age 65 (High Court) or 70 (Supreme Court), unless removed for reason of inability to perform the functions of office or misbehaviour.¹⁷

Beginning in 2000, "[t]he judiciary in Fiji has been deeply and bitterly divided."¹⁸ In May 2000, Chief Justice Sir Timoci Tuivaga, Justice Daniel Fatiaki, and Justice Michael Scott were said to have offered legal advice to President Ratu Sir Kamisese Mara at a time when Prime Minister Chaudhry and members of Parliament were held hostage in the parliamentary complex. Subsequently, Chief Justice Tuivaga was involved in the preparation of the Administration of Justice Decree,¹⁹ which abolished the Supreme Court and extended the time in office of the Chief Justice by changing the mandatory retirement age of the Chief Justice from 70 to 75 years.

Other members of the judiciary and the legal profession viewed Chief Justice Tuivaga's actions with concern,²⁰ and some suggested his action could be interpreted as being in violation of the 1997 Constitution.²¹ Chief Justice Tuivaga responded by saying he had acted pragmatically to protect the operations of the courts:²²

My predominant concern was not to render assistance as such to the defacto government but to ensure that the maintenance of law and order and justice in this country was not to be frustrated by an ineffective administrative court machinery that could easily have resulted otherwise without my intervention.

The Judiciary eventually was invited to determine the legality of this interim government in a series of high-profile rulings.²³ On May 1, 2001, the Supreme

15 Fiji Const ch 9, § 117(1).

16 "The judges of the State are independent of the legislative and executive branches of government." Fiji Const ch 9, § 118.

17 Fiji Const ch 9, §§ 117, 134, 137, 138.

18 Loyal Fijian-Fiji Independent News, A Divided Judiciary: *Justice Shameem v Justice Scott* <<http://loyalfijian.blogspot.com/2007/07/exclusive-divided-judiciary-justice.html>>.

19 Republic of Fiji Administration of Justice Decree (2000) (repealed by Judicature Decree 2000), available at <www.paclii.org/fj/legis/num_act/aojd2000285/>.

20 Brij Lal, *Islands of turmoil Elections and Politics in Fiji 201* (Canberra, Asia pacific Press 2006).

21 LawAsia, Report of Visit to Fiji by LAWASIA Observer Mission 8 (LawAsia 2007).

22 Ibid.

23 *Chandrika Prasad v Republic of Fiji* [2001] NZAR 385.

Court unanimously ruled that "[t]he 1997 Constitution remains the supreme law of the Republic of the Fiji Islands and has not be abrogated."²⁴ In October 2001, Chief Justice Tuivaga turned 70. Although initially reluctant to retire, he eventually did, and Justice Fatiaki became the new Chief Justice in July 2002.

On December 5, 2006, armed forces commander Commodore Josaia Voreqe (Frank) Bainimarama overthrew the elected government of Prime Minister Laisenia Qarase in a bloodless coup d'etat, and then in January 2007 the interim military government named Bainimarama to be prime minister. According to the US State Department Annual Human Rights Country Reports, the interim government denied citizens the right to change their government peacefully, and the judiciary was subject to political interference. In January 2007, Commodore Bainimarama put Chief Justice Fatiaki on "leave" and launched a misconduct investigation against him, which was dropped in December 2008 as part of an agreement that involved Fatiaki's formal resignation from office.

After Chief Justice Fatiaki's forced leave in January 2007, the Judicial Services Commission recommended the suspension of Chief Justice Fatiaki and the appointment of Justice Anthony Gates to replace Chief Justice Fatiaki on an acting capacity. (Justice Gates had previously ruled in 2000, as a member of the High Court, that the 1997 Constitution had not been abrogated and was thus still in force,²⁵ in the case affirmed by the Fiji Supreme Court in 2001.)

In July 2007, Gordon Ward, the president of the Court of Appeal left the bench, declining to renew his contract, and his home subsequently burned down under unexplained circumstances. In September 2007, "the entire panel of the Court of Appeal resigned being, in their view, frustrated from continuing by the Acting Chief Justice."²⁶

The participants at the Seventeenth Conference in Tonga in November 2007 discussed the difficulties faced by the Fiji judges in some detail. Sir Thomas Eichelbaum, who had served on the Fiji Court of Appeal from 1999 to 2007, noted that events "may have turned out differently had the judiciary been more united" and stressed the importance of judges providing "mutual support" to each other in times of difficulty.²⁷ The participants encouraged the chair of the conference, Chief

24 George Williams *Feature: Republic of Fiji v Prasad* Melb IJ 5 (2001).

25 *Chandrika Prasad v Attorney-General of Fiji*, [2000] 2 FLR 89; *Prasad v Republic of Fiji & Another* [2001] 1 LRC 655, [2001] NZAR 21.

26 Sir Thomas Eichelbaum, *Interference with Judicial Independence in the Pacific*, Seventeenth Pacific Judicial Conference, Tonga, 7-9 November 2007, at 6.

27 *Ibid* at 5 and 7.

Justice Anthony Ford of Tonga, to issue a statement regarding this situation. Chief Justice Ford did issue a statement to the press saying that "the judiciary was under pressure from the Fiji government, which goes against the idea of the independence of the judiciary [and the] principle ... that a judge should be able to make a decision on the merits of the case without any sort of direct or indirect pressure from government or anyone else."²⁸

On March 5, 2008, Prime Minister Qarase filed an action in the Fiji High Court posing the question for the court "whether the existence and exercise by the President of a power to appoint Ministers in the period of January 5 to January 15, 2007 is amenable to judicial review, and, if so, are the events which occurred in December 2006 relevant to the determination of that issue?"

The High Court, consisting of Acting Chief Justice Gates, Justice J E Byrne, and Justice D Pathik, held that the existence of a national security situation is nonjusticiable, and that the dissolution of Parliament and the direct rule by the President "are held to be valid and lawful acts in exercise of the prerogative powers of the head of State to act for the public good in a crisis" and that "to rule directly pending the holding of fresh, fair and accurate elections is upheld as valid and lawful."²⁹

This ruling was reversed on April 9, 2009 by Fiji's Court of Appeals (then consisting of three judges originally from Australia), which ruled that the government of Bainimarama was illegal. The next day, President Ratu Josefa Iloilo announced that he had abolished the Constitution, assumed all governing power, and revoked all judicial appointments.³⁰ On April 17, 2009, President Iloilo signed a decree to re-establish the courts and said new judicial appointments would be made in the next few days. These events were discussed further by the participants at the Eighteenth Conference, in Tahiti in June 2009.

The Republic of the Marshall Islands provides another example of a country that has struggled to maintain the independence of its judiciary. One example of this tension was discussed at the Fourteenth South Pacific Judicial Conference in 2001, involving a demand by the Minister of Justice for monthly reports from the courts. The Marshall Island judges viewed this request to violate judicial

28 *Pacific Judges Call for Probe of Fiji Judiciary*, Fijilive, 14 November 2007.

29 *Qarase and Others v Bainimarama and Others*, FJHC 241, 39 (2008)(internal citations omitted) <www.fijitimes.com/extras/qarase-vs-bainimarama-coup-case-judgement.pdf>.

30 *NZ Condemns Fiji Judge Sackings*, Stuff, 10 April 2009, available at <www.stuff.co.nz/world/south-pacific/2327182/Fiji-president-fires-all-judges>.

independence because it implied that the judicial system was under the supervision of the Minister of Justice, a presidential appointee.

At the Seventeenth Conference, in Tonga in 2007, Vincent Lunabek, Chief Justice of Vanuatu, presented a paper on how to strengthen judicial independence, stressing the need for judges to make it clear to their communities that they are able to operate independently and have the capacity to declare acts and regulations to be in violation of the country's constitution.³¹ Such actions will inevitably create tensions with the other branches, but judges can protect their role by stressing that "their task is to review the legality and not the merits of administrative decisions."³² Sir Thomas Eichelbaum, fresh from serving for eight years on the Fiji Court of Appeals, emphasized that "the judiciary must never be seen as taking part in matters that are properly within the realm of politics," noting that "Fiji and Vanuatu provide stark examples of how easy it is for Judges to infringe; even experienced Judges, in the case of Fiji."³³

Judges can also earn respect for their role, said Chief Justice Lunabek, if "we are prompt in our decision-making, eliminate back logs, and provide rational reasons for our decisions."³⁴ He stressed that the judiciary must control its own staff and budget, and that it can promote its independence through a media liaison officer who can explain the court's work to the public and by establishing a complaint procedure to allow citizens to bring concerns to the court's attention. The process of filing and evaluating complaints was addressed in detail by Consuelo Bland Marshall, US District Judge for the Central District of California.³⁵ She explained how complaints were handled in US courts and concluded by saying that a "system of filing complaints, if properly investigated, is a way in which the judiciary can remain independent and still preserve accountability. ... 'In the end, judicial independence can be preserved only if the judges exert the moral leadership and strength of character required to ensure judicial accountability.'"³⁶

31 Vincent Lunabek "What Can Judges Do to Strengthen Judicial Independence?" Seventeenth Pacific Judicial Conference, Tonga, 7-9 November 2007.

32 Ibid at 3.

33 Sir Thomas Eichelbaum "Interference with Judicial Independence in the Pacific" Seventeenth Pacific Judicial Conference, Tonga, 7-9 November 2007, at 6.

34 Vincent Lunabek "What Can Judges Do to Strengthen Judicial Independence?" Seventeenth Pacific Judicial Conference, Tonga, 7-9 November 2007, at 3.

35 Consuelo Bland Marshall "The Need for a Method to Check on the Judges – Who Watches the Watchman?" Seventeenth Judicial Conference, Tonga, 7-9 November 2007.

36 Ibid at 6 (quoting from J Clifford Wallace "Resolving Judicial Corruption While Preserving Judicial Independence: Comparative Perspectives" 28 California Western International Law Journal 341, 344 (1998)).

Miguel S Demapan, Chief Justice of the Commonwealth of the Northern Mariana Islands, provided a survey of the Codes of Judicial Conduct in 14 jurisdictions in the Pacific.³⁷ He found that all the surveyed jurisdictions shared a "[g]enuine concern to keep the judiciary in high regard" and "to keep the judiciary ethical."³⁸ At the "top in their lists is the judge's duties to uphold the independence, integrity, and impartiality of the judiciary, to avoid impropriety and its appearance, and to avoid abusing the prestige of judicial office."³⁹

Sir Thomas Eichelbaum, who had been Chief Justice of New Zealand and on the Fiji Court of Appeal from 1999 to 2007, also gave a paper at the 2007 Tonga Conference, stressing the challenges of maintaining judicial independence.⁴⁰ He noted that limits on remuneration may reduce the possibility of encouraging the best candidates to seek judicial positions, he argued strongly for appointments being made "by a body independent of government," and he stated that "appointments for a fixed period are undesirable" especially when "there is a possibility of reappointment."⁴¹ Judges can promote the integrity of the judicial branch by issuing judgments in a timely fashion, and he noted that "[a]mong some Judges in the Fiji High Court – not those present here – there is scandalous dilatoriness in the delivery of reserved judgments."⁴²

Another paper on judicial independence was delivered to the Seventeenth Conference in Tonga by Paul de Jersey, Chief Justice of Queensland, Australia.⁴³ He discussed in some detail the Beijing Statement of Principles of the Independence of the Judiciary in the LawAsia Region, which was signed by six Chief Justices from Pacific jurisdictions (along with 14 others) in 1995 and was later signed by three other Pacific Chief Justices.⁴⁴ Judge de Jersey stressed that

37 Miguel S Demapan "Presentation on Judicial Canons" Seventeenth Pacific Judicial Conference, Tonga, 7-9 November 2007.

38 *Ibid* at 3.

39 *Ibid* at 5-6.

40 Sir Thomas Eichelbaum "Interference with Judicial Independence in the Pacific" Seventeenth Pacific Judicial Conference, Tonga, 7-9 November 2007.

41 *Ibid* at 1-2.

42 *Ibid* at 4.

43 Paul de Jersey "Beijing Statement of Principles of the Independence of the Judiciary" Seventeenth Pacific Judicial Conference, Tonga, 7-9 November 2007.

44 Those signing from the Pacific were Olivier Aimot (then President of the New Caledonia Court of Appeal), Sir Thomas Eichelbaum (then Chief Justice of New Zealand), Sir Arnold Amet (Chief Justice of Papua New Guinea), Charles D'Imecourt (Chief Justice of Vanuatu), Tiavaasue Sapolu (Chief Justice of Western Samoa), and Sir Gerard Brennan (Chief Justice of Australia). Those

"judicial independence means that judges may rule against the government without influence or fear in cases that come before the court" and quoted from Judge Clifford Wallace who had said that "[a] judiciary that does not independently review the actions of other branches [of government] detracts from the people's belief in their government's legitimacy."⁴⁵

2 *Failure to provide sufficient salaries*

Lack of sufficient funding is ubiquitous among the Pacific Island judiciaries. For example, Sir John Muria, Chief Justice of the Solomons, told delegates at the Fifteenth Pacific Judicial Conference in Papua New Guinea in 2003, that he had not been paid for the past five months. The executive branch had no money and when it did assemble some, the judiciary was not the first priority to fund.⁴⁶

Independent judiciaries require sufficient funding and compensation. Without such funding, justice becomes for sale and judicial independence is undermined. Inadequate judicial compensation undermines the strength of the judiciary.⁴⁷ As Sir Thomas Eichelbaum noted at the Seventeenth Conference in Tonga in 2007, low salaries deter qualified candidates from seeking judicial positions.⁴⁸ Judicial recruitment may thus be limited to the independently wealthy or the inexperienced.⁴⁹

Inadequate compensation increases the chances of outside corruption. Thus, when a judge has not been paid for five months, that judge will be tempted to take a bribe to survive financially. Such a situation undermines the judiciary and results in the loss of faith by the citizens. Sufficient judicial funding and compensation ensures that the highest qualified persons will seek judgeships and that outside

from the Pacific who signed later included Sir Timoci Tuivaga (Chief Justice of Fiji), Sir John Muria (Chief Justice of the Solomon Islands), and Nigel Hampton (Chief Justice of Tonga).

45 Paul de Jersey "Beijing Statement of Principles of the Independence of the Judiciary" Seventeenth Pacific Judicial Conference, Tonga, 7-9 November 2007, at 4 (quoting from J Clifford Wallace "An Essay on Independence of the Judiciary: Independence from What and Why" 58 NYU Annual Survey of American Law 241, 251 (2001)).

46 Fifteenth Pacific Judicial Conference, Papua New Guinea, 23-27 June 2003.

47 Presentation by Ian Sheppard of the Federal Court of Australia Tenth Pacific Judicial Conference, Suva, Fiji, 23-28 May 1993.

48 Vincent Lunabek "What Can Judges Do to Strengthen Judicial Independence?" Seventeenth Pacific Judicial Conference, Tonga, 7-9 November 2007, at 1.

49 See Judge Paul A Magnuson "The Structural Elements of an Independent Judiciary: Financial, Organization" Political 11 (May 27, 2005) (internal quotations omitted) at <www.internationaljudicialconference.org/PDF/13/Magnuson.pdf>.

political pressure will not impact the impartial and neutral decisionmakers on the bench.

3 *Judicial appointment*

In order to achieve the impartial administration of justice, it is imperative to have some form of institutional autonomy. For some justices, the election of judges is "unthinkable if we are to maintain any semblance of judicial independence."⁵⁰ For others, however, it is the selection or promotion of judges based on how they are likely to decide, rather than on the basis of their professional expertise, that impinges on judicial independence.⁵¹

At the Eighth South Pacific Judicial Conference in Kauai, Hawaii, in 1989, Grover Rees III, Associate Justice of the High Court of American Samoa, offered his views that the people, through their elected representatives, have a right to select judges, and that where one judge might strike down a given statute, another judge could reasonably rule a different way.⁵² Ninth Circuit Judge William C Canby commented that considerations of philosophical views as a criterion in judicial selection is perfectly proper, and helps to ensure that law will reflect the values inherent in a society. He pointed to the US process of selecting federal judges, with constitutionally-mandated presidential appointment and Senate confirmation, as an example.⁵³ He noted that each system of selecting judges (election, executive appointment, or merit selection by an "independent" panel) threatens judicial independence to some extent, because whoever selects the judge is indebted to somebody else. In any case, he said, it is not so much the method of selection as the method of removal that is key to meaningful judicial independence. He did not believe that life tenure is really necessary to assure judicial independence because "lawyers are ornery enough to have their own opinions no matter what." What is important is that people have the perception that a judge will be around forever, and that they may have to learn to live with his judicial opinions, and not see the judicial process as just another process to be overridden.

Another participant agreed, saying that although a judge may be under an obligation to the selectors, if enough insulation exists once that judge is on the job,

50 Justice Ian Sheppard of the Federal Court of Australia at the Tenth South Pacific Judicial Conference, Suva, Fiji, 23-28 May 1993.

51 See Sir Timoci Tuivaga at the Fourteenth South Pacific Judicial Conference, Noumea, New Caledonia, 24-28 September 2001.

52 Eight South Pacific Judicial Conference, Kauai, Hawai'i, 1-3 May 1989.

53 Judge William Canby, Senior Judge of the US Ninth Circuit Court of Appeals, at the Eighth South Pacific Judicial Conference, Kauai, Hawai'i, 1-3 May 1989.

then the judge may feel free to disappoint the selectors. If, however, the judge has to be reviewed and reappointed regularly, independence is much harder.⁵⁴ Judge Canby agreed, and related the story of telling an elected judge that as long as the judge had integrity and decided cases according to the law, it would be the electorate's job to decide whether the judge should keep doing it. The response was, "That's a lot like having a crocodile in the bathtub. You may feel you should ignore it, you may try to ignore it, but you can't ever quite get it out of your mind."⁵⁵

Robert Hefner, Chief Judge of the Commonwealth Trial Court of the Northern Mariana Islands, said judicial independence was something that was not taken for granted in Micronesia. In the Republic of the Marshall Islands, for instance, life tenure was provided by the Constitution only if the judge was a citizen of the Marshalls – otherwise judges served on short-term contracts and could be removed literally overnight.⁵⁶

Robin Millhouse, Chief Justice of Kiribati, explained at the Fifteenth Pacific Judicial Conference in 2003, that under his country's Constitution, judicial tenure was limited to a fixed-term appointment.⁵⁷ Although such fixed-terms could constitute a threat to judicial independence, this limited tenure was justified by the limited availability of legal talent in Kiribati and the small size of the community, which made judicial impartiality very difficult, leading to the decision to bring in judges from the outside. But when a contract was negotiated with an outside judge, neither the judge nor the Kiribati community could know for sure what it would be getting. As of 2003, Chief Justice Millhouse had served one full term, with an extension for another two years. He said he had never had any kind of pressure put on him, not even hinted at or implied in any way, but he was always aware that he did not know what would happen at the end of this term. He assured the group that he was comfortable enough financially that he did not worry about whether his term would be renewed, but wondered about someone who might not be as comfortable. He also noted that an appointed judge could give three months notice of intent to leave, but otherwise, whether the judge was good or bad, Kiribati would be stuck with the judge for the duration of the contract, unless the judge was

54 Eighth South Pacific Judicial Conference, Kauai, Hawai'i, 1-3 May 1989.

55 The Honorable William C Canby, Ninth Circuit Court of the United States, at the Eighth South Pacific Judicial Conference, Kauai, Hawai'i, 1-3 May 1989.

56 The Honorable Robert Hefner, Chief Judge of the Commonwealth Trial Court of the Northern Mariana Islands, at the Eighth South Pacific Judicial Conference, Kauai, Hawai'i, 1-3 May 1989.

57 The Honorable Robin Millhouse, Chief Justice of Kiribati, at the Fifteenth Pacific Judicial Conference, Papua New Guinea, 23-27 June 2003.

removed for misconduct or incapacity after an inquiry. Other Pacific nations will give their own citizens judicial life tenure but will appoint expatriate judges only to a term of a few years.⁵⁸ In Samoa, for example, citizens can hold office to age 62, while expatriate judges are appointed for a term of years. Judges may not be removed except by the Head of State on a resolution supported by two-thirds of the total of members of the Legislative Assembly on the ground of stated misbehaviour or infirmity of body or mind.⁵⁹

Gordon Ward, then Chief Justice of the Solomon Islands, pointed out at the Eighth South Pacific Judicial Conference in 1989 that another important and less visible element in judicial independence is the question of who appoints the general administrative staff of the courts. "The judiciary should have a clear say in the appointment of people right down through the system so that the executive cannot gain control of the judiciary by a backdoor means."⁶⁰

4 *Removal of jurisdiction*

Chief Justice Ward also explained at the 1989 Conference that, although most Pacific nations have judicial independence written into their constitutions, many have ways of getting around it. In the Solomons, for instance, a judge may be removed easily by an administrative act of the Minister of Immigration, who, while the judge is out of the country, may simply have him declared a prohibited immigrant.⁶¹

A D Tenekone added to the colloquy by describing the challenges he faced as Chief Justice of the High Court of the Republic of the Marshalls.⁶² He explained that although the Marshall Islands Constitution establishes an independent judiciary, judges are typically appointed for a term of only four years, renewable after two. Moreover, the judiciary was part of the Internal Securities Department, the Minister of which considered himself to be the head of the judiciary. Administrative needs and finances were controlled by the executive. Some

58 In Western Samoa for example, citizens hold office to age 62, while expatriate judges are appointed for a term of years. Judges may not be removed except by the Head of State on a resolution supported by two-thirds of the total of members of the Legislative Assembly on the ground of stated misbehaviour or infirmity of body or mind. W Samoa Const art 65, 68-9.

59 W Samoa Const art 65, 68-9.

60 Eighth South Pacific Judicial Conference, Kauai, Hawai'i, 1-3 May 1989.

61 The Honorable Frederick Gordon Ward, Chief Justice of the High Court of the Solomon Islands, at the Eighth South Pacific Judicial Conference, Kauai, Hawai'i, 1-3 May 1989.

62 The Honorable AD Tenekone, Chief Justice of the Republic of the Marshalls, at the Eighth South Pacific Judicial Conference, Kauai, Hawai'i, 1-3 May 1989.

ministers were making definite inroads on judicial independence, he said, including specific threats to have him removed from the bench.

Judge Hefner told of what he described as a volatile situation in Palau, where a very controversial case led to a death, an arson fire, and a bombing, and the judge, who got no support from the bar at all, would certainly have been removed if he could have been.⁶³ (The Honorable Chief Justice Mamoru Nakamura, who presided in that trial, said, however, that this was an isolated political incident and was not representative of the state of judicial independence in Palau.)⁶⁴

5 *Lack of tradition*

At the Fourth South Pacific Judicial Conference in 1979, Professor J F Northey, Dean of the Faculty of Law, University of Auckland, New Zealand, commented on the particular struggle to uphold the independence of the judiciary in countries with no tradition of a separation of powers.⁶⁵ Dr Northey noted that most of the new states had some elements of judicial independence incorporated into their constitutions. But where no tradition has existed, judicial autonomy can easily be eroded. In some cases, he pointed out, there might be a want of independence on both sides, with the executive relying on a sympathetic judiciary at the same time that the judiciary looked to a benevolent executive. Encroachment is not always blatant, and the judiciary may simply undertake a task at the request of the executive, which may use judges for purposes other than their primary function and sometimes in politically sensitive situations.

The Republic of the Marshall Islands, for instance, is continuing to undergo a delicate process – implementing its newly adopted Constitution. Although a firm consensus is developing on what the roles of each branch of government enumerated in the constitution entail, a consensus has not yet developed on the respective roles of "insiders" and "outsiders" in that process.

Edward C King, Chief Justice of the Federated States of Micronesia, at the Eighth Conference on Kauai in 1989, related some of the problems inherent in guaranteeing judicial independence when no tradition of an independent tribunal is found in customary practice.⁶⁶ The nominating process is not always controlled by the nation to be governed. Judicial candidates, he said, should be asked about their

63 The Honorable Robert Hefner, Chief Judge of the Commonwealth Trial Court of the Northern Mariana Islands, at the Eighth South Pacific Judicial Conference, Kauai, Hawai'i, 1-3 May 1989.

64 Eighth South Pacific Judicial Conference, Kauai, Hawai'i, 1-3 May 1989.

65 Fourth South Pacific Judicial Conference, Rarotonga, Cook Islands, 15-19 May 1979.

66 Eighth South Pacific Judicial Conference, Kauai, Hawai'i, 1-3 May 1989.

political views, specifically with respect to the self-government of the nation and the extent to which the colonizing nation's laws should be incorporated and utilized over the aspirations, values, and traditions within that nation. "I am suggesting that it may well be that we have an obligation to help our own nations decide how to go about selecting judges, and suggest inquiries in these areas."

6 The role of the media

The importance of the media to judicial independence was addressed at the Fifteenth Pacific Judicial Conference in 2003 by the Honorable Gerard Fey, President of the New Caledonia Court of Appeal.⁶⁷ Judge Fey focused on the French system but suggested parallels with other legal systems in the Pacific. He asked conferees to ask themselves whether the media was a counter-balancing power, or a fourth branch of government. He answered his own question, saying that the media, as "witnesses and denouncers of dysfunction" were an important counter-balancing power that contributed effectively to guaranteeing judicial independence in a democratic government.

The fact that debate has occurred in open court has meant that the media can analyse the process and can translate its results to the public. This media presence, he said, was a fundamental guarantee against an arbitrary judge, because the attention from the media forces the judge to demonstrate the judge's impartial judgment, independence, and competence. Thus, the media can contribute to preventing arbitrary and unjust decisions, and he cited several instances where media publicity about judicial injustice righted a wrong.

Judge Fey noted that the media can sometimes have a negative impact on the independence of the judiciary, such as when journalists have developed a good relationship with a particular judge, and then put that judge in the limelight. The incentive to make decisions that encourage continued favourable coverage creates a risk that the judge will end up losing independence. A judge, he declared, must in all circumstances remain outside of the media debate generated by a case on which he sits. Although it remains important for the judicial system to communicate with the media, it should only be in the context of an organized service within the judicial system.

Live coverage of trials via cameras in the courtroom can create risks for judicial independence. Cameras can transform the participants, including the judge, into actors with potentially negative consequences. They can also create the risk that persons watching selected parts of a trial may misunderstand the trial and reach

⁶⁷ Fifteenth Pacific Judicial Conference, Papua New Guinea, 23-27 June 2003.

premature or inappropriate results. Some judicial remedies can be exercised against the press for violations of private life, defamation where the honour or reputation of an individual has been unfairly attacked, and infringements on the presumption of innocence or the confidential nature of a prosecutor's investigations.

Salamo Injia, Judge of the Supreme Court of Papua New Guinea, said in 2003 that he was not convinced the media could be counted on to safeguard judicial independence. He understood that the media could play a constructive role in communicating correct information to the public, which is critically important, but that the media did not always fulfill that role regarding coverage of the judiciary. Reporters were not required to attend court, and when they did, they generally were not there for the entire case, sometimes relying on information from the parties or their lawyers rather than legal records. He referred to the many problems he said he saw in the media's misunderstanding of court decisions, including incorrect reporting, perceived biased, and insensitive and dramatized reporting.⁶⁸

According to Judge Injia, leaving fundamentals of good governance to the good understanding of those involved is a palpable risk. The judiciary and the media need to sit down as equal partners and engage in meaningful dialogue toward setting guidelines for minimum standards to respect each other's role and independence, and at the same time, develop public judicial education or awareness programs.

7 Detecting judicial corruption

Ninth Circuit Judge Clifford Wallace explained the importance of judicial integrity at the Fifteenth Pacific Judicial Conference in 2003.⁶⁹ In the absence of judicial integrity, where would the corruptors and the corrupted be tried for their misdeeds? If justice is for sale, he declared, there is no real rule of law. The problem is in detecting judicial corruption accurately, investigating it fairly, and eradicating it effectively without eroding the independence of the judiciary. Tension is inevitable between enforcing judicial integrity and judicial independence.

Judge Wallace enumerated the basic principles he believes should apply to any process for ensuring judicial accountability and integrity:

- The process should be within the judiciary, in line with the need to guard judicial independence. Control of the process should not be left to the political branches.

⁶⁸ Fifteenth Pacific Judicial Conference, Papua New Guinea, 23-27 June 2003.

⁶⁹ Fifteenth Pacific Judicial Conference, Papua New Guinea, 23-27 June 2003.

- The process should be open, with any citizen having the ability to complain against a judicial officer or raise issues of alleged corruption or wrongdoing.
- The process should be transparent enough to assure the judiciary is not merely protecting its own.
- The process must be fair, assuring the judges themselves of due process rights.
- The process must be flexible enough to deal with situations requiring a response short of removal of a judge from the bench.
- The process should focus on helping the judge to become a better judge. Complaints may unearth a problem that can be solved, strengthening the system and the judiciary.

Even though judges generally know what is required of them, it helps to publish codes of conduct and ethics. A code of conduct establishes a basic conduct below which judges will be subject to sanctions, while ethical goals are aspirational, intended to encourage judges to be their best.

Speaking on the topic "A Model Legal Framework for Judicial Independence in the Pacific" Barry Bonnell, Chief Justice of the Republic of Nauru, said in 2003 that ultimately the best guarantee of judicial independence lies in the integrity of the judiciary itself. In a democratic society, a delicate balance determines the scope that an independent judiciary may exercise. This balancing process will also involve some tension, which is not necessarily a bad thing, but it is the management of that tension that is important. If perfect harmony exists between judges and the executives, then the citizens need to worry. He wondered if the word judicial *autonomy* might be better than judicial *independence* because it would make it clear that the judicial branch is not subject to the authority or control of any other branch.⁷⁰

At the Seventeenth Conference in Tonga in 2007, Robin Millhouse, Chief Justice of Kiribati and Nauru suggested establishing a Pacific-wide body to consider allegations of corruption brought against judges.⁷¹ He suggested three judges "drawn from different Pacific jurisdictions to consider charges against the judge in a fourth jurisdiction. In other words, peer review at the most senior level."⁷² An example of such an approach occurred recently in the Marshall Islands

70 Fifteenth Pacific Judicial Conference, Papua New Guinea, 23-27 June 2003.

71 Robin Millhouse "Can a Model for Judicial Accountability Be Developed in the Pacific?" Seventeenth Pacific Conference, Tonga, 5-7 November 2007.

72 Ibid at 3.

when Arthur Ngraklsong, Chief Justice of Palau, was assigned the task of evaluating charges brought against a judge in the Marshalls.

B Education of the Judges

These Conferences have repeatedly focused on the importance of judicial education. Both expatriate judges with extensive legal training and experience (but, in some cases, limited familiarity with the cultures of the island nations in which they served) and native judicial officials whose legal training and experience is in some cases limited have recognized the importance of training.

How best to accomplish the judicial education of both expatriate and native judges has been an issue of importance and debate over the life of the Conferences. Andon Amaraich, Chief Justice of the Supreme Court of the Federated States of Micronesia (FSM), spoke to conferees about the challenges of providing special judicial education for lay judicial officers in Pohnpei, Chuuk, Kosrae, and Yap, the four states of the FSM, at the Fifteenth Conference in 2003. These problems were familiar to many of the attendees to the conference.⁷³

Justice Amaraich explained that the lay judicial officers were very knowledgeable about the customs and traditions of their culture, but lacked knowledge of substantive laws and foreign laws. The cost of providing formal legal training was increased by the geographic dispersion and remote location of the states, which has meant that everything has had to be imported. And in the FSM these problems are especially complex, because of the nation's political organization. Each of the four FSM states has its own unique culture and language (although English is an official language) and this diversity requires much translation. Although the underlying legal principles have been derived from the US legal system, local courts also give consideration to Micronesian custom and tradition. The court structure is unique because the national government is a federation in which each state court acts independently of the national court, with the result that five autonomous judicial systems operate independently and simultaneously. Each operates under a different set of rules, applies a different body of law, and has a separate system of administration. Developing a program of judicial education that is relevant to all has been a real challenge.

Justice Amaraich explained the significance of some of the training programs put together by the US Ninth Circuit's Pacific Islands Committee for national and state court judges. The Pacific Island Committee and the National College in Reno, Nevada sponsored several programs in 2002, for instance, for judicial officers from

73 Fifteenth Pacific Judicial Conference, Papua New Guinea, 23-27 June 2003.

the FSM and other Pacific jurisdictions. The training faculty included judges from the United States who had some previous experience in the Pacific region or who had been to the FSM. The topics included the rule of law, the role of judges, judicial decisionmaking, contract law, tort law, and evidence. Training also occurs in the FSM itself, and in affiliated jurisdictions. The FSM has been an active participant in the Pacific Judicial Education Program, which has been funded by donors who have had an interest in seeing that the lay judicial officers in the Pacific Island nations receive adequate training in the law. Some workshops have been held for municipal judges in Pohnpei and Yap, in which judges have participated in mock courtroom scenarios dealing with hypothetical court situations. The FSM National Coordinator to the Pacific Judicial Education Program has been working on a benchbook project with the Pacific Judicial Education Program as a resource for the Pohnpei Supreme Court, and the other state courts.

In 1991, at the Ninth Pacific Judicial Conference, Edward C King, then recently retired as Chief Justice of the FSM Supreme Court, presented the delegates with the idea for the establishment of a Judicial Institute.⁷⁴ Justice King envisioned that the Judicial Institute would provide judicial administration via research and technical assistance, and serve as a clearinghouse for information. It would provide judicial education, staff training, and translation services. In addition, it would help with communication among the judiciaries by publishing a Pacific Island Reporter bringing together relevant cases and decisions.⁷⁵

The Institute would also help to establish appellate panels, establish a system for judicial discipline, help to provide continuing legal education for attorneys, and assist in the establishment of standards and bar exams. It would help to codify laws, and possibly help start up a Pacific Islands Law Journal. It could even function as an association for the Pacific judiciaries to help them act and buy collectively.

Justice King said he envisioned the Institute as a nonprofit corporation with a board of directors that would be controlled by the Pacific judiciaries. Funding would be from foundations, at least at the beginning, with the Asia Foundation having indicated that it might be able to help financially. Over the long term, he said, he saw the Institute as very nearly self-supporting from contributions from various Pacific Island judiciaries. Because the Institute would not carry out all the

74 Ninth South Pacific Judicial Conference, Papeete, Tahiti, French Polynesia, 21-24 May 1991.

75 Edward C King, former Chief Justice of the Supreme Court of the Federated States of Micronesia, at the Ninth South Pacific Judicial Conference, Papeete, Tahiti, French Polynesia, 21-24 May 1991.

functions, but rather serve as liaison and coordinator, a large staff and headquarters would not be needed.

Subsequent discussion of the proposal seemed generally positive. Chief Justice Fariq Muhammad of Kiribati said he liked the idea very much.⁷⁶ Chief Justice G W Martin of Tonga shared some reservations, although he was not entirely critical of the idea. All of the things the Institute would do, he noted, were already being done with varying degrees of success, and he wondered how the Institute would do them better. He also suggested that the smaller states might not want to be overseen by an international organization.⁷⁷ Judge Clifford Wallace said that the fear of being dominated by larger countries could be countered by electing members to the board only from smaller nations, to make sure it functioned in their interest.⁷⁸ Justice Tuivaga of Fiji added that the Institute would impose nothing, would not interfere, but would be available to help when asked.⁷⁹ Gordon Ward, then Chief Judge of the High Court of the Solomon Islands, said that the Institute's headquarters would best be located in some central location in the South Pacific, rather than in Hawai'i, no matter how convenient Hawai'i might be in some ways.⁸⁰

The group decided against voting on a motion to establish the Institute formally or even formally pursue the idea, since the Conference had no charter, no rules, and the only thing its membership had ever voted on was where to hold the next Conference. Some Conference members expressed strong interest in the project and offered to help Justice King to develop the idea further. An ad hoc working group was set up informally, with Justice King as chair, to explore this idea in more detail.⁸¹

Two years later, at the Tenth South Pacific Judicial Conference in 1993, Chief Justice King, president of the newly incorporated Pacific Institute of Judicial Administration (PIJA), together with chair of the working committee, Chief Justice Sir Timoci Tuivaga of the Supreme Court of Fiji, talked about the work that had

76 The Honorable Chief Justice Fariq Muhammad of Kiribati at the Ninth South Pacific Judicial Conference, Papeete, Tahiti, French Polynesia, 21-24 May 1991.

77 The Honorable Chief Justice GW Martin of Tonga at the Ninth South Pacific Judicial Conference, Papeete, Tahiti, French Polynesia, 21-24 May 1991.

78 The Honorable J Clifford Wallace, Chief Judge of the US Ninth Circuit Court of Appeals, at the Ninth South Pacific Judicial Conference, Papeete, Tahiti, French Polynesia, 21-24 May 1991.

79 The Honorable Sir Timoci Tuivaga, Chief Justice of the Supreme Court of Fiji, at the Ninth South Pacific Judicial Conference, Papeete, Tahiti, French Polynesia, 21-24 May 1991.

80 The Honorable Frederick Gordon Ward, Chief of the High Court of the Solomon Islands, at the Ninth South Pacific Judicial Conference, Papeete, Tahiti, French Polynesia, 21-24 May 1991.

81 Ninth South Pacific Judicial Conference, Papeete, Tahiti, French Polynesia, 21-24 May 1991.

been done on the concept of the Institute since it was proposed at the 1991 conference in Tahiti.⁸² Chief Justice Tuivaga described the concept in significant detail in a 1993 letter to Judge Clifford Wallace.⁸³

Under the proposal, topics for judicial seminars could include sentencing and alternatives to incarceration, evidence, integration of principles derived from custom and tradition into the system of justice, alternative forms of dispute resolution, crimes of violence, white collar and juvenile crimes, issues of commercial law and economic development in the Pacific courts, environmental law, land issues, and others.⁸⁴ Judicial administration programs for chief justices, justices, magistrates, clerks, registrars, administrators, probation officers, court reporters, and secretaries could include case flow management and delay reduction, processing appeals, separation of powers and functions with respect to relationships between judiciaries and other parts of the government, and the operation and maintenance of court reporting transcribers.

Technical assistance under PIJA could include the design and implementation of plans for computerization of the court, assessment of a court system with confidential recommendations, preparation of bench books, and design of statistical reports. PIJA could also serve a clearinghouse role, helping with circulation of judgments as a tool for research, publishing a newsletter for Pacific judiciaries as the first step towards a legal journal for the Pacific, legal education for selected jurisdictions, helping to locate outstanding students and helping them get into law schools. The concept was discussed at length with the group, picking up momentum as it went along.

The Pacific Institute of Judicial Administration never developed beyond the planning stage, however, because this idea failed at the 1995 Conference to receive the financial support from delegates necessary to move forward.⁸⁵ The issue of judicial training and PIJA was considered once again at the Twelfth South Pacific Judicial Conference in 1997.⁸⁶ A survey was conducted by Richard Grimes, of the Institute of Justice and Applied Legal Studies at the University of the South Pacific, surveying 15 jurisdictions, with 132 judges responding. One key finding was that although some valuable courses and training were available across and beyond the region, training was generally piecemeal in nature, and needed greater

82 Tenth South Pacific Judicial Conference, Suva, Fiji, 23-28 May 1993.

83 Tenth South Pacific Judicial Conference, Suva, Fiji, 23-28 May 1993.

84 Tenth South Pacific Judicial Conference, Suva, Fiji, 23-28 May 1993.

85 Twelfth South Pacific Judicial Conference, Sydney, Australia, 14-18 April 1997.

86 Twelfth South Pacific Judicial Conference, Sydney, Australia, 14-18 April 1997.

coordination and planning to be effective. The survey also indicated that successful training must be based on national needs in terms of delivery, language, substantive law, procedure, custom and tradition, and that in-country training from local experts and personnel was a prerequisite to effective administration.

Recommendations of the report included:

- Structure: creation of a judicial training center, preferably in Vanuatu because of its central position in the region, the English and French connections there, and the availability of a well-stocked law library.
- Short term: preparation of bench books, training manuals on law and procedure for court administration, preparation of training manuals on computer technology, in-country training courses to supplement the bench book/manuals, establishment of an e-mail training "listserve," development of a regional orientation program, organization of skills workshops, creation of a regional faculty of training experts, appointment of national training officers, holding of a regional conference on judicial training.
- Long term: establishment of a law reporting system, development of a model computer system for court records, standardization of qualifications, development of a structured training program building on short term achievements, establishment of a regional Council for Legal Education.

Sources of potential support and funding identified in the Grimes report included Australian AID, US AID, ODA (New Zealand), ODA (United Kingdom), Commonwealth Secretariat and CFTC monies, as well as possible funding opportunities from Canada, France, Japan, Korea, and independent charitable foundations. The chief judges approved the report.⁸⁷

By the Thirteenth South Pacific Judicial Conference in 1999, the Pacific Judicial Education Program (PJEP) was getting underway. PJEP is a five-year program, funded primarily by Australia, which had been approved two years earlier at the Twelfth Conference in Sydney. The judges present listened as Mr. Livingston Armytage, Australian consultant in judicial and legal development, discussed effective judicial training.⁸⁸

The credibility of any educational process for judges, he explained, depends on the ability of the education-provider to preserve judicial independence and avoid seeming like indoctrination, whether actual or apparent. Effective training should

87 Twelfth South Pacific Judicial Conference, Sydney, Australia, 14-18 April 1997.

88 Thirteenth South Pacific Judicial Conference, Apia, Samoa, June 28-2 July 1999.

promote the development of the distinctive skills of judging, and reflect on attitudes relating to fair trials and equality before the law (the "how") as well as substantive law and procedure (the "what").

The needs for judicial training throughout the Pacific region are profound, widespread, and diverse, declared Mr Armytage. The judiciary needs to be strengthened in exercising its role as guardian of the principles of good governance, accountability and transparency. The court's role is to protect citizens from political oppression, commercial exploitation, and the abuse of fundamental human rights, including violence against women. Ultimately, strengthening the rule of law, he continued, promotes economic development by protecting financial investment and trade. Furthermore, he said, "there are no shortcuts to addressing the fundamental deficits in the professional competence of lay justices, magistrates, court officers, and paralegals."

Mr Armytage listed the three primary areas where legal education and professional training for lay magistrates and judges is needed:

- Legal knowledge and concepts (law, evidence, jurisdictions, legal literacy, customary law, etc)
- Judicial outlook, attitude, and values (role, powers, responsibilities, independence, impartiality, integrity, review, conduct and ethics)
- Judicial skills (how to conduct a hearing trial, control of the courtroom, note-taking, legal research, statutory interpretation, judgment writing, communication skills, time management, and case management).

Education for court officers and paralegals should include:

- Legal knowledge and concepts (legal literacy, court system and method, court procedures)
- Legal interpretation
- Judicial administration skills (case management, administering courts and filings, fixtures, hearing lists and queuing, record management, registry management and practice, and teamwork)
- Generic management and administrative skills (written and oral communication, client service, and office management).

Judicial officers themselves, most of whom have a law degree (although the extent of professional training and experience varies throughout the region), need continuing education in case management, team leadership, coaching and mentoring, judicial information technology and computer skills, judicial

information systems, human rights and gender equity, managing complex litigation and commercial disputes, evidentiary issues, major fraud, and customary law.

Expatriate judicial officers also need local training on law, custom, and culture, as well as coaching and mentoring. Good lawyers, he noted, do not necessarily become good judges. Going from adversary to adjudicator means changing one's attitude, learning and using new skills, and sometimes severing old ties. In addition, he added, generic needs of the judicial service remain, including education in the operation and use of judicial information systems, computer training in word-processing and electronic legal research methods, and training in court recording.

The need is there, Mr Armytage said. He enumerated what he considered the guiding principles that would make a judicial training program for the Pacific effective:

- Judicial ownership – a good program must be judge-led and court-owned.
- Bench-specific, with a national focus and decentralized delivery – it should be designed to meet specific local needs, although some training should be conducted on a regional basis to provide opportunities to network and share experiences.
- Capacity building – the goal should be to build regional commitment and capacity to deliver sustainable judicial training, rather than create a system which is donor driven or dependent on outside expertise.
- Sustaining incremental medium-term change – in order to consolidate a sustainable foundation of judicial expertise, the focus of a good program should be medium-term incremental development, avoiding "quick fixes"
- Resource utilization and coordination – the program should use existing resources within the region when available
- Bottom-up priority – the program should aim first to develop the basic legal knowledge, practical judicial skills, and judicial outlook
- Consolidate judicial identity – the program should address specific and local needs of judges, magistrates, and court administrators.

Armytage submitted a proposal for a detailed work plan for short-term activities for each year from 1999-2004. He also had a list of specific recommendations:

- Assume ongoing responsibility for overseeing the development of regional judicial training program

- Constitute a council of judicial education to make policy, set priorities, and oversee management of the program of judicial training
- Appoint a chief judicial officer to chair the Council of Judicial Education
- Establish an Executive Committee of the Council of Judicial Education to oversee the day-to-day operation of the secretariat
- Convene the Council of Judicial Education annually, and Executive Committee at least quarterly
- Establish and staff a Pacific judicial training secretariat, and incorporate it as an NGO (non-governmental organization)
- Enter into a memorandum of understanding – or affiliation agreement – with Institute of Justice and Applied Legal Studies, of the University of the South Pacific
- Invite the University of the South Pacific to develop curricula and courseware
- Advocate to appointing authorities throughout the region the establishment of a minimum standard for eligibility to judicial office

Finally, Mr Armytage had a very important and specific recommendation for each of the chief judicial officers of the Pacific Island nations: lobby each government for endorsement of the need to allocate 1.5% of each national law and justice budget for judicial training.

C Sharing of Materials

The value in sharing information and experiences was recognized by the participants at the First South Pacific Judicial Conference⁸⁹ and has been repeated frequently. The limited availability of relevant legal materials was a serious concern and burden for many judiciaries in the Pacific.⁹⁰ Only one legal periodical produced in the South Pacific has been published outside of Australia and New Zealand, and few, if any, textbooks have been devoted to the law of the independent states that have emerged since 1970.⁹¹

89 First South Pacific Judicial Conference, Apia, Samoa; and Pago Pago, American Samoa, 10-13 January 1972.

90 Fourth South Pacific Judicial Conference, Rarotonga, Cook Islands, 15-19 May 1979.

91 Fourth South Pacific Judicial Conference, Rarotonga, Cook Islands, 15-19 May 1979. In 1945, World War II ended, and previous Pacific Island colonies worked towards self-determination. See generally Tagaloa et al, *Cultural & Democracy in the South Pacific* 1-2 (Ron Crocombe et al (eds) University of the South Pacific 1992).

Information-sharing began to be recognized as an attainable goal with the advent of the internet and its growing availability in the islands.⁹² At the Eighth South Pacific Judicial Conference in 1989, most participants agreed that their greatest common need was to share information and opinions with each other.⁹³ The participants discussed the need for a publishing company to develop a digest or research material that would allow them to keep abreast of what their colleagues are doing, examine each other's approaches and learn from one another. The participants agreed that the experiences of other Pacific Islands were generally probably more relevant to them than the experiences of the metropolitan powers.⁹⁴ Sir Mari Kapi, Deputy Chief Justice of the Supreme Court of Papua New Guinea, suggested that in order to move their discussions at these Conferences beyond mere discussions into something of more practical significance, they would need a sponsor to finance a series of law reports for the Pacific.⁹⁵

The goal of sharing opinions and other legal resources finally became a reality with the creation of the Pacific Islands Legal Information Institute (PacLII). "The PacLII, in partnership with the University of the South Pacific School of Law, promotes free access to South Pacific laws and materials (case law, legislation, treaties, Law Reform Commission documents, etc) via the Internet."⁹⁶ The foundation of PacLII is the Australian Legal Information Institute (AustLII) which assists PacLII in mark-up processing, database structure, search engine facilities, and other aspects of technical infrastructure.⁹⁷

PacLII garners new legal information such as statutes, amendments, regulations, and recent judgments by maintaining contact with the courts and governments in the region who supply cases and legislation as they are released in print and electronic format.⁹⁸ PacLII works closely with the University of the South Pacific Law School Library to scan copies of print opinions for publication on the website.⁹⁹

92 Fourth South Pacific Judicial Conference, Rarotonga, Cook Islands, 15-19 May 1979.

93 Eighth South Pacific Judicial Conference, Kauai, Hawai'i, 1-3 May 1989.

94 Eight Pacific Judicial Conference, Kauai, Hawai'i, 1-3 May 1989.

95 Eight Pacific Judicial Conference, Kauai, Hawai'i, 1-3 May 1989.

96 The Pacific Islands Legal Information Institute <www.pacii.org/pacii/FAQ.html#Heading37> (last visited 19 April 2009).

97 *Ibid.*

98 *Ibid.*

99 *Ibid.*

The impact that PacLII has had on the judiciaries in the Pacific has been swift and important. PacLII facilitates knowledge-sharing and knowledge-management mechanisms among the judges and legal practitioners in the Pacific.

D Regional Court of Appeals

The idea of a Regional Court of Appeal was raised at the First Conference in Samoa¹⁰⁰ and has been discussed periodically since then. Participants at that first meeting thought that a Regional Court could help address common problems such as the need to interpret, report, and transcribe judicial proceedings in several languages, the need for agreements among various Pacific Island nations to enforce court judgments, and the need to extradite and exchange prisoners.

In 1982, at the Fifth South Pacific Judicial Conference, Mere Pulea Kite, Barrister at Law and Special Assistant to the Vice-Chancellor, University of the South Pacific in Fiji, presented a paper on the idea of a Regional Court of Appeal.¹⁰¹ Ms Kite acknowledged that the concept needed more research and refining, but said that at least in some countries of the region, a second-tier appellate court is needed in the interests of justice and protection for the community. Ms Kite suggested options, and even names for a Pacific Regional Court of Appeal, and her presentation led to a provocative discussion among the participants.

One possibility, she explained, would be to establish a Court of Appeal without a fixed location that would assemble when needed, which would avoid the political and financial problems of locating a centralized headquarters in any one country. A second possibility would be to establish a court located centrally in the region, with a library and registrar. Ms. Kite recognized the questions of costs, staff training, and other issues, but noted that "a regional court would not only be one of the greatest unifying factors in regional cooperation but it could be of great value to the administration of justice in the Pacific."¹⁰²

In the discussion, E F Gianotti, Associate Justice for the High Court of the Trust Territory of the Pacific, expressed the view that may also have been held by others: "Personally, I feel that a Court of Appeal in the Pacific, North, South, or West, would be a good thing. However, I do not think there is a proverbial snowball in hell chance of it ever being formed."¹⁰³ Justice Gianotti explained that Pacific

100 First South Pacific Judicial Conference, Apia, Samoa; and Pago Pago, American Samoa, 10-13 January 1972.

101 Fifth South Pacific Judicial Conference, Canberra, Australia, 24-26 May 1982.

102 Fifth South Pacific Judicial Conference, Canberra, Australia, 24-26 May 1982.

103 Fifth South Pacific Judicial Conference, Canberra, Australia, 24-26 May 1982.

governments and their courts tend to be jealous of their jurisdictions, not wanting someone to come from outside and monitor their activities.

J D Dillon, Acting Chief Justice for the Cook Islands, worried that a regional central court would deprive the independent countries of the opportunity to have an appellate court sitting in their own jurisdiction, but he did not feel that these concerns were insurmountable. Justice Dillon suggested starting off with a pool of eminent jurists from Australia and New Zealand, using the English common law as the basis for judgments, in those countries using the English common law, and thus avoiding the problems of conflicting sources of law, from US and French jurisprudence.¹⁰⁴

Sir Ronald Davison, Chief Justice of New Zealand, noted that New Zealand has provided facilities and judges throughout the region, and would be willing to continue to render assistance to island nations on request, so far as possible. But, he added, "New Zealand is unlikely to subject itself to the jurisdiction of a regional court."¹⁰⁵

Sir Harry Gibbs, Chief Justice of Australia, added to the discussion by stating that the chances of the Australian appeals being taken to a Regional Court of Appeal were nonexistent, because the Australian Constitution would forbid it.¹⁰⁶ Chief Justice Gibbs added, however, that if a Regional Court were to be established for those nations wanting one, he was sure that Australian judges would be available to sit if asked.¹⁰⁷

Justice Davison observed that practical problems could be overcome by negotiation among the governments concerned, so that the first steps of the process could be taken to develop what could evolve into a Regional Court of Appeal. "It appears to me that there is certainly a large volume of good will amongst the nations of this area which would wish to see a regional court established."¹⁰⁸

Despite the rich discussions held at the Conferences, a Regional Court of Appeals remains as merely a concept. Any moves toward a more comprehensive regional integration will require both new regional treaties and national constitutional and legislative changes. As observed in 2007 at the Pacific Plan Action Committee Meeting in Nuku'alofa, Tonga, "[n]ew relationships between

104 Fifth South Pacific Judicial Conference, Canberra, Australia, 24-26 May 1982.

105 Fifth South Pacific Judicial Conference, Canberra, Australia, 24-26 May 1982.

106 Fifth Pacific Judicial Conference, Canberra, Australia, 24-26 May 1982.

107 Fifth South Pacific Judicial Conference, Canberra, Australia, 24-26 May 1982.

108 Fifth South Pacific Judicial Conference, Canberra, Australia, 24-26 May 1982.

member countries as they interact regionally will necessitate high-level legal advice as well as judicial institutions equipped to interpret and referee them. It therefore seems self-evident that development of governments' legal capacity, and the institutions which house it ..." is inevitable.¹⁰⁹

At the Seventeenth Conference in Tonga in November 2007, Justice Gerard Winter, who had previously served on the Fiji High Court for four years, gave a presentation on his current effort to promote a regional court for the Pacific.¹¹⁰ He has been tasked by the Pacific Forum at its 16-17 October 2007 meeting in Tonga to study this possibility, along with the idea of creating a Pacific Law Commission and a Pacific Judges Register. He suggested that the first step might be to form a regional pool of jurists equipped to serve in Pacific Island courts. He intended to study all possibilities for a Pacific Court of Appeal, including one that would cover the whole region or simply a subregion of the Pacific, and would discuss whether it would apply local law or some region-wide Pacific law and international law.

E Expatriate Judges or Indigenous Judges

Some island communities, such as Samoa, American Samoa, Papua New Guinea, the Federated States of Micronesia, Palau, Guam, the Northern Marianas, have tried to staff their judiciaries with local judges, while others, such as Fiji, Tonga, the Solomon Islands, the Cook Islands, Kiribati, Nauru, Niue, the Marshall Islands, French Polynesia, and New Caledonia have tended to use expatriate judges. Each system has advantages and perhaps also disadvantages.

In small island communities, it is unrealistic to expect a judge to stay apart from the community, and it is not desirable that the judge try to do so. As Judge Olivier Aimot of French Polynesia explained at the 2007 Conference in Tonga, "if judges are natives to the island where they fulfill their duties, the island nature of such an environment makes the isolation of the judge from his social context a totally illusive issue; if they come from another country they should...immerse themselves in the local context in order to better understand all the specificities and...the behavior and conduct of a judge must reaffirm the people's faith in the integrity of the judiciary. Justice must not merely be done but must also be seen to be done."¹¹¹

¹⁰⁹ Pacific Islands Forum Secretariat, Pacific Plan Action Committee Meeting, Nuku'alofa, Tonga, September 24, 2007, <www.pacii.org/PJDP/resources/PJC/Should_there_be_one_Overall_Final_Court_of_Appeal_in_the_Pacific.pdf>.

¹¹⁰ Gerard Winter "One South Pacific. One Regional Court" Seventeenth Pacific Judicial Conference, Tonga, 5-7 November 2007.

¹¹¹ Olivier Aimot, The Bangalore Principles of Judicial Conduct – Are They Applicable in the Melanesian and Polynesian Islands of the Pacific? Seventeenth Pacific Judicial Conference, Tonga, 7-9 November 2007, at 6.

F Customary Law and Western Law

As they have emerged from colonialism to independence, each Pacific Island country has addressed how to integrate its customary and traditional legal concepts into its constitutional structure based on Western ideas. The Chair of the Papua New Guinea Law Reform Commission, Bernard Mullu Narokobi, delivered a passionate speech on adaption of Western law with the customs and tribal laws of his new country and the problems and frustrations the Commission faced, at the Third South Pacific Judicial Conference in 1977.¹¹² He explained that when Papua New Guinea became independent, on September 16, 1975, Western legal, political, and ceremonial institutions were adopted without consideration of Papua New Guinea's traditions and customs. "The dispute settlement mechanisms which promoted harmony, group justice, compromise, concern for the succeeding generations, compassion, mercy, forgiveness, and popular participation were replaced with narrow legalism based on professional ethics, sectarianism, the police, and the court room conflict." He observed that the Western-based law and legal institutions were over-centralized, over bureaucratized, and over-professionalized. "This is convenient for the court and the lawyers, but unsatisfactory for the people."

Some elements of Western law, including its emphasis on the individual, are, he noted, directly contrary to the traditions of Papua New Guinea. His culture, he explained, values interdependence over individual independence. It places heavy emphasis on the values of mediation, consensus, and compromise, as well as popular participation in the dispute-settlement process. Community solidarity and mutual responsibility are important cornerstones of the culture. "The concept of joint responsibility among Melanesians is no more repugnant to the idea of personal responsibility than the concept of corporate liability in company law."

Among the accomplishments of the newly-independent Papua New Guinea, Narokobi explained, was the establishment of a Law Reform Commission, directed under the Constitution to investigate underlying law "in order to more systematically formulate our own common law." The Commission reintroduced native customs as a source of law, particularly in the areas of marriage, adultery, and the transmission of property of a native who dies intestate, but in other areas the application of native custom remains clouded with fear and distrust. Notions of "reasonableness" of an act were very problematic, he said, because of the difficulty in determining what standards would be used in determining what is reasonable.

Narokobi's frustration was clear:

¹¹² Third South Pacific Judicial Conference, Port Moresby, Papua New Guinea, 19-23 April 1977.

Papua New Guinea is nearly two years old as a nation state. But we are born to an ancient tradition. Our ancient wisdoms may even be older than the recorded history of Egypt. It is a return to our rich, rightful, and assured past. We cannot be ourselves without our past. We cannot adapt Western laws until we first adopt our own laws.

The Law Reform Commission, which he chaired, concluded that Papua New Guinea should embark on a deliberate policy of developing its own jurisprudence, based largely on its own customs and perceptions. Change, he insisted, is needed. The courts must be staffed with Papua New Guineans, and he reminded delegates that the English, the Americans, and the Australians did not have trained lawyers and judges when they started their democratic governance. Papua New Guineans too, he said, should have the freedom to err in order to grow as human beings. "My heart bleeds and longs for the day when our Papua New Guinea norms, customs, sanctions, and perceptions, and the methods we use to come down in favour of one party rather than another in a situation of human conflict, would be given its fullest significance."

In some constitutions, the place of custom is expressly recognized, and the two systems can co-exist. Where jurisdiction is not specifically spelled out, legal questions can arise when a local court applies custom, for example, and an appeal is taken to another court that applies another system of law.¹¹³

Anthony M Kennedy, then a judge on the Ninth Circuit, helped to put the problems emerging nations were confronting in drafting and implementing new constitutions into a historical framework at the Sixth South Pacific Judicial Conference in 1984.¹¹⁴ Judge Kennedy focused on the US judicial system as it related to the US-affiliated territories in the Pacific, but his comments made it clear that he took a larger view of the significance of these Conferences:

The spirit of judicial constitutional evolution here is more dynamic, more questioning in the Pacific areas represented here than in any region of the world. This spirit is the catalyst for new political and judicial institutions and structures. Your conference, with its exchange of ideas and perspectives, can become an integral part of that evolution.

The Conference, bringing together judicial officials from all over the Pacific, reminded Judge Kennedy of the value of perspective. He acknowledged that he and other US federal judges have tended to evaluate other constitutions and judicial

¹¹³ Fourth South Pacific Judicial Conference, Rarotonga, Cook Islands, 15-19 May 1979.

¹¹⁴ Sixth South Pacific Judicial Conference, Saipan, Commonwealth of the Northern Marianas, 27-29 August 1984.

systems by comparison with the US system. He admitted that although US federal judges are inclined to consider the US system as the ideal, "[i]t is important for us to remember, of course, that our system was not handed to us on a mountaintop. Our Constitution was drafted by practical men, highly skilled in the art and science of constitution-making..."

The judicial structures in the US-affiliated Pacific territories, he said, provide a convenient perspective to study two of the principles that underlie most of the constitutional structures within the Anglo-American tradition. The first principle, one he termed of "vast importance" for constitutional evolution, is judicial independence. Some structural independence is built into the US system under the US Constitution. These structural guarantees reinforce the ideas that respect must be given to the judgments of the courts and that the courts must operate impartially.

The structure of appellate courts, however, posed a problem for many of the island communities of the Pacific, because few have the caseloads or professional infrastructure to support a full-time appellate bench. "The design and maintenance of independent appellate courts in the Pacific region is a subject open to new and innovative approaches."

The second principle Judge Kennedy discussed as underlying constitutional structures in the United States was the legitimacy of local law. He reminded the participants that the framers of the US Constitution confronted an issue not unlike the issue of customary versus statutory law, which most of the new nations of the Pacific have grappled with. The solution in the United States was to design a structural mechanism to accommodate local law by recognizing the sovereignty of the states. "Though the balance between national and state power has never been constant and even now is subject to stress, federal courts as a routine matter decide cases by the specific application of state law principles. Respect for the legitimacy of state rules of decision is central to our constitutional tradition."

In fact, he told the group, "[o]ur tradition has been so shaped by federal experience that the Congress of the US and the Pacific judicial systems in the American territories recognize the importance, if not the necessity, of accommodating local law principles." The integrity of local law, he maintained, and how to weigh a local cultural component against an asserted constitutional right, was a question deserving of careful consideration by the delegates, most of whom had found this issue, in one form or another, before them more than occasionally.

Judge Kennedy referred directly to the "vitality of local law and cultural distinctiveness" in American Samoa. By agreement, the *fa'a Samoa* (the Samoan culture and the Samoan way) was to remain intact. The *matai* title and chieftain

system was preserved and recognized by the courts and other governing authorities. He expressed concern that if a US federal court were to have specific territorial jurisdiction over American Samoa, then Samoan customs might be subordinated to other national policies.

Guam and the Commonwealth of the Northern Mariana Islands have US District Courts staffed by judges who are appointed for a specific term, not for life. Nonetheless, Judge Kennedy observed, each court had a tradition of independence and authority and competence equivalent to that of district courts in the 50 states.

One approach utilized by the framers of the US Constitution that would be useful for those writing constitutions for the developing nations of the Pacific, he suggested, was to remain flexible, and be open to innovation:

If we are true to our heritage, then we must remember that the development of judicial and political structures is a pragmatic exercise. The American Constitutional idea, therefore, is not antithetical to innovation and experiment; it is premised on that concept. Thus it is with great interest that we observe, and where possible contribute, to the development of the political and judicial institutions of the Pacific.

One area of law presenting tensions between customary and Western law is land disputes. This concern was addressed at the Ninth South Pacific Judicial Conference in Tahiti in 1991.¹¹⁵ Gaston Flosse, then President of French Polynesia, welcomed the delegates to this discussion, reminding them of the various national land claims in the Pacific region. Conference Chair M. Thierry Cathala, First President of the Court of Appeals of French Polynesia, described the role and function of the Cour de Cassation in the French judicial system.

The creation of titles of landownership in French Polynesia was the subject of a paper presented by R Calinaud, Judge of the Court of Appeal in Papeete. Disputes over land had become more numerous and complex over the years, he said, but the main problem was the uncertainty about land rights because of the European settlement in the area.¹¹⁶ Prior to the arrival of the Europeans, land ownership in French Polynesia was based on either the clan, or the *marai*, a kind of collective family ownership. European arrivals brought demographic, economic, technical, sociopolitical, and intellectual changes, having different impacts for the Kingdom of Tahiti, the Leeward Islands, the Marquesas, and the other islands that now form French Polynesia. In each island community, a transition period was marked by the abolition of customary taboos and the introduction of new prohibitions and

¹¹⁵ Ninth South Pacific Judicial Conference, Papeete, Tahiti, French Polynesia, 21-24 May 1991.

¹¹⁶ Ninth South Pacific Judicial Conference, Papeete, Tahiti, French Polynesia, 21-24 May 1991.

penalties, promoted by the missionaries to contain foreign settlement through bans on land sales and mixed marriages and regulations of leases. Later, he explained, when the territories were opened to the colonization, new laws were established with the ultimate motivation "to favor European or half-caste settlement, and the establishment of plantations."

In 1847, the decision was made to award title of land to those who held it "since the end of paganism," dismissing all prior claims and quarrels of the past. This decision, said Judge Calinaud, "was well defined, far-reaching and not open to question on account of its religious implications." A registry was subsequently set up for all privately-held land, so that all Polynesians would become individual landowners with unquestionable titles. Then, in 1866, the Civil Code was enacted which provided greater freedom for land sales.

The Catholic Church also had a role in land issues in another part of the French Republic, Wallis and Futuna, according to Justice M. Bernard Henne, President of the Tribunal of First Instance for Wallis and Futuna. Land, he explained, remains vital to Wallisian status. The Polynesia tradition of hospitality required that a newcomer be given land, which happened when the first missionaries arrived. But in 1870, the Bishop was able to facilitate the approval of a code governing land ownership, which prohibited the sale or donation of land to any seafaring alien. This provision is still in force, so gifts and sales of land are now restricted. Currently, he said, disputes are still settled by the chieftainship, with the King as the final authority. He can settle the matter, but then change his mind and start all over again, so land disputes sometimes never reach a final decision. This uncertainty creates problems for the Catholic Church, which has wanted to protect its vested interests and customary authority to maintain whatever small powers it has, and for the French authorities which frequently cannot go forward with infrastructure development because land litigation remains unresolved.¹¹⁷

French settlement in New Caledonia has brought somewhat different problems to the land issue. Fote Trolue and Hilaire Gire, judges in Noumea, explained how the issues of land evolved through colonial and modern history, and how land disputes were traditionally resolved.¹¹⁸ Kanaks, the indigenous people of New Caledonia, were a clan society, based on groups of families. The concept of the group was overriding. Communities contained land-owning and land-using clans, and traditionally land was not for sale. People considered that they belonged to a specific piece of land, not that the land belonged to them. The land was related to

117 Ninth Pacific Judicial Conference, Papeete, Tahiti, French Polynesia, 21-24 May 1991.

118 Ninth Pacific Judicial Conference, Papeete, Tahiti, French Polynesia, 21-24 May 1991.

the clan, and the tribe was just an administrative unit. This system was challenged in 1855, when France declared sovereignty over the land, and the European encroachment upon Kanak land began. The claims by Europeans to land triggered native uprisings, and, in turn, reprisals from the French government.

The colonial government set up two types of land: (1) reserve lands, which were governed by customary law, and (2) ordinary lands, governed by French law. The boundaries of the reserves were drawn by the colonial government, which ignored the Kanak culture's attitudes toward the land and the traditional boundaries of the former Kanak kingdoms. Under this regime, the Kanaks could leave reserve lands only by getting a special permit, until 1947, when the Kanaks became French citizens. Because of the way the reserve lands were defined, and because of the rapid changes in Kanak society, decisions based on interpretations of traditions and customs have often not been accepted or respected. Land disputes have become ugly, the judges said, and the traditional dialogue over land disputes has given way to violence as if customary law authorities no longer existed.

M G Lucazeau, Procureur General of the Cour d'Appel of New Caledonia, explained that in 1982, lawmakers set up a "customary law court." This tribunal was not really a customary institution, but was instead a hybrid state court, presided over by a professional magistrate assisted by two representatives of the customary areas involved in the dispute. It tried to bridge the gap between the machinery of custom and the machinery of adjudication embodied by an ultimate authority. But, he added, it had not operated with much success so far, because of the difficulty in reconciling the custom and the court procedure open to litigants.¹¹⁹

At the Seventeenth Conference, in Tonga in 2007, Olivier Aimot, President of the Court of Appeals of French Polynesia, explained that the customs of Pacific Island communities may sometimes "clash" with "the very individualist nature of the Universal Declaration of Human Rights."¹²⁰ The Bangalore Code of Judicial Conduct, which emerged in the early years of the twenty-first century may, therefore, "be too detailed, too restrictive and at times hard to apply to small ethnic entities that are still so profoundly attached to their very vivid traditions."¹²¹ But he also noted that traditional forms of dispute-resolution were evolving with the introduction of Western ideas. In the Polynesian islands of Wallis and Futuna,

119 Ninth South Pacific Judicial Conference, Papeete, Tahiti, French Polynesia, 21-24 May 1991.

120 Olivier Aimot "The Bangalore Principles of Judicial Conduct – Are They Applicable in the Melanesian and Polynesian Islands of the Pacific?" Seventeenth Pacific Judicial Conference, Tonga, 7-9 November 2007, at 7.

121 *Ibid* at 11.

where Judge Aimot once served, the chiefs undertook both executive and judicial functions because "all justice comes from the king who, himself, holds it from God."¹²² But with "[t]he intrusion of the western way of life ... new attitudes ... have worn down the chiefs' credibility and their ability to make decisions, some of which were unexpected and suspected to have originated from a generous gift from one of the litigants."¹²³ Just as in France during the French Revolution, he noted, "the Wallisians and the Futunians too have lost the trust they had placed in their customary judges," leading perhaps to a desire to establish a more formal system of adjudication, to ensure "the trust of the people in their judges" which is, "beyond any other consideration, a fundamental element to the smooth running of any society and its judicial system."¹²⁴

The history of land rights and ownership in Palau was explained at the Ninth Conference in a paper submitted by Mamoru Nakamura, Chief Justice of the Supreme Court of Palau. In the late nineteenth century, German colonizers introduced the concept of individual ownership of land to Palau by confiscating all unused or unclaimed land and then requiring each Palauan male to plant 100 coconuts in an assigned area. If he complied with this requirement, he got the land on which on the trees were planted. The Japanese, after World War I, expanded the concept of individual ownership and public- or government-owned land. Within ten years, more than 80 percent of the land became recognized as government or public land. After their land registration program, the Japanese produced a land book that became a main source of information about land ownership, which has been used by the courts in Palau through the present.¹²⁵

After World War II, the US administration began to return confiscated land to private ownership by the individual or the clan. These efforts continued under the Palauan Constitution, which says specifically that all lands previously taken by occupying powers for less than an adequate compensation shall be returned to the private owners. This provision has had limited success, however, and after 30 years, the job still is not complete.

One of the problems has been the breakdown of the traditional dispute-resolution system, so that people now more frequently take their unresolved disputes to the courts rather than to the clan. Another problem has been lack of technology; record keeping traditionally was done manually, rather than through a

¹²² Ibid at 10.

¹²³ Ibid at 11.

¹²⁴ Ibid.

¹²⁵ Ninth South Pacific Judicial Conference, Papeete, Tahiti, French Polynesia, 21-24 May 1991.

computerized system for record keeping and land registration. A third problem has been the large volume of cases. Palau contains 18,000 parcels of land, and 15,000 people, with another 5,000 Palauans living outside the country.¹²⁶ Still another problem has been that Palau had only one certified surveyor to formalize the boundaries of each parcel. Finally, the Japanese land books, or *tochidaicho*, could not be found at all for three of the 16 Palauan states.

Edward C. King, then Chief Justice of the Federated States of Micronesia, said he was sceptical about the real value of the Japanese land books, which he said were used by the courts as a safety belt to avoid more litigation. He expressed the view that the Japanese were trying to expand their land holdings throughout the Pacific and Asia, which made transactions after 1938 somewhat suspect.¹²⁷

Grover Rees, Associate Justice of the High Court of American Samoa, said that Samoans have not wanted to register their lands. They have not trusted the process and believed they could establish their boundaries with their neighbours better, to the mutual satisfaction of all, if they kept the matter out of the courts and of the registrar's office.¹²⁸ Registration has been very slow, said Michael Kruse, Chief Justice of the High Court of American Samoa. A statute has been on the books for many years establishing an administrative proceeding requiring parties to attempt mediation before they go to court over land issues, but most parties have looked upon the mediation process as nothing more than a formality.¹²⁹

Faqir Justice Muhammad, Chief Justice of the Court of Appeals for Kiribati, said Kiribati has experienced many problems over land surveys. The size of land parcels varies, boundary disputes are frequent, and views differ on how land rights should be given to the people.¹³⁰

Sir Timoci Tuivaga, Chief Justice of the High Court of Fiji, noted that Fiji was ceded by the High Chiefs of Fiji to Great Britain in 1874, and the British Crown then recognized the rights of the native Fijians and implemented legislation to protect those rights. This system, he said, has worked well.¹³¹

In Papua New Guinea, 97% of all land is still in the hands of the indigenous people, said Sir Buri Kidu, Chief Justice of the Supreme Court of Papua New

126 Ninth South Pacific Judicial Conference, Papeete, Tahiti, French Polynesia, 21-24 May 1991.

127 Ninth Pacific Judicial Conference, Papeete, Tahiti, French Polynesia, 21-24 May 1991.

128 Ninth Pacific Judicial Conference, Papeete, Tahiti, French Polynesia, 21-24 May 1991.

129 Ninth Pacific Judicial Conference, Papeete, Tahiti, French Polynesia, 21-24 May 1991.

130 Ninth Pacific Judicial Conference, Papeete, Tahiti, French Polynesia, 21-24 May 1991.

131 Ninth Pacific Judicial Conference, Papeete, Tahiti, French Polynesia, 21-24 May 1991.

Guinea. But the problem was that mining rights remain in dispute. The British system adopted by Papua New Guinea said that the government owned all mineral resources, even though the land itself belonged to the customary owners. This division was in direct conflict with customary and traditional belief.¹³² The central government of Papua New Guinea has been reluctant to apply a land registration system because such a system would subject landowners to taxes from both the central and provincial governments. He said the government has set up special land courts to settle certain boundary disputes between clans. The law has required mediation first, presided over by an appointed land magistrate and a number of chiefs or leaders from the relevant area, followed by a court proceeding.

Australia, which also bases its law on British common law, handles land issues differently as described by John Toohey, Chief Justice of the High Court of Australia. When the British Crown acquired sovereignty over Australia, the land became the property of the crown. It was not until the 1960s that the Commonwealth government, following an amendment to the Constitution, began to pass legislation in regard to aboriginal title to land. The 1966 Aboriginal Land Rights Northern Territory Act set up a system by which claims could be made by groups of aboriginal people. It defined the class of traditional owners, and established that claims, under this law, could be made only to land which was "unalienated" (land in which no one has an interest other than the Crown). Although this stipulation has presented grounds for conflict, it remains possible to adopt a test of historical association with the land and thus to obtain title to it. And, he added, "the view has been taken that if the land is to be granted, it will not be granted to individuals to avoid possibility of fragmentation of interests over a long period of time. Land can be leased to members of the community, but it cannot be sold." He said the aboriginal people helped to draft the Land Rights Act, and reaction has generally been positive.¹³³

The interaction between customary and Western law presents itself in numerous other ways. Chief Justice Barrie Spring explained at the First Conference in 1972 that Samoa had adapted the jury system in serious criminal trials involving a potential punishment of five years or more by using a panel of four lay assessors to incorporate traditional law into decisions of the court.¹³⁴ Conviction requires a vote of at least three of the assessors and the trial judge, who does not deliberate with the assessors, so he will not have undue influence over their decision. At the

¹³² Ninth South Pacific Judicial Conference, Papeete, Tahiti, French Polynesia, 21-24 May 1991.

¹³³ Ninth South Pacific Judicial Conference, Papeete, Tahiti, French Polynesia, 21-24 May 1991.

¹³⁴ First South Pacific Judicial Conference, Samoa, 10-13 January 1972.

Second Conference in 1975 in Honolulu, Harold W. Burnett of the Trust Territory of the Pacific Islands explained that he had also used assessors on occasion, but had come to use them less because of the lack of agreement on what the relevant custom in a particular case might be.¹³⁵ The principal value of using assessors, he said, was to help evaluate witnesses whose testimony was provided in a local language. At that same Conference, Sir Harry Gibbs of the High Court of Australia observed that the assessor system was introduced by the British, because they used expatriate judges throughout their empire.¹³⁶ Sydney Frost, Chief Justice of Papua New Guinea, added that assessors are used there because of the great diversity of languages and customs in the country.

Juries are also now used in American Samoa, the Cook Islands, the Republic of the Marshall Islands, Guam, and the Commonwealth of the Northern Mariana Islands, and Palau recently adopted a constitutional amendment to start utilizing juries in serious criminal cases.

The Seventh South Pacific Judicial Conference in Auckland, New Zealand, in 1987 focused on crime and violence and discussion focused on how to use traditional leaders to assist with probation and traditional penalties (such as community service) where appropriate.¹³⁷ Grover Rees III, Associate Justice of the High Court of American Samoa, described the *ifoga* tradition in Samoa, whereby an offender's family group formally apologizes to the victim's side, offering something of value in hopes of concluding or reducing the hostilities. At the Twelfth Conference in Sydney, Australia in 1997, Andon Amaraich, Chief Justice of the FSM Supreme Court explained that the nature of island life involves repeated daily contacts and close relationships of the residents, which requires an emphasis on conflict avoidance and the promotion of harmony.¹³⁸ An adversarial winner-take-all system of deciding disputes does not always work in such a context, and a system of mediation or equitable balancing is seen as more culturally appropriate. Numerous Pacific courts have struggled with how an apology ceremony should affect a subsequent criminal prosecution and sentencing.

135 Second South Pacific Judicial Conference, Honolulu, 16-19 July 1975.

136 *Ibid.*

137 Seventh South Pacific Judicial Conference, Auckland, NZ, 3-5 March 1987.

138 Twelfth South Pacific Judicial Conference, Sydney, Australia, 13-18 April 1997.