

CAN A MODEL FOR JUDICIAL ACCOUNTABILITY BE DEVELOPED IN THE PACIFIC?

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The best way to get rid of corruption in the judicial system is to appoint honest men and women as judges, give them a good (but not enormous) salary and comfortable conditions so that they are not tempted to corruption of any kind.

Looking round the conference I trust we all are honest men and women – and hopefully our salaries and conditions are adequate. Does anyone dispute that?

One tends to see oneself blameless. The problem is always with others!

It doesn't always happen that the best people are appointed and, let's face it, temptation to wrongdoing may not be far away from any of us. We pray not to fall: our prayers may be answered but we are not the only ones.

Once corruption comes in, it becomes endemic. I remember a new Commissioner of Police for New South Wales, a Englishman, Peter Ryan, being appointed. Many NSW police had for years been corrupt. Commissioner Ryan said on his appointment that once corruption gets into a system it takes years to get rid of it. Peter Ryan has long gone now but corrupt police are still being uncovered.

At least occasional acts of wrongdoing within our judicial systems must be accepted. Personally I am happy to be able to say I have not come across it either in South Australia where I sat for 18 years nor in Kiribati nor, so far, in Nauru (where my experience is much shorter). Cliff Wallace when he invited me to speak referred me to a paper he prepared in 1998. I have read it with interest and respect. Cliff wrote:-

Judicial corruption certainly exists; I know of no country that is completely free of corruption, with its insidious effect of undermining the rule of law.

Occasional act of wrongdoing will occur. We must prepare to deal with them.

Nowadays we are concerned more with corruption than with any other kind of judicial wrongdoing. No activity seems to be free of corruption: not only judicial systems but other branches of government, business and commerce as well.

The latest edition I have of the Concise Oxford Dictionary defines "corrupt" as being "willing to act dishonestly in return for money or personal gain" and "corruption" as "the state of being corrupt".

Transparency international defines corruption as "the misuse of entrusted power for private gain". We all, I suggest, may agree with the definitions. We know what corruption is and I'm sure each of us tries in his own jurisdiction to guard against it.

In 2002 I was in Cyprus for a Judicial Colloquium on Combating Corruption within the Judiciary, organized by the Commonwealth Secretariat. A valuable experience. It converted me to codes of conduct for judicial officers. There had been no code in Kiribati up to then but before I left Cyprus I sat down and drafted one. I based it on notes I collected during the Colloquium and expect it is very similar to codes in most jurisdictions.

All codes are inevitably full of motherhood statements. I quote only one paragraph from the Kiribati Code:

A judicial officer does not accept any gift, favour or benefit of whatsoever nature which may possibly influence him or her in the execution of official duties or create the possible impression that this is the case.

I haven't come across a code in Nauru and this conference will give me a push to search and, if there be none, to prepare one.

Besides the kinds of codes of conduct I have mentioned the Australasian Institute of Judicial Administration published for the Council of Chief Justices a "Guide to Judicial Conduct". I have a copy with me but need not refer to it.

It is easy to get as far as this – state the problem and tell people the right way to act. Much more difficult to know what to do about it when they don't.

The Commonwealth Principles on the Accountability of and the Relationship between the Three Branches of Government (the Latimer House Guidelines) gives the beginning of a clue. Under the heading "Accountability Mechanisms":-

Discipline

- (i) In cases where a judge is at risk of removal, the judge must have the right to be fully informed of the charges, to be represented at a hearing, to make a full defence and to be judged by an independent and impartial tribunal. Grounds for removal of a judge should be limited to:
 - (A) inability to perform judicial duties and
 - (B) serious misconduct.
- (ii) In all other matters, the process should be conducted by the chief judge of the courts;
- (iii) Disciplinary procedures should not include the public admonition of judges. Any admonitions should be delivered in private, by the chief judge.

Each of our jurisdictions has its own way of disciplining the subordinate judiciary. In Kiribati I must admit there is no formal procedure. If I ever found it I would admonish at least and dismiss at most the person involved: if appropriate, refer the matter to the Attorney General for prosecution. I'm not concerned with that level. I suggest that discipline at the level of the subordinate judiciary is best left to separate jurisdictions. Internal arrangements are peculiar to each jurisdiction. I doubt if we could devise a model which would be appropriate to all.

I suggest what we should be considering is the senior level – our level – the level of chief justices and judges of superior courts. Cliff in his letter of invitation asked for an answer to the question, "Can a model be developed in the Pacific?" The answer is "Yes".

My strong suggestion is that our aim should be to have one body based on peer review, to consider charges of judicial wrongdoing by senior members of the judiciary in Pacific countries. I'm no good at detail and anyway at this stage it would be a waste of time to attempt to go into detail. What I have in mind is a group – I use a non-threatening word – of, say, three judges each 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.

I acknowledge the most challenging difficulties in the way of setting this up. First we here would have to agree the suggestion is worth pursuing. Then we would have to persuade the politicians in our respective countries to support us. That would be more difficult! Probably mean amendments to national constitutions.

I remember when I had not been long in Kiribati, brashly suggesting to the then President it would be a good idea if there were one common final Court of Appeal for all Pacific jurisdictions. His reaction was adverse. "We've only just got our independence. We are not going to give any of it up". I didn't pursue the matter.

There is a precedent for a common court. In the early 1960's, still in colonial times, the High Court of the Western Pacific was established by the Western Pacific (Courts) Order in Council 1961 to have jurisdiction in the then Gilbert and Ellice Islands, the then New Hebrides, the Solomon Islands and Tonga. It seems to have lasted until respective independence. Some of you may know more about it than I do. The High Court (Civil Procedure) Rules came into effect in 1964. Kiribati uses the same Rules unaltered still. The Rules are identical to what we called in South Australia the 1936 Rules: identical because they are the then English Rules. I was brought up on them and feel very comfortable using them still in Kiribati. The great advantage which we lost later was it meant we could find our law in procedural matters in the Annual Practice, the White Book, and take advantage of the learning and experience of English judges and masters.

We must be careful, though. Reference to the High Court of the Western Pacific could work both ways. It could work against the proposal in that it would mean countries taking a step back and giving up power: only a tiny bit of power but still, may be a stumbling block for politicians. It would work for the proposal as an example of what can be done to cooperate with each other and have the benefit of views other than local.

How should we go about it? First there need be consensus among us.

My experience has been in Commonwealth countries as my references shrew but there is no reason why it couldn't work in all common law jurisdictions in the Pacific whether members of the Commonwealth or not and may be also in jurisdictions based on the Code as well.

If there were consensus among us, the next step would be to approach the Pacific Forum Secretariat and get the Forum officers on side. Some one or more of us should talk to Greg Urwin, the Secretary General.

If we had the support of the Secretariat the next step would be to persuade the Forum members.

I do not under estimate the difficulties or the time it would take. Yet I suggest it is worth a try.

This conference itself is a sign of friendship and cooperation between our various jurisdictions. We are all small. We should work together more and more and where we properly can pool our resources. This would be a step forward in the process.

What do you think?

