The Pacific Judicial Conference: Strengthening the Independent Judiciary and the Rule of Law in the Pacific

Jon M. Van Dyke[1]

Introduction

The dynamics of the Pacific have changed dramatically during the past fifty years, as island communities emerged from the "orgy of national enslavement" that occurred in the nineteenth century[2] into a new era of independence and regional

[1]This paper was written with the assistance of Gary Nelson, class of 2011, William S. Richardson School of Law, University of Hawai'i at Manoa; Jacquelyn Tryon Esser and Terrence Thornburgh, class of 2009, William S. Richardson School of Law, University of Hawai'i at Manoa; Joshua Walsh, class of 2008, William S. Richardson School of Law, University of Hawai'i at Manoa; Brice Dumas, LLM recipient, 2008, William S. Richardson School of Law, University of Hawai'i at Manoa; Sherry P. Broder, attorney, Honolulu; Gerald W. Berkely-Coats, class of 1991, William S. Richardson School of Law, University of Hawai'i at Manoa, and now assistant director for international support services at Virginia Tech; and Melinda A. Berkley-Coats, formerly a journalist on Guam. Particular thanks go to Jerry and Melinda Berkley-Coats, who organized and summarized the materials from these conferences in a manner that has allowed this narrative to be presented. Thanks also go to Judges Clifford Wallace and Richard Clifton for their encouragement regarding this project, as well as to all the chief justices and attendees who have participated in the Pacific Judicial Conferences.

[2]Tom Coffman, *Nation Within: The Story of America's Annexation of the Nation of Hawai'i* (Kihei, Hawai'i, 1998), 63; see Jon M. Van Dyke, *Who Owns the Crown Lands of Hawai'i?* (Honolulu, 2008), 2–3.

Jon M. Van Dyke is a professor of law and the Carlsmith Ball Faculty Scholar at the William S. Richardson School of Law, University of Hawai'i at Manoa. In the spring semester of 2011, he will be a visiting professor at the School of Law of the University of California, Berkeley.

integration.[3] Samoa (formerly Western Samoa) became independent in 1962, Nauru in 1968, Fiji and Tonga in 1970, Papua New Guinea in 1975, the Solomon Islands and Tuvalu in 1978, Kiribati in 1979, and Vanuatu in 1980.[4] The Republic of the Marshall Islands and the Federated States of Micronesia became independent as freely associated states (with the United States) in 1986, with Palau achieving this same status in 1994. The Cook Islands and Niue are freely associated states connected with New Zealand, and Tokelau is a territory of New Zealand. Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands (CNMI) remain under the sovereignty of the United States.[5] French Polynesia is an overseas territory *(territoire d'outre-mer)* of France, Wallis and Futuna is an overseas collectivity *(collectivité d'outre-mer)* of France, and New Caledonia is in the process of becoming more autonomous, but is still under French sovereignty.[6]

[3]See generally Jon Van Dyke, "The South Pacific: Lessons Learned," in *Maritime Regime Building: Lessons Learned and Their Relevance for Northeast Asia*, ed. Mark J. Valencia (The Hague, 2001), 93; Van Dyke, "Regionalism, Fisheries, and Environmental Challenges in the Pacific," *San Diego International Law Journal* 6 (2004): 143–78.

[4]Chief Justice Vincent Lunabek of Vanuatu explained to the Fifteenth Pacific Judicial Conference in Madang, Papua New Guinea, that judicial decisions during the colonial period contributed to the drive for independence in Vanuatu:

> Although the Joint Court [established during the colonial period] had jurisdiction over all Condominium matters, its main *raison d'être* was to minimize conflict among the European settlers over the grab for land.
>
> This had the effect of legalizing fraudulent land dealings by some unscrupulous Europeans, and mistaken land dealings in which indigenous 'vendors' were unaware of the nature of the transaction and unable to understand the written contracts.
>
> Not surprisingly land grabs, fraud and speculation during the colonial period were the main causes of unrest and the stimuli of nationalist political movements leading to independence in 1980.

Vincent Lunabek, "Developing Culturally-Appropriate Dispute Resolution Procedures: The Vanuatu Experience" (Fifteenth Pacific Judicial Conference, Madang, Papua New Guinea, June 23–27, 2003).

[5]See generally Jon Van Dyke, "The Evolving Legal Relationships Between the United States and Its Affiliated U.S.-Flag Islands," *University of Hawai'i Law Review* 14 (1992): 445–517; Ediberto Roman, *The Other American Colonies* (Durham, NC, 2006); Stanley K. Laughlin, Jr., *The Law of United States Territories and Affiliated Jurisdictions* (North Baldwin, NY, 1995); Arnold H. Leibowitz, *Defining Status* (Dordrecht, Netherlands, 1989).

[6]See generally Ron Crocombe, *The South Pacific*, 7th ed. (Suva, Fiji Islands, 2008); W. von Busch, et al., eds., *New Politics in the South Pacific* (Suva, Fiji Islands, 1994); Peter Hampenstall and Noel Rutherford, *Protest and Dissent in the Colonial Pacific* (Suva, Fiji Islands, 1984); Yash H. Ghai, ed., *Law, Politics and Government in the Pacific Island States* (Suva, Fiji Islands, 1988).

The evolution in governance that occurred during this decolonialization process required that changes also be made in the judiciaries of these island communities, but it has been challenging to establish appropriate judiciaries in these small islands with their close-knit populations and traditions of consensus decision-making. Many have observed that the widely separated islanders have a shared system of values governing the settlement of disputes, but the vast distances separating the Pacific islands have made it extremely hard for island judges to communicate and learn from one another. The limited telephone communication, the slow postal service, and the awkward (or nonexistent) air links connecting them in the 1970s meant that the judges in these small islands operated in isolation, and almost every question they dealt with was a case of first impression, or so it seemed. Air routes did not connect the islands in the North Pacific with those below the equator. Those islands linked to the United States drew on a different legal heritage from those linked with Britain, and those linked with France were separated from the others by language as well as by legal tradition.

Bringing together judges from throughout the Pacific for periodic meetings has been a daunting challenge because of the geography involved, but the importance of doing so cannot be overestimated. The Pacific Judicial Conferences described in this article have strengthened the judiciaries throughout the region by bringing judges together to share their experiences and provide support to one another when needed. Determining the appropriate role for the judiciary in a small community where clan ties and customary linkages are frequently of overriding importance has been difficult, but most Pacific island communities now have judiciaries that operate independently, and the conferences have played a useful role in this development.

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 U.S. 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 reinforcing the commitment to independent judiciaries and constitutional governments in the diverse (and mostly small) islands of the Pacific. These meetings—which began to be called the "Pacific" Judicial Conference instead of "South Pacific" at the Fifteenth Conference in Papua New Guinea in 2003, to reflect the active participation of judges from north of

the equator—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.[7] Anthony M. Kennedy, when he was still a judge in the U.S. Court of Appeals for the Ninth Circuit, told the Sixth South Pacific Judicial Conference in Saipan in 1984,

> The spirit of judicial and constitutional evolution here is more dynamic, more questing 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.[8]

This narrative is designed to describe the issues addressed by, and the accomplishments of, these Pacific Judicial Conferences, and to examine the issues that continue to need attention.

THE FIRST SOUTH PACIFIC JUDICIAL CONFERENCE

The idea of the South Pacific Judicial Conference was formulated in September 1970 by American Samoa Chief Justice Donald Crothers, who proposed to Western Samoa Chief Justice Barrie Spring that, instead of holding a judicial conference between the two Samoas as Spring had suggested, an enlarged gathering of chief justices from around the Pacific be held.[9] Chief Justice Spring supported the idea, and thus the concept of a South Pacific Judicial Conference was given life.

For the next year, 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 Ninth Circuit 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," and he appreciated the "encouragement, assistance, and advice" he received from Chambers.[10]

[7]"Introductory Note" (Seventeenth Pacific Judicial Conference, Nuku'alofa, Tonga, Nov. 5–9, 2007), www.paclii.org/PJDP/resources/PJC/Introductory_Note.pdf.

[8]Anthony M. Kennedy, "Address to the South Pacific Judicial Conference" (Sixth South Pacific Judicial Conference, Aug. 27–29, 1984, Saipan, CNMI).

[9]Correspondence in the files of the U.S. Court of Appeals for the Ninth Circuit.

[10]Ibid.

PACIFIC JUDICIAL CONFERENCES

Conference	Dates	Location
First South Pacific Judicial Conference	Jan. 10–13, 1972	Samoa (Apia & Pago Pago)
Second South Pacific Judicial Conference	July 16–19, 1975	Honolulu, Hawai'i, USA
Third South Pacific Judicial Conference	April 19–23, 1977	Port Moresby, Papua New Guinea
Fourth South Pacific Judicial Conference	May 15–19, 1979	Rarotonga, Cook Islands
Fifth South Pacific Judicial Conference	May 24–26, 1982	Canberra, Australia
Sixth South Pacific Judicial Conference	Aug. 27–29, 1984	Saipan, Commonwealth of the Northern Mariana Islands
Seventh South Pacific Judicial Conference	March 3–5, 1987	Auckland, New Zealand
Eighth South Pacific Judicial Conference	May 1–3, 1989	Poipu Beach, Kaua'i, Hawai'i, USA
Ninth South Pacific Judicial Conference	May 21–24, 1991	Papeete, Tahiti, French Polynesia
Tenth South Pacific Judicial Conference	May 23–28, 1993	Yanuca Island, Viti Levu, Fiji
Eleventh South Pacific Judicial Conference	Feb. 5–10, 1995	Tumon, Guam, USA
Twelfth South Pacific Judicial Conference	April 13–18, 1997	Sydney, Australia
Thirteenth South Pacific Judicial Conference	June 28–July 2, '99	Apia, Western Samoa
Fourteenth South Pacific Judicial Conference	Sept. 24–28, 2001	Noumea, New Caledonia
Fifteenth Pacific Judicial Conference	June 23–27, 2003	Madang, Papua New Guinea
Sixteenth Pacific Judicial Conference	July 25–29, 2005	Port Vila, Vanuatu
Seventeenth Pacific Judicial Conference	Nov. 5–9, 2007	Nuku`alofa, Tonga
Eighteenth Pacific Judicial Conference	June 15–18, 2009	Punaauia, Tahiti, French Polynesia
Nineteenth Pacific Judicial Conference	Scheduled for Nov. 2010	Guam, USA
Twentieth Pacific Judicial Conference	Scheduled for 2012	Solomon Islands

After a year of planning, the First South Pacific Judicial Conference was opened on January 10, 1972, in Apia, Samoa. This meeting was the first time that judicial representatives assembled from the three cultural regions of the Pacific—Polynesia, Melanesia, and Micronesia. The meeting also included the president of the court of appeal in French Polynesia (Yves Pegourier) and the chief justice of the Hawai'i Supreme Court (William S. Richardson), as well as judges from the Trust Territory of the Pacific and U.S. federal courts. On the second day, the conference moved to Pago Pago, American Samoa, where it closed on January 13, 1972.

This meeting provided the first opportunity for the judges of the Pacific, both local and expatriate, to share experiences and knowledge and to discuss different adaptations to the constitutional and political changes they were experiencing. Chief Justice Spring was elected chair by the delegates in attendance, and he opened the conference by explaining the judicial system of Western 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 successful establishment of 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.

THE STRUGGLE TO KEEP THE CONFERENCE ALIVE

This First South Pacific Judicial Conference was a success, but problems arose regarding when and where a Second Pacific Judicial Conference might be held and who would be responsible for organizing it. Crothers, who was scheduled to return to the United States in the following month, suggested that Spring be appointed as "sort of a guardian to get the thing together again." But five months later, in June 1972, Spring also returned home, to Auckland, New Zealand, and "tossed the ball" to 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, Minogue announced in March 1974 his intention to resign. He suffered a heart attack that same month and formally retired in May 1974.[11] The task of organizing the Second South Pacific Judicial Conference then fell to the new chief justice of Papua New Guinea, Sydney Frost.

At this point, Ninth Circuit Chief Judge Chambers, building on his longstanding interest in the Pacific, stepped back into the picture. Several years earlier, in 1968, he had 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. 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, Chambers wrote to Sir Garfield Barwick, chief justice of the High Court of Australia, explaining 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.[12]

As a result of Chambers' suggestion, and with the assistance of both William S. Richardson, chief justice of the Hawai'i Supreme Court, and Samuel P. King, chief judge of the U.S. 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. Richardson set the tone at the beginning of the conference by observing,

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

[12]Correspondence in the files of the U.S. Court of Appeals for the Ninth Circuit.

> 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. . . ."[13]

Although occasionally three years have passed between meetings, the conference has generally been convened every two years. The location shifts each time, and many of the island communities have played host, with two of the first nineteen conferences having been held in Australia, French Polynesia, Guam, Hawai'i, Papua New Guinea, and Samoa. The number of participants has varied from a low of seventeen at the Third Conference in Papua New Guinea in 1977, to a high of eighty-nine at the Fifteenth 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.[14] The number of observers has always been kept small, and the media are usually authorized to report only on the opening speeches and social events.[15]

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 (Cook Islands, 1979), 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

[13]Ibid.

[14]Tenth South Pacific Judicial Conference, May 23–28, 1993, Yanuca Island, Viti Levu, Fiji.

[15]Social events and networking have also always been an important part of these conferences. After the Eighth South Pacific Conference in Poipu Beach, Kaua'i, Hawai'i, in 1989, Anne King, wife of U.S. District Judge Samuel P. King, assembled recipes from the other wives of the judges and circulated them to all the conference participants. *Recipes from the South Pacific Judicial Conference* (Poipu, Hawai'i, 1989).

or French. At least one judge (and frequently two or more) from the U.S. 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 Hawai'i 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.[16] The dynamics of the conferences have always involved some underlying tension between the South Pacific judges, who are mostly linked to the British legal tradition, and those from the North Pacific, who are mostly linked with the United States and its legal tradition.

The tradition of the conferences has been to refrain from adopting any formal resolutions. At the Eighth Conference in 1989, a motion in favor of judicial independence was proposed by Judge Robert Hefner of Palau and seconded by Judge Alex Munson of the U.S. District Court for the Northern Marianas, but it was later withdrawn, not because of any disagreement about 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. Some participants at the Ninth Conference in 1991 suggested passing a resolution to support judicial independence in the Marshall Islands, but Judge Samuel P. King noted that it would be difficult for the conference to determine whether only chief justices should vote, or how such a vote would be conducted, and he thought it would be better for individual justices to express their concerns. 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 instead 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, that

[16]The 1987 conference was originally scheduled to be in Fiji, but Fiji withdrew as host because of cyclones Eric and Nigel and "other difficulties," and this meeting was moved to Auckland, New Zealand. The 1989 conference was also originally scheduled to be held in Fiji, but Fiji again withdrew as host, because a military coup had made it impossible for the Fijian judiciary to operate independently (discussed in more detail below). That conference, the eighth, was moved to Kaua'i in Hawai'i, and Fiji later hosted the Tenth Conference in 1993.

> 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. 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.[17]

Again after the Eighteenth Conference in Tahiti in 2009, President (Chief Justice) Olivier Aimot, the chair of this meeting, issued a statement summarizing views expressed at the meeting:

> In keeping with the 1995 Beijing Statement of Principles of the Independence of the Judiciary, which affirms that no community can live in peace, freedom and prosperity unless governed by the rule of law, members reiterated the importance of maintaining the rule of law through an independent judiciary, assisted by an independent legal profession.
>
> Members viewed with concern reports on recent events in Fiji and the serious threats these events represent to the independence of the judiciary and the legal profession and thus to the maintenance of the rule of law in that country.
>
> They urge Fiji's resumption of its world status as an exemplar of the rule of law. And they look forward to the judges of Fiji resuming their rightful place among their number.[18]

The only votes that have ever been taken at a conference have been to determine where the next meeting should be held.

Among the judges who have been particularly active at these conferences are

- Olivier Aimot (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)

[17]"Pacific Judges Call for Probe of Fiji Judiciary," *Fijilive.com*, Nov. 14, 2007. This statement by Chief Justice Ford led to a call for the United Nations Special Rapporteur on the Independence of Judges and Lawyers to be allowed into Fiji to conduct an investigation of the judiciary. Pacific Islands Report, "Pacific Judges Call for Probe of Fiji Judiciary," <http://archives.pireport.org/archive/2007/november/11-5-05.htm>. See infra text at note 80.

[18]Statement of President Olivier Aimot, chair of the Eighteenth Pacific Judicial Conference, Tahiti, June 18, 2009 (delivered at the end of the conference).

- Michael E.J. Black (eight conferences, from the Federal Court of Australia)
- William C. Canby (four conferences, from the U.S. Ninth Circuit)
- Richard Chambers (the first four conferences, from the U.S. 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, Nauru, and Nuie)
- 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 U.S. 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 (four conferences, from Pohnpei)
- Mari Kapi (seven conferences, from Papua New Guinea and, in 1993, from Fiji)
- Anthony M. Kennedy (five conferences, three when he was a judge on the U.S. Ninth Circuit and two when he was an associate justice on the U.S. 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)
- John Mansfield (five conferences, from the Federal Court of Australia)
- 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 Ngiraklsong (six conferences, from Palau)
- William S. Richardson (the first four conferences, from the Hawai'i Supreme Court)
- Lyle Richmond (five conferences, from American Samoa)
- Bruce Robertson (seven conferences, from New Zealand and Vanuatu)
- Edwel H. Santos (four conferences, from Pohnpei)
- Tiavaasu'e Falefatu M. Sapolu (eight conferences, from Samoa)
- Timici Tuivaga (eight conferences, from Fiji)

- John von Doussa (five conferences, from Australia, Vanuatu, and Fiji)
- J. Clifford Wallace (ten conferences, from the U.S. Ninth Circuit)
- Frederick Gordon Ward (five conferences, three from the Solomon Islands and two from Tonga)

Bryan Beaumont and Ian Sheppard from Australia and John Muria from the Solomon Islands have also been active participants in the conferences.

THE NINTH CIRCUIT'S PACIFIC ISLANDS COMMITTEE[19]

Shortly after the Second South Pacific Judicial Conference, Chief Judge Chambers recommended to U.S. 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, Burger wrote approvingly to 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," and consisted originally of Chambers, Judge Herbert Y.C. Choy, Judge Walter R. Ely, Jr., Judge Paul D. Shriver, and Charles H. Habernigg.[20] In 1977, committee members attended the Third South Pacific Judicial Conference 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 Conference in Rarotonga, Cook Islands, and recommended that the practice of sending surplus law books to Pacific island judicial officers be continued.

In 1982, Chambers resigned from the Pacific Islands Committee for personal reasons and was replaced as chair by U.S. 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." [21] Kennedy was appointed to the U.S. Supreme Court in 1988, and in 1990 he recommended

[19]The Pacific Islands Committee and the development of the judiciaries in the U.S.-affiliated Pacific island communities are discussed in more detail in Alfred T. Goodwin, "United States Law in the Pacific Islands," also in this issue.

[20]Alfred T. Goodwin, "A History of the Pacific Islands Committee of the Judicial Council of the Ninth Circuit" (unpublished paper in the files of the author, 2004), 1–2.

[21]Ibid., 6.

to Chief Justice William Rehnquist that the future work of the Pacific Islands Committee be assigned to the U.S. Ninth Circuit's Judicial Council. (It then consisted of Judges Jerome Farris, William C. Canby, and Samuel P. King, as well as Justice Kennedy.) The Pacific Territories Committee of the Ninth Circuit was thereby chartered on April 19, 1991, instructed to liaison with "Pacific jurisdictions in joint endeavors to improve the administration of justice in the Pacific Basin."[22]

Initially chaired by Ninth Circuit Judge Alfred T. Goodwin, with Judges Canby, King, John Unpingco, and Alex R. Munson as members, the Pacific Territories Committee focused on providing legal resources for the Pacific island courts and securing better training for island judges. Judge Melvin T. Brunetti chaired this committee for a time, and then in 2000, Ninth Circuit Judge J. Clifford Wallace assumed the duties of committee chair. He later changed its name to the Pacific Islands Committee. Joining Judge Wallace on the committee at that time were Judges C.H. Hall, Unpingco, Munson, David Ezra, and Susan Oki Mollway. Judges A. Wallace Tashima, Dean D. Pregerson, and Charles Jones joined the committee later, and as of 2010, the committee was chaired by U.S. District Judge Consuelo Marshall, with Judges Richard Clifton, Joaquin V.E. Manibusan, Alex R. Munson,[23] Mary M. Schroeder, J. Michael Seabright, and Frances Tydingco-Gatewood as members.

The committee now functions as a standing committee of the Judicial Council of the Ninth Circuit and serves as a liaison with the Committee on Federal-State Jurisdiction of the Judicial Conference of the United States.[24] The Pacific Islands Committee administers funds appropriated by Congress for the education of Pacific island judges and court administrators, and it has promoted a wide variety of judicial training programs for the judges in the U.S.-affiliated islands. It also helps with funding for periodic meetings of the judges within the U.S. political community through an organization called the Pacific Judicial

[22]Ibid., 10.

[23]Judge Munson retired in February 2010 after serving as an "Article I" judge in the Commonwealth of the Northern Mariana Islands for twenty-two years, but he continued to sit on cases in that court until his replacement was named.

[24]*An Introduction to the Pacific Islands Committee of the Ninth Circuit Judicial Council* (Dec. 2006), 2.

Council,[25] which has brought together judges from Guam, the Northern Marianas, American Samoa, Palau, the Federated States of Micronesia, and the Marshall Islands. The Marshall Islands have since dropped out of the council, seeking closer ties with the courts of the South Pacific, but the council continues to operate (chaired recently by CNMI Chief Justice Miguel Demapan, with the Education Committee chaired by Guam Supreme Court Justice Philip Carbullido) and organizes regular educational programs for the judges and their staff members.

The Pacific Islands Committee also identifies judges (usually from among its own members) to serve on the Supreme Court of American Samoa and the Supreme Court of the Marshall Islands when appellate panels are needed by those courts.[26] As Judge Goodwin explains in his article in this issue, the courts in the U.S.-flag island communities (Guam, the Commonwealth of the Northern Mariana Islands [CNMI], and American Samoa) have all evolved with the nurturing of the Ninth Circuit judges, but some further evolution is still expected. Guam and the CNMI have federal district courts, but these courts are considered to be "Article I" courts instead of "Article III" courts, and the district judges in those communities serve for ten-year terms, without the lifetime appointments that other federal judges have.[27] American Samoa still has no federal court

[25]This organization is sometimes referred to as the Pacific Judicial Education Council to avoid confusion with the Pacific Judicial Conference. Meetings of the judges in the U.S-affiliated islands have been held, for instance, in Palau in April 1998 and June 2005. See *The Wisdom of the Past, A Vision for the Future—The Judiciary of the Republic of Palau* (Palau, 2001), 56–59. These meetings in Palau were called the "Pacific Judicial Conference," creating some confusion with the Pacific-wide meetings described in this paper.

[26]The ad hoc judges for the Supreme Court of American Samoa are, as a formal matter, appointed by the U.S. secretary of the interior, and the judges for the Supreme Court of the Marshall Islands are appointed by the Marshall Islands government, on recommendation of the Pacific Islands Committee. Judge Donald Cadra serves as the chief justice of the Supreme Court of the Marshall Islands, but the other members of the court's panels generally come from recommendations made by the Pacific Islands Committee. Magistrate Judge Barry Curren of the U.S. District Court for the District of Hawai'i has sat on a number of panels of the Marshall Islands Supreme Court.

[27]The "Article I" district judges in Guam and the Northern Marianas do not have the capacity and status to accept assignments to sit on appeals to the Ninth Circuit. *Nguyen v. United States*, 539 U.S. 69 (2003). Judge Alex Munson has explained that being an "Article I" judge is problematic, because the judge is always criticized for ruling in favor of the United States (because others assume the judge is seeking reappointment); he has urged that since the Northern Marianas now have a permanent relationship with the United States, they should also have an Article III federal judge. Puerto Rico, which is also characterized as a commonwealth, has seven Article III federal judges. Interview, Saipan, Oct. 21, 2008; see Pub. L. 89-571 (1966).

at all, and persons charged with federal crimes there must be tried in Honolulu[28] or Washington, D.C.,[29] with juries selected from communities very different from those found in American Samoa itself. American Samoa's nonvoting delegate to Congress, Eni Faleomavaega, has introduced legislation to provide a federal district court for American Samoa, but no action has been taken on this proposal.

Appeals from the supreme courts of Guam and of the Commonwealth of the Northern Mariana Islands formerly could be taken to the U.S. Court of Appeals for the Ninth Circuit, but now appeals from these courts can be taken only by a petition for certiorari to the U.S. Supreme Court. With the support of the Ninth Circuit's Pacific Islands Committee, these courts have emerged from a rather ambiguous and subservient status to having an equivalent status within the U.S. judicial system to the supreme courts of the fifty states.

JUDGE J. CLIFFORD WALLACE

Judge John Clifford Wallace has played a central role in the Pacific Judicial Conferences for many years, helping to develop programs, raising funds, and dealing with the difficult issues involved in making sure the meetings are useful to all the participants. His commitment to an independent judiciary—a major, recurring theme of the Pacific Judicial Conferences—has been of special significance.[30]

Born to a poor family, Wallace took advantage of public education and graduated from San Diego State University before earning his law degree from the University of California, Berkeley,

[28]Kil Soo Lee, the former owner of an American Samoa garment factory, was tried in the U.S. district court in Honolulu in 2003 for numerous federal criminal violations, including involuntary servitude, extortion, and money laundering, and was sentenced to forty years in prison for his role in holding more than two hundred victims in forced servitude.

[29]The lieutenant governor of American Samoa, Aitofele T.F. Sunia, and Senator Tini Lam Yuen were arrested in 2007 on fraud, bribery, and obstruction charges and, if their cases go to trial, will face a jury trial in Washington, D.C. The defendants allegedly engaged in a scheme to avoid the competitive bidding process by conspiring to split a large project for furniture construction for the American Samoa school system among companies owned and operated by the defendants.

[30]See section on independent judiciary, infra.

Judge Clifford Wallace, Valda Ford, Jenee Wallace, and Tongan Chief Justice Anthony Ford (left to right) during the Seventeenth Conference in Nuku'alofa, Tonga, November 2007. (Courtesy of Valda Ford)

in 1955.[31] After practicing as a litigator with a major law firm in San Diego for fifteen years, he was nominated to the U.S. District Court for the Southern District of California in October 1970 by President Richard Nixon. Less than two years later, on July 14, 1972, President Nixon appointed Judge Wallace to the U.S. Court of Appeals for the Ninth Circuit, where he has continued to serve until the present time. He served as chief judge of the Ninth Circuit from 1991 until 1996, when he took senior status on the court.[32]

From a very early point in his judicial career, Wallace has been interested in judicial administration. He has been especially interested in promoting sound judicial administration and judicial independence in developing foreign countries, and

[31]For an interesting interview with Judge Wallace, see Harry Kreisler interviewing Judge J. Clifford Wallace, "The role of judges in democracies—Judges and the rule of law," http://sciencestage.com/v/7435/the-role-of-judges-in-democracies-judges-and-the-rule-of-law-judge-j.-clifford-wallace-and-harry-kreisler-html. See also the press release from the United States Courts for the Ninth Circuit issued upon Wallace's receipt of the Devitt Award for Judicial Service, http://207.41.19.15/web/ocelibra.nsf/504ca249c786e20f85256284006da7ab/ccaefd498f03be70882571d4005abf98?OpenDocument.

[32]J. Clifford Wallace, Judicial Staff Directory, Judicial Staff Biographies (2009).

he has devoted about half his time to this effort since taking senior status. At the Seventeenth Conference in Tonga in 2007, he commented that "[n]o one will remember my opinions, but I think they will remember my contributions abroad."[33] His experiences abroad accelerated in the 1980s when Haydn Williams, then president of the Asia Foundation, heard Judge Wallace speak and decided to appoint him to be the foundation's senior advisor for judicial administration.[34] Soon after, Wallace found himself meeting with and advising the Supreme People's Court in China.[35]

Judge Wallace has contributed in one form or another to the judiciaries of more than forty countries worldwide.[36] In Thailand, for example, he is known as the "father of the courts," because of his assistance in developing Thailand's judicial system.[37] In Pakistan, Wallace has encouraged judges to protect the rights recognized in the Pakistani constitution.[38] In Fiji in 2005, Wallace worked to promote the development of an independent judiciary by explaining that "investors will only come if the rule of law is stable."[39]

Judge Wallace has contributed significantly to the scholarly literature on topics such as efficient judicial administration, judicial corruption, judicial independence, the resolution of intercircuit conflicts, religious freedom, the Establishment

[33]J. Clifford Wallace, in discussion with the author, Nuku'alofa, Tonga, Nov. 4, 2007.

[34]"Frontier Justice—The Ninth Circuit Court of Appeals Is Second to One—and the U.S. Supreme Court," *San Francisco Chronicle*, Oct. 6, 1996.

[35]Ibid.

[36]"Judge J. Clifford Wallace and Dr. Jenee Wallace Conclude Speaking Tour of Australia, New Zealand, and Papua New Guinea," *Australian Newsroom*, May 2, 2005, http://www.lds.org.au/newsroom/article.asp?id=8E6D5BEF-B4CC-4963-BB08-394FCE30052F.

[37]"Guardian of Law Traditions," *West Australian (Perth)*, March 26, 2005. See also J. Clifford Wallace, "Judicial Restraint and Judicial Activism" (Oct. 2, 2008), http://www.ulaw.tv/watch/525/judge-j-clifford-wallace---judicial-restraint-and-judicial-activism.

[38]Ibid.

[39]"Fiji Needs Rule of Law," *Fiji Times*, Aug. 5, 2005.

Clause, and foreign judicial processes.[40] He believes that judicial independence is a universal human right and is "essential to the attainment of the judiciary's rule of law governance objective and the proper performance of its functions in a free society."[41] In explaining the concept of judicial independence, Judge Wallace has stated that "[i]ndependence of the judiciary is not itself an important governance value. . . . [T]o justify judicial independence, there must be an emphasis on how the doctrine protects values held dear by society."[42] One such societal value is that individual liberty cannot be subject to the will of the executive. "If the people are to have any realistic check on a powerful executive short of armed conflict, it must be by an independent judiciary authorized and able to decide cases contrary to the position of the government when required by law."[43] "[W]ith an independent judiciary, no one is above the law and no one is below the law. Without it, there is little hope for the rule of law."[44]

An independent judiciary can emerge, however, only if the judges are able to earn the trust of the people:

> Why should the people trust the judges to check the executive? What is so significant about donning the robe that necessarily proves that judges should trump the views of the people's elected leaders? These questions lead to a basic truth: Courts must create trust through judicial activity that warrants trust.[45]

[40]See J. Clifford Wallace, "Intramural Reforms: How the U.S. Courts of Appeals Have Helped Themselves," *Florida State University Law Review* 22 (2002): 913; Wallace, "Judges Forum No. 2: An Essay on Independence of the Judiciary: Independence From What and Why," *New York University Annual Survey of American Law* 58 (2001): 241; Wallace, "The Framers' Establishment Clause: How High the Wall?" *Brigham Young University Law Review* (2001): 755; Wallace, "The Nature and Extent of Intercircuit Conflicts: A Solution Needed for a Mountain or a Molehill?" *California Law Review* 71 (1983): 913; Wallace, "International Law and Religion Symposium: Challenges and Opportunities Facing Religious Freedom in the Public Square," *Brigham Young University Law Review* (2005): 755; Wallace, "Judicial Education and Training in Asia and the Pacific," *Michigan Journal of International Law* 21 (2000): 849; Wallace, "Civil Pretrial Procedures in Asia and the Pacific: A Comparative Analysis," *George Washington International Law Review* 34 (2002): 1; Wallace, "Resolving Judicial Corruption While Preserving Judicial Independence," *California Western International Law Journal* 28 (1998): 341, 343.

[41]Wallace, "Resolving Judicial Corruption," 343.

[42]Wallace, "Judges' Forum No. 2," 241.

[43]Ibid., 244.

[44]Wallace, "Resolving Judicial Corruption," 343.

[45]Wallace, "Judges' Forum No. 2," 244–45.

Judicial independence comes with the responsibility of the judges to limit their own power:

> [T]the proper functioning of judicial independence is not solely an issue of how the political branches treat the judiciary; the judiciary has a co-equal responsibility to keep its judgments separate from the responsibilities of the political branches except, and only except, when the Constitution requires it to act.[46]

THE JUDGES FROM AUSTRALIA AND NEW ZEALAND

One of the keys to the success of the Pacific Judicial Conferences has been the active participation and support provided by the judges of Australia and New Zealand. Two of the conferences have been hosted in Australia, the fifth in 1982 in Canberra and the twelfth in 1997 in Sydney, and the Seventh Conference was hosted in 1987 by New Zealand in Auckland. Sir Garfield Barwick, chief justice of Australia from 1964 to 1981, came to the First Conference in 1972 and the Fourth Conference in 1979; his successor, Sir Harry Gibbs, who was chief justice from 1981 to 1987, participated in the 1975, 1982, and 1984 conferences. Sir Anthony Mason, chief justice of the Australian High Court, participated in the 1977, 1982, 1989, and 1993 conferences. Chief Justice Michael E.J. Black of Australia's Federal Court started coming to the conferences in 1991(when he was first appointed) and has been particularly active since then, participating as well in the 1993, 1997, 2001, 2003, 2005, 2007, and 2009 conferences. (Chief Justice Black retired from the Australian Federal Court in 2010.) Justice Bryan Beaumont, who had served as an appellate judge in Vanuatu, Fiji, and Tonga, as well as on the Australian Federal Court, attended the conferences in 1997, 1999, and 2001.

KEY CONCERNS AND ISSUES

Between 1972 and 2010, eighteen Pacific Judicial Conferences have been held, with the nineteenth scheduled for November 2010. Among the recurring themes discussed at these meetings have been (1) the independence of the judiciary; (2) the education of the judges; (3) the sharing of materials; (4) the

[46]Ibid., 255.

possibility of a Pacific island regional court of appeals; (5) the use of expatriate judges versus local judges; and (6) the reconciliation of customary law and Western law.

The Independent Judiciary

Anthony M. Kennedy, when he was a Ninth Circuit judge, told the Sixth Conference in 1984 that "judicial independence has long been at the center of the constitutional process."[47] He explained that the 1328 statute of Northampton "provided that judgments of a common law court could not be corrected by a legislative act," and that Lord Coke's dictum several centuries later that the "King is subject to God and the Law" became accepted "as a sound constitutional principle."[48] The drafters of the U.S. Constitution sought to institutionalize this principle "by the creation of a structural system for a separate judiciary, lest the legislative branch dominate the constitutional process. . . . Even in recent months, federal courts have ruled that Congress may not diminish judicial salaries or, by the unlimited assignment of cases to nonjudicial officers, erode the judicial function."[49]

The Eighth Conference in Kaua'i in 1989 addressed judicial independence in its opening panel and discussed with candor and useful insights a recent incitement-to-mutiny trial in Vanuatu,[50] the political difficulties in Fiji, and litigation in Palau regarding the Compact of Free Association with the United States.

In 1993, in Fiji, Justice Ian Sheppard of the Federal Court of Australia stressed that the essence of judicial independence is "impartiality in deciding court cases" and that this independence is fragile even in stable communities.[51] It can be undermined, he

[47]Anthony M. Kennedy, "Address to the South Pacific Judicial Conference" (Sixth South Pacific Judicial Conference, Saipan, CNMI, 1984). Kennedy also gave the keynote address to the Eleventh South Pacific Judicial Conference in Guam, February 5, 1995, after he had become an associate justice of the U.S. Supreme Court.

[48]Ibid.

[49]Ibid.

[50]This case involved the prosecution of Ati George Sokomanu, Barak Tame Sope, Maxime Carlot, and Willie Jimmy for charges related to an insurrection. Gordon Ward, who was then in the Solomons, sat as trial judge and issued his opinion finding the accused guilty in March 1989, but his ruling was set aside in April 1989 by a court of appeals panel made up of Justice Arnold Amet, a judge in Papua New Guinea; Justice G. Martin, a judge in Tonga; and Justice E. Goldsbrough, a judge in Vanuatu.

[51]Ian F. Sheppard, "Independence of the Judiciary and Freedom from Political Reprisal" (Tenth South Pacific Judicial Conference, Yanuca Island, Fiji, May 23–28, 1993).

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.[52] Sir Timoci Tuivaga, when still chief justice of Fiji, explained at the Fourteenth Conference in 2001 that the judiciary is physically and financially the weakest of the three branches of government, because it holds neither the sword nor the purse.[53] Its strength, he said, is the confidence that is placed in it by the people.

Speaking at the Fifteenth Conference in Papua New Guinea in 2003, Barry Connell, chief justice of Nauru, said 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 term *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.[54]

In fact, the independence of the judiciary has been discussed at nearly all of the conferences and was the central focus of the Seventeenth Conference in Tonga in 2007,[55] where Chief Justice Michael E.J. Black of the Federal Court of Australia emphasized that "the independence of judges is granted and protected not for ourselves but for the people whom we serve."[56] Structural elements are important, including "security of tenure, with removal only as an exceptional matter and only on the ground of misbehavior or incapacity" and "[s]ecurity of remuneration."[57] Institutional independence is also important,

[52]Ibid., 21.

[53]Sir Timoci Tuivaga, "Presentation" (Fourteenth Pacific Judicial Conference, Noumea, New Caledonia, Sept. 24–28, 2001).

[54]Barry Bonnell, "A Model Legal Framework for Judicial Independence in the Pacific" (Fifteenth Pacific Judicial Conference, Papua New Guinea, June 23–27, 2003).

[55]A panel discussion on the independent judiciary has been held at ten of the first sixteen conferences.

[56]Chief Justice Michael Black, Federal Court of Australia, "Maintaining the Independence of the Judiciary—Much More Than Structures" (Seventeenth Pacific Judicial Conference, Nuku'alofa, Tonga, Nov. 8, 2007).

[57]Ibid.

and the judiciary should have "the principal responsibility for court administration, including the appointment of staff."[58]

Numerous speakers have emphasized that courts must be perceived as independent and that this perception is the key to ensuring public confidence in the justice system. The subtopics addressed include (1) tension between the judiciary and the executive and legislative branches; (2) failure to provide sufficient salaries; (3) judicial appointment and removal or dilution of jurisdiction; (4) lack of tradition; (5) role of the media and free press; and (6) detection of judicial corruption.

TENSION BETWEEN THE JUDICIARY AND THE EXECUTIVE/LEGISLATIVE BRANCHES

Ian Sheppard of the Federal Court of Australia explained at the Tenth Conference in 1993 that judicial independence involves both individual and institutional relationships to the legislative and executive branches. The perception of independence, he noted, is as important as the reality.[59] At the Fifteenth Conference in 2003 in Madang, Papua New Guinea, Sir Robert K. Brooks, who had served on the national and supreme courts of Papua New Guinea, said,

> Independence of the judiciary is a myth unless judges are appointed for life tenure. Judges who have been appointed *without* life tenure are chosen by the executive branch, which almost always has a particular agenda, and the judges are simply removed if they do not bend their decisions towards fulfillment of the agenda.[60]

Also at that Fifteenth Conference, Gordon Ward, then chief justice of Tonga, described the challenges of maintaining an independent judiciary in a constitutional monarchy. He explained that the Tongan Privy Council (which was authorized to enact legislation when Parliament was not in session) had passed a measure forbidding the importation of a New Zealand publication perceived as having 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

[58]Ibid.

[59]Ian Sheppard, "Presentation" (Tenth South Pacific Judicial Conference, Suva, Fiji, May 23–28, 1993).

[60]Sir Robert K. Woods, "Minimum Standards for Judicial Independence: A Pacific Perspective" (Fifteenth Pacific Judicial Conference, Madang, Papua New Guinea, June 23–27, 2003).

limited, he said, because the judges were selected by the executive branch and could be removed through impeachment by the executive and legislative branches:

> Judges are not chosen by independent selectors and there are no written standards setting forth grounds for impeachment and removal of a judge. This lack of standards means, effectively, that accused judges are tried by the executive and the legislative branches, who are free to use any criteria they choose for impeachment and removal.[61]

Fiji Chief Justice Timoci Tuivaga 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."[62] 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 U.S. President Bill Clinton reportedly told a federal judge that if he did not change his ruling, the president would call for his resignation.

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. 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, Tuivaga described how he and his colleagues survived the two military coups of 1987.[63] 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.[64] Tuivaga told

[61]Gordon Ward, "The Challenges of Maintaining an Independent Judiciary Under a Constitutional Monarchy" (Fifteenth Pacific Judicial Conference, Madang, Papua New Guinea, June 23–27, 2003).

[62]Sir Timici Tuivaga, "Presentation" (Fourteenth South Pacific Judicial Conference, Noumea, New Caledonia, Sept. 24–28, 2001).

[63]Tuivaga, "Presentation" (Eighth South Pacific Judicial Conference, Kaua'i, Hawai'i, May 1–3, 1989).

[64]Sir Vijay R Singh, "A Diminished Judiciary," *Fiji Times*, Oct. 17, 2000, http://www.vanuatu.usp.ac.fj/journal_splaw/Special_Interest/Fiji_2000/Fiji_Singh1.html.

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 asked him to start a completely new judiciary. This process took a while and a tremendous amount of effort, he assured his colleagues, but, as of 1989, the new government had kept a distance from the new judiciary.[65]

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, and a supreme court,[66] and ensured judicial independence.[67] Judges were to be appointed by the president upon recommendation of the Judicial Service Commission and were to serve to age sixty-five (high court) or seventy (supreme court), unless removed for reason of misbehavior or inability to perform the functions of office.[68]

Beginning in 2000, "[t]he judiciary in Fiji has been deeply and bitterly divided."[69] In May of that year, Chief Justice 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, Tuivaga was involved in the preparation of the Administration of Justice Decree,[70] 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 seventy to seventy-five years.

Other members of the judiciary and the legal profession viewed Chief Justice Tuivaga's actions with concern,[71] and some suggested his action could be interpreted as being in violation of the 1997 constitution.[72] Tuivaga responded by saying he had acted pragmatically to protect the operations of the courts:

[65]Sir Timoci Tuivaga, "Presentation" (Eighth Pacific Judicial Conference, Kaua'i, Hawai'i, May 1–3, 1989).

[66]Fiji Constitution, ch. 9, §117(1).

[67]"The judges of the State are independent of the legislative and executive branches of government." Fiji Constitution, ch. 9, §118.

[68]Fiji Constitution, ch. 9, §§117, 134, 137, 138.

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

[70]*Republic of Fiji Administration of Justice Decree* (2000) (repealed by Judicature Decree 2000).

[71]Brij Lal, *Islands of Turmoil—Elections and Politics in Fiji* (Canberra, 2006), 201.

[72]LawAsia, *Report of Visit to Fiji by LAWASIA Observer Mission* (LawAsia, 2007), 8.

> My predominant concern was not to render assistance as such to the *de facto* 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.[73]

The Fiji judiciary eventually was invited to determine the legality of this interim government in a series of high-profile rulings.[74] On May 1, 2001, the supreme court unanimously ruled that "[t]he 1997 Constitution remains the supreme law of the Republic of the Fiji Islands and has not been abrogated."[75] In October 2001, Tuivaga turned seventy. Although initially reluctant to retire, he eventually did, and Justice Daniel 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'état, and then in January 2007 the interim military government named Bainimarama prime minister. According to the U.S. 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 prohibited him from leaving the country, pending a misconduct investigation launched against him, which was dropped in December 2008 as part of an agreement that involved Fatiaki's formal resignation from office.[76]

After Chief Justice Fatiaki's forced leave in January 2007, the Judicial Services Commission "suspended" Fatiaki and appointed Anthony H.C.T. Gates to replace Fatiaki in an acting capacity. (Gates had previously ruled in 2000, as a member of the Fiji High Court, that the 1997 constitution had not been

[73]Ibid.

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

[75]George Williams, "Feature: *Republic of Fiji v. Prasad*," *Melbourne Journal of International Law* 5 (2001), http://www.austlii.edu.au/au/journals/MelbJIL/2001/5.html.

[76]In November 2007, the interim attorney general had announced the appointment of three expatriate judges to hear allegations against Fatiaki, involving falsifying tax returns and acting outside judicial bounds during Fiji's 2000 coup.

abrogated and was thus still in force,[77] in the case affirmed by the Fiji Supreme Court in 2001.)

In July 2007, Gordon Ward, president of Fiji's Court of Appeal, left the bench, declining to renew his contract through a sense of loyalty to the Fiji judges experiencing pressure from the military government, and his home was 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."[78]

The participants at the 2007 conference in Tonga 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 might have "turned out differently had the judiciary been more united," and he stressed the importance of judges providing "mutual support" to one another in times of difficulty.[79] With the encouragement of the participants, the chair of the conference, Chief Justice Anthony Ford of Tonga, issued the statement to the press included above.[80]

On March 5, 2008, Prime Minister Laisenia 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?"[81] The high court, consisting of Acting Chief Justice Anthony 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."[82]

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

[78]Sir Thomas Eichelbaum, "Interference with Judicial Independence in the Pacific" (Seventeenth Pacific Judicial Conference, Nuku'alofa, Tonga, Nov. 7–9, 2007).

[79]Ibid., 5, 7.

[80]See supra text at note 17.

[81]*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.

[82]Ibid.

This ruling was reversed on April 9, 2009 by Fiji's court of appeals (consisting of three Australian lawyers who had never served as Australian judges, appointed by the Fiji military regime), which ruled that the Bainimarama government was illegal. The next day, Fiji's President Ratu Josefa Iloilo announced that he had abolished the Fiji constitution, assumed all governing power, and revoked all judicial appointments.[83] On April 17, 2009, President Iloilo signed a decree to reestablish the courts and said new judicial appointments would be made in the next few days. The following month, Anthony Gates (whose 2008 opinion as a high court judge had declared that the acts of the military government were legitimate) was named the new chief justice of Fiji. Judge Clifford Wallace presented a summary of these developments at the Eighteenth Conference in Tahiti in June 2009, and they were discussed by the participants, leading to the statement made by President Olivier Aimot, reproduced above.[84] At the time of this publication, the Fiji judiciary continues to be in turmoil, and in June 2010 Chief Registrar Ana Rokomoti was suddenly removed from her office without explanation.

The Republic of the Marshall Islands provides another example of a country that has struggled to maintain the independence of its judiciary. High court Chief Justice A.D. Tennekone explained at the Eighth Conference in 1989 that although the Marshall Islands constitution established an independent judiciary, expatriate judges were typically appointed for a maximum term of only four years (two years with an automatic renewal for two more, unless the government gave notice of termination after the first two years). Judges could apply for renewal after four years, but had to begin the application process anew. Moreover, the judiciary was part of the Internal Security Department (now the Ministry of Justice), the minister of which considered himself to be the head of the judiciary. Administrative needs and finances were controlled by the executive. Some ministers were making definite inroads on judicial independence, he said, mentioning specific threats to have him removed from the bench.

Judge Robert A. Hefner of Palau told the Eighth Conference that because of the short-term contracts, which are "subject almost completely to the will of the President and his cabinet," "what may appear to be on the surface an independent judiciary

[83]"NZ Condemns Fiji Judge Sackings," *Stuff*, April 10, 2009, http://www.stuff.co.nz/world/south-pacific/2327182/Fiji-president-fires-all-judges; see also http://www.theaustralian.news.com.au/business/story/0,28124,25588281-36418,00.html, June 5, 2009.

[84]See supra text at note 18.

[in the Marshalls is] in reality . . . a judiciary intimately tied to the wishes, desires, and pressures of the President who controls his cabinet."[85] Marshall Islands Supreme Court Chief Justice Harold Burnett, for instance, did not have his contract renewed in the late 1980s because of a decision he made in a long-festering dispute regarding the important *Iroijlablab* chiefly title, and Judge Hefner, "who sat on the three judge panel on a designated basis, has not been requested to sit on any more cases."[86] Judge Tennekone resigned later in 1989 and publicly accused the Nitijela (the Marshall Islands legislature) of judicial interference because they had threatened his removal from the bench if he made any decisions against any member of the Marshall Islands cabinet.[87]

Judge Tennekone was replaced as chief justice of the high court by Philip Bird, who tried to promote a resolution of the dispute through traditional dispute-resolution techniques. That effort was only partially successful, however, and the Nitijela stepped in once again to resolve the matter, and declared that the lawsuit should be viewed as terminated.[88] Chief Justice Bird agreed that the Nitijela could determine the customary law applicable to the dispute, but he disagreed with the idea that the Nitijela had the power to order the court to dismiss the case, stating that insofar as the new law "can be said to direct this court to enter an order for dismissal, that section invades the province of the judiciary, and to that extent, is unconstitutional."[89] The Nitijela then unanimously approved a resolution to dismiss Bird as chief justice for his "clear failure to faithfully discharge the duties of his office and for abuses inconsistent with the authority of that office."[90] The resolution

[85]Robert A. Hefner, "Judicial Independence in Micronesia—Fact or Fiction?" (Eighth South Pacific Judicial Conference, Poipu Beach, Kaua'i, Hawai'i, 1989).

[86]Ibid.

[87]Judge Tennekone was in the process of trying to adjudicate a dispute (*Kabua v. Kabua*, Civil No. 1984-98) over who held the *Iroijlablab* title, a case that had been pending for five years and had been repeatedly delayed. In a public statement explaining his decision to resign, Judge Tennekone warned the legal community that judges must be prepared to overcome attempts to jeopardize the independence of the courts and said, "All I have to say about threats is that one has to make a choice between being a judge and being a coward. I'm happy to choose the first one." Giff Johnson, "A Case of Justice vs. Tradition? Marshalls Lose Another Chief Justice and a Chief Still Has Top Title," *Island Business News* (April 1991), 16.

[88]*Marshall Islands Customary Law Declaration Act of 1990*, Pub. L. No. 89, §§602–603.

[89]Johnson, "A Case of Justice," 18.

[90]Ibid.

stated that Chief Justice Bird had failed to understand customary law.[91] Bird was removed from his responsibilities without a public hearing or an opportunity to respond to the charges of the Nitijela.[92]

The American Bar Association quickly came to Bird's defense, stating that "[a] judge cannot be removed for performing his constitutional duty. . . . The Bar Association knows of no evidence which would support a finding . . . for the removal of Chief Justice Bird."[93] Bird subsequently agreed to resign as of March 5, 1991, when the Nitijela agreed to rescind the resolution removing him. Bird said he had resigned to "alleviate the growing constitutional crisis. . . . Were this my country, I would have seen the matter through to the end."[94] He stated later that "I think it is important that the constitutional parameters be established. Basic issues do cry out for resolution. Until they are resolved there are uncertainties and they make it hard for the judiciary to deal with matters."[95]

At the Ninth Conference in 1991, the participants discussed the plight of Chief Justice Bird as a prime example of the problem of maintaining judicial independence in a small island community. Another example from the Marshalls was discussed at the Fourteenth Conference in 2001, involving a demand by the minister of justice for monthly reports from the courts. The Marshall Island judges viewed this request as a violation of judicial independence because it implied that the judicial system was under the supervision of the minister of justice, a presidential appointee.

At the 1989 Kaua'i conference, Judge Hefner described what he viewed as a volatile situation in Palau, where a controversial case led to a death, an arson fire, and a bombing, and the judge, who received no support from the bar at all, would certainly have been removed if he could have been.[96] (Chief Justice Mamoru Nakamura, who presided in that trial, said, however,

[91]Ibid.

[92]Ibid.

[93]Ibid.

[94]Ibid.

[95]Ibid.

[96]Robert Hefner, "Presentation" (Eighth South Pacific Judicial Conference, Poipu Beach, Kaua'i, Hawai'i, May 1–3, 1989).

that this was an isolated political incident and was not representative of the state of judicial independence in Palau.)[97]

At the Tonga conference in 2007, Vincent Lunabek, chief justice of Vanuatu, presented a paper about 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.[98] Such actions will inevitably create tensions with the other branches, he said, but judges can protect their role by stressing that "their task is to review the legality and not the merits of administrative decisions."[99] Sir Thomas Eichelbaum, who had just finished 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."[100]

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."[101] 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 in 2007 by Consuelo Bland Marshall, U.S. district judge for the Central District of California.[102] She explained how complaints were handled in U.S. courts and concluded by saying that a "system

[97]Mamoru Nakamura, "Comment" (Eighth South Pacific Judicial Conference, Poipu Beach, Kaua'i, Hawai'i, May 1–3, 1989). This incident was described in some detail in *Palau—A Challenge to the Rule of Law in Micronesia* (Report of a Mission by William J. Butler, Hon. George C. Edwards & Hon. Michael D. Kirby, 1988), which described "government complicity" in "[a]n organized attempt to threaten the Judiciary" and "a possible appearance that Chief Justice Nakamura yielded to that pressure" by vacating a previous order and disqualifying himself after "the receipt of intimidating letters and a petition threatening his removal." Ibid., 40–41, 44.

[98]Vincent Lunabek, "What Can Judges Do to Strengthen Judicial Independence?" (Seventeenth Pacific Judicial Conference, Nuku'alofa, Tonga, Nov. 7–9, 2007).

[99]Ibid., 3.

[100]Eichelbaum, "Interference with Judicial Independence," 6.

[101]Lunabek, "What Can Judges Do," 3.

[102]Consuelo Bland Marshall, "The Need for a Method to Check on the Judges—Who Watches the Watchman?" (Seventeenth Pacific Judicial Conference, Tonga, Nov. 7–9, 2007).

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.'"[103]

Also in 2007, Miguel S. Demapan, chief justice of the Commonwealth of the Northern Mariana Islands, provided a survey of the Codes of Judicial Conduct in fourteen jurisdictions in the Pacific.[104] 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."[105] 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."[106]

In his 2007 paper, Sir Thomas Eichelbaum noted that limits on remuneration may reduce the possibility of encouraging the best candidates to seek judicial positions. He argued strongly for appointments to be 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."[107] 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."[108]

The paper on judicial independence delivered in 2007 by Paul de Jersey, chief justice of Queensland, Australia,[109] discussed in some detail the Beijing Statement of Principles of the Independence of the Judiciary in the LawAsia Region,[110] which

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

[104]Miguel S. Demapan, "Presentation on Judicial Canons" (Seventeenth Pacific Judicial Conference, Tonga, Nov. 7–9, 2007).

[105]Ibid., 3.

[106]Ibid., 5–6.

[107]Eichelbaum, "Interference with Judicial Independence," 1–2.

[108]Ibid., 4.

[109]Paul de Jersey, "Beijing Statement of Principles of the Independence of the Judiciary" (Seventeenth Pacific Judicial Conference, Nuku'alofa, Tonga, Nov. 7–9, 2007).

[110]See http://lawasia.asn.au/: "LAWASIA is an international organisation of lawyers' associations, individual lawyers, judges, legal academics, and others which focuses on the interests and concerns of the legal profession in the Asia Pacific region."

was signed by six chief justices from Pacific jurisdictions (along with fourteen others) in 1995 and was later signed by three other Pacific chief justices.[111] De Jersey stressed that "judicial independence means that judges may rule against the government without influence or fear in cases that come before the court," and he quoted Judge Wallace's statement 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."[112]

FAILURE TO PROVIDE SUFFICIENT SALARIES

Lack of sufficient funding is ubiquitous among the Pacific island judiciaries and contributes to loss of judicial independence. Sir John Muria, chief justice of the Solomons, told delegates at the Fifteenth Conference in 2003, for example, 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 for funding.[113]

Independent judiciaries require sufficient funding and compensation. According to Ian Sheppard of the Federal Court of Australia, without such funding, justice goes up for sale, and judicial independence is undermined.[114] Sir Thomas Eichelbaum noted in 2007 that low salaries deter qualified candidates from seeking judicial positions[115] and that judicial recruitment may thus be limited to the independently wealthy or the inexperienced.[116]

[111]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 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).

[112]Paul de Jersey, "Beijing Statement of Principles" (2007), 4 (quoting from J. Clifford Wallace, "An Essay on Independence of the Judiciary: Independence from What and Why?" *N.Y.U. Annual Survey of American Law* 58 (2001): 241, 251).

[113]Sir John Muria, "The Struggle for a Separate Judiciary Budget in the Solomon Islands" (Fifteenth Pacific Judicial Conference, Madang, Papua New Guinea, June 23–27, 2003). Judge Muria also noted that a large hole in the roof of his courthouse was left unrepaired for a substantial period of time.

[114]Ian Sheppard, "Presentation" (Tenth Pacific Judicial Conference, Yanuca Island, Fiji, May 23–28, 1993).

[115]Lunabek, "What Can Judges Do," 1.

[116]See Judge Paul A. Magnuson, *The Structural Elements of an Independent Judiciary: Financial, Organization, Political* (May 27, 2005), 11, www.internationaljudicialconference.org/PDF/13/Magnuson.pdf (internal quotations omitted).

Inadequate compensation increases the chances of outside corruption. 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 political pressure will not impact the impartial and neutral decision-makers on the bench.

Chief Justice Carl Ingram of the Marshall Islands High Court has observed that important indices of the independence of the judiciary include the ability of the judiciary to control its own budget (which should be sufficient to provide for reasonable facilities, an adequate staff, and proper training of the staff), adequate resources for the compensation package for the judges, and sufficient lengths of terms of service for the judges.[117] Robin Millhouse, chief justice of Kiribati, told the 2003 conference that in Kiribati "[t]he Prime Minister approves the judiciary's budget, which may compromise the chief justice and induce him to cooperate with the executive branch."[118]

JUDICIAL APPOINTMENT (AND REMOVAL)

In order to achieve the impartial administration of justice, some form of institutional autonomy is imperative. For some justices, the election of judges is "unthinkable if we are to maintain any semblance of judicial independence."[119] 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.[120]

At the 1989 conference, Associate Justice Grover Rees III 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.[121] Ninth Circuit Judge William C. Canby commented that

[117]Carl Ingram (chief justice, Republic of the Marshall Islands), in discussion with the author, June 20, 2009, Tahiti.

[118]Robin Millhouse, "Problems Establishing Judicial Independence in Small Jurisdictions" (Fifteenth Pacific Judicial Conference, Madang, Papua New Guinea, June 23–27, 2003).

[119]Ian Sheppard, "Presentation" (Tenth South Pacific Judicial Conference, Yanuca Island, Fiji, May 23–28, 1993).

[120]Tuivaga, "Comment" (Fourteenth South Pacific Judicial Conference, Noumea, New Caledonia, Sept, 24–28, 2001).

[121]Grover Rees III, "Presentation" (Eighth South Pacific Judicial Conference, Poipu Beach, Kaua'i, Hawai'i, May 1–3, 1989).

consideration 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 U.S. process of selecting federal judges, with constitutionally mandated presidential appointment and Senate confirmation, as an example.[122] 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 that they 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, 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. 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."[123]

Robin Millhouse, chief justice of Kiribati, explained at the 2003 conference that under his country's constitution, judicial tenure was limited to a fixed-term appointment.[124] 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

[122]William Canby, "Presentation" (Eighth South Pacific Judicial Conference, Poipu Beach, Kaua'i, Hawai'i, May 1–3, 1989).

[123]Ibid.

[124]Millhouse, "Presentation" (Fifteenth Pacific Judicial Conference, Madang, Papua New Guinea, June 23–27, 2003).

it would be getting. As of 2003, 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 he 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 have the judge for the duration of the contract, unless the judge was removed for misconduct or incapacity after an inquiry.

Some Pacific island countries will give their own citizens judicial life tenure but will appoint expatriate judges to a fixed term of only a few years. In Samoa, for example, citizens can hold office to age sixty-eight, 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 misbehavior or infirmity of body or mind.[125]

Gordon Ward, then chief justice of the Solomon Islands, pointed out at the 1989 conference 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."[126]

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.[127]

LACK OF TRADITION OF AN INDEPENDENT JUDICIARY

At the Fourth Conference, in the Cook Islands 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

[125]Western Samoa Constitution, arts. 65, 68–69.

[126]Ward, "Presentation" (Eighth South Pacific Judicial Conference, Poipu Beach, Kaua'i, Hawai'i, May 1–3, 1989).

[127]Ibid.

with no tradition of a separation of powers.[128] 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 may 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.

Edward C. King, chief justice of the Federated States of Micronesia, related to the 1989 Kaua'i conference some of the problems inherent in guaranteeing judicial independence when no tradition of an independent tribunal is found in customary practice.[129] Judicial candidates, he said, should be asked about their 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."

THE ROLE OF THE MEDIA

The importance of the media to judicial independence was addressed at the 2003 conference in Papua New Guinea by Gerard Fey, president (chief justice) of the New Caledonia Court of Appeal.[130] Focusing on the French system but suggesting parallels with other legal systems in the Pacific, he asked conferees to ask themselves whether the media were a counter-balancing power or a fourth branch of government. He answered his own question by saying that the media, as "witnesses and denouncers of dysfunction," were an important counterbalancing 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 analyze the process and can translate its results to the public. This media presence, he said, was a

[128]J.F. Northey, "Presentation" (Fourth South Pacific Judicial Conference, Rarotonga, Cook Islands, May 15–19, 1979).

[129]Edward C. King, "Presentation (Eighth South Pacific Judicial Conference, Poipu Beach, Kaua'i, Hawai'i, May 1–3, 1989).

[130]Gerard Fey, "Presentation" (Fifteenth Pacific Judicial Conference, Medong, Papua New Guinea, June 23–27, 2003).

fundamental guarantee against an arbitrary judge, because the attention from the media forces the judge to demonstrate his or her impartial judgment, independence, and competence. Thus, the media can contribute to preventing arbitrary and unjust decisions. Judge Fey cited several instances where media publicity about judicial injustice righted a wrong.

Fey noted that the media can, however, 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 favorable coverage creates a risk that the judge will end up losing independence. A judge, Fey 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, such communication should only be in the context of an organized service within the judicial system.

Live coverage of trials via cameras in the courtroom, Fey said, can also 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 may come to premature or inappropriate conclusions. Some judicial remedies can be exercised against the press for violations of private life, defamation where the honor 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.

Judge Salamo Injia of the Papua New Guinea Supreme Court told the same 2003 conference 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 worried 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 had seen in the media's misunderstanding of court decisions, including incorrect reporting, perceived biases, and insensitive and dramatized reporting.[131]

[131]Salamo Injia, "Presentation" (Fifteenth Pacific Judicial Conference, Medong, Papua New Guinea, June 23–27, 2003).

According to Judge Injia, leaving fundamentals of good governance to the 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.

Chief Justice Michael E.J. Black of the Federal Court of Australia illustrated the importance of transparency and public confidence in court procedure when he delivered the keynote address at the Seventeenth Conference in Tonga in 2007. He explained that the structures that work toward ensuring judicial independence are important but not sufficient in themselves, and he emphasized the need for judges to provide and encourage public education about courts and their work. He noted the importance of publishing decisions and easily accessible case summaries for important decisions, recognizing the contribution made by the establishment of the web resource "PacLII."[132] Finally, Black highlighted the significance of courtesy to the public in perceptions of judicial independence and the need for judges constantly to strive toward a vision to improve service delivery and fulfillment of judicial responsibility.[133] He noted, for instance, that "[w]hen I joined the Federal Court, one of the first things I did was to order the removal of a crude sign which announced to anyone visiting our courthouse in Melbourne: 'No change for phone.' It revealed an attitude of mind that was quite unacceptable."[134] In terms of promoting public support, he explained, courtesy "and even cleanliness of the premises" may be crucial, and that these elements may be even more important "in the smaller more intimate island communities of the Pacific."[135]

DETECTING JUDICIAL CORRUPTION

Judge J. Clifford Wallace of the Ninth Circuit Court of Appeals discussed the importance of judicial integrity at the 2003 conference,[136] asking where, in the absence of judicial integrity,

[132]Michael E.J. Black, "Maintaining the Independence of the Judiciary—Much More than Structures" (Keynote Address to the Seventeenth Pacific Judicial Conference, Nuku'alofa, Tonga, Nov. 8, 2007); PacLII is discussed infra, text at notes 151 and 152.

[133]Ibid., 9.

[134]Ibid.

[135]Ibid., 10.

[136]J. Clifford Wallace, "Presentation" (Fifteenth Pacific Judicial Conference, Medong, Papua New Guinea, June 23–27, 2003).

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.

Wallace enumerated the basic principles that 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.

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.

At the 2007 conference, Robin Millhouse, chief justice of Kiribati and Nauru, suggested establishing a Pacific-wide body to consider allegations of corruption brought against judges. 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."[137] An example of such an approach occurred in 2002 when Arthur Ngiraklsong, chief justice of Palau, was assigned to be acting High Court judge in the Marshall Islands to sit on a criminal case against Marshall Islands Judge Charles Henry, who was accused of double dipping in his travel forms. (This

[137]Millhouse, "Can a Model for Judicial Accountability Be Developed in the Pacific?" (Seventeenth Pacific Conference, Nuku'alofa, Tonga, Nov. 5–7, 2007).

trial never occurred, because Judge Henry never returned to the Marshalls, and no extradition proceedings against him were pursued, but Judge Henry was impeached and removed from office in 2003.)

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 local judicial officials whose legal training and experience are, in some cases, limited have recognized the importance of training.

How best to accomplish the judicial education of both expatriate and local judges has been an issue of importance and debate over the life of the conferences. Andon Amaraich, chief justice of the Federated States of Micronesia (FSM), spoke at the 2003 conference about the challenges of providing special judicial education for lay judicial officers in Pohnpei, Chuuk, Kosrae, and Yap, the four states of the FSM, discussing problems that were familiar to many of the participants.[138]

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. These problems are especially complex in the FSM 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 U.S. 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.

[138]Andon Amaraich, "Presentation" (Fifteenth Pacific Judicial Conference, Medong, Papua New Guinea, June 23–27, 2003).

Chief Justice Amaraich discussed the significance of some of the training programs put together by the U.S. 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 example, for judicial officers from 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 decision-making, 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 bench book project as a resource for the Pohnpei Supreme Court and the other state courts.

In the 1980s, many Micronesian judges, particularly those without formal law school training, attended short courses taught by members of the faculty at the William S. Richardson Law School, University of Hawai'i at Manoa, who used Micronesian cases and materials to develop judicial skills. Because judges in small islands are faced regularly with profound issues of first impression and basic choices of direction, they need educational opportunities that focus on their unique situations, rather than examining only the challenges facing judges in developed communities.

At the Ninth Conference in 1991 in Tahiti, Edward C. King, predecessor to Amaraich as chief justice of the FSM Supreme Court, proposed the establishment of a Pacific Institute of Judicial Administration (PIJA).[139] King envisioned that this judicial institute would provide judicial administration via research and technical assistance and would serve as a clearinghouse for information. It would provide judicial education, staff training, and translation services. In addition, it would help with com-

[139]Ninth South Pacific Judicial Conference, Papeete, Tahiti, French Polynesia, May 21–24, 1991.

munication among the judiciaries by publishing a Pacific island reporter, bringing together relevant cases and decisions.[140]

The institute would also help to establish appellate panels, create 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.

Chief Justice King envisioned this 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 in 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 functions but rather would serve as liaison and coordinator, a large staff and headquarters would not be needed.

Subsequent discussion of the proposal seemed generally positive, but with some voicing reservations. Chief Justice Fariq Muhammad of Kiribati said he liked the idea very much. Chief Justice G.W. Martin of Tonga shared some concerns, 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. Judge 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. Chief Justice Tuivaga of Fiji added that the institute would impose nothing and would not interfere, but would be available to help when asked. Gordon Ward, then chief judge of the High Court of the Solomon Islands, said that the institute's headquarters would best be placed in some central location in the South Pacific, rather than in Hawai'i, no matter how convenient Hawai'i might be in some ways.[141]

The group decided against voting on a motion to establish the institute formally or even formally to pursue the idea, since the conference had no charter and no rules, and the only

[140]Edward C. King, "Presentation" (Ninth South Pacific Judicial Conference, Papeete, Tahiti, French Polynesia, May 21–24, 1991).

[141]"Discussions" (Ninth South Pacific Judicial Conference, Papeete, Tahiti, French Polynesia, May 21–24, 1991).

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 develop the idea further. An ad hoc working group was set up informally, with Chief Justice King as chair, to explore this idea in more detail.[142]

Two years later, at the 1993 conference, Chief Justice King, president of the newly incorporated Pacific Institute of Judicial Administration (PIJA), together with the chair of the working committee, Fiji Chief Justice Sir Timoci Tuivaga, talked about the work that had been done on the concept of the institute since it was proposed at the 1991 conference in Tahiti.[143] A board had been formed to develop this idea, and articles of incorporation were filed in Hawai'i for PIJA, signed by nine incorporators—Edward C. King; Samuel P. King, U.S. district judge in Hawai'i; Jose Dela Cruz, chief justice of the Commonwealth of the Northern Mariana Islands; Sir Bari W. Kidu, chief justice of Papua New Guinea; Trevor Rees Morling, Federal Court of Australia; Chief Justice Andon Amaraich, FSM Supreme Court; Alberto C. Lamorena III, Guam Supreme Court; Chief Justice Clinton R. Ashford, Marshall Islands Supreme Court; and Chief Justice Tuivaga of Fiji.

Under the proposal, topics for judicial seminars might 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. Judicial administration programs for chief justices, justices, magistrates, clerks, registrars, administrators, probation officers, court reporters, and secretaries could include case flow management and reducing delays, 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, publish-

[142]Ibid.

[143]"Discussions" (Tenth South Pacific Judicial Conference, Yanuca Island, Fiji, May 23–28, 1993).

ing a newsletter for Pacific judiciaries as the first step toward a legal journal for the Pacific, providing legal education for selected jurisdictions, helping to locate outstanding students, and helping them gain admission to law schools. The concept was discussed at length with the group, gaining momentum as it went along.

The Pacific Institute of Judicial Administration never developed beyond the planning stage, however, because the delegates at the 1995 conference failed to provide the support necessary to move forward.[144] Perhaps the judges from Australia and New Zealand were reluctant to have this institute based in the United States, since they had provided leadership in the Pacific and wanted to continue to do so, and the French judges may not have been enthusiastic about supporting an English-speaking judicial administration center. Judge Wallace wanted to support this idea but did not want it to become a source of conflict with other countries.

The issue of judicial training and PIJA was considered once again at the Twelfth Conference in 1997. A survey was conducted by Richard Grimes of the Institute of Justice and Applied Legal Studies at the University of the South Pacific, examining fifteen jurisdictions, with 132 judges responding.[145] 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 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 books/manuals, establishment of an e-mail train-

[144]"Discussions" (Eleventh South Pacific Judicial Conference, Tumon, Guam, Feb. 5–10, 1995).

[145]Richard Grimes, "Survey" (Twelfth South Pacific Judicial Conference, Sydney, Australia, April 14–18, 1997).

ing "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 possible aid from the governments of Australia, New Zealand, the United States, and the United Kingdom, as well as possible funding opportunities from Canada, France, Japan, Korea, and independent charitable foundations. The chief judges indicated general support for this report.[146]

By the Thirteenth Conference in Apia, Samoa, in 1999, the Pacific Judicial Education Program (PJEP) was getting under way. PJEP was a five-year program—funded primarily by Australia and guided particularly by Justice Bryan Beaumont of the Federal Court of Australia—which had been supported two years earlier at the Twelfth Conference in Sydney. The judges present listened as Livingston Armytage, Australian consultant in judicial and legal development, discussed effective judicial training.[147]

The needs for judicial training throughout the Pacific region are profound, widespread, and diverse, declared 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."

Judicial officers themselves, most of whom have a law degree (although the extent of professional training and experi-

[146]"Discussions" (Twelfth South Pacific Judicial Conference, Sydney, Australia, April 14–18, 1997).

[147]Livingston Armytage, "Presentation" (Thirteenth South Pacific Judicial Conference, Apia, Samoa, June 28–July 2, 1999).

ence 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 in 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. 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 percent of each national law and justice budget for judicial training.

Since late 2004, the Federal Court of Australia, with funding from the Australian government overseas aid agency AusAID, has been providing interim assistance to South Pacific judiciaries while the Pacific Judicial Development Program was being designed. The Pacific Judicial Development Program was formed to strengthen governance and the rule of law in fifteen participating Pacific island countries and is funded jointly by AusAID and the New Zealand equivalent, NZAID.

Sharing of Materials

The value in sharing information and experiences was recognized by the participants at the First Conference in 1972 and has been emphasized frequently since then. The limited availability of relevant legal materials was a serious concern and burden for many judiciaries in the Pacific. 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.

In the mid-1980s, FSM Chief Justice Edward C. King approached West Publishing at their headquarters in St. Paul, Minnesota, but West was not interested in establishing a reporting system for the Pacific, because they did not believe they would be able to obtain opinions from all the jurisdictions in a timely fashion and did not want to attempt to operate out-

side the United States.

Information-sharing, however, began to be recognized as an attainable goal with the advent of the internet and its growing availability in the islands.[148] At the Eighth Conference on Kaua'i in 1989, most participants agreed that their greatest common need was to share information and opinions with one another.[149] 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 probably more relevant to them than the experiences of the metropolitan powers. Sir Mari Kapi, deputy chief justice of the Supreme Court of Papua New Guinea, suggested that in order to move 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.[150]

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."[151] The foundation of PacLII is the Australian Legal Information Institute (AustLII), which assists PacLII in markup processing, database structure, search engine facilities, and other aspects of technical infrastructure.

PacLII garners new legal information such as statutes, amendments, regulations, and recent judgments by maintaining contact with the courts and governments in the region, which supply cases and legislation as they are released in print and electronic format. PacLII works closely with the University of the South Pacific School of Law library to scan copies of print opinions for publication on the website.[152] 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

[148]"Discussions" (Fourth South Pacific Judicial Conference, Rarotonga, Cook Islands, May 15–19, 1979).

[149]"Discussions" (Eighth South Pacific Judicial Conference, Poipu Beach, Kaua'i, Hawai'i, May 1–3, 1989).

[150]Ibid.

[151]The Pacific Islands Legal Information Institute (PacLII), http://www.paclii.org/paclii/FAQ.html#Heading37.

[152]Ibid.

legal practitioners in the Pacific.

For many years, Australia has participated in a significant program of "library twinning" in the Pacific. The Federal Court of Australia operates three programs to provide assistance to court and legal libraries in the South Pacific, including administering a five-year AusAID grant of $104,500 to provide library assistance. The Federal Court of Australia has also established libraries for the supreme courts of Vanuatu and Tonga, and it provides assistance to the libraries of the High Court and Court of Appeal of Fiji and the Supreme Court of Kiribati. Australia's library support initiative also includes sending law librarians to the supported countries to assist with library maintenance and advice.

Regional Court of Appeals

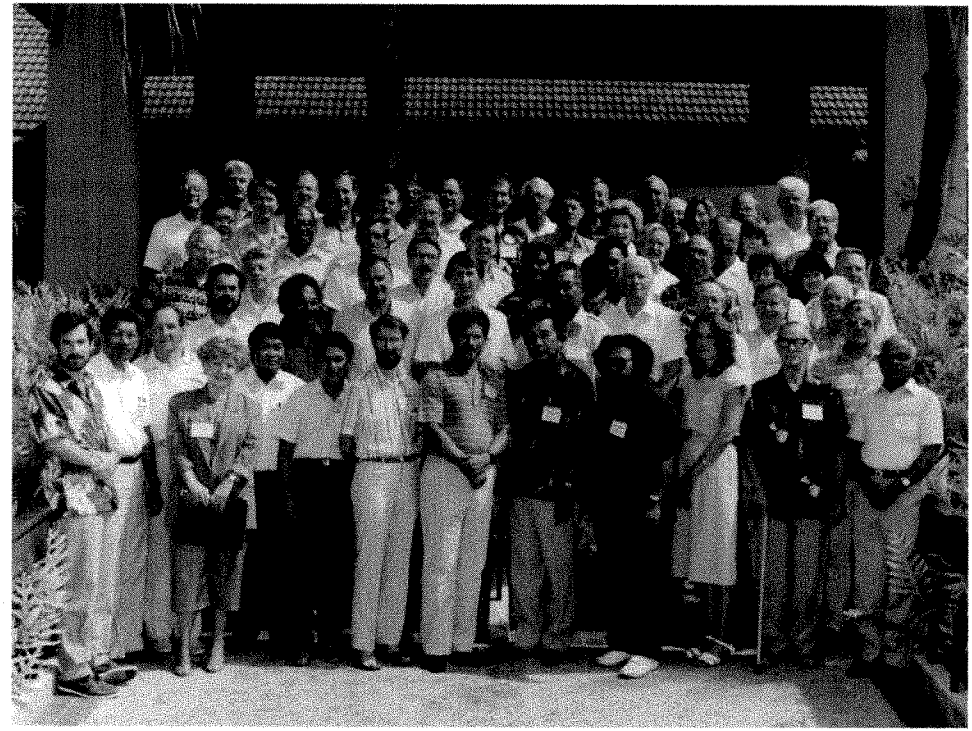
During the colonial period, in the 1960s and early 1970s, a Western Pacific Court of Appeal was based in Fiji and was used by various island communities, but countries declined to use it as they gained independence. The idea of a new regional court of appeal persists—it was raised at the First Conference in Samoa[153] 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. Western Samoan Chief Justice Barrie C. Spring noted that a regional court of appeal "would have the advantage that the sitting members would be aware of the customs, traditions, and way of life of the peoples of the South Pacific, and, in my view, this would greatly assist in the determination of appeals."[154]

In 1982, 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.[155] Kite acknowledged that the concept needed more research and refining, but she emphasized 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. Kite suggested options, and even names, for a Pacific regional

[153]"Discussions" (First South Pacific Judicial Conference, Apia, Samoa; and Pago Pago, American Samoa, Jan. 10–13, 1972).

[154]Ibid.

[155]Mere Pulea Kite, "Presentation" (Fifth South Pacific Judicial Conference, Canberra, Australia, May 24–26, 1982).



Group photo from Eighth Pacific Judicial Conference, Poipu Beach, Kaua'i, Hawai'i, in 1989.

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, thus avoiding 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 a registrar. 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."[156]

In the discussion, E.F. Gianotti, associate justice for the High Court of the Trust Territory of the Pacific, expressed a 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."[157] Gianotti explained that Pacific 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. Dillon suggested starting off with a pool of eminent jurists from Australia and New Zealand, using English common law as the basis for judgments in those countries using English common law, and thus avoiding the problems of conflicting sources of law from U.S. and French jurisprudence.[158]

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."[159]

Davison observed, however, 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

[156]Ibid.

[157]"Discussions" (Fifth South Pacific Judicial Conference, Canberra, Australia, May 24–26, 1982).

[158]Ibid.

[159]Ibid.

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."[160]

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. 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.[161]

Olivier Aimot, who served as a judge in the three French Pacific communities—Wallis and Futuna, New Caledonia, and French Polynesia—has explained that a regional court of appeal would not be suitable for the French Pacific islands for several reasons:

- The civil law applicable in the French islands derives from two distinct sources—*"droit privé"* (private law) and *"droit publique"* (public law), which have different jurisdictions and judges, even in appeals.
- French judges do not have the power to declare a law to be unconstitutional (although this limitation is in the process of changing).
- The geographic distances separating the three French island communities (and all the other island communities) would create difficulties and costs.
- Customs are different in the three French Pacific communities, and they are applied differently. Traditional Melanesian practices differ from traditional Polynesian practices, and each values its political autonomy and institutions.[162]

Despite the lively discussions held at the conferences, a regional court of appeals remains merely a concept. Any move 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 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

[160]Ibid.

[161]Ibid.

[162]Olivier Aimot, "Comments" (Seventeenth Pacific Judicial Conference, Nuku'alofa, Tonga, Nov. 5–9, 2007).

self-evident that development of governments' legal capacity, and the institutions which house it" is inevitable.[163]

At the 2007 conference in Tonga, Gerard Winter, who had previously served on the High Court of Fiji for four years, gave a presentation about his current effort to promote a regional court for the Pacific.[164] He had been tasked by the Pacific Forum at its 2007 meeting in Tonga the previous month 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 regionwide Pacific law and international law. Many participants agreed that the concept of a regional court of appeals is sound, but they pointed out that it ignores the proud independence of individual countries.

Even without a formal regional court, elements of a regional judiciary can be found by the substantial interchange of judges between various countries (such as Gordon Ward, described in more detail below, and others who have moved in recent years among Papua New Guinea, the Solomons, Fiji, Vanuatu, and Tonga), as well as by the practice of bringing judges from one court to another to fill in appellate panels. Alex R. Munson, who was the "Article I" U.S. district judge in Saipan from 1988 to 2010, has been, for example, appointed by the Ninth Circuit to sit in Guam, and the Guam federal judge (Frances Tydingco-Gatewood) is assigned to cases in Saipan when there are recusals. Munson has also been given a lifetime appointment by the president of Palau to serve as a judge there when needed, and he generally goes to Palau twice a year for cases. The judges of the supreme courts of Guam and of the Commonwealth of the Northern Mariana Islands similarly sit on each other's panels periodically. Chief Justice Arthur Ngiraklsong of Palau occasionally sits on the Supreme Court of the Federated States of Micronesia and on the Supreme Court of the State of Yap. Judge Daniel N. Cadra is both the chief justice of the Supreme Court of the Marshall Islands and a land court judge in Palau.

[163]Pacific Islands Forum Secretariat, Pacific Plan Action Committee Meeting (Nuku'alofa, Tonga, September 24, 2007), http://www.paclii.org/PJDP/resources/PJC/Should_there_be_one_Overall_Final_Court_of_Appeal_in_the_Pacific.pdf.

[164]Gerard Winter, "One South Pacific. One Regional Court" (Seventeenth Pacific Judicial Conference, Nuku'alofa, Tonga, Nov. 5–7, 2007).

Group photo from Seventeenth Pacific Judicial Conference, Nuku'alofa, Tonga, 2007

Expatriate or Local Judges?

Some island communities, such as Samoa, American Samoa, Papua New Guinea, Vanuatu, the Federated States of Micronesia, Palau, Guam, and the Northern Marianas, have tried to staff their judiciaries with local judges, while others, including 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.

At the First Conference in 1972, Justice C.C. Marsack of the Fiji Court of Appeals explained that in a trial presided over by a judge from another culture, the judge may not understand how a "reasonable man" in the local culture might react to a provocation:

> Often a highly trained judge hasn't been in a territory long enough to make a reasonable assessment of what constitutes a reasonable man. . . . [I]n many cases substantial justice cannot be done . . . unless proper allowance is made for local conditions and customs in the islands and, most importantly, for the essential differences in human character and general outlook between the average islander and the ordinary reasonable man of British jurisprudence. . . . Perhaps the solution lies in the setting up of a judicial system such as that in force in Western Samoa, where local assessors form part of the court in serious crimes, and can explain fully to the trial judge the reasons actuating them in arriving at their verdict; and where, in all other trials, the Judge may have associated with him Samoan Judges who can give him valuable assistance in the matter of the character and outlook of the Samoans, and of the age-old customs by which their lives are largely regulated.[165]

In the Second Conference in 1975, Harold W. Burnett, chief justice of the Trust Territory of the Pacific, acknowledged that even though he had lived in Guam for an extended period prior to his appointment to the Trust Territory High Court and had served on that court for seven-and-one-half years, he was still searching for an understanding of Micronesia and its people and was becoming less and less convinced that he was ever going to achieve it.[166]

[165]C.C. Marsack, "Cultural and Ethnic Disparities and Their Effect on the Judicial Process" (First South Pacific Judicial Conference, Samoa, Jan. 10–13, 1972).

[166]Harold W. Burnett, "Comment" (Second South Pacific Judicial Conference, Honolulu, Hawai'i, 1975).

This issue was much discussed in the early years of the Federated States of Micronesia (FSM). Edward C. King, an American who had worked for Micronesian Legal Services for a number of years, was appointed to be chief justice of the FSM Supreme Court in 1980, and he worked hard to develop an independent judiciary for the new country and to address the complicated legal issues that came before the court.[167] During the summer of 1986, King announced that he wished to retire from the court as of early 1988 so that a Micronesian could become chief justice, and in his announcement he suggested that the forthcoming period of transition would be an appropriate time to develop strategies to deal with a series of problems that had surfaced during his tenure. FSM President Tosiwo Nakayama then convened a Judicial Systems Conference, held on Joy Island in Pohnpei State in September 1986, to discuss the future of the FSM judiciary. This meeting brought together the governors, legislative leaders, and judges of the country for an in-depth discussion.

The participants at this Joy Island meeting affirmed the important role an independent judiciary can play in providing the stability and predictability needed for economic development, but they were not able to agree on the level of autonomy the judicial branch should have regarding administering its own budget. They discussed the role of customary law in FSM jurisprudence and the division of responsibilities between the courts of the four states and the courts of the national government. The second day of the conference was devoted primarily to the transition to a new Micronesian chief justice through the appointment of new Micronesian associate justices, and discussion focused on the preparation needed for this transition and whether the new chief justice should be someone with formal law school training. Most of the participants agreed that formal judicial training would not be necessary if a person had adequate experience practicing law, and some thought a justice could be selected from a "statesmen's class" consisting of persons who had been active in building the nation. All agreed that a chief justice should have the qualities of high moral integrity, impartiality, common sense, proper judicial temperament, and patience, and should be able to unite the judiciary and the nation. Many participants were reluctant to rush into a new appointment and wondered if Chief Justice King could delay his resignation.[168]

[167]Bruce M. Turcott, "The Beginnings of the Federated States of Micronesia Supreme Court," *University of Hawai'i Law Review* 5 (1983): 361–90.

[168]Jon Van Dyke and Peter Haynes, "Report on the Judicial Systems Conference for the Federated States of Micronesia" (1986).

Building on these 1986 discussions, Andon Amaraich from Chuuk was appointed to be associate justice in 1990 and became chief justice in 1993, following the resignation of Chief Justice King. Chief Justice Amaraich had never attended law school, but he had served as assistant clerk to the Truk (Chuuk) District Court in 1955–56, and thereafter as chief public defender in Chuuk for ten years.[169] He also played many roles in the development of the FSM and was viewed as one of its founding fathers. Chief Justice Amaraich passed away in January 2010, and Associate Justice Martin G. Yinug (from Yap) was nominated in the spring of 2010 to replace him as chief justice of the FSM Supreme Court, and Beauleen Carl-Worswick was nominated at that time to be the new associate justice.

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, but sometimes local pressures can be significant. Western Samoan Chief Justice Barrie Spring explained at the First Conference in 1972 that Samoan judicial officers were often subjected to great *aiga,* or family pressure, and sometimes asked to be excused from sitting on a particular case because of pressure or threats.[170] President Olivier Aimot of French Polynesia explained at the 2007 conference in Tonga that "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."[171]

The debate between employing local and expatriate judges does not lead to a clear answer in favor of one approach over the other, and some jurisdictions use both types of judges. Some of the very distinguished expatriate judges who have been serving in the Pacific islands include Anthony Ford, who was chief justice of Tonga; David Williams, chief justice of the Cook Islands; and Robin Millhouse, chief justice of Kiribati and

[169]A discussion of a case handled by Andon Amaraich as a public defender in the 1950s described him as "a quiet, brainy young man from the Mortlocks." Willard C. Muller, *Faces of the Islands* (Hillsboro, OR, 2002), 200.

[170]Chief Justice Barrie C. Spring, "The Judicial System of Western Samoa, Including Its Relationship to the Executive and the System of Legal Education" (First South Pacific Judicial Conference, Samoa, Jan. 10–13, 1972).

[171]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, Nov. 7–9, 2007).

Nauru. Some countries, such as Palau and the Federated States of Micronesia, primarily use local judges but occasionally utilize expatriates as part of their judiciary. The Marshall Islands was using expatriate judges with short, two-year terms of office for a number of years, but more recently has given Carl Ingram, chief judge of the high court, a ten-year term (2003–13), and has also given a ten-year term (also 2003–13) to Daniel N. Cadra, chief justice of the supreme court, who is based in Alaska but travels to the Marshall Islands every six months to hear cases.[172] Some have raised concerns about the use, in some situations, of retired expatriate judges, who are barred from sitting in their home countries because of their age but continue to sit in Pacific island communities well into their eighties.

A related issue is whether the small island communities should have separate trial and appellate courts or should utilize the same judges for both roles. In Palau and the Federated States of Micronesia, the justices of the supreme court sit as trial judges, and, if their ruling is appealed, the other justices form an appellate panel. In the Marshalls, on the other hand, different justices form the supreme court when appeals are taken. The Palau voters recently approved a constitutional amendment calling for the implementation of "the separation of the Justices of the appellate division" "when the Olbiil Era Kelalau [the Palau Legislature] appropriates funds for additional justices to serve on the appellate division."

An examination of several of the judges who have played active roles in the Pacific illustrates the complexity of this issue. We start first with one of the most active expatriate judges, then turn to two distinguished local judges, and conclude with a French judge who has spent much of his career in the Pacific.

GORDON WARD

Frederick Gordon Ward began his career as a barrister in England, litigating cases for twelve years[173] during the 1960s and 1970s[174] before moving to Fiji and working first as a magistrate in 1979–80 and then as chief magistrate in 1980–86. In 1986, he left his position in Fiji and became the chief justice of the High Court of the Solomon Islands, where he remained until he joined the

[172]Judge Cadra also sits on the land court in Palau.

[173]Angie Toussaint, "In the NEWS: Governor Formally Appoints New Supreme Court Chief Justice," WIV4 news broadcast, May 2, 2008, http://wiv4.wordpress.com/2008/05/02/in-the-news-governor-formally-appoints-new-supreme-court-chief-justice/.

[174]"Justice Ward Sworn In," *Fiji Times*, July 8, 2004, 2.

Tonga judiciary in 1992.[175] Ward was the last British judge brought to the Tonga judiciary under an agreement dating back to 1905 that allowed Britain to appoint Tongan judges.[176] He served as chief justice of Tonga from 1992 until 1995, when the agreement between England and Tonga expired, and then served for three years as the resident judge on the British bases in Cyprus.[177] In 1998, he was reappointed chief justice of Tonga, this time commissioned by the Tongan government itself.[178] During his tenure in Tonga, he also sat on the Court of Appeal of Fiji in the 2000 *Prasad* case,[179] when the court upheld Fiji's 1997 constitution in a case brought by deposed Prime Minister Mehendra Chaudhry, who had challenged the abrogation of that constitution.[180]

Ward faced unique situations in Tonga because the Tongan government is a constitutional monarchy. Until recently, the Tongan king wielded direct authority over the country, but Ward supported the efforts of pro-democracy reformers and tried to carve out a measure of judicial independence. "While the reformers' true target has always been the monarchy, their efforts have proven to be most influential on strengthening the role of the Tongan judiciary to act as a counter-balance to the King's power."[181] In 1996, for example, after the king had ordered a newspaper publisher and a pro-democracy politician to be imprisoned for contempt of Parliament, Ward ruled that the two prisoners must be released on constitutional grounds. His ruling was followed, and the men were released.[182]

Later, in 2003, the king issued orders banning a pro-democracy newspaper, the *Taimi 'o Tonga*. The newspaper sued in court and Chief Justice Ward held, in *Lali Media v. Lavaka Ata*, that the ban was unconstitutional. In his opinion, Ward stated that when the constitution was enacted in 1875, King Tupuo I stat-

[175]Ibid.

[176]"Tonga's Chief Justice Leaving Post Early," *BBC Summary of World Broadcasts*, April 21, 2004.

[177]"Justice Ward Sworn In," *Fiji Times*, 2.

[178]Ibid.

[179]"Fiji: Legal Teams Arrive for Start of Constitution Appeal," *BBC Worldwide Monitoring*, Feb. 18, 2001.

[180]International Bar Association, *Dire Straits. A Report on the Rule of Law in Fiji* (2009), http://www.fijilive.com/archive/showpdf.php?pdf=2009/03/322_03_2009_March_Dire_Straits-A_report_on_the_rule_of_law_in_Fiji.pdf, 16.

[181]John Maloney and Jason Reed Struble, "A New Day in Tonga: The Judiciary, The Reformers and the Future," *Journal of South Pacific Law* 11:2 (2007): 151, 159–60 (describing the court's reasoning in *Taione v. Kingdom of Tonga*).

[182]Matthew Dearnaley, "King Reasserts Newspaper Ban," *New Zealand Herald*, March 14, 2003.

ed, "[I]t is my wish to grant a Constitution and to carry on my duties in accordance with it and those that come after me shall do the same and the Constitution shall be as a firm rock in Tonga forever."[183] The king's actions in banning the newspaper were ruled to be unconstitutional because the proper processes to make such a decree had not been followed, and the justifications for the decree were not sufficient under the law.[184]

In this situation, however, the king of Tonga did not respect Ward's decision. Instead, King Tupuo IV amended the constitution to legitimize actions taken by the king to protect national security, public interest, morality, or cultural traditions of the kingdom, and further stated that "it shall be lawful to enact laws to regulate the operation of any media."[185] The newspapers challenged the king's authority to amend the constitution in such a manner. The supreme court ruled, in *Taione v. Kingdom of Tonga,* that the amendments violated the Entrenchment Clause, which held that any amendments passed by the king or the Legislative Assembly must not violate the "laws of liberty." The court further held that the amendments did in fact violate the laws of liberty and that they were unconstitutional. In April 2004, before Ward had issued his decision, he offered his resignation and gave three months' notice (announcing also that he had agreed to join the Court of Appeal of Fiji), but the three months provided the time necessary to hear *Taione* and issue the opinion. Although Ward worried that he had failed to establish judicial authority and protect the concept of free speech,[186] in fact the king and the country of Tonga respected his ruling in *Taione,* the amendments were struck down, and the *Taimi 'o Tonga* was reinstated. Thus Ward succeeded in setting a firm and lasting precedent for the protection of freedom of speech in Tonga.[187]

After Ward's resignation in Tonga took effect, he was sworn in as president of the Court of Appeal of Fiji on July 7, 2004,[188] where he faced even more significant challenges to judicial autonomy. During one high-profile appeal, the police inexplicably barred media personnel from entering Justice Ward's courtroom and covering the case. Ward made clear that he had not ordered

[183]Sione Latukefu, "The History of the Tongan Constitution," http://www.planet-tonga.com/HRDMT/Articles/Convention_92/Sione_Latukefu.shtml.

[184]Maloney and Struble, "A New Day in Tonga," 159–60.

[185]Ibid.

[186]*"Tonga Chief Justice Quits," Radio New Zealand Int.,* April 22, 2004, http://www.rnzi.com/pages/news.php?op=read&id=9596.

[187]Maloney and Struble, "A New Day in Tonga," 163.

[188]"Justice Ward Sworn In," *Fiji Times,* 2.

the interference and condemned the actions of the police, and promised that he would make certain that seats were reserved for media personnel in the future.[189]

Ward served in Fiji during a time of particular political turmoil that culminated in the 2006 coup that installed Commodore Bainimarama and his military government. In June 2007, the interim attorney general in Fiji called on Ward to resign for calling the events of 2006 a coup.[190] Although some people supported Ward,[191] in July 2007 he refused to renew his contract, because he felt to do so would endorse the 2006 coup and subsequent events. Soon after, as mentioned earlier, Ward's home in Fiji burned down under unexplained circumstances. Initial reports were that the blaze was a result of arson,[192] but after only minimal investigation the case was dropped, and no information was ever released.[193]

Ward then moved to the Turks and Caicos Islands, a British territory in the Caribbean, where he is now the chief justice and where he has continued to face controversial questions.[194] He was also appointed chair of Tonga's Constitutional and

[189]Imran Ali, "Police Stop Media from Appeal Case," *Fiji Times*, Nov. 4, 2004, 4.

[190]"Interim AG Calls on Judge to Quit," *PacNews*, June 11, 2007.

[191]"You Have Gone Too Far, Qarase Tells A-G," *Fiji Times* (Australia), June 12, 2007, 1.

[192]"Blaze Guts Judge's Home," *Fiji Times*, Aug. 27, 2007, 5.

[193]International Bar Association, *Dire Straits*, 44.

[194]On August 15, 2009, Great Britain suspended the government of the Turks and Caicos Islands as well as the right to a jury trial and asserted direct authority over the island nation after allegations of widespread corruption and mismanagement. ("Britain Seizes Control of Scandal-hit Dependency; Allegations of 'Political Amorality' Against Former Turks and Caicos Leader," *The Independent* [London], Aug. 15, 2009; "Britain Imposes Direct Rule of Turks and Caicos Isles," *CNN International*, Aug. 15, 2009) An investigation led by former British judge Sir Robert Auld into Michael "Iron Mike" Misick, the former premier of the Turks and Caicos Islands, found widespread corruption in the form of indecent relations between the island nation's politicians and foreign land developers. ("Islanders Split as Whitehall Takes Over Turks and Caicos," *The Observer* [England], Aug. 16, 2009) The investigation also found that the nation's tourism budget was being used largely to subsidize Misick's personal lifestyle. ("Britain Seizes Control of Scandal-hit Dependency") The queen of England retains governors in all of its Caribbean dependencies, and has the constitutional authority to reassert direct rule in certain situations. (Peter Clegg, "Governing the UK Caribbean Overseas Territories: a Two-Way Perspective" [2009], http://www.psa.ac.uk/2009/pps/Clegg.pdf) Gordon Wetherell, current governor of the Turks and Caicos Islands, stated that he expects elections for a new democratic government to be held in April 2011. ("Elections Scheduled for April 2011 Says Overseas Territories Director," *Turks and Caicos News*, Feb. 8, 2010) Judge Ward has been in the middle of a number of difficult cases during this period of turmoil.

Electoral Commission,[195] which issued a long report on November 5, 2009, recommending changes that would give the voters control of the Tongan parliament.[196]

ARTHUR NGIRAKLSONG

A contrast to Judge Ward, who has moved from court to court throughout his career, is Chief Justice Arthur Ngiraklsong of Palau, who joined the Palau judiciary in 1986 and has skillfully built the Palau judiciary into an effective and independent branch of his country's government.[197] Ngiraklsong was born and raised in Palau but spent a number of years away from his home country being educated in the United States and gaining employment experience. He earned a B.A. in political science from the University of Hawai'i at Manoa and a master's degree from the University of Missouri before earning his J.D. from the Rutgers-Camden School of Law in 1974. Later, in 1980–81, he completed a one-year special program as a visiting scholar at Harvard Law School, focusing on the adoption of Western legal systems by non-Western societies.[198]

Ngiraklsong began his legal career in 1975 as a staff attorney for the Micronesian Constitutional Convention in Saipan, where he helped draft the new constitution for the Federated States of Micronesia. (Palau subsequently opted out of the FSM to become an independent country.) From 1976 to 1979, he worked as a staff attorney for the Congress of Micronesia, followed by a stint as legislative counsel to the Federated States of Micronesia.[199] He then worked as an assistant attorney general in Guam for five years, specializing in civil litigation. In 1986, he was appointed by President Lazarus Salii to be an associate justice of the Palau Supreme Court,[200] and then in 1992 he was elevated to the position of chief justice by President Ngiratkel Etpison, after Chief Justice Mamoru Nakamura passed away.[201]

[195]"Tonga Appoints Members of Political Reform Commission," *PacNews*, Nov. 27, 2008.

[196]Tongan Constitutional and Electoral Commission, *Final Report*, Nov. 5, 2009. The commission recommended that the Tongan Legislative Assembly (Fale Alea) change from having only nine of its thirty members elected by the public to a system whereby seventeen out its twenty-six members would be elected by the public (with the other nine elected by the nobles).

[197]See Palau Supreme Court, *The Quest for Harmony: A Pictorial History of Law and Justice in the Republic of Palau* (Palau, 1995), 48.

[198]Ibid.

[199]Ibid.

[200]Ibid.

[201]Ibid.

Chief Justice Ngiraklsong has always believed that a primary function of the courts is to provide for "a fair, just, and efficient way for citizens to resolve the conflicts that are an inevitable part of life."[202] In order to carry out that mission effectively, he has maintained a firm belief in the importance of judicial integrity and consistency, explaining that "[j]udges must be respected for their integrity, intelligence, and dedication. If they are not, the court is not effective and people lose faith in their government because the concept of justice becomes hollow."[203] With these goals in mind, Ngiraklsong has worked hard to construct and preserve judicial integrity and independence during the early stages of Palauan independence and development. For example, in 2008 Ngiraklsong squared off against four members of the House of Delegates who tried to run for a fourth term despite the established law that limits members of the national congress to three terms. Ngiraklsong upheld the law and "chastised the lawmakers for testing a law that he said was clear in its intent and purpose."[204] He held that "[i]t is well established that where the language is plain and admits of no more than one meaning, the duty of interpretation does not arise."[205]

One of the most difficult cases Ngiraklsong has had to deal with involved an assault and battery with a baseball bat committed by one of Palau's two high chiefs, Ibedul Yutaka Gibbons, against a U.S. attorney who had wanted to observe a housing meeting chaired by the ibedul.[206] Ibedul Gibbons said the meeting was closed; when the attorney refused to leave, Gibbons retrieved the bat from his car and assaulted the attorney, breaking his arm and causing other physical harm. Despite the serious injuries, Palau public opinion tended to support the ibedul, because Palau chiefs have historically enforced their will through physical means. Nonetheless, Ngiraklsong found him guilty of assault and sentenced him to three years, with one year in prison. The verdict led to widespread public and political condemnation, and only one prominent official, Senator Joshua Koshiba, supported Chief Justice Ngiraklsong, stating that "the rule of law should be applied and the high chief should be jailed." After more than four thousand Palauans signed a petition supporting Ibedul Gibbons, President Tommy E. Remengesau officially pardoned Gibbons and suspended his sentence. Nonetheless,

[202] *The Wisdom of the Past, a Vision for the Future,* dedication page.

[203] Ibid.

[204] "Palau Supreme Court Upholds Term Limit Law," *PacNews,* Oct. 8, 2008.

[205] Ibid.

[206] "Micronesia in Review: Issues and Events," *The Contemporary Pacific,* March 22, 2005.

Ngiraklsong, for his part, applied the law equally to both the common man and the prominent public official, and the Palau courts also ruled in the related civil case that Gibbons had to pay a substantial amount to the attorney.

Chief Justice Ngiraklsong has, through his decisions, helped develop and modernize the country of Palau, while preserving cultural and societal traditions. For example, Palauan custom provides that land is held in the names of clans, but Ngiraklsong upheld the modern view that individually owned land passes to the owner's heirs on his death rather than back to his clan.[207] In doing so, Ngiraklsong also reserved a place in the law for tradition by recognizing that, while individuals may pass land to heirs, an *eldecheduch*, or gathering where a clan decides the disposition of a clan member's property,[208] can by law decide whom those heirs will be.[209] This ruling helped preserve Palauan culture while making the country more accessible to global integration and foreign investment.

Because of Chief Justice Ngiraklsong's reputation for integrity and leadership on the bench, he is sometimes asked to lend his expertise to the judiciaries of other countries. He was, for example, asked to preside over the High Court of the Republic of the Marshall Islands in a high-profile case in which former Judge Charles Henry was accused by the republic's government of a number of judicial misconduct offenses, including embezzlement, libel, and abuse of government funds.[210] He has also periodically acted as a temporary justice for the Supreme Court of the Federated States of Micronesia and the courts of the state of Yap.[211]

In building the Palau judiciary, Ngiraklsong has sought to identify Palauans with the qualifications to serve as judges, whenever possible, but has also used judges and lawyers from the United States, when needed. His associate justices now consist of four Palauans—Kathleen Salii, Lourdes Materne, Honora Dudimch, and Rosemary Skebong—and one American, Alexandra F. Foster, who joined the court in 2008 to replace As-

[207] *Remengesau v. Sato* [1994], PWSC 1; SC Civil Appeal No 5-93 (1994).

[208] "Law and Investment in Palau: A Brief Overview for Prospective Foreign Investors," *Indiana International & Comparative Law Review* 17 (2007): 49.

[209] See *Remengesau v. Sato*, http://www.paclii.org/pw/cases/PWSC/1994/1.html.

[210] "Former Chief Justice Faces New Charges," *PacNews*, Aug. 5, 2003.

[211] See *United Church of Christ v. Hamo* [1989], FMSC 13; 4 FSM Intrm. 095 (App. 1989); *Dabchur v. Yap* [1987], FMYSC 1; 3 FSM Intrm. 203 (Yap S Ct. App. 1987); *Rumar v. Federated States of Micronesia*, [1988] FMSC 13; 3 FSM Intrm. 308 (Pon. 1988); *Jano v. King* [1992], FMSC 11; 5 FSM Intrm. 326 (App. 1992), http://www.paclii.org/cgi-bin/sinosrch.cgi?query=Ngiraklsong&results=50&submit=Search&rank=on&callback=on&meta=%2Fpaclii&method=all.

sociate Justice Larry Miller. Except for Chief Justice Ngiraklsong, all the other Palau justices are currently female.[212]

In November 2009, Ngiraklsong signed a cooperation agreement with the supreme courts of Guam, the Philippines, and the Northern Mariana Islands aimed at strengthening mutual cooperation, support, and knowledge between these island communities.[213] The agreement creates joint committees composed of members of each country's courts to implement cooperative endeavors such as judicial training.[214]

PATU TIAVAASUE FALEFATU SAPOLU

Patu Tiavaasue Falefatu Sapolu was appointed chief justice to the Supreme Court of Western Samoa (now Samoa) in July 1992.[215] Before this appointment, he had served as acting chief justice once (in 1990) and as attorney general twice (1983–85 and 1987–89), and had maintained an active private practice.[216]

Chief Justice Sapolu has been an influential voice in Samoa on a number of controversial topics, exercising judicial restraint but nonetheless making difficult decisions, when necessary. On the topic of abortion, Sapolu has recognized—in a case in which he felt obliged to sentence a nurse to thirty months' imprisonment for providing an abortion for another woman—that the current laws of Samoa forbidding abortions in all circumstances except where the mother's life is in grave danger result in underground, unregulated, and often unsafe abortions.[217] Sapolu said that he personally believed the law should be relaxed, and that the case showed a clear need for legally sanctioned abortion services based on the number of women who had contacted the defendant with requests for abortions, but he nonetheless followed the governing law and adminis-

[212]The Palau Supreme Court has also used part-time associate justices from other jurisdictions, who have included Alex R. Munson, U.S. district judge for the Northern Marianas (now retired from that court); Janet Healy Weeks, formerly on the Guam Supreme Court; and Edward C. King, former chief justice of the Federated States of Micronesia.

[213]"SC Chief Signs Cooperation Pact with Guam, Palau and Northern Mariana Islands," *Philippines News Agency*, Nov. 5, 2009.

[214]Ibid.

[215]*The Contemporary Pacific* (Spring 1994), http://scholarspace.manoa.hawaii.edu/bitstream/10125/13372/2/v6n1-198-200-politicalrev.pdf.txt.

[216]*ANZ Banking Group Ltd v. Ale* [1991], WSSC 3; [1980–1993] WSLR 468 (1991), http://www.paclii.org//cgi-bin/disp.pl/ws/cases/WSSC/1991/3.html?query=Ryan.

[217]"Samoa Chief Justice Backs Abortion Law Relaxation," *PacNews*, Aug. 18, 2004.

tered the required sentence, demonstrating judicial restraint and adherence to the law.[218]

With regard to religion, Chief Justice Sapolu has presided at a time when his country is divided between traditional religious practices and the freedom to choose one's own religion. Proponents of traditional Samoan religious practices have often tried to force members of their community to adhere to traditional beliefs, but Sapolu has consistently protected freedom of religion and stressed tolerance. In an article addressing the issue, Sapolu stated that the freedom of religion "includes the freedom to change one's religion and the freedom not to have any religion at all." The chief justice further stated that limits to the freedom of religion come into play only when "a religious practice or observance involves a crime such as murder, rape, theft, and so on." He concluded by stating that "[f]reedom of religion requires tolerance, understanding and respect for the religious beliefs of others. Not all people will ever share or subscribe to the same beliefs, including religious beliefs. Such is life and the world we live in."[219]

Chief Justice Sapolu has frequently found himself at odds with politicians and the executive branch and has consistently upheld the rule of law in the face of pressures to do otherwise. In September 2006, he convicted Su'a Rimoni Ah Chong of bribery after Ah Chong gave a new television set to one of the electors two days before the election was to be held.[220] Sapolu noted in a later case that electoral corruption is common and perhaps even accepted in Samoa and "does not seem to attract any social stigma against the guilty candidates."[221] With regard to electoral corruption, he explained "that my experience over the years with election petitions which involve allegations of electoral corrupt practice is that it is not uncommon that both the successful candidate at the general election and the unsuccessful candidate who petitions are found guilty of the same offence."[222] He has suggested that electoral reform may be

[218]Ibid.

[219]Patu Tiavaasue Falefatu Sapolu, "Intolerance Draws Nearer," *Samoan Observer*, March 4, 2010, http://samoaobserver.ws/index.php?option=com_content&view=article&id=20786:intolerance-draws-nearer&catid=51:editorial&Itemid=103.

[220]"Samoan Party Leader Guilty of Election Bribe," *BBC Worldwide Monitoring*, Sept. 27, 2006.

[221]*Samoa Party v. Attorney General* [2009], WSSC 23 (2009), http://www.paclii.org//cgi-bin/disp.pl/ws/cases/WSSC/2009/23.html?query=Chief%20Justice%20Sapolu.

[222]Ibid.

necessary to remedy the problem, because the law did not seem to be functioning as an effective deterrent.[223]

Among the challenges Sapolu regularly faces is the task of reconciling Western law with traditional Samoan practices. He has, in his decisions, tried to preserve Samoan culture while guiding the nation through a period of modernization. In a speech titled "The Samoa Experience" presented at the 2007 conference in Tonga,[224] Sapolu explained that he tried to find the right balance by focusing on the similarities between the two sets of laws.[225] He reasoned that "if there is any area where custom in the context of Pacific Island States jurisdictions and introduced law may be able to co-exist and interact with one another, it is in the principles of fairness and reasonableness associated with judicial review as well as the principles and notions of good conscience to be found in equity."[226]

In trying to reconcile the two sets of laws, Sapolu has carved out places within Western law where customary law can still play a useful role. For example, in 2007, a man from the Vaisala village went to the Falealupo village and shot a sixty-three-year-old man in the back of the head.[227] The Vaisala villager was convicted of attempted murder, but in the sentencing Sapolu took into account the fact that the village of the accused had performed a traditional *ifoga* (apology) by banishing the man from their village and presenting the victim's village with gifts, money, and their sincere remorseful apology, which was accepted by the Falealupo village.[228] The maximum penalty for attempted murder in Samoa is life imprisonment, but traditional Samoan culture would have considered peace and harmony restored between the parties after the *ifoga* was offered and accepted.[229] Chief Justice Sapolu struck a balance between these competing doctrines by reducing the penalty to four-and-one-half years, noting that although the *ifoga* was accepted, "the seriousness of the offence commands a custodial sentence."[230]

[223]Ibid.

[224]The Pacific Judicial Development Program, http://www.paclii.org/PJDP/PJC.shtml.

[225]Tiavaasue Falefatu Sapolu Patu, "The Samoa Experience" (Seventeenth Pacific Judicial Conference, Nuku'alofa, Tonga, Nov. 7, 2007), http://www.paclii.org/PJDP/resources/PJC/The_Samoa_Experience.pdf.

[226]Ibid.

[227]*Police v. Titi* [2007], WSSC 91 (2007), http://www.paclii.org//cgi-bin/disp.pl/ws/cases/WSSC/2007/91.html?query=Falealupo.

[228]Ibid.

[229]Ibid.

[230]"Samoa Court Gives Jail Term to Gunman for Trying to Kill MP on Savaii," *PacNews*, Dec. 12, 2007.

Sapolu's ability to act decisively and thoughtfully may have been strengthened by an awkward situation that occurred when he first became a judge. While serving as acting chief justice in 1990, he maintained his private practice, which spurred criticism in the media because of potential conflicts of interests.[231] That same year, a murder case came before the court in which Sapolu's sister, a member of his law firm, represented the defendant.[232] Complicating matters even more, after Sapolu had been appointed acting chief justice, his deputy at the attorney general's office had been appointed acting attorney general and was representing the prosecution. Sapolu met with the acting attorney general and his sister to obtain their consent to hear the case; when neither objected, he presided over the case.[233] After the *Samoa Times* criticized his decision to keep jurisdiction over the case, Sapolu then held the publication and its editor in contempt of court, stating that "the Court in this kind of contempt is not concerned with the truth or falsity of the publication [but rather] the protection of the integrity of the institution of fair trial and the confidence of the public in that institution."[234] The contempt order was appealed to the Court of Appeal of Western Samoa, which reversed in an opinion that chastised the conduct of Sapolu for his handling of his employment affairs and his attempted suppression of free speech. The appellate court ruled that it was Sapolu's conduct, and not the magazine article, that compromised public confidence in Samoa's judicial branch, and that the public debate that resulted was protected by Samoa's constitution.[235]

This early stumble occurred at the beginning of Chief Justice Sapolu's long and distinguished career, and he clearly learned from it and moved on. In October 2009, he recused himself from a drug and weapons-possession case, after the defendant requested the recusal based on the fact that Sapolu was chair of the parole board that had released the defendant from prison several years earlier.[236] Recently, Sapolu chaired a committee consisting of lawyers and judges to draft legislation to implement alternative dispute resolution processes that would help

[231] *Petaia v. Supreme Court of Western Samoa* [1990], http://www.paclii.org//cgi-bin/disp.pl/ws/cases/WSCA/1990/1.html?query=Sapolu.

[232] Ibid.

[233] Ibid.

[234] Ibid.

[235] Ibid.

[236] "Samoa Chief Justice Steps Aside over Former Parole Board Role," *New Zealand International*, Oct. 30, 2009; "CJ Steps Down in Filipaina Hearing," *Samoa Observer*, Oct. 28, 2009.

the courts cope with their high caseload and provide greater access to justice for the Samoan people.[237] Since the enactment of the Alternative Dispute Resolution Act of 2007 in November of that year, Sapolu has worked to implement and refine the act.[238] He is also working to build relationships abroad. In September 2009, he met in Beijing with Wang Shengjun, chief justice of the Supreme People's Court of China, to discuss their respective judicial systems and to foster further communication and cooperation.[239]

In 2010, Samoa opened a completely new court complex consisting of two supreme courts, two district courts, a land and titles court, and new administrative facilities[240] designed by Chinese architects and financed with Chinese money. The opening in January 2010 was attended by a delegation from China led by Chen Changzhi, deputy chairman of the National People's Congress, who said, "Samoa is very special to China, and China is ready to assist Samoa in whatever way [we] can."[241]

THE FRENCH APPROACH AND OLIVIER AIMOT

France views the Pacific island communities that fly the French flag (French Polynesia, New Caledonia, and Wallis and Futuna) as integral parts of France, where French law applies and French judges preside.[242] Certain talented young French law graduates are trained for the judiciary and then spend their careers rotating around French provinces. The movement of the judges is designed to reduce the corruption that might result from a close link to the community in which they sit. The French Pacific islands are part of this rotation, and so the courts of these islands are staffed by individuals trained in the French judicial system who come for a period of years and then move on to another French community.

Olivier Aimot came from this training and tradition, but he has spent much of his judicial career in the Pacific and thus

[237]Pacific Islands Law Officers' Network, *Country Report*, Dec. 10, 2007, http://www.pilonsec.org/www/pilon/rwpattach.nsf/VAP/%28756EDFD270AD704EF00C15CF396D6111%29~Samoa+Country+report+-+26th+annual+meeting.pdf/$file/Samoa+Country+report+-+26th+annual+meeting.pdf.

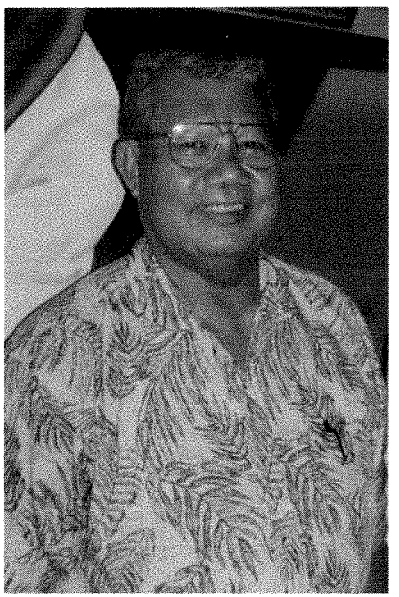
[238]Ibid.

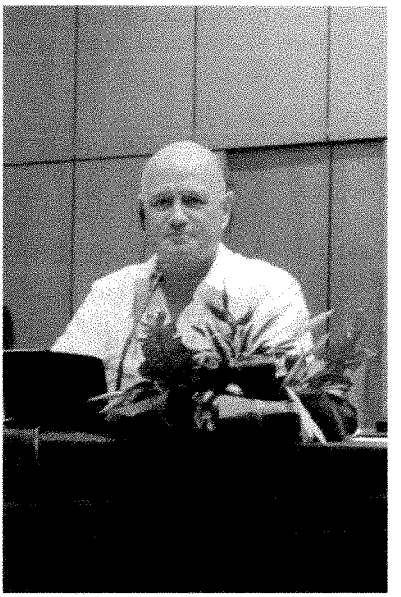
[239]*Chief Justices of China, Samoa Meet in Beijing*, Xinhua General News Service, Sept. 3, 2009.

[240]"New US$15 Million Court House Opens in Samoa," *Pacific Islands Broadcasting Association*, Jan. 28, 2010.

[241]Ibid.

[242]New Caledonia is a possible exception to this statement, because it is in the process of evolving into a more autonomous status.





Chief Justice Arthur Ngiraklsong, left, has built the Palau judiciary into an effective and independent branch of his country's government. (Courtesy of Jon Van Dyke) While Olivier Aimot, right, served as chief justice of the Court of Appeal of Papeete, Tahiti, he hosted the Eighteenth Pacific Judicial Conference. (Courtesy of Eighteenth Pacific Judicial Conference, Papeete, Tahiti)

has had a particularly important impact on the development of the judiciary in the French islands. After his initial law studies, he studied at the École Nationale de la Magistrature [ENM], the French national school to train judges and prosecutors, from 1969 to 1971. He served as a prosecutor for three years in France, and then in 1975, when he was thirty-one, he became a judge in Wallis and Futuna, where he remained for four years. He then served for three years in French Guyana, followed by three years in Clermont-Ferrand in the Auvergne region of central France and one year in Agen in southwestern France. Then, in 1992, he returned to the Pacific as first president (chief justice) of the Court of Appeal of Noumea in New Caledonia, where he remained until 1998. Next was another five years as a judge in Rennes, in northwestern France, and then back to the Pacific as first president (chief justice) of the Court of Appeal of Papeete, Tahiti, in French Polynesia, where he remained until 2009 (extending his stay so he could host the Eighteenth Pacific Judicial Conference there). President Aimot has had an important personal impact on the jurisprudence of

the French Pacific islands, and he has worked hard to bridge the barrier between the French-speaking and English-speaking Pacific islands.

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.[243] At the Third Conference in Papua New Guinea in 1977, the chair of the Papua New Guinea Law Reform Commission, Bernard Mullu Narokobi, delivered a passionate speech on adaptation of Western law to the customs and tribal laws of his new country and the problems and frustrations the commission faced. 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. . . . The overall effect of Western law was to take away the pride, self-respect, dignity, self-reliance, and the sovereignty of the people, replacing these with the self-assumed authority of the gun and the foreign ruler. . . . No PNGan with a sense of pride in himself and his culture can accept the present legal situation where, in order to find his rights, he has to read the Anglo Saxon books; in order to defend his client, he has to read Western jurisprudence, Western laws and Western legal culture based on Western wisdoms and prejudices. This unjust situation must cease, and as far as I am concerned, the sooner the better.[244]

[243]See generally Guy Powles and Mere Pulea, eds., *Pacific Courts and Legal Systems* (Suva, Fiji, 1988); Jennifer Corrin and Don Paterson, *Introduction to South Pacific Law*, 2d ed. (New York, 2007); Michael A. Ntumy, ed., *South Pacific Islands Legal Systems* (Honolulu, 1993); *Pacific Courts and Justice* (Suva, Fiji, 1977); Henry P. Lundsgaarde, ed., *Land Tenure in Oceania* (Honolulu, 1974).

[244]Bernard Mullu Narokobi, "Presentation" (Third South Pacific Judicial Conference, Port Moresby, Papua New Guinea, 1977).

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."[245]

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."[246]

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, Narokobi said, because of the difficulty in determining what standards would be used to determine what is reasonable. His frustration was clear:

> 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.[247]

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

[245]Ibid.

[246]Ibid.

[247]Ibid.

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 favor of one party rather than another in a situation of human conflict, would be given its fullest significance."[248]

In some constitutions, Narokobi said, the place of custom is expressly recognized, and the two systems can coexist. 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.[249]

At the Sixth Conference in Saipan in 1984, 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. He acknowledged that he and other U.S. federal judges have tended to evaluate other constitutions and judicial systems by comparison with the U.S. system. He admitted that although U.S. federal judges are inclined to consider the U.S. system 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. . . ."[250]

The judicial structures in the U.S.-affiliated Pacific territories, he said, provide a convenient perspective from which 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 U.S. system under the U.S. 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

[248]Ibid.

[249]Ibid.

[250]Anthony M. Kennedy, "Address to the South Pacific Judicial Conference" (Sixth South Pacific Judicial Conference, Saipan, Commonwealth of the Northern Marianas, Aug. 27–29, 1984).

courts in the Pacific region is a subject open to new and innovative approaches."[251]

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 U.S. 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.[252]

In fact, he told the group, "our tradition has been so shaped by federal experience that the Congress of the United States and the Pacific judicial systems in the American territories recognize the importance, if not the necessity, of accommodating local law principles."[253] 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.[254]

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.[255] He expressed concern that if a U.S. 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 U.S. district courts staffed by "Article I" judges who

[251]Ibid., 4.

[252]Ibid., 5.

[253]Ibid., 6.

[254]Ibid., 5.

[255]Ibid., 7.

are appointed for a ten-year term, not for life. Nonetheless, Kennedy observed, each court had a tradition of independence, authority, and competence equivalent to that of district courts in the fifty states.[256]

An approach utilized by the framers of the U.S. 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.[257]

One area of law presenting tensions between customary and Western law is land disputes. This concern was addressed at the 1991 conference in Tahiti.[258] 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 (chief justice) 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 then explained by R. Calinaud, judge of the Court of Appeal of 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 European settlement in the area. 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 penalties, promoted by the mis-

[256]Ibid., 8.

[257]Ibid., 2.

[258]Ninth South Pacific Judicial Conference, Papeete, Tahiti, French Polynesia, May 21–24, 1991.

sionaries to contain foreign settlement through bans on land sales and mixed marriages and regulations of leases. Later, Judge Calinaud explained, when the territories were opened to colonization, new laws were established with the ultimate motivation "to favor European or half-caste settlement, and the establishment of plantations."[259]

In 1847, the decision was made to award title of land to those who had held it "since the end of paganism," dismissing all prior claims and quarrels of the past. This decision, said Calinaud, "was well defined, far-reaching and not open to question on account of its religious implications."[260] 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, which provided greater freedom for land sales, was enacted.

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 those islands. Land, he explained, remains vital to Wallisian status. The Polynesian 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 that 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, Justice Henne said, disputes are still settled by the chieftainship, with the king as the final authority. He can settle the matter, but then can change his mind and start all over again, so land disputes sometimes never reach a final resolution. 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, who frequently cannot go forward with infrastructure development because land litigation remains unresolved.[261]

French settlement in New Caledonia has created somewhat different land problems. 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

[259]R. Calinaud, "Presentation" (Ninth South Pacific Judicial Conference, Papeete, Tahiti, French Polynesia, May 21–24, 1991).

[260]Ibid.

[261]M. Bernard Henne, "Presentation" (Ninth Pacific Judicial Conference, Papeete, Tahiti, French Polynesia, May 21–24, 1991).

traditionally resolved.[262] 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. Kanaks viewed themselves as belonging to a specific piece of land, not that the land belonged to them. The land was related to 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 to land by Europeans 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 Kanaks' attitudes toward the land and the traditional boundaries of the former Kanak kingdoms. Under this regime, until the Kanaks became French citizens in 1947 they could leave reserve lands only by getting a special permit. 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.[263]

M.G. Lucazeau, procureur général 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, because of the difficulty in reconciling custom with the court procedure open to litigants.[264]

At the 2007 conference in Tonga, President Olivier Aimot explained that the customs of Pacific island communities may sometimes "clash" with "the very individualist nature of the

[262]Fote Trolue and Hilaire Gire, "Presentation" (Ninth Pacific Judicial Conference, Papeete, Tahiti, French Polynesia, May 21–24, 1991).

[263]Ibid.

[264]M.G. Lucazeau, "Presentation" (Ninth South Pacific Judicial Conference, Papeete, Tahiti, French Polynesia, May 21–24, 1991).

Universal Declaration of Human Rights."[265] 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."[266] 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, where Judge Aimot served in the late 1970s, the chiefs undertook both executive and judicial functions because "all justice comes from the king who, himself, holds it from God."[267] 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."[268] 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."[269]

As a formal matter, customary law cannot be invoked to resolve disputes in French Polynesia, where French law applies just as it does in France,[270] but in New Caledonia, custom can be invoked in disputes among the Kanaks, particularly

[265]Olivier Aimot, "The Bangalore Principles of Judicial Conduct," 7.

[266]Ibid., 11.

[267]Ibid., 10.

[268]Ibid., 11.

[269]Ibid.

[270]French legal tradition has tended to reject custom as it has tried to centralize its polity. "Custom? For Montesquieu, it was the 'reasoning of fools,' and the revolutionary legislator, like our current law manuals, sought to effect it as a source of the law." Norbert Rouland, "Custom and the Law," in *Custom and the Law*, ed. Paul de Deckker and Jean-Yves Faberon (Canberra, 2001), 1.

> President Aimot has explained that even though custom cannot be used as a source of law in French Polynesia, the state of mind of the Polynesians is different from that of the Europeans, so the application of the law is not the same. The feeling for the land is much stronger, for example, and that must be taken into account. Even within French Polynesia, there are differences between Tahiti and the small islands of the Tuamotu, and between the Americanized island of Bora Bora and the traditional island of Rapa (Australes).
>
> Olivier Aimot, "Customary Legal Proceedings in Wallis and Futuna," in *Custom and the Law*, 156.

with regard to disputes brought to the custom councils involving land ownership.[271] In Wallis and Futuna, the laws adopted in 1961 state that the customs must be respected as long as they are not opposed to the general principles of French law.[272] Traditional dispute-resolution procedures are still utilized in Wallis and Futuna, including the exchange of gifts as part of the process:

> Although theoretically not compulsory it is strongly recommended that the parties [to a dispute] prepare an umu (traditional meal, consisting of taro or yam, kape, and cooked pork), accompanied either by a kava root or a wrapped bottle. To present the gifts, they are expected to wear traditional attire. The members of the fono [a gathering held every Sunday after mass, attended by the district chief, ministers, and village chiefs] hear the parties and, if it is likely to facilitate a solution, they will go to the places concerned.[273]

After Vanuatu gained its independence from France and the United Kingdom in 1980, it adopted a constitution that "mandates that custom is the principal source in the development of an appropriate dispute resolution methodology for Vanuatu" and that "[c]ustomary law shall continue to have effect as part of the law of the Republic."[274] Tonga does not recognize cus-

[271]New Caledonia Organic Law of 1999, Title I.

[272]*Wallis and Futuna Laws of 1961*, art. 3; see generally Olivier Aimot, "Customary Legal Proceedings in Wallis and Futuna," in *Custom and the Law*, 156–69. Aimot wrote,

> To sum up, customary authority [in Wallis and Futuna] was almost in the legal domain until 1933, then it was separated but remained largely dominant from 1933-61, when it became limited, at least in the texts if not in fact, to a section of the civil domain. Since then, the ways it is implemented have been contested increasingly often by those to whom it applies.
>
> This long confrontation between slowly weakening customary authority and the authority of the Republic [of France], would lead us to conclude that common law is gradually replacing local law. Paradoxically, this is taking place at a time when the rights of peoples to their own cultural identity is increasingly being recognised.

Ibid., 159.

[273]Ibid., 161.

[274]Vincent Lunabek, "Developing Culturally-Appropriate Dispute Resolution Procedures: The Vanuatu Experience" (Fifteenth Pacific Judicial Conference, Madang, Papua New Guinea, June 23–27, 2003) (referring to articles 51 and 95[3] of the Vanuatu Constitution).

tomary law, as a formal matter, because it never lost its sovereignty completely and has been free to develop its own law.[275]

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 one hundred coconuts in an assigned area. If the Palauan complied with this requirement, he was recognized as owner of the land on which the trees were planted. The Japanese, after World War I, expanded the concepts of individual ownership and of 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 and continues to be used by the courts in Palau.[276]

After World War II, the U.S. 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 the process has not been completed.

One of the problems has been the breakdown of the traditional dispute-resolution system, so that people now tend to 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 computerized system for land registration. A third problem has been the large volume of cases. Palau contains 18,000 parcels of land and some 15,000 people, with another 5,000 Palauans living outside the country. 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 sixteen Palauan states.[277]

Edward C. King, chief justice of the Federated States of Micronesia, was skeptical about the real value of the Japanese land books, which he said were used by the courts as a safety

[275]Attorney general of Tonga, "Welcoming Address" (Seventeenth Pacific Judicial Conference, Nuku'alofa, Tonga, Nov. 7, 2007).

[276]Nakamura, "Presentation" (Ninth South Pacific Judicial Conference, Papeete, Tahiti, French Polynesia, May 21–24, 1991).

[277]Ibid.

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.[278]

Grover Rees III, 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 neighbors better, to the mutual satisfaction of all, if they kept the matter out of the courts and out of the registrar's office.[279] Registration has been very slow, according to 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 on the mediation process as nothing more than a formality.[280]

Fariq Muhammad, chief justice of Kiribati, said Kiribati had 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.[281]

Fiji Chief Justice Sir Timoci Tuivaga 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.[282]

In Papua New Guinea, 97 percent of all land is still in the hands of the indigenous people, said Sir Buri Kidu, chief justice of Papua New Guinea, but mining rights remain in dispute. The British system adopted by Papua New Guinea gave the government ownership of all mineral resources, even though the land itself belonged to the customary owners. This division was in direct conflict with customary and traditional practices.[283] 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

[278]"Discussion" (Ninth South Pacific Judicial Conference, Papeete, Tahiti, French Polynesia, May 21–24, 1991).

[279]Ibid.

[280]Ibid.

[281]Ibid.

[282]Ibid.

[283]Ibid.

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, 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 created conflicts, 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.[284]

The interaction between customary and Western law presents itself in numerous other ways. The Western Samoan chief justice explained at the First Conference in 1972 that Western 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.[285] 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 1975 conference 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

[284]John Toohey, "Presentation" (Ninth South Pacific Judicial Conference, Papeete, Tahiti, French Polynesia, May 21–24, 1991). Justice Toohey's paper was delivered a year before the epoch-making decision of *Mabo and Others v. Queensland (No. 2)* [1992] HCA 23; (1992) 175 CLR 1, in which the High Court of Australia held that sovereignty did not displace the right of indigenous people to possession, occupation, use, and enjoyment of land to which they had maintained continuous traditional connection since before European occupation.

[285]Barrie C. Spring, "The Judicial System of Western Samoa, Including Its Relationship to the Executive and the System of Legal Education" (First South Pacific Judicial Conference, Samoa, Jan. 10–13, 1972).

what the relevant custom in a particular case might be.[286] 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.[287] Sir 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. Fiji has used professional assessors, a select group of thirty-five citizens, who sit in panels of three or five in murder trials to give advice to a single judge.[288]

Also in 1975, the U.S. Court of Appeals for the District of Columbia considered the applicability of the Sixth Amendment (entitling defendants to jury trials) to American Samoa,[289] and instructed the U.S. District Court to determine whether the jury system was "practicable" in light of "the Samoan mores and *matai* culture with its strict societal distinctions."[290] William B. Bryant, chief judge of the U.S. District Court for the District of Columbia, received testimony from eight Samoans, four U.S. government officials, and noted anthropologist Margaret Mead. None of those testifying wanted the jury system to be implemented immediately,[291] but Judge Bryant nonetheless ruled that it should be introduced right away, in light of the educational advancements in American Samoa, the "adaptability and flexibility" of Samoan society, and the islanders' ability to accommodate and assimilate U.S legal institutions.[292]

[286]"Discussion" (Second South Pacific Judicial Conference, Honolulu, Hawai'i, July 16–19, 1975).

[287]Ibid.

[288]Gerard Winter, "Discussion" (Seventeenth Pacific Judicial Conference, Nuku'alofa, Tonga, Nov. 7, 2007).

[289]The U.S. Supreme Court ruled in 1902 that the Sixth Amendment right to a jury trial was not among the "fundamental" constitutional rights that extended to all territories under U.S. sovereignty. *Territory of Hawai'i v. Mankichi*, 190 U.S. 197, 217–18 (1902) (permitting a conviction of a defendant for manslaughter by a 9–3 vote).

[290]*King v. Morton*, 520 F.2d 1140 (D.C.Cir. 1975).

[291]Arnold H. Leibowitz, "American Samoa: Decline of a Culture," *California Western International Law Journal* 10 (1980): 220, 262–63 (citing from the record).

[292]*King v. Andrus*, 452 F.Supp. 11 (D.D.C. 1977); Timothy S. Robinson, "Federal Judge Approves Jury Trials for Samoa," *Washington Post*, Jan. 4, 1978, A8. See generally Stanley K. Laughlin, Jr., "Cultural Preservation in Pacific Islands: Still a Good Idea—and Constitutional," *University of Hawaii Law Review* 27 (2005): 331–75.

Juries are also now used in, for example, American Samoa, the Cook Islands, the Republic of the Marshall Islands, Guam, and the Commonwealth of the Northern Mariana Islands (if the defendant faces a potential punishment of five years' imprisonment or more or a $2,000 fine),[293] and Palau recently adopted a constitutional amendment to start utilizing juries in serious criminal cases.[294]

The Seventh Conference in Auckland 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.[295] 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 in 1997, FSM Chief Justice Andon Amaraich explained that the nature of island life involves repeated daily contacts and close relationships of the residents, which require an emphasis on conflict avoidance and the promotion of harmony.[296] In Micronesia, "[d]ecisions on a small scale having to do with living arrangements in a village, clan, or in some societal subgroup" have traditionally been left to traditional leaders, but the more formal adversarial court system was adopted in the 1975 FSM constitution "to protect the rights of the individual against encroachment by the various levels of government in the FSM" and to "define the roles of the various branches of government," decisions that "are not well suited to the traditional mechanisms of conflict resolution."[297] The "adversarial,

[293]See *Commonwealth of the Northern Mariana Islands v. Atalig*, 723 F.2d 682, 684 (9th Cir. 1984).

[294]The provision adopted by the Palau voters after the Second Palau Constitutional Convention says,

> The Olbiil Era Kelulau [the Palau Legislature] may provide for a trial by jury in criminal and civil cases, as prescribed by law; provided, however, that where a criminal offense is alleged to have been committed after December 31, 2009, and where such criminal offense is punishable by a sentence of imprisonment of twelve (12) years or more, the accused shall have the right to a trial by jury, as prescribed by law.

[295]"Discussion" (Seventh South Pacific Judicial Conference, Auckland, NZ, March 3–5, 1987).

[296]Andon L. Amaraich, "Adapting a Western System of Jurisprudence to an Emerging Island Nation: The Micronesian Experience" (Twelfth South Pacific Judicial Conference, Sydney, Australia, April 13–18, 1997), 98.

[297]Ibid., 96.

rule oriented, system of jurisprudence" has also been adopted to promote economic development, "in order to give those who wish to do business in our country the predictability of outcome needed by business development activities."[298] The adversarial system has necessarily been adapted, however, because a winner-take-all system of deciding disputes does not always work, and a system of mediation or equitable balancing (where each side in a land dispute, for instance, receives "some equitable share of the disputed property") is seen as more culturally appropriate.[299]

Numerous Pacific courts have struggled with how an apology ceremony should affect a subsequent criminal prosecution and sentencing. The FSM Supreme Court has ruled that prosecutions should not be dismissed just because an apology has taken place, but that "the appropriate way to take the traditional apology into account was at the time of sentencing."[300] Similarly, if an assailant has received a traditional punishment, that should be considered at the time of sentencing, but only if the punishment was "carried out as required by tradition and custom" and not as "the result of mere vigilantism."[301]

Custom and tradition, the court noted, are always challenging to apply because "they are not written or codified."

> Customs and traditions are revealed to us through human practice and oral description and must always be elucidated through the oral testimony of witnesses. They are almost never the subject of agreement and thus the court must weigh the conflicting testimony of witnesses in order to reach a decision about their effect in any particular case. Customs and traditions also vary from state to state and even from island to island, making it extra difficult for uniform application. Our courts have found that the application of tradition and customs are inappropriate in cases having to do with transactions and behavior which are distinctively non-traditional and non-local, such as cases involving business licenses and contracts, foreign shipping agreements and international extraditions.

[298]Ibid.,105.

[299]Ibid.,99.

[300]Ibid.,101 (referring to the decisions of the FSM Supreme Court in *FSM v. Mudong* and *FSM v. Benjamin*).

[301]Ibid.,103 (referring to the decision of the FSM Supreme Court in *Tammed v. FSM*).

> We are not done with the tasks before us. Our job is continual, and we must always keep in mind those two goals of promotion of economic endeavors, and protection of customs and tradition, and balance our decisions so that one does not become eclipsed by the other.[302]

CONCLUSION

That these Pacific Judicial Conferences are continuing regularly after forty years is the strongest indication that they have proven their worth. Great progress has been made in enabling the judiciaries of the small islands of the Pacific to keep abreast of judicial developments across the region, and support has been provided to isolated judiciaries under stress. Some topics reoccur regularly, however, indicating that some important problems remain.

At the Fiji Conference in 1993, Gordon Ward, then chief justice of Tonga, raised some fundamental questions that still hang over these conferences. How big should each conference be? Should the number of judges from each jurisdiction be limited? To what extent should persons who are not judges be invited? Will comments made at the conference be totally confidential, or will they appear eventually in academic conferences or lecture notes? Should the media be allowed to report on anything more than the opening speeches and the social events? Should the conference be structured with formal presentations, or should there be more emphasis on discussions? Should the conference remain a large forum, or should there be subgroups based on the size of the country or the origin of its legal system? Are the conferences useful to the judges from the larger countries (Australia, New Zealand, and the United States) as well as to the judges from the smaller countries? Will the conferences continue indefinitely? What are the future goals of the conferences?

[302]Ibid., 106–107. It can also be noted that Hawai'i Supreme Court Chief Justice William S. Richardson, who was an active participant in the early conferences, sought during his tenure to meld the legal concepts employed by Hawaiian communities before Western contact with the very different Western legal values that were brought to Hawai'i, in cases such as *In re Application of Ashford*, 50 Hawai'i 314, 440 P.2d 76 (1968) (beach access); *McBryde Sugar Co. v. Robinson*, 54 Hawai'i 174, 504 P.2d 1330 (1973), affirmed on rehearing, 55 Hawai'i 260, 517 P.2d 26 (1973) (water rights); *County of Hawaii v. Sotomura*, 55 Hawai'i 176, 517 P.2d 57 (1973) (beach access); *State v. Zimring*, 58 Hawai'i 106, 566 P.2d 725 (1977) (public rights to land created by volcanic lava); *Robinson v. Ariyoshi*, 65 Hawai'i 641, 568 P.2d 287 (1982) (water rights); and *Kalipi v. Hawaiian Trust Co., Ltd.*, 66 Hawai'i 1, 656 P.2d 745 (1982) (customary and traditional access and gathering rights).

Should there be a secretariat or headquarters? What subjects should be addressed at future conferences?[303]

These topics will continue to be addressed at forthcoming conferences. After the Nineteenth Pacific Judicial Conference in Guam in November 2010, the twentieth is scheduled for 2012 in the Solomon Islands. The judges from small island communities have benefited from having a chance to think deeply about the appropriate role of the judicial branch; they have learned from one another and have gained strength in their judicial roles from the friendships developed at these conferences.

[303]Gordon Ward, "Presentation" (Tenth South Pacific Judicial Conference, Yanuca Island, Viti Levu, Fiji, May 23–28, 1993).