PACIFIC JUDICIAL
CONFERENCE
MADANG - PAPUA NEW GUINEA
2003

15TH PACIFIC JUDICIAL CONFERENCE

Theme: Promoting an Independent Judiciary for all Pacific People

CONFERENCE PROGRAMME

MONDAY 23RD TO FRIDAY 27TH JUNE 2003

MADANG, PAPUA NEW GUINEA

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15th Pacific Judicial Conference

Papua New Guinea

June 23-27, 2003

The 2003 conference in Papua New Guinea (PNG) set another series of "firsts," most visibly by renaming itself the Pacific Judicial Conference, dropping "south" in recognition of the reality of participants from all over the Pacific region. This conference also was open, at different levels of participation, to many members of both the higher and lower judiciaries of the Pacific island nations, including the magistracy and select representatives of the legal profession on specific topics. The concept of a Pacific Legal Convention or Conference, that would embrace the entire profession including the judiciary, the magistracy, lawyers, and academics, was presented for discussion by the conferees.

But it was that bedrock concept, judicial independence, which was not only on the agenda for this 15th Pacific Judicial Conference, but was this time the theme for most of the session. Conference planners recognized that critical and helpful examination on an ongoing basis is necessary for it to be guaranteed or even promoted. The organizing committee of this conference, however, came under some criticism for soliciting funds from business and statutory corporations (some of which have been appearing in the courts as litigants), which some of the conferees felt was itself a compromise of the goal of judicial independence.

The Honorable Justice Clifford Wallace, Chief Judge Emeritus of the US Ninth Circuit Court of Appeals, said he has been surprised by how far the issue of judicial independence was off the radar screen of political leaders. He addressed the group on critical issues relating to judicial independence and judicial accountability. Judicial integrity, he said, is essential because if there were none, 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, he went on, is in detecting judicial corruption accurately, investigating it fairly, and eradicating it effectively without eroding the independence of the judiciary. There will inevitably be tension between enforcing judicial integrity and judicial independence, he said.

Most countries put primary responsibility for investigation and action in the judicial branch itself, as with a combination of the chief justice and a commission or judicial council, or possibly the ministry of justice.

He enumerated certain 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.
- 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.

Judges, he concluded, probably know what is required of them, but there is no harm in publishing it. Codes of conduct and ethics have been written and adopted, but they have different roles. A code of conduct establishes a basic conduct below which they 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," the Honorable Justice Barry Bonnell, Chief Justice of the Republic of Nauru, said ultimately the best guarantee of judicial independence lies in the integrity of the judiciary itself. There is often a delicate balance in a democratic society, which determines the scope that an independent judiciary may exercise. Some tension will always be experienced, and in fact, should be, but it is the management of that tension that is important. He added that it seems to him that when there is a state of perfect harmony between judges and the executives, that, then, is when the citizens need to worry. He wondered if the word of judicial *autonomy* might be better since it would not be subject to the authority or control of any other.

A Pacific perspective on minimum standards for judicial independence was offered by Sir Robert Woods, CBE, and former justice of the Supreme Court of PNG. He reiterated that the perception of impartiality is as important as the fact of it when resolving disputes. Still, there are often many people, including the highly educated and influential, in any community who see judicial independence as a self-serving notion used by judges to preserve their status and privileges.

While the judiciary should not be susceptible to direction and pressure from the executive or other pressure groups, he emphasized that this does not mean that it should not be susceptible to the community. "A judicial officer cannot give judgments in complete isolation or disregard of the forces and events which affect the community. There must sometimes be a balance between community values and demands which tend to wax and wane in respect of public or controversial issues of the day."

That said, however, he warned that the need for judicial independence is particularly acute when a judge is required to hear cases arising during times of crisis. He also warned against the trend whereby judicial independence can be sidestepped by a government that sets up tribunals or other decision-making bodies rather than letting the court resolve disputes.

Several other conferees stepped forward to tell of the constitutional challenges to the judiciary in their nations. Mr. Salesi Temo, Magistrate of Fiji, told of the role of the

Fijian judiciary in extra-constitutional changes of government. He himself was a member of the Fiji Court of Appeals, which was involved in a constitutional crisis provoked by a military coup, which prevented the president from implementing the emergency powers provided in the Constitution. The Court upheld Fiji's Constitution, which then put the sitting judges in a very difficult situation with respect to the military.

The Honorable Justice Gordon Ward, Chief Justice of Tonga, described the challenges of maintaining an independent judiciary in a constitutional monarchy. Tonga, the only native monarchy in the Pacific, had its constitution introduced in 1875, and it established three branches of government. Tongans, he said, revered the monarchy, and many believed that if the king had a particular wish or opinion, then that was something that transcended law. He told of measures passed by the Privy Counsel (which it was authorized to do whenever parliament was not in session) deeply eroding freedom of the press by forbidding the publication of material that was perceived to in some way disparage the king or his ideas. Another proposal under consideration by the Privy Counsel would remove the power of the court to review any decision of the Privy Counsel or the legislative assembly. The court was hamstrung to challenge the constitutionality of these actions by the fact that there was no independent method of selection of judges, and the method of determining whether a judge should be removed was impeachment, which meant trial by the executive and legislative branches. Justice Ward added, however, that he didn't think the problem was with the fact that Tonga was a constitutional monarchy. The problem, he believed, was that those who wanted to undermine the courts did so under the claim that it was done on behalf of the king.

The Chief Justice of Kiribati, The Honorable Robin Millhouse, explained that under his country's Constitution, judicial tenure was limited to the term of appointment. While this could constitute a threat to judicial independence, he explained that there were reasons that to a certain extent justified this limited tenure. Because of the limited availability of legal talent in Kiribati, and because the community was so small as to make judicial impartiality very difficult, judges were brought in from the outside. But when the contract was negotiated with an outside judge, neither the judge nor Kiribati could know for sure what it would be getting. He himself had served one full term, with an extension for another two years. He said he'd never had any kind of pressure put on him, not even hinted at or implied in any way. Yet, it was always in his mind that he didn't know what would happen at the end of this term. He assured the group that he is comfortable enough financially that he didn't 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 he was a good judge or a bad one, Kiribati would be stuck with him for the duration of the contract, unless he was removed for misconduct or incapacity after an inquiry.

Chief Justice Millhouse added, however, that Kiribati was a wonderful place to live and work, and he was more than happy to accept its few problems of judicial independence for the sake of being there.

The Honorable Justice Sir John Muria, Chief Justice of the Solomons, told delegates that he hadn't been paid for five months, although the Court Administrator in the Solomons got paid because his position was funded by an international organization. The executive branch, he explained, had no money and when it did get a little, the judiciary was not what got funded.

Financial

The importance of the media to judicial independence was addressed by the Honorable Gerard Fey, Premier President del la Cour d'Appel de Noumea, who 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 with reservations, he believes 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.

Media

The very fact that debate has occured in open court meant the media could reflect the process and its results to the public. This, he said, was a fundamental guarantee against an arbitrary judge because the attention from the media forced the judge to demonstrate his impartial judgment, independence, and competence. Thus, the media could contribute to preventing arbitrary and unjust decisions, and he cited several instances where publicity, via the media, about judicial injustice righted a wrong.

The news media could also have a valuable role in preventing the thwarting of justice to avoid exposing some politician or other important person to criticism or criminal sanctions.

He said that in denouncing to the public the mistakes of the three institutional powers and exposing abuse, dysfunction, errors, and failures, the media has functioned as a counter-balancing power that reinforced judicial independence in relation to the other arms of government.

It hasn't always worked this way though, he admitted, and the media could also have a profoundly negative impact. The "popular press" sometimes has tried cases itself without regard to ethical standards of journalism and with the purely commercial goal of satisfying a small part of the populace's desire for scandals, sex, and violence with insinuations and unverified information.

It has also had a negative impact in more subtle ways, such as when journalists have developed a good relationship with a particular judge, and then put that judge in the limelight. Because of an incentive to make decisions that encourage continued favorable coverage, there was a risk that the judge would end up losing his independence. A judge, he declared, must in all circumstances remain outside of the media debate generated by a case on which he sits. While 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 a similar risk for judicial independence. This can transform the participants, including the judge, into actors with potentially negative consequences. It also can run the risk of people watching selected parts of a trial, generating public outrage without regard for the presumption of innocence. There are some judicial remedies against the press for violation of private life, defamation where the honor or reputation of an individual has been unfairly attacked, for infringing on the presumption of innocence, or the confidential nature of a prosecutor's investigations. But these remedies are only available after the fact, he said. The harm has already been done.

The debate, he admitted, remains open "but one thing is certain — there is no counter-balance to the power of the press."

Indeed, the Honorable Justice Salamo Injia, Judge of the National and Supreme Court of PNG, said he doubted that the media had a valid role to play in safeguarding judicial independence, which was in any case, entrenched in the constitution. But the media's role as a medium of communicating correct information to the public, he said, was critically important, and that was problematic where coverage of the judiciary was concerned. Reporters weren't required to attend court, and when they did, they generally weren't there for the entire case, sometimes then relying on information from the parties or their lawyers rather than legal records. He alluded to the many problems he said he

saw in the media's misunderstanding of court decisions, incorrect reporting, perceived biased reporting, insensitive and dramatized reporting, etc.

There is a real risk, according to Justice Injia, to leaving fundamentals of good governance to the good understanding of those involved. 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 others role and independence, and at the same time, develop public judicial education or awareness programs.

After a progress report on the proposed Pacific Legal Convention, which would extend beyond the realm of judges, magistrates, and the judiciary to encompass the entire legal profession of the Pacific region, the group returned to one of the basic purposes of the Pacific Judicial Conferences from the beginning, the issue of judicial education.

The Honorable 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. These problems were familiar to many of the attendees to the conference.

Judicial Edu

Justice Amaraich explained that the lay judicial officers were very knowledgeable of the customs and traditions of their culture, but lacked knowledge of substantive laws and foreign laws. The cost of providing the more formal legal training was made worse by

the geographic dispersion and remote location of the states, which meant that everything had to be imported.

But, he explained, problems in the FSM were a little more complex than in most countries because of the nation's new political organization. Each of the states of the FSM had its own unique culture and language (although English was an official language) and this has meant much translation has been needed. While the underlying legal principles have been derived from the US legal system, they were localized to give consideration to Micronesian custom and tradition. The court structure was unique because the national government was a federation in which each state court acted independent of the national court. So there were five autonomous judicial systems operating independently and simultaneously. Each operated under a different set of rules, applied a different body of law, and had a separate system of administration. So coming up with one program of judicial education that would be relevant to all has been a real challenge.

He told them of the significance of some of the training programs put together by the US Ninth Circuit Pacific Islands Committee for National and State Court Judges. The Pacific Islands Committee and the National Judicial College in Reno, Nevada, had sponsored several programs in 2002 for judicial officers from the FSM and other Pacific jurisdictions. The training faculty included judges from the US 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 Decision Making, Contract Law, Tort Law, and

Evidence. Another course of study was being planned for Pohnpei in August of 2003 for state and national lay judicial officers from the FSM and other Pacific island jurisdictions. Topics were to include criminal law and procedure, and evidence.

He said the FSM has been an active participant in the Pacific Judicial Education program (PJEP), which has been funded by a group of donors who have had an interest in seeing that the lay judicial officers in the Pacific Island nations get adequate training in the law.

Some workshops have been held for municipal judges in Pohnpei and Yap, in which judges participated in mock courtroom scenarios dealing with hypothetical court situations. The FSM National Coordinator to the PJEP had been working on a benchbook project with PJEP as a resource for the Pohnpei Supreme Court, and eventually similar efforts for Yap, Chuuk, Kosrae, and the FSM state court.

The conference wound up with a discussion of the development of culturally appropriate dispute resolution procedures in Vanuatu, and then agreed to reconvene in Vanuatu in 2005.