Third South Pacific Judicial Conference 1977

PROGRAMME

Function Room, Islander Hotel
Hohola,
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3rd South Pacific Judicial Conference

Port Moresby, Papua New Guinea

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Newly independent Papua New Guinea (PNG) hosted the Third South Pacific Judicial Conference in 1977, and the new Prime Minister, the Right Honorable Michael Somare, MP, welcomed the group with comments on the effort his nation had just undergone.

Acknowledging the fact that most of the participant countries had inherited their legal systems from the nations of the British Commonwealth, France, or the United States, he said that the process of achieving nationhood had revealed to Papua New Guinea (PNG) the need for adapting the inherited legal system to PNG's custom and culture to be sure it reflected their own heritage. Among the accomplishments of the new nation 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." Much, he said, had already been accomplished including the establishment of a system of village courts and local land courts to settle most disputes in a customary way. Laws relating to arrest, search, and bail had already been passed by Parliament.

"We all still share common problems," he reminded the delegates, "despite the differences in our legal systems: problems with urban drift, population growth, education, the advance of technology, all of which have contributed to the emergence of law and order problems."

With that, the Third South Pacific Judicial Conference began, and again, as in past two conferences, the host country shared its experience with participants from other nations and developing nations in the Pacific region.

The Chairman of the PNG Law Reform Commission, Bernard Mullu Narokobi, delivered a passionate speech to the group about the ways introduced Western law was being adapted with the customs and tribal laws of his new country, and the problems and frustrations the Commission faced. He explained that when PNG became independent, on September 16, 1975, all Western legal, political and ceremonial institutions were adopted, "without consideration of PNG institutions...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 court room conflict." He said the 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."

He declared that some elements of Western law, including its emphasis on the individual, were directly contrary to tradition in Papua New Guinea. His culture, he explained, valued interdependence as opposed to individual independence. It placed 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 were 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."

Although the Commission had brought about some significant concessions to native customs as a source of law, including those regarding marriage, punishing adultery, and the transmission of property of a native who dies intestate, he said that in many areas the application of native custom remained 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, and compared to whom?

Narokobi's frustration was clear. "Papua New Guinea is nearly two years old as a nation state. But we are born to an ancient tradition. ~~Or~~ 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."

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. PNG 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 favor of one party rather than another in a situation of human conflict, would be given its fullest significance."

The Law Reform Commission, which he chairs, concluded that PNG should embark on a deliberate policy of developing its own jurisprudence based largely on its own customs and perceptions.

In fact, said William Clifford, Director of the Australian Institute of Criminology in Canberra, the very definition of what constitutes a crime is not as culturally based as one might expect. In an address on individual and group interpretations of human rights, he cited several studies showing a broad similarity in what most societies find to be totally unacceptable behavior. But, he added, this similarity did not extend to the structure of the legal institutions for the enforcement of the law, or for the punishment of offenders.

Customary courts, he explained, have been more concerned with consequences of a decision in their aim to settle disputes so as to restore peace and order. Western courts tended to serve a more abstract justice in following a code or precedent, and might not take into account the possible social consequences of their rulings.

Human rights, he said, is a notion that is unique to the Twentieth century, a doctrine that applicable to all countries and peoples at any cultural or technological level of development and regardless of ideology or political system. The problem/goal is ensuring human rights in different cultural settings.

Clifford explained his view that the concept of "rights" in the Western individual context found no echo in customary law. A person subject to customary law did have human rights, as well as rights within his community, but might not enjoy them individually. They came to him by virtue of his membership of the group.

In the West, he said, it had been the rights rather than the obligations which had been stressed. He pointed out to the delegates little quoted sections of the United Nations Declaration of Human Rights that he said were intended to "mitigate the pursuit of absolute rights regardless of others." They emphasized obligations to others and to the society at large.

He admitted, however, that the size and complexity of any society affected the extent to which it could be regulated by custom.

Clifford concluded his presentation by reiterating an idea he presented at the 1975 conference in Hawaii, saying, "If we hope to avoid even more repressive laws to prevent crime, we need to depend more upon such informal controls as are normal and acceptable within community groups, whether these be tribal, neighborhood, or religious congregations."

An entirely different topic was then brought before the delegates for their attention: the UN Conference on the Law of the Sea. Sir Anthony Mason, Justice of the High Court of Australia, and G.P.M. Dabb, Legal Advisor for the PNG Department of Foreign Affairs & Trade, spoke about a variety of issues relating to the Law of the Sea, including extending the Exclusive Economic Zone (EEZ) from three miles to twelve; the concept of

the mid-ocean Archipelago State, comprised of Indonesia, the Philippines, PNG, Fiji, and the Bahamas; and efforts to formulate an international convention to provide acceptable solutions to enough of the controversial problems to attract signatories among the more powerful nations.

The conference itself drew a variety of comments from participants. Some felt that more conclusions and specific recommendations should come from these conferences, while others held that continuing debate and discussion were a good feature, and that it would be undesirable to reach conclusions except in special circumstances.

There was some discussion about whether the South Pacific Judicial Conferences should be opened to the public, or at least to others in the legal profession besides judges and law officers. Some who favored a more open conference said that some governments would not sponsor the conferences if they were open to the entire profession and to observers. Those who wanted to limit attendance at the conference argued that to open it would impede the frankness of discussion that helped all participants.

There was discussion about inviting participation from larger nations around the Pacific, including the Philippines, China, and Japan. But the consensus here was that to broaden the conference too far would dilute the interests of the Pacific island nations.

But the Honorable Richard H. Chambers, Chief Judge for the US Court of Appeals for the Ninth Circuit, commented that the papers presented at this conference were the best

of any conference he'd ever attended to date. He said he'd never learned so much per hour in judges' meetings as he had in these conferences.

Delegates accepted the offer from the Cook Islands to host the next conference, in 1979, and recommended inclusion of several issues on the agenda: organization and management of the courts and their structure; sentencing in criminal cases and parole problems; and comparison of lower court structures.