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CMJA, Uganda House, 58-59 Trafalgar Square, London WC2N 5DX, U-K. Tel: +44 207 976 1007
Fax: +44 207 976 2394  Email: info@cmja.org website: www.cmja.org
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EDITORIAL

Through this editorial, I would firstly like to bring to the attention of readers the next Conference of the Commonwealth Magistrates’ and Judges’ Association (CMJA) which will be held in Livingstone, Zambia from 7-11 September 2014. Registration for this Conference, which is set to coincide with the 50th Anniversary of Zambia’s independence, is open at www.cmja.org. The theme is “Judicial Independence: The Challenges of the Modern Era”. The principle of judicial independence is particularly topical, in view of challenges to this principle in some Commonwealth countries. In this context, I would like to mention, in particular, the recent events in Nauru, whereby the visa of the Chief Justice was cancelled and the Resident Magistrate was deported in defiance of court orders to the contrary. These events give rise to serious concerns over respect for the principle of judicial independence.

Regular readers will recall that in last year’s issue of the CJJ (Vol 21, No 1), in my editorial, I had referred to the possibility of the journal being published in electronic format if no suitable sponsor was found. In this respect, I would note that while a temporary funding source has been identified, and we are truly grateful for this, in the longer term, it appears likely that this journal will have to start being published exclusively in electronic format especially as postage costs have increased exponentially over the last few years. Moving towards an electronic format for the Journal will ensure the journal remains sustainable and cost-effective. Moreover, it is believed that internet access has increased significantly across the Commonwealth and our readers would be able to access and download the journal through the CMJA website. If you have any views on this subject, we would like to hear from you. Please contact us at info@cmja.org.

In this issue, we open with an article by Justice John A. Logan, who makes the case for a common, regional, appellate court in the South Pacific. This is followed by an article by David Roberts QC, who presents a brief overview of the judicial system in the United States of America, focusing on the selection of judges and the elective systems which are sometimes used in this context. Next, Justice Michael Beloff writes on the relationship between the judiciary and journalists, in the context of the principles of open justice and freedom of expression. In this issue, we also have an article by Justice Ambeng Kandakasi, who makes the argument for greater use of alternative forms of dispute resolution (ADR), in particular, mediation.

The CJJ has once again collaborated with the Law Reports of the Commonwealth (LRC) to publish two judgments, both relating to contempt of court, namely (i) Siemer v Solicitor General and (ii) R v Swaziland Independent Publishers (PTY) Ltd And Another. In this respect, I wish to renew our thanks to Dr Peter E. Slinn both in his capacity as chairperson of the Editorial Board of this Journal and as general editor, together with Prof. James S. Read, of the LRC, for allowing us to publish these law reports. I would also like to express my appreciation to the President of the CMJA, the Hon. Justice John Vertes and to Dr Karen Brewer, Secretary General, for their ongoing support of the Journal.
A REGIONAL FINAL COURT OF APPEAL FOR THE SOUTH PACIFIC?


This article is based on a paper presented at the 21st Pacific Judicial Conference, New Zealand, May 2014.

Abstract: In this article, the author draws on his experiences in practice and later in judicial service in, or in relation to, the South Pacific, to make the case for a common, regional, appellate court (Regional Court) in the South Pacific. In this context, he provides a historical overview of the development of the idea of a Commonwealth Court of Appeal. He notes that such a Regional Court would promote an efficient, progressive, coherent development of the law by affording a common solution to common problems, in a way that judicial insularity may not. This matter may be gaining in importance in view of the inter-connected world in which we live. A Regional Court may serve to reduce the prospect of divergent lines of authority developing.

Keywords: Regional Court in the South Pacific – Commonwealth Court of Appeal – judicial coherence – judicial insularity – fragmentation

Introduction

In his Narrative of the surveying voyages of His Majesty’s Ships Adventure and Beagle, Charles Darwin, the great British naturalist and geologist opined of the finches found in the Galapagos Islands by him and others and later identified by the famous English ornithologist, John Gould:

Although the species are thus peculiar to the archipelago, yet nearly all in their general structure, habits, colour of feathers, and even tone of voice, are strictly American.

A 21st Century voyager, venturing further west into the Pacific and collecting samples not of finches but of our legal systems might well observe:

Although the judicial species are thus peculiar to each island nation, yet nearly all in their general structure and habits, are strictly English common law in origin.

Darwin’s reflections upon the specimens that he and others had collected would come to inspire his theory of natural selection and survival of the fittest.

The inspiration for this paper is derived from the recollection of Darwin’s findings and from experiences in practice and later in judicial service in or in relation to the South Pacific, pertinent examples from which I shall shortly relate. This has prompted a growing concern on my part that, in the absence of a common, regional ultimate appellate court (Regional Court), the peoples of the South Pacific are at risk of a form of legal Darwinism to the detriment of their mutual prosperity and cohesion.

There is nothing new about the notion of a Regional Court.

In 1980, in her article, A Regional Court of Appeal for the South Pacific (Pacific Perspective, (1980) Vol 9, No 2. p 1), Dr Mere Pulea traced the idea to the first of the Pacific Judicial Conferences, held in Western and Eastern Samoa in 1972. There, at a session chaired by Sir Garfield Barwick, then Chief Justice of Australia, Mr Justice Tikaram of Fiji spoke on the desirability and feasibility of a Regional Court. According to Dr Pulea, that conference agreed that the subject “should be further pursued with a view to exploring the possibility of establishing a peripatetic Court of Appeal covering the region” but she observed that, to date, little work had been done in that regard. Dr Pulea also related how, in 1974, at the first Fiji Law Convention, the establishment of a Regional Court and a related, consequential abolition of appeals to the Judicial Committee of the Privy Council (Judicial Committee) was advocated, only to be rejected by Australia and New Zealand on the grounds that Independent Island States would not accept outsiders on such an Appeal Bench.
Even if it were a soundly based ground for rejection at the time, and I am not qualified to speak on that subject, it is not so now. On that subject, I am qualified to speak, if only because I am living proof of an example of the acceptance of an “outsider”. There are many other contemporary examples of such acceptance by the Independent Island States.

Even before these events, Sir Jocelyn Bodilly, when Chief Justice of the High Court of the Western Pacific, proposed not only the creation of a common superior court of general jurisdiction and Court of Appeal for all of the British islands in the Pacific but also a common admission of legal practitioners. This proposal, too, did not meet with contemporary acceptance. If, as well he might have been at that time, Sir Jocelyn were anticipating what might follow after those islands became independent and desiring to put in place an alternative beforehand, his proposal was truly prescient.

In 1966, when Sir Jocelyn voiced this proposal, the Judicial Committee was the ultimate appellate forum for all of the British or, like Australia and New Zealand, once British, islands in the Pacific, including their then external territories. Presumably, that body would have undertaken a like role for the Court of Appeal and superior court which he had in mind. Even then, Samoa (or Western Samoa as it was then known) would have needed to make its own arrangements to utilise the Judicial Committee, because it had become independent in 1962 with the cessation of New Zealand’s trusteeship, though it remained a member of the Commonwealth.

In 1966, the Judicial Committee’s role as an ultimate appellate forum extended considerably beyond the Pacific, even after the progressive cessation of appeals from Canada, India, Pakistan and South Africa. The year before, following the canvassing of the subject at both Commonwealth Prime Ministers’ meetings and Commonwealth Law Conferences over the decade beforehand, the then Lord Chancellor, Lord Gardiner, made an offer at the Commonwealth Law Conference in Sydney in 1965 to the effect that, if there were sufficient support for a Commonwealth Court of Appeal from other Commonwealth countries, the United Kingdom would be prepared to consider the cessation of appeals to the Judicial Committee of the House of Lords and, instead, direct appeals to that Commonwealth Court of Appeal.

This proposal, superficially radical, was, at the same time and like the common law itself, a logical evolution of an existing position to meet changed societal and international circumstances. It met with no success but it had a number of distinguished and insightful supporters.

The origin of the idea for a Commonwealth Court of Appeal may be traced to a speech delivered in the House of Commons in 1953 by Mr Hector Hughes, Labour Member for Aberdeen North, in the debate in reply to the Speech from the Throne at the Opening of Parliament. Hughes made reference to the then unrest in Kenya, the Central African Federation and Nigeria and to the suspension of the constitution in British Guiana, all then British colonies. He highlighted that each of these was a potential dominion, closely inter-related by the rule of law. He stated:

In the world as it is today, more than ever the rule of law is of paramount importance. Certainty as to what is the law should be world-wide and therefore, in my submission, exposition of that law at the highest level is essential. The unique elasticity, versatility and extent throughout the world of our Commonwealth of Nations makes it possible to found a Commonwealth court of widespread jurisdiction without any, except theoretical, derogation from the sovereignty of the founding nations. Such a court could be, and would be, a watchful guardian of human rights and an expositer of scientific law at the highest level within, and with the goodwill of, all the sovereign nations of the Commonwealth. The sovereign nations of the Commonwealth are all completely free to make treaties and to enact legislation for this purpose if it seems to them useful so to do.

For Hughes to voice this idea constituted a conversion akin to that of Saul on the road to Damascus. For, in 1931, at the time of the Statute of Westminster, Hughes had authored a book in which he strongly supported the concept of Dominion judicial sovereignty. A generation later, he had come to the view that judicial sovereignty was not necessarily
incompatible with submission to the jurisdiction of an international court.

Also included in the supporters of a Commonwealth Court of Appeal was Sir Hartley Shawcross, a former Attorney-General of the United Kingdom. At the Commonwealth Law Conference in 1955, he advocated a Commonwealth Court of Appeal drawn from a panel of judges larger than that from which the Judicial Committee was then drawn so that the new court could be convened in Commonwealth countries other than the United Kingdom. He envisaged that the court could be comprised of two or three judges from the host country, together with two or three leading judges from elsewhere in the Commonwealth.

Sir Robert Menzies, also writing in the mid-1960’s and after his retirement as Prime Minister of Australia, did not envisage a Commonwealth Court of Appeal by name but he did promote a quite radical change to the then jurisdiction of the Judicial Committee. Referring to the provision in the Australian Constitution which restricted appeals to the Judicial Committee in inter se matters, save by a grant of leave by the High Court of Australia, Sir Robert stated that he could “see no reason why the Judicial Committee should have power to entertain an appeal from any (his emphasis) decision of the High Court of Australia on the interpretation of the Australian Constitution”. He continued:

In all other respects, I would preserve the power of the Privy Council to grant leave, in matters of common law and equity, and all matters (excluding constitutional questions) in which the decision is on a point of general interest and application in what we call ‘Common Law’ countries, which include not only Australia and New Zealand and the United States but also a considerable number of Commonwealth countries.

In these fields of law, broad uniformity of decision has positive value, to students, practitioners, and courts alike. A sort of central clearing-house is of advantage. If it disappeared, by the complete abolition of the Judicial Committee appeal, separate lines of decision would soon begin to emerge. Each country would in time develop its own body of principles, and could afford to ignore development elsewhere. Standard text-books, those invaluable adjuncts to practice which are now used in many countries, would be replaced by purely local productions. ‘Why not?’ you may ask. ‘Let’s be patriotic and have pride in ourselves!’

This is an engaging sentiment. But before we get carried away by it, we should remember that such great elements as the Common Law, though they began in the vicinity of Westminster Hall, are part of a common inheritance which has much to do (as I think), with true civilisation. To break this inheritance into fragments may please the immediate beneficiaries, but, before long, the estate will have gone.

How has the Judicial Committee’s position changed in relation to the Pacific since the mid-1960’s? The Judicial Committee still constitutes the ultimate appellate jurisdiction for some Pacific countries, each of which is a member of the Commonwealth. Of the countries of which HM The Queen is Head of State, these are the Cook Islands and Niue (each Associated States of New Zealand) and Tuvalu and, of the republics, Kiribati. It also exercises a like jurisdiction in respect of the remaining British Overseas Territory in the Pacific, the Pitcairn Islands.

Of the other Commonwealth countries in the Pacific, the position otherwise is a patchwork:

- **Australia** — New appeals to the Judicial Committee in matters arising under Federal law were abolished in 1968; all such appeals in 1975 and appeals under State law were abolished in 1986. The High Court of Australia has, ever since, been Australia’s ultimate appellate court. There are intermediate appellate courts in the Federal, State and Territory justice systems.

- **Papua New Guinea** — Appeals to the Judicial Committee were abolished in 1968 when an External Territory of Australia and not restored upon independence in 1975. The Supreme Court of Papua New Guinea, rotationally constituted by judges of the National Court, is the ultimate appellate court. There is no intermediate appellate court
• New Zealand — New appeals to the Judicial Committee were abolished in 2003. The Supreme Court of New Zealand is the ultimate appellate court. The Court of Appeal is the intermediate appellate court. The New Zealand Supreme Court is also the ultimate appellate court for Tokelau, an external territory of New Zealand.

• The Solomon Islands — Appeals ceased to the Judicial Committee on independence in 1978. The Court of Appeal of the Solomon Islands is the ultimate appellate court. There is no intermediate appellate court.

• Nauru — Immediately prior to independence on 1 January 1968, an appeal by leave lay to the Judicial Committee from the High Court of Australia. That court, in turn, had jurisdiction to grant leave to appeal and then to hear appeals from the then Court of Appeal of Nauru. After independence, an appeal from the Supreme Court of Nauru lay, initially, to a Full Court of that court constituted by not less than two judges. On and from 21 March 1977, pursuant to an agreement made between Nauru and Australia and related legislation adopting that agreement, provision was made for an appeal to the High Court of Australia from the Supreme Court of Nauru in its original jurisdiction, subject to reservations in that agreement.

• Fiji — Until the abrogation of the 1970 independence constitution following the 1987 military coups, an appeal lay to the Judicial Committee from the Fiji Court of Appeal. Eventually thereafter, a newly constituted Supreme Court of Fiji came to exercise ultimate appellate jurisdiction. The hitherto superior court of general jurisdiction known as the Supreme Court of Fiji was renamed the High Court of Fiji. Provision was made for an intermediate Court of Appeal to take appeals from the High Court.

• Samoa (formerly Western Samoa) — Ever since independence in 1962, Samoa’s ultimate appellate court has been the Court of Appeal, to which by leave of that court, an appeal lies from the Supreme Court. The latter is a superior court of general jurisdiction.

• Tonga — Appeals from Tonga’s superior court of general jurisdiction (except in respect of land disputes), the Supreme Court, lie to the Court of Appeal. There is no intermediate appellate court. The Privy Council of Tonga exercises an appellate jurisdiction from the Land Court, which deals with land disputes.

• Vanuatu — An appeal from Vanuatu’s superior court of general jurisdiction lies to the Court of Appeal, which is rotationally constituted from the Supreme Court judiciary. There is no intermediate appellate court.

Where has this left us in terms of the common estate of law to which Sir Robert Menzies referred? Well, some of it remains but it is ever increasingly being sacrificed or at risk of being sacrificed on the altar of parochialism and, perhaps also, judicial vanity.

I highlight this by examples drawn from personal experience in practice and in judicial office.

First, I offer an example of the benefits of the common estate of law.

On 25 September 1967, the Suva City Council acquired from Mr Mukta Ben and others (the owners) 20 acres of land on which the city council came to build a major power station. Even at the time, highest and best use of the land concerned was predictably rather more than the agricultural pursuits to which it had been put by the person from whom the owners had acquired it. The acquisition was undertaken by compulsory acquisition under an ordinance which became, after independence, the State Acquisition of Land Act (Fiji). The legislation followed a form which was found in the United Kingdom and in many British or former British colonies.

The owners, who were astute property investors and developers, were not pleased either by the acquisition itself or the amount of the compensation offered. After settlement negotiations failed, they instituted proceedings in the then Supreme Court of Fiji (now the High Court of Fiji) in respect of the acquisition.

What followed is one of the more dramatic examples why it can sometimes be wise, if only in hindsight, for a judge to resist a Siren-like call of the parties to split a case. The legality of the acquisition was heard as a
separate issue of law. That issue was ultimately
determined adversely to the owners by the
Judicial Committee in 1979. That left the issue
of compensation for trial. After what Fiji’s
substitute ultimate appellate court later came
to describe, with masterly understatement,
as a “series of vicissitudes” (four coups, the
retirement of the original trial judge and the
death in office of one successor) compensation
was determined in the Fiji High Court in 2004.
An appeal to the Court of Appeal by the city
council and then by the owners by special leave
to the Fiji Supreme Court followed. I appeared
for the owners upon the final resumption of
the trial in the High Court and in the Court
of Appeal. Though I settled the application for
special leave to appeal, I was appointed to the
Federal Court before that was heard.

On this occasion, the issue at ultimate
appellate level was whether the owners were
entitled to an award of compound interest on
the judicially assessed value of their land as
at its date of acquisition or only, as the Fiji
Court of Appeal had concluded, overturning
in this regard the conclusion of the trial judge,
an award of simple interest on that value.
The legislation was cast in general terms and
provided for an assessment of “compensation”
by the court.

The enduring worth of the common estate
of law is very much on display in the judge-
ment of the Fiji Supreme Court. Drawing
upon precedent from English courts, decisions
of the Judicial Committee in Canadian and
Hong Kong appeals and the High Court
of Australia, the court concluded that the
legislation empowered the awarding of
compound interest.

The Australian High Court decision concerned
was decided at a time when appeals from
that court lay to the Judicial Committee. The
judgements delivered in that Australian case
are replete with references to many cases
in which the language of the model United
Kingdom statute or analogues was considered
either by the courts of that country or, in
respect of analogous replications elsewhere
in British colonies or Dominions, the Judicial
Committee. Included in the latter is an
authority which emanated from India.

The judgment of the trial judge was restored
by the Fiji Supreme Court. I later applied the
Fiji Supreme Court’s judgement by analogy in
the Federal Court in deciding that a statutory
jurisdiction to award compensation in respect
of a breach by a trustee of a superannuation
fund extended to the awarding of compound
interest.

That Federal Court case also offers an
illustration of the risk of a sacrificing of the
common estate by the loss of what Sir Robert
Menzies described as a “central clearing-
house”. The Fiji Supreme Court’s judgement was
not reported. It almost certainly would have been
reported in the Appeal Cases had the appeal been
to the Judicial Committee. My knowledge of it,
and the authorities upon which it drew, came not
from counsel who appeared before me but from
a serendipitous personal association with the
case. Even prior to the last coup in Fiji, it would
have been unusual for counsel in Australia to
look to Fiji’s court system for precedent. It would
have been routine for counsel to look at the
Appeal Cases.

There are other advantages of a central
clearing-house. A land acquisition controversy,
even in a large Pacific country like Australia is
not a routine event. Even more infrequent is a
disposition by the parties to that controversy to
litigate that controversy to ultimate appellate
level. With a common clearing-house ultimate
appellate court, as the Judicial Committee
once was for many countries, its decision will
not just resolve the immediate controversy but
settle the question for all “feeder” jurisdictions
having analogous statutory provisions where
the same type of controversy may not yet have
arisen.

The “common estate” example offered by this
land acquisition controversy can be replicated
across all branches of the law.

In contrast, with jurisdictional insularity, the
existence of foreign authority resolving just
such a controversy as has appeared locally
may never become known, because however
distinguished the membership of that foreign
ultimate appellate court may be, its decisions
may not be a usual source of reference either
for the practising profession or academia.
The local controversy may thereby fester,
unnecessarily consuming the resources of the
parties and a national court system when
all the while an answer is sitting there in
the jurisprudence of another jurisdiction. A central clearing-house promotes, in a way jurisdictional insularity does not, an efficient, progressive, coherent development of the law by affording a common solution to common problems.

The provision of common solutions to common problems is of great benefit in the conduct of trade or commerce. In a federation such as Australia, we have much experience of those benefits from harmonised laws between States and of the cost and other burdens and disincentives for expansion presented by divergent State laws on the same subject. These same benefits and burdens attend international trade and commerce.

This, too, is no new subject. In his address to the Royal Commonwealth Society on 1 October 1962, Lord Spens, who was the last Chief Justice of British India and who was a member of the United Kingdom Parliament both before and after holding that office, emphasised the difficulties and inconvenience which divergence brought to the undertaking of trade and commerce.

The difficulties and inconvenience occasioned by divergence are not confined to the commercial.

In 2012, I was a member of a Full Court of the Federal Court before which came an appeal from the Queensland Supreme Court which, at the time, was invested with original Federal jurisdiction enabling that court to review the decision of a magistrate to issue a warrant for the surrender of an accused to New Zealand. The accused was a very elderly man charged in New Zealand with a number of indecency offences against minors dating back to the late 1950’s and early 1960’s. In reviewing the magistrate’s decision, the Queensland Supreme Court had given close attention to all of the factors which attend the extradition of a very elderly accused of, by then, lengthy Australian residence in respect of long ago alleged offences. We had little difficulty in concluding that, in this regard, the primary judge’s conclusion to confirm the surrender was one reasonably open on the evidence.

Also raised but only in passing before his Honour was whether it would, in terms of Australia’s extradition legislation, be “unjust, oppressive or too severe a punishment” to surrender the accused to New Zealand because some of the charges he faced were “representative” in nature. This issue had much greater prominence in the appeal than it did in the original jurisdiction and it was upon it that the outcome of the appeal came to turn.

Statutory intrusion apart, the practice of formulating representative charges is lawful in New Zealand but not in Australia. Australian High Court authority holds that such charges are objectionable on the basis that they entail latent ambiguity and have a tendency to embarrass an accused in the conduct of his or her defence. This, so the Australian line of authority holds, is because they compel an accused to meet a charge based on an uncertain number of occasions the proved occurrence of any one of which during the period alleged would constitute proof of that charge. There have been statutory modifications of this general law position in each country but we were concerned with the general law position. Obliged as we were to measure what was “unjust, oppressive or too severe a punishment” by Australian standards and bound by Australian High Court authority to hold that the practice of proffering such charges was objectionable, the Full Court decided, in the face of a continuing desire on the part of New Zealand to bring the accused to trial on all charges, to allow the appeal and to quash the decision to surrender the accused.

Not long after the Full Court’s judgement was published, a letter from one of the accused’s alleged victims, by then a woman in late middle age, arrived in chambers. Obviously at quite some emotional cost, she had assisted the New Zealand police with their investigation. She made known to me in no uncertain terms this and her angst that the accused would not be brought to trial. The jurisprudential merits or otherwise of representative charges were lost on her. I did no more than pass the letter to the court’s registrar for formal acknowledgement but the memory of it lingers in the present context.

Those jurisprudential merits may still have been lost on her had the propriety of the practice been resolved, one way or the other, by the Judicial Committee in the days when an appeal lay to it from each jurisdiction and when its decision bound the courts of each country. And the same would apply were
there a Regional Court. Had the divergence in authority been so resolved then either the representative charges would never have been included in those proffered or there could have been no question of concluding that an extradition which entailed the accused facing charges which included ones of this type was “unjust, oppressive or too severe a punishment”. Whichever jurisprudential point of view came to triumph at ultimate appellate level, the resultant inter-jurisdictional harmony would have meant that the accused was extradited.

The differences in authority on this subject as between Australia and New Zealand could hardly be attributed to different cultural values. There are arguments for and against the practice, as the authorities reveal but they are wholly jurisprudential.

Judicial service on Papua New Guinea’s ultimate appellate court, the Supreme Court has also brought with it reminders of divergences patent and latent which can occur in the absence of a “common clearing house”.

Independence for Papua New Guinea in 1975 brought with it by express constitutional provision an adoption, subject to exceptions set out in the PNG Constitution, of “the principles and rules that formed, immediately before Independence Day, the principles and rules of common law and equity in England”. In 1975, one might have thought, given this reference to the principles and rules of common law and equity in England, that the legal severance with Australian law effected by the PNG Constitution was more one of form than substance, given the provenance of the principles of the common law and equity as applied in Australia.

Patent recognition of subsequent divergence is offered by the legislative history of s 80 of the Judiciary Act 1903 (Aus), a key provision in respect of the exercise of Federal jurisdiction in Australia. At the time of Papua New Guinea’s independence, it provided, as it had since 1903:

80. So far as the laws of the Commonwealth are not applicable or so far as their provisions are insufficient to carry them into effect, or to provide adequate remedies or punishment, the common law of England as modified by the Constitution and by the statute law in force in the State in which the Court in which the jurisdiction is exercised is held shall, so far as it is applicable and not inconsistent with the Constitution and the laws of the Commonwealth, govern all Courts exercising federal jurisdiction in the exercise of their jurisdiction in civil and criminal matters.

[Emphasis added]

In 1988, s 80 was amended so as to replace the reference to the “common law of England” with a reference to “the common law in Australia”. The rationale for this amendment, as provided by the then Australian Attorney-General, The Hon Lionel Bowen MP was this:

57. The reference to the ‘common law of England’ is no longer appropriate because in some respects the common law in Australia has diverged from the common law of England.

Accordingly, section 80 is amended by changing the reference to the common law in Australia.

Why worry about this divergence from English common law? Did not the Sun set on the Empire long ago? Geopolitically, it did, but London remains the world’s leading financial centre. And the general law which governs transactions there is English common law.

Papua New Guinea’s National Court has a busy and lively judicial review jurisdiction. As in Australia, want of reasonableness in the exercise of a discretionary power can be a ground of review. But the fate since 1975 of Lord Greene’s admonition in Associated Provincial Picture Houses Ltd v Wednesbury Corporation (Wednesbury) that the ground was applicable in a strictly limited class of case has been different as between the United Kingdom and Australia. That fate is neatly and accurately described by the authors of a leading Australian text on administrative law in this way:

The English criticisms were of its restrictiveness, and its original strictness is now routinely reviled. The Australian criticisms were of Wednesbury’s temporary permissiveness. The result in Australia is that Wednesbury has now reverted to its
originally severe standard, and it also has a reduced field of operation.

In Papua New Guinea, *Wednesbury* is cited with approval in the Supreme Court for the proposition that the judicial review ground of unreasonableness is not made out unless the decision concerned is so unreasonable that no reasonable decision-maker could have made the decision.

The occasion has not yet arisen for the PNG Supreme Court to consider whether or not inspiration for a more liberal, proportionality based approach to this ground of review is to be found in the observation made in passing and without finally deciding the point by Lord Phillips, Schiemann and Dyson LJJ in *R (Association of British Civilian Internees: Far East Region) v Secretary of State for Defence* that, “we have difficulty in seeing what justification there now is for retaining the *Wednesbury* test”. Thus, the prospect of divergence is presently latent, rather than patent. In the way of things, an occasion for consideration of whether there is any difference in the reasonableness ground of review as between Papua New Guinea and Australia in light of Papua New Guinea’s express constitutional provision will arise. That occasion is fraught with the potential for the basis for judicial review on this ground to differ between two nations with a common border, a common legal heritage and ever increasing trade and investment ties.

Administrative law offers another example of latent inter-jurisdictional divergence in the Pacific. Actual bias aside, the test for disqualification for bias is whether there is a “real danger” of bias. In Australia, the test is differently formulated, “reasonable apprehension of bias”. This difference is grounded not just out of concern for the reputation of the judicial or administrative officer involved but because of a view that the “real danger” formulation neither makes it sufficiently clear that all that is needed for disqualification is a possibility rather than a probability of bias, nor that that possibility is to be measured by the reasonable view of a third party.

In the course of the exercise of its United Kingdom professional disciplinary appellate jurisdiction, the Judicial Committee has noted this difference but found it unnecessary to resolve it in the circumstances of the particular case, because, on either formulation of the test, which it opined “may not reflect any basic difference of approach”, a case for disqualification for bias was not made out on the facts.” For Papua New Guinea, this reticence on the part of the Judicial Committee in respect of the correct English common law position may be serendipitous. That is because, to date, the PNG Supreme Court” has been content to adopt the Australian formulation of the test without being forced to consider whether, in light of the PNG Constitution, the test should be as formulated in the United Kingdom.

As with the propriety or otherwise of representative charges, these administrative law divergences are wholly jurisprudential in origin, not cultural. That is not to deny the merits either way of the lines of authority which have developed on these subjects, only to highlight by example what occurs in the absence of a common clearing-house.

The detrimental effects of divergence were, as I have highlighted, well recognised half a century ago. Today they are even more acute. In the 21st century, we in the Pacific are connected as never before both with each other and with the world beyond. This is not just because of improvements in and the reduced cost and greater availability of transportation for both persons and goods. More importantly, advances in communications, particularly electronic communications, have already and will, ever increasingly, transform international trade and commerce and challenge national sovereignty.

“E commerce”, as it is known, makes it possible, for example, for the people of an increasingly well educated, English speaking workforce in a developing Pacific island nation with reliable telecommunications and internet links effectively to compete with Australia or New Zealand or beyond in relation to call centre business, banking or financial services or professional advisory or support services. I have experienced this phenomenon already when making telephone inquiries of an insurer and finding that the lady with whom I was speaking about my insurable interest in Australia was located not in Australia but in the Philippines. If the Philippines, why not, for example, Fiji or Kiribati? This aside, all of us with an internet connection know that
it is possible to view catalogues of, order and pay for goods as never before from remote locations. In ways limited only by imagination and innovation, the internet promotes a global community and internationalism rather than nationalism.

The World Bank has stated with respect to its strategic goals, “eliminating extreme poverty and boosting shared prosperity require effective justice institutions to ensure inclusive growth and fairness in distribution, regulation and allocation of resources”. On that same subject, another highly experienced participant in and observer of international development programs has stated:

*The ascendant view [amongst economists, national and international aid agency participants and influential participants in the public debate] is that institutions [defined elsewhere to include courts and other elements of the justice system] matter for economic development, and that they do so in a major way.*

Demonstrably, the erosion of a common legal estate does not prevent international trade or commerce, be that inter-Pacific or beyond. It does complicate it by introducing unnecessary uncertainties into the foundation for business relationships and by adding on-costs for advice in respect of the differences. It may also inhibit it. At a time when the world has never been more interconnected in trade, commerce and travel, a national justice system, no matter how internally effective, which inhibits rather than promotes common ground may inhibit the growth of each of these activities.

There is an inherent tension, I respectfully suggest, between on the one hand, promoting free trade as a means of advancing multi-lateral prosperity and not promoting on the other regional rather than national appellate courts. Amendments such as that made to the Judiciary Act, comforting as they may be to the vanity of the Judiciary or politicians of the jurisdiction concerned, are in reality a form of protectionism.

Further, measured against a background where ever increasingly, commercial and societal behaviours are regulated by subscription to international agreements on subjects as diverse as sale of goods, cross-border insolvency, child custody and human rights, declarations of independence made by national ultimate appellate courts in the heady aftermath of liberation from the common estate of the common law look increasingly incongruent.

Personal experience again informs that observation. In *Gainsford v Tannenbaum* I was confronted with an application by the trustees of the respondent’s South African bankrupt estate for the recognition of insolvency proceedings in that country as a “foreign main proceeding” for the purposes of the UNCITRAL Model Law on Cross-Border Insolvency and for consequential relief in terms of his public examination and related production of documents. Whether or not to grant such recognition turned on whether South Africa could be termed his “centre of main interests” (COMI) and his country of habitual residence. Mr Tannenbaum had quit South Africa for Australia with his family prior to a truly spectacular insolvency in that country. That was some years before the application and, in the meantime, he had put down roots in Australia. The subject of COMI was well though not consistently tilled by overseas authority in relation to corporate insolvency but not so in relation to personal insolvency. The year before the case came before me, Heath J of New Zealand had been confronted with a Model Law case in respect of personal insolvency. Fortunately, that case came to my attention. His Honour’s scholarship on the subject was, so I respectfully considered, both impressive and persuasive. I adopted and applied his reasoning so as to hold that the South African proceeding was not a foreign main proceeding, because South Africa was not Mr Tannenbaum’s country of habitual residence.

I should record that I nonetheless came to grant the foreign bankruptcy trustees’ application on its alternative foundation via an exercise of the jurisdiction of one court with insolvency jurisdiction to assist another such court.

I was not bound by that New Zealand authority. Had I not followed it, there was potential for different lines of authority to have developed in respect of the interpretation of the same international instrument, depending upon the fate of any appeal. A Regional Court would reduce, at least to the extent of the number of jurisdictions it serves, the prospect of such divergent lines of authority developing.
Drawing as it would not only on a larger talent pool but also upon a greater number of feeder jurisdictions a Regional Court makes feasible, particularly for smaller nations, of which there are many in the Pacific, an ultimate appellate court of high international standing. Of course, there are alternatives which at least promote inter-jurisdictional collegiality and challenge insularity of judicial thought and which may, to a limited extent, also inhibit a sacrificing of the common estate. The additional commissions exercised by judges from Australia, New Zealand and Papua New Guinea to which I have referred manifest this. These though are ad hoc responses nowhere near as effective in addressing inter-jurisdictional divergence in the common law or equity or the interpretation of international conventions or analogous statutes in different countries as a Regional Court of over-arching authority.

None of this is to advocate a return to the Judicial Committee, at least in its present form. Alternatives are possible. One might be the establishment of a regional committee of the Judicial Committee. Another, as the Caribbean Court of Justice (CCJ) exemplifies against a background similar to that in which we find ourselves in the South Pacific, might be to establish an equivalent Regional Court in the Pacific, a Pacific Court of Justice (PCJ).

An account of the lengthy process which led to the establishment of the CCJ lies beyond the scope of this paper. One who has offered such an account has stated:

Commencing with a period of intense intellectuality, the regional debate on the establishment of the Court traversed interrupted periods of sober rationalisation and introspection, comprehended periods of excessive emotionalism and chauvinism and culminated in a period of careful premeditation and bold, innovative, imaginative decision-making.

Who could doubt that the path to a PCJ would be any different? Perhaps, in hindsight, it will be said that we are already on that path and today was but a step along the way.

The Commonwealth played a role, as I respectfully suggest it could in relation to a PCJ, in fostering and facilitating, via regional Heads of Government meetings and constituent bar associations and law societies, the formative discussions that culminated in the establishment of the CCJ.

The CCJ complements and is a sequel to the establishment by treaty of the Caribbean Community Single Market and Economy. The CCJ exercises both an original as well as an appellate jurisdiction. The original jurisdiction is that of an international court in respect of the interpretation and application of the treaty by which the Caribbean Community was established. The appellate jurisdiction is municipal, that of an ultimate appellate court in civil and criminal matters in respect of those member states which have decided to cease the use of the Judicial Committee for that purpose.

Appointments to the CCJ are made by a Regional Judicial and Legal Services Commission (RJLSC). Membership of that commission is drawn both from regional private bars and academia but includes two lay persons with the President of the CCJ as chair. The CCJ is funded by lump sum contributions from member nations into a trust fund established under treaty so as “to provide the resources necessary to finance the biennial capital and operating budget of the [CCJ] and the [RJLSC] in perpetuity”.

What benefits, if any, has the CCJ brought? According to its President, The Right Honourable Sir Dennis Byron, experience to date demonstrates that the benefits are these. A jurisprudence of multi-lateral rather than unilateral quality is already developing. For the citizens of member communities, the CCJ has improved access to justice by making feasible or, in the case of a constituent body politic, more feasible access to a proximate, ultimate appellate jurisdiction in ways that the Judicial Committee did not. For the legal profession:

- heightened personal and professional development;
- an increase in confidence by clients in the local legal profession.

Though it would be established by treaty, a PCJ akin to the CCJ would not, in the exercise of its appellate jurisdiction, exhibit the same weakness that is present in respect of the International Court of Justice (ICJ), that of inability for its judgements readily to be enforced. That is because, unlike the ICJ, the PCJ appellate jurisdiction would, in respect of each member Nation, be municipal, enforce-
able via the mechanisms of that country, in the same way as are and have been the decisions of the Judicial Committee.

What of a Pacific Commonwealth country such as Vanuatu, whose justice system draws upon both the common law as well as the civil because of its unique colonial heritage? The answer to this is that the Judicial Committee exercised for many decades an ultimate appellate role in respect of Canada, which included, via Quebec, a civil law system and in respect of South Africa with its Roman Dutch system.

What of countries of which HM The Queen is not Head of State? Would this not prevent a PCJ from exercising ultimate appellate jurisdiction? The answer to this is surely, “No”. Even in respect of the Judicial Committee, which has a role of advising the Monarch, the ultimate appellate role which it undertook was modified by international agreement such that its advice was tendered to the President of a newly independent republic or, as in the case of Malaysia, the Sovereign of a newly independent, different constitutional monarchy. In the exercise of its municipal, ultimate appellate jurisdiction, a PCJ, like the disparate, present ultimate appellate courts of the Pacific, would just pronounce judgement. It would not tender advice to a Head of State.

What of Pacific countries which were not members of the Commonwealth but which saw advantage in having access to a PCJ? The answer to this is that, because that court’s jurisdiction would be grounded in international agreement, they need do no more than negotiate with existing member Nations a mutually acceptable basis upon which to access a PCJ.

What about particular, constitutional issues in respect of which, as was sometimes said of the Judicial Committee, the ultimate appellate court was not attuned to local heritage? The same might be said of a PCJ, as it might also be said in relation to issues of customary land ownership. An answer to these concerns might be found in particular reservations in the treaty along the lines of those presently found in the treaty governing appeals from the Supreme Court of Nauru to the Australian High Court.

Papua New Guinea’s economy and population have reached a stage of post-Independence development whereby it is felt that the PNG Constitution is in need of reform so as to provide for a three tiered superior court system, comprised of a court of general original jurisdiction (the role of the National Court at present), an intermediate appellate court and an ultimate appellate court, rather than the present two tiered system. That need is manifest to me on each occasion when I sit in the PNG Supreme Court. Invariably, there will be present in the list appeals from the National Court which, in Australia would never come to an ultimate appellate court such as the Australian High Court, because they would be dealt with to finality by an intermediate appellate court such as the Full Court of the Federal Court. Sometimes, this is because the appeal itself is procedurally misconceived; sometimes because the appeal involves no principle of general importance; sometimes it is just because any substantial injustice in the particular case could be remedied by an intermediate appellate court. As I have come to know, my Papua New Guinea colleagues are not just collegiate but able. Even so, and with the very greatest of respect, I do have a concern as to whether there is presently available to Papua New Guinea a sufficiently large pool of judges and, within the local profession, potential judges to staff not just an ultimate appellate court of, say, seven judges, an intermediate appellate court and then leave sufficient experienced judges in the National Court. As mentioned, strength of institutions is essential to economic development and the general prosperity of citizens.

What if, instead of adopting unilateral approach, Papua New Guinea’s Attorney-General, like Lord Gardiner once did, were to announce on behalf of his government that, if sufficient support were forthcoming from elsewhere in the Pacific, Papua New Guinea would be prepared to consider the transfer of its ultimate appellate jurisdiction to a Pacific Court of Justice? What if, upon its return to democracy, this was echoed by Fiji? What if New Zealand, which has localised its ultimate appellate jurisdiction but in an insular way were to support this? The process of adoption could be gradual but, if it gained momentum or was developed in conjunction with a free trade zone, would not Australia also come to see the mutual benefits of such a court?
What if, in time, the United Kingdom were to join with those who created the CO and the PCJ so as finally to create a Commonwealth Court of Appeal?

Axiomatically, such initiatives are for the political class or, dare one say it, for the statesmen amongst that class but the separation of powers does not, I suggest, prevent the Judiciary from highlighting such benefits as we may see for national prosperity and enhanced access to justice in such a development.

I conclude as I began on an ornithological note. If we do not highlight such benefits, might not our respective justice and legal systems, once of common origin, evolve, in the fullness of time, in such idiosyncratic ways as to end up like the Dodo bird of Mauritius, a distant relation of the flighted Nicobar Pigeon, which is found, amongst other places in the Solomon Islands and Palau, but developmentally flightless and eventually extinct?
Abstract: This article presents a brief overview of the judicial system in the United States of America, focusing on the selection of judges to the federal and state courts. It notes that, in some states, appointments to the courts follow elective systems, which have received criticism from such proponents as Roscoe Pound, on account of the problem they pose for the independence of the judiciary and the perception of such independence. However, the author concludes that, while one would have hoped that the U.S. might be inching towards abolition of the election of judges, the omens so far have not been in favour of such reform.

Keywords: Judicial system of the United States of America – selection of Judges – elective systems – independence of the judiciary

Introduction

The United States runs two court systems: federal courts and state courts. The Supreme Court of the United States is the court of last resort for both sets of courts. The Supreme Court is the only court mentioned in the American Constitution, 1787, and it is created by article 3. All other courts are created by statute: the federal courts by a statute of Congress, the state courts by state legislatures and within states some local courts are established by cities, counties and municipalities. The Supreme Court of the United States has been composed of nine members since 1869. Its membership is fixed by Congress. In its first eighty years it had as many as ten and as few as five members.

As a result of this system, the national government and the fifty state governments each make and enforce law. Article 3 of the Constitution gives Congress the power to create courts. Whereas the Constitution itself created the Supreme Court, Congress, by the Judiciary Act of 1879, created the Federal Courts. These are divided into two kinds of courts, the legislative courts and the constitutional courts.

The federal constitutional courts

These courts consist of the U.S. District Courts and the U.S. (Circuit) Courts of Appeals. There are ninety four District Courts, which are the trial courts of the federal system. The appellate (Circuit) courts are divided into thirteen Circuits, twelve based on geographic lines. The thirteenth, created in 1981, is known as the Court of Appeals for the Federal Circuit and deals with customs and patent appeals and claims by citizens against the government of the United States, most of which arise out of public contracts, federal expropriations of private property and suits for damages for injuries caused by government employees. It is located in Washington, D. C. The Circuit courts hear appeals from the District Courts, the Territorial Courts, the U.S. Tax Court, the U.S. Court of International Trade, the U.S. Independent Regulatory Commissions and certain federal administrative agencies. Judges hold office “during good behaviour”, which means, in effect, for life.

To some extent the jurisdiction of the two court systems, federal and state, overlap. Where both sets of courts have jurisdiction, the parties (presumably the plaintiff) may choose in which court to litigate. The jurisdiction of the two systems is a substantial area and in many American Law school procedure courses students spend an entire year on the issue and some take specialized courses on the subject. This paper, therefore, is necessarily a superficial study.

Put briefly, the jurisdiction of the Federal Courts is limited to the types of cases listed in the constitution and specifically provided for by Congress. For the most part the Federal Courts hear:

1. Cases in which the United States is a party,
2. Cases involving violation of the American Constitution or federal laws, including criminal laws,
3. Cases between citizens of different states if the amount in controversy exceeds $75,000
and
4. Bankruptcy, copyright, patent and maritime cases.

The state courts have a broad jurisdiction. 97% of cases tried in the U.S. are tried in the state courts and 64% of civil cases in the state courts are heard by a judge with a jury. If the issue is whether a state law violates the constitution, then it must be heard in federal court. Most criminal cases involve violation of state law. But, for instance, whereas robbery is a crime created by state law, there are a few federal laws dealing with robbery, such as the law that makes it a federal crime to rob a bank whose deposits are insured by a federal agency. Other examples include, bringing illegal drugs into the country or across state boundaries, crimes committed on federal property, such as national parks or military reservations and the use of U.S. Mails to swindle consumers (mail fraud). Conrad Black was charged and tried in a federal District Court in Chicago.

There are just over 1700 judges in the federal system, including the nine judges of the Supreme Court of the United States, the bankruptcy judges and the magistrate judges. There are almost 30,000 judges in the state court system.

Appointment

To the Federal Courts

The first question here would be: What role do All of the approximately 816 federally appointed judges (excluding bankruptcy and magistrate judges) are nominated by the President and confirmed by the Senate by a simple majority after a confirmation hearing by the Senate Judiciary Committee. This includes all judges of the federal courts, not just those nominated for appointment to the Supreme Court. The Judiciary Committee is one of the original Senate standing committees, which deals with much more than judicial nominations. The Judiciary Committee will vote on whether or not to send a nomination to the floor of the Senate for a vote. It is actually a sub-committee that conducts the confirmation hearings. Until 1925 candidates did not appear before the committee. Then in 1925 Harlan Stone volunteered to do so. Since 1955 all nominees do so, though, technically they are not obliged to appear. The Justice Department receives and screens all applications for appointment to the federal courts. Some presidents have informally delegated to the Attorney General and the Justice Department the task of choosing nominees.

The President consults the American Bar Association, which has a committee of fourteen lawyers, established in 1946, who conduct research and then make recommendations. Each geographic circuit has one member except the 5th and 9th which have two each. This committee rates the candidates, mainly based on merit, though it has rejected some as being too old. The President is not obliged to follow the committee’s recommendation. The President, by tradition and, indeed, by political necessity, also consults the local senator. The appointments are for life. Once the Senate confirms a candidate, the President proceeds with the appointment.

The 352 bankruptcy judges are appointed by the courts of appeals in each circuit and the 551 magistrate judges are appointed by the district courts.

Appointment to the State Courts

The fifty American States employ six diverse types of selection for their judges,

1. Partisan election: candidates run, nominated by a political party and under a party label,

2. Non-partisan election: candidates run without a party label, though they may, in fact, be party sponsored,

3. Merit selection: plans differ from state to state, but most include a permanent non-partisan commission, composed of lawyers and non-lawyers, appointed by a variety of public and private officials who recruit and screen candidates. The commission forwards a list of about five candidates to the governor or the legislature who must make an appointment from the list. Usually the judges serve a one or two year probationary period, after which they must run unopposed on a retention ballot. A judge must win a majority of the vote of the electorate to remain in office for a full term,

4. Gubernatorial appointment, with or without the assistance of a screening commission,
5. Election by the state legislature, again with or without a commission,

6. Selection by sitting judges.

During the colonial era the king appointed the judiciary, but his wide powers were one of the abuses attacked in the Declaration of Independence. After the revolution the states continued to select judges by appointment, but the chief executive did not wield the power of a monarch. Eight of the original thirteen states vested the power of appointment in one or both houses of their legislatures. Two allowed appointment by the governor and his council and three vested it in the governor, but with the consent of his council. However, people began to resent the fact that the property owners, in effect, had the power to control the appointment of the judiciary. They determined to end this privilege of the upper classes and to ensure adherence to principles of Jacksonian democracy. Gradually reform occurred and New York's adoption of a system of judicial selection by election of judges began a trend so that by the time of the civil war 24 of 34 states elected their judges by the votes of the populace. As new states were admitted to the Union all of them adopted popular election until the admission of Alaska in 1959, which opted for merit selection.

However, within a short time the elective system began causing discontent. The objective of a judiciary uncontrolled by special interests was not being achieved. People grew uneasy that the judges had become enmeshed in the political mill. Judges were seen to be being selected by political machines and to be controlled by them. Judges were often perceived as being corrupt and incompetent. Thus it was that non-partisan elections were conceived. Cook County, Chicago, in 1873, was the first constituency in which candidates appeared on the ballot without a party label. It was, in fact, the judges themselves who chose to run on a non-partisan ballot. By 1927, 12 states employed the non-partisan system of election. However, over the years the electorate grew discontented with non-partisan elections, because it was soon discovered that the candidates were still being chosen by party leaders and paraded before an unwitting electorate.

Slowly a ground-swell of criticism of all elective systems began to grow. Roscoe Pound is famous for his speech to the American Bar Association in 1906 in which he excoriated the elective system: “...putting the courts into politics and compelling judges to become politicians...had almost destroyed the traditional respect for the bench”. William Howard Taft, in 1913, in a speech to the Cincinnati Bar Association, said it was “...disgraceful to see men campaigning for the state supreme court on the ground that their decisions would have a particular class flavour”. It was “...so shocking and so out of keeping with the fixedness of moral principles.” Over the years a number of plans have been devised for eliminating the worst features of the two elective systems: the so called “merit plans”. Most of these plans include non-partisan committees with lawyers and non-lawyers as members, which recruit and screen candidates.

Today there exists a dizzying combination of methods of judicial selection scattered through the states. The fact is that no two states have precisely identical judicial selection procedures. Briefly the selection methods are as follows, and they are seriously confusing:

**Appointment**

Thirty two states and the District of Columbia use nominating commissions to help the governor select state judges. Of these, twenty four states and the District of Columbia use a commission to make initial appointments to most or all of their courts and eight others use a commission only for interim appointments. Five states use gubernatorial or legislative appointments without the aid of a nominating commission. Seven states elect all of their judges in partisan elections and seven use non-partisan elections to elect some of their judges. Thirteen states use non-partisan elections to select all their judges and eight states use non-partisan elections to elect some of their judges. Now, it is not possible to add up all these systems and come out with fifty states and the District of Columbia. That is because so many states use two or more systems, depending on which judges are being appointed to which court and whether for an interim or a full term.

Some states have three levels of courts: Trial, Appellate and Supreme. There are also inferior or Magistrates’ courts, Justices of the Peace and Municipal courts, in some cases judges are selected for these courts by elections in the
jurisdiction which they serve, or by appointment by the local council.

Twenty one states hold elections for judges serving on their courts of last resort, eight use partisan elections and thirteen, non-partisan elections. In twenty four states and D.C. judges are appointed by the governor with the assistance of a nominating commission. In three the governor appoints without such assistance. In two the legislature chooses the judges.

Forty states have intermediate appellate courts. Seventeen elect the judges, (six, partisan and eleven non-partisan) five use appointment procedures without nominating commissions, (two allow the legislature to select, two allow the Supreme Court of the state to do so and one allows the governor to do so). Eighteen states use a nominating commission to appoint to intermediate appellate courts.

For the trial courts the following patchwork exists:

Nine states use partisan elections and eighteen use non-partisan elections. Fifteen states and D.C. use a commission to help the governor appoint all trial judges. In two the governor appoints unaided by a commission and two have the legislature appoint, unaided. Four states use multiple methods, varying from county to county or by judicial district.

In total, thirty nine states choose some, most or all their judges using some form of popular election.

Selection by election has attracted much criticism over the years. The main problem has to do with the independence and the perception of independence of the judges. Candidates run campaigns for election. Campaigns cost money, so the judges, or their backers, raise money to finance the campaigns. Many lawyers will contribute to campaigns. When a lawyer, who has contributed to a judge’s campaign, appears before that judge there automatically arises a perception of bias. When a party to a law-suit has contributed to the campaign fund of the judge hearing the case, it will create a feeling of serious unease on the part of the other party and this occurs whether the election is partisan or non-partisan. At election time American lawyers function in fear of the telephone call “I am calling on behalf of Judge So-and-So. He wants to know if he can rely on your financial support”.

Florida Judge George W. Greer gave a speech to the annual meeting of the American College of Trial Lawyers. He was the judge who, for seven years presided over the notorious Terry Schiavo case. Terry Schiavo, after a medical collapse, had been in a coma for two years. Her husband and the executor of her estate petitioned the court for permission to terminate life support, which Judge Greer granted.

In the context of judicial independence, Judge Greer said this: ... the 800 pound gorilla in this discussion is that of judicial elections. They rattle the core public respect for the judiciary and its ability to make fair and impartial decisions. ... In America we have a patchwork quilt on how state court judges get on the bench... Some are elected and re-elected some are appointed and meritoriously (sic) retained. And other states use a blend of these. These elections are becoming more and more hostile and more and more partisan, which again leads to the inevitable result of undermining public respect for what judges do. In judicial elections starting in 2000 and ending in 2006, the number of TV ads rose a startling 600% to a total in 2006 of 121,000 commercials for judicial candidates. As you can imagine, this caused a dramatic increase in campaign funding ...

Justice Sandra Day O’Connor (who retired as a justice of the U.S. Supreme Court in 2006) wrote an article in Parade Magazine in February 2008. She related the story of a candidate for judicial office who had raised $4.7 million for his judicial race, much of it coming from two companies, $350,000 from an insurance company which had filed a suit that was pending in the court. More came from a large tobacco company that was involved in a class action suit. That judge cast a deciding vote to reverse a $456 million breach of contract suit against the insurance company. Then he cast the deciding vote in a tobacco case, reversing a $10 billion judgment against the tobacco company. Justice O’Connor asked, rhetorically, how anyone can have faith in such a system.

In Republican Party of Minnesota v. White (536 U.S. 765) a case having to do with the constitutionality of Minnesota’s judicial ethics code restriction on candidates’ right to “announce” their views on issues that might come before the court, Justice O’Connor argued that judicial impartiality is very difficult to
maintain when judges decisions impact and are impacted by voters and contributors. She wrote that Minnesota’s claim that it needs to restrict significantly judges’ speech in order to protect judicial impartiality is particularly troubling. “If the state has a problem with judicial impartiality” she said, “it is largely one that the state has brought upon itself by continuing the practice of popularly electing judges”.

Chief Justice John Marshall, during the 1829 debate over the Virginia State Constitution said “The greatest scourge an angry heaven ever inflicted upon an ungrateful and a sinning people was an ignorant, a corrupt or a dependent judiciary.”

In June 2009, the Supreme Court of the United States gave judgment in Caperton et al v. Massey Coal Company. A Virginia jury had found the coal company liable for $50 million for fraudulent misrepresentation. The company had contributed $3 million to the campaign fund of the appeal judge who cast the deciding vote reversing the jury’s award. The petitioners had moved to have the judge recuse himself, which he declined to do. The Supreme Court of the United States, by a majority of only 5 to 4, held that the judge should not have taken part in the decision. The American Bar Association filed an amicus curiae brief in support of the petition.

The President of the American Bar Association, in an editorial discussing the Caperton case, had this to say:

The murkiness surrounding the recusal points to a larger problem: the election of state court judges. No other nation in the world elects judges, yet 39 states elect at least some of their judges. The financial and political pressures of running for office inevitably undermine the public perception of a prospective judge’s integrity and ultimately create distrust of the fairness of our judicial system...Merit based appointments via transparent, diverse nomination commissions are the best means of ensuring fair and impartial courts. A judicial system that requires judges to solicit contributions from interests appearing before the court risks removing the blindfold from the eyes of Lady Justice. The viability of our judicial system demands the separation of the courts from political influence. The ABA, working with state and local bars, is committed to promoting judicial independence accordingly.

In the fall of 2012 three Iowa Supreme Court judges were defeated in their bids for re-election, opposed by right wing forces because they had participated in a unanimous ruling that allowed same-sex marriages. The Republican Party worked hard to defeat a well-respected judge who participated in the same ruling, and faced a yes-no retention vote on November’s ballot. The National Organization for Marriage was running television ads against the judge. In Florida three judges are being targeted for various rulings that annoyed conservatives, one of which struck from the ballot a misleadingly worded constitutional amendment designed to allow the state to opt out of Federal health care reform. The advocacy group, Americans for Prosperity, financed by the Koch brothers, ran ads on television criticizing the court’s ruling and other cases, with a view to framing the moderate justices as out of control judicial activists. The three Justices have raised a million dollars to finance their re-election campaign and have secured the endorsement of twenty three past presidents of the Florida Bar Association. Nonetheless, this spectacle discloses the ability of political groups in the U.S. to intimidate elected judges. It does not make for an independent bench.

A report by three non-partisan legal reform groups disclosed the following, disheartening financial statistics: “Between 1990 and 1999 campaign fund raising by State Supreme Court candidates totalled $83.3 million”. This was less than half the $206 million raised between 2000 and 2009.

In a somewhat similar fashion to the abolition of the death penalty, one would have hoped that the United States might be slowly inching its way towards the abolition of the election of judges. It has been over a hundred years since the first serious criticism was voiced by Roscoe Pound. The omens, however, are not in favour of such reform. Ohio voters have twice rejected measures that would bring selection by merit to the appointment of judges. In the last thirty six years eight states have rejected selection of their judiciaries by merit.
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Uganda House, 58-59 Trafalgar Square
London WC2N 5DX United Kingdom

Tel: +44 207 976 1007 Fax: +44 207 976 2394 Email: kbrewer@cmja.org Website: www.cmja.org

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Abstract: This article explores the relationship between the judiciary and journalists, in the context of the principles of open justice and freedom of expression. It notes that the media acts as the public’s scrutineer against potential judicial misbehaviour, by seeing that justice is done. However, the press’s real interests remain those of enhancing circulation through potentially sensational stories which may be revealed in the course of legal proceedings. The author notes that some judges may be more tolerant of what others may see as moderate hypocrisy. He finds that, while judges and journalists may indeed be uncomfortable bedfellows, this friction may be a sign of democracy’s health.

Keywords: Open justice – freedom of expression – investigative journalism and the courts – sensationalism – democracy

Over three decades ago I represented a journalist who was seeking to challenge the decision of the Horsham Magistrates to prohibit the reporting of committal proceedings in which the defendants were charged with offences in connection with the export or attempted export of arms and ammunition.

I was leading Andrew Nicol, junior counsel, now Mr Justice Nicol, and was instructed by Harriet Harman, now Deputy Leader of the Labour Party. My main opponent was Simon Brown, later Lord Simon Brown and a recently retired member of the Supreme Court.

The Court of Appeal, presided over by Lord Denning, Master of the Rolls, roundly rejected my submissions that powers under the Contempt of Court Act 1981, only recently brought into force, could not extend the powers which magistrates already enjoyed to restrict reporting committal proceedings under the more limited provisions of the Magistrates Court Act 1980.

In that case also Lord Denning gave a major – but not the first nor certainly the last – endorsement of what he called “two of our most fundamental principles. One is open justice. The other is freedom of the press. It is of the first importance that justice should be done openly in public; that anyone who wishes should be entitled to come into the court and hear and see what takes place and that any newspaper should be entitled to publish a fair and accurate report of the proceedings without fear of a libel action or proceedings for contempt of court”.

But it is precisely because the perceived imperatives of justice and freedom of expression are not always coincident, that journalists and judges make indeed uncomfortable bedfellows. The default position in the legal system of England and Wales is – as it is in Jersey and Guernsey - that courts should be open to public and press alike. But the press has a special role - to act as the public’s scrutineer against potential judicial misbehaviour, and by seeing that justice is done to ensure that it is actually done. Lord Neuberger in the Judicial Studies Board’s annual lecture in 2011 said about open justice “Public scrutiny of the Courts is an essential means by which we ensure that judges do justice according to law and thereby secure public confidence in the Courts and the law”. But those members of the public who attend Court proceedings, usually with some special interest in their outcome, rarely pass through the courtroom doors so to familiarise themselves, as constitutional geeks or nerds, with the workings of the judicial organ of government, and hardly ever if there is something better on television. In any event those spectators see only what they see and hear only what they hear. The Press in its reporting conveys the relevant information to a far larger audience. In Lord Nicholls succinct sentence in Reynolds v Times Newspaper “the Press discharges vital functions as a bloodhound as well as a watchdog”.

Of course important, indeed vital, as that role is, the press’s real interest is in enhancing circulation by what they call good copy-stories
of sex and scandal and the exposure of the feet of clay of the high and the mighty, as revealed in the course of legal proceedings. Some judges are tolerant of what others may see as moderate hypocrisy. In Grobelaar v Times Newspapers Simon Brown LJ overruled an injunction in a libel action by saying realistically, if only after repeating the familiar canine metaphor, “investigative journalism is not conducted with a view to bringing miscreants to justice, but rather so as to sell newspaper” but, nonetheless suggesting that “instead of the press being deterred from publishing these exposes by the need to prove justification, they should be protected by the defence of qualified privilege”.

Given the commitment to open justice it is surprising how many examples remain of where the doors can be closed or partly closed to the press. Hoffman LJ in R v Central Independent TV said “There are in the law reports many impressive and emphatic statements about the importance of the freedom of speech and the press. But they are often followed by a paragraph which begins with the word, nevertheless...”.

Judges - at any rate some Judges - are themselves becoming more liberal. Sir James Munby, the new President of the family Division earlier this month refused to prohibit footage of social services staff from the Staffordshire County Council taking a man’s new -born child into care being broadcast on the internet, while maintaining the anonymity of the baby itself. He said clearly obiter “We must have the humility to recognize that public debate and the jealous vigilance of an informed media have an important role to play in exposing past miscarriages of justice and in preventing possible future miscarriages of justice”. But some Judges are not all Judges. Mr Justice Eady, for long the senior judges in charge of the jury list, was repeatedly and unfairly pilloried on the basis of his award of damages to Max Mosley,then the CEO of the FIA for press ventilation of his participation in private spanking sessions.

Closed proceedings where national security is at stake exclude not only the public and the press but even one of the parties and their lawyers, a situation mitigated only in part by the use of special advocates to comment as best they can on the closed material in the interests of the persons concerned.

There are now at least six statutory provisions which vouch for the procedure since it - as the Supreme Court held, in the Al Rawi case is alien to the common law although not in principle inconsistent with Article 6 of the European Convention on Human Rights, which allows with all the usual preconditions, for the potential exclusion of the press (and public) for trials in a variety of interests, moral, public order, national security, interest of juveniles, protection of privacy, and the interests of justice itself. Indeed the rationale for the departure from open justice was far earlier epitomized by Lord Haldane LC in the classic case of Scott v Scott when he referred to a “yet more fundamental principle that the chief object of the courts of justice must be to secure that justice is done”. A recent example in this very jurisdiction involved private consideration by the Court of Appeal, over which I presided, of material where the allegation was of attempted jury tampering in a high profile criminal trial.

The fundamental principle is not itself open to challenge; but its application may well be. A relative newcomer to the remedies given by the Courts, and one whose life span has proved somewhat transient, is the so-called super injunction in which a defendant, usually the press, is prevented from publishing confidential information, but in addition prevented from reporting even that such an injunction has been sought.

Confidential information used to be for the most part a synonym for commercial secrets. In modern times it has become a euphemism for sexual misconduct. The super injunction was a remedy seemingly fashioned for highly paid- some might even say overpaid - modern footballers. I once asked in a convivial moment at a party a solicitor who specialised in reputation management for sportsmen how many members of the then England football team had obtained this form of relief; and he told me - with, I suspect, only minor exaggeration - 7 out of 11. This may itself explain the inconsistent form of our national squad over recent years. The paradox is that the journalists themselves usually know the name of the protected party from a miscellany of sources. Their irritation stems from an inability to share it with the wider world.
The press of course are vigilant to protect their interests or where judges exercising a discretion under statute make or are asked to make orders which require particular proceedings or part of them to be in camera. I recall a particularly ambitious attempt by Ernest Saunders, one of the Guinness 4, who tried to have the entirety of the criminal trial at Southwark Crown Court barred to the press. Even the fact that he was represented by the silver tongued Dick Ferguson, and the serious media were represented by me did not persuade Mr Justice Henry to deprive the press of a story that in the event created many weeks of headlines. More recently the Guardian persuaded the Supreme Court to lift the cloak of anonymity on persons whose were challenging their designation as suspected terrorists – the late Lord Rodger opening his judgement by quoting what he described as the provocative opening words of Counsel for the Guardian “your first term docket reads like an alphabet soup”.

The press too are vigilant to lobby against further encroachments on their freedom of information. National and regional editors claimed a degree of credit for the fact that the new Coroners rules effective from July provided for inquests to be held in public except where national security or in the case of pre inquest hearings, judicial proceedings were put at risk. And already editorials have deplored the Government’s plan to include in a reform of libel law provisions for allowing judges to refuse the press their costs against an unsuccessful claimant and plans in the draft deregulation bill to end the need for written statements given in criminal proceedings to be read out in Court.

Contempt of court is a particularly fraught area because the judges are properly concerned to ensure that trials are fair. The brings to mind Sir David Frost, who was famous not only for his interview with ex-President Nixon - a project of his mature years - but for his cross-examination of the insurance fraudster Emil Savundra, which excited the trenchant dictum of Lord Justice Salmon “Trial by television will not be tolerated in this country”. In the USA by contrast the first amendment and its guarantee of freedom of expression trumps virtually all other interests. When in the Caribbean, I marvelled at the daily coverage of criminal trials of exotic murders beamed in from American channels in which the day’s evidence is analysed from both prosecution and defence perspective by pundits from law schools or law firms - broadcasts presumably as available to jurors as they were to the viewing public.

The conservative side in the debate over whether court proceedings should be televised bases its opposition on the fear that witnesses may be intimidated by the realization that their testimony is being broadcast even on invisible cameras and - dare I say it - that there are advocates who will give full vent to their suppressed thespian tendencies by playing to the gallery, and hoping, if briefs ever dry up, to an invitation to appear on Strictly Come Dancing, Big Brother, or even Britain’s Got Talent – a show which proves the falsity of its own title. I should add that the Supreme Court has its own channel without conspicuous impact, for better or for worse, on counsels performance, or, alas, on overall viewing figures; and the Court of Appeal in England - but not, I think in Jersey - will soon partially open its doors to the TV cameras.

Mercifully the offence of scandalising the judiciary - criticizing judges in such a way as to bring the administration of justice into disrepute - can now be preserved in a draw marked ‘obsolescent’ even though Peter Hain, youthful protester turned middle aged cabinet minister, found himself threatened with proceedings when in a passage in his memoirs, he criticized the then Mr Justice Girvan for his handling of a judicial review challenging the appointment of a policeman’s widow as interim victims commissioner in Northern Ireland. Although leave was given, the proceedings were compromised; and the offence itself promptly abolished by statute in Northern Ireland. The Law Commission has recommended that the provinces example is followed on the mainland. That particular point of friction between judge and journalist has therefore been assuaged. And the judiciary must tolerate with such fortitude as it can muster that traditional tabloid headline when some part time assistant district judge is charged with forgetful failure to pay his annual TV licence “Top Judge in financial scandal”.

But another area in which there remains scope for collision is in the substantive law which affects the press. Here, in broad overview, the last decade or so has seen on the one hand libel
law liberalised in the press favour by development in particular of so called Reynolds privilege, extending the defence of qualified privilege in libel to responsible journalism on matters of public interest even where the facts on which the libel was based can be shown to be inaccurate - and on the other hand the development of a recognisable law of privacy. It might have been said before the creation of the Supreme Court - the law lords giveth and the law lords taketh away.

Above the whole issue looms the shadow of Leveson; set up of course, not by the judiciary but by the executive to investigate the ethics, and practices, of the press, but predictably and may be necessarily presided over by a senior Judge, whose recommendations, yet to be implemented in full or modified form, suggested to some organs of the press a concerted attack upon freedom of expression by subordination to, however indirectly, governmental regulation. The revelation in the Daily Mail that female junior counsel to the inquiry had holidayed in the Greek island of Santorini together with one of the male counsel representing a newspaper interest with a view, as she put it, to exploring the possibility of a future relationship - an explanation which makes some demands on the reader’s credulity - was only the most exotic of the media’s counter-attacks.

In concluding I will not display bias by saying judges are necessary but the press is merely desirable. Both are required in a functioning democracy and the friction between them may be more a sign of democracy’s health than of any ailment. Judges and journalists are indeed uncomfortable bedfellows; and like bedfellows the world over will enjoy turbulent, but also torpid, times.
Abstract: This article makes the argument that, although the formal judicial system has been accepted as the preferred and acceptable process for the resolution of disputes, alternative forms of dispute resolution (ADR), in particular mediation, are growing in popularity. The author draws on the experience of Papua New Guinea with ADR to show that the results are overwhelmingly positive. In this context, he argues that rather than being “alternative”, ADR should be elevated to a primary means of dispute settlements. The author also discusses some cases which may not be suitable for mediation. He concludes by briefly discussing PNG’s activities in the field of ADR, including the organisation of mediation skills workshops and ADR awareness workshops.

Keywords: Alternative dispute resolution – mediation – cases not suitable for mediation – ADR training and awareness-raising

Introduction

For many decades if not centuries, the formal judicial system has been revered and accepted as the preferred and acceptable process for the resolution of disputes. In recent times, alternative forms of dispute resolutions (ADR), in particular mediation, has taken the world by storm. This might be causing some fear amongst judges, magistrates and lawyers and those who are associated with the formal court systems that, their positions and their work might be taken away from them and render them irrelevant in society. Given such fears some judges, magistrates and lawyers may be opposed to mediation. This may be the reason why some compulsory mediation or forms of ADR annexed to the formal court system are not as successful as they should be. This paper seeks to demonstrate that there is no need for such fear and show that those who hold such fear or have any doubts, could make better use of ADR and in so doing better discharge their duties and responsibilities in a cost and time effective manner with quality outputs. The paper tries to do that by drawing from the ADR developments and application in Papua New Guinea (PNG) since 2001 to the present.

Mediation World Trends

On 23rd May 2012, Secretary General of the United Nations, Ban Ki-moon issued a circular asking member states to embrace and use mediation as a preferred form of conflict resolution. Earlier, on 13th June 2008, the European Union issued a directive in similar terms. Following the EU directive, Italy enacted legislation for compulsory mediation before litigation. Canada allows filing before mediation but requires mediation before trial. Recently, in 2011, Australia passed its Civil Procedure Act 2011, requiring litigants to attempt to resolve their disputes through mediation first before litigation. I understand there is a very active ADR practice with some emphasis on mediation also in New Zealand. For PNG between 2008 and 2010, through a combination of amendments to her National Court Act and Rules Relating to the Accreditation, Regulation, and Conduct of Mediators, promulgated under the amended National Court Act, empowered the Judges to order mediation at any stage of the proceedings, with or without the consent of the parties and allow for a serious consideration in favour of mediation before proceeding with the litigation process. Nearly all of the South Pacific Island countries have embraced ADR and in particular mediation, with some form of mediation skills training and awareness workshops, which have been mainly sponsored by the World Bank through its business arm the International Finance Corporation (IFC) and the Pacific Judicial Development Program funded by the Australian and New Zealand Governments.
The Results

The results of these trends speak overwhelmingly for mediation. In PNG for example, since its formal adoption and use of Court Annexed ADR with focus on mediation in 2010, a number of cases have been and continue to be referred to mediation. In respect of the cases thus referred to mediation, the ADR Committee has been running a system of monitoring and evaluation through a web based survey feeding in feedbacks from parties and lawyers following mediation. A sample analysis of 23 mediated cases revealed the following:

1. 60% stated that mediation increased their trust and confidence in the court system while the balance stated their level of trust and confidence remained unchanged;
2. 92% stated that the Courts should support and use mediation more;
3. 100% stated going to mediation was safe, comfortable, user friendly and more secure;
4. 91% of survey respondents stated that if they were involved in another dispute they would refer the matter to mediation;
5. 96% stated they would recommend mediation to a colleague, friend or a relative as a good way to resolving their conflicts;
6. 87% thought the mediation process assisted in identifying the real issues in dispute between parties;
7. 91% thought that the mediation process assisted them to understand the other party’s views;
8. 87% thought that the mediation process gave them opportunities to develop options for settlement;
9. 71% stated that they resolved all of the issues in dispute while 19% stated that they had resolved none of the issues in dispute. The remaining 10% stated that they had resolved some of the matters in dispute; and
10. Parties and lawyers surveyed estimated that settling the case through mediation resulted in an average estimated saving per party of 80,000 Kina (USD 39,000) and over K1 million (USD450,000) and a similar amount in funds or business opportunities locked up in litigation.

Additionally, a research report from a Fulbright scholar showed that out of three major agriculture project cases that went to mediation, at least six additional cases on the court’s list were removed. The process also provided the parties with a forum to discuss and generate mutually agreeable solutions built around present and future risks. The research than noted that the value added by successful mediations could not be underestimated in that:

1. Presence matters. Every party stated that this was the first face-to-face conversation held between the parties and each party stated they learned new and critical information about the dispute from the conversation;
2. The negotiations dispelled disinformation or misinformation. Each corporate party found that the negotiations provided them with an opportunity to correct disinformation and or misinformation and make known their own interests and problems to the landowners;
3. The mediation improved the “social license” between landowners and companies. Each company stated that the informal agreement with landowners, allowed and significantly enabled them to peacefully carry out business and reduce delay, cost, and risks and improve relationships;
4. The mediation forum gives landowners a sense of ownership over the dispute and its resolution. Nearly every landowner interviewed expressed that they were able to express themselves and be a part of solving the problem, and expressed a vested sense of responsibility in implementing the solution agreed upon; and
5. The mediations are teaching participants methods for resolving future disputes. Two of the three company representatives, and all of the lawyers and parties involved, stated that they would try to resolve future disputes through face-to-face conversations before going to court.

New Definition for ADR

The trend and results briefly mentioned above has elevated mediation, as the primary or preferred form of dispute resolution. Hence, it is now incorrect to continue to think or treat such forms of dispute resolution as an alterna-
tive to the formal court process. Instead it is a primary or preferred form of dispute resolution that is and should readily be available on a menu, listing a number of forms of dispute resolution process open and available for the parties, our clients, to choose from going by that which meets their needs. It thus necessitates a relook at the definition of ADR. When we do that, mediation and the other forms of dispute resolution, other than the Courts, become one of “Appropriate”, or “Active”, or “Assisted” Dispute Resolution, which is something the PNG ADR Committee is now promoting. This author notes that similar definitions have been adopted in New Zealand and Australia. In conclusion, I must emphasise that lawyers of every description must take personal responsibility for upholding the LHP. In his address to the Hong Kong Commonwealth Law Conference 30 years ago, Sir Shridath Ramphal stated that we must be more than ‘keeper of the seals’. Despite the frustrations of dealing with governments’ reluctance to put their Latimer Houses in order, it is comforting that as is shown by numerous references by our judges, speaking both judicially and extra-judicially, to the LHP that they have become enshrined in the jurisprudence of the Commonwealth. In that we are entitled to take some pride.

Drivers of ADR

The rise and prominence of ADR is driven by a desire to arrive at a final and lasting resolution of conflicts in ways that are less time consuming, less costly and through processes that are free and easily accessible for many in conflicts. Litigation is by far the most expensive, time consuming and most stressful process of conflict or dispute resolution with a forced or false sense of finality. On the other hand, some forms of ADR, such as mediation, early neutral evaluation and expert case appraisals deliver expedited, less costly, less stressful and most definitely lasting outcomes which the disputing parties can live with. Accessibility of the processes by the disputing parties, meaningfully and directly participating in and taking ownership of the outcome are other serious and important factors. Whilst the formal processes and those behind it speak for and consider these processes accessible, only those who have the money and or who know their way around have and can have real access. Even in those cases, only lawyers, judges and magistrates do most of the talking and determine the final outcome. Parties hardly play any significant role in that except only to instruct lawyers and give evidence when called upon. On the other hand, mediation and some other forms of ADR recognize that the parties own the dispute and they have the necessary power and authority to talk about the dispute, consider all settlement options open to them and arrive at an outcome that meets their needs. The process allows for even a person without the ability to afford expensive legal fees to have access to ADR and have their disputes resolved.

Matters in Common

Both the formal court process and the mediation process have certain fundamental features in Common. One of the most important features is the element or the requirement for impartiality which features very firmly in both cases. Impartiality is required as a matter of necessity and as an integral part of both processes. It is this which gives people choosing to use the processes the confidence and an assurance that, the outcome will be based on merit and not by virtue of the facilitator’s interest in the matter or his or her relationship or connection with either of the parties.

Another important feature includes the requirement for fairness. That element of course is an inseparable twin to the principle of impartiality. Both processes endeavour to be fair to all parties. Wells J.’s decision in the South Australia case of Donaldson v. Harris, who took the opportunity to trace briefly the origins of the development of procedural rules on discovery from the old common law emphasis on ‘the system of litigation by antagonists’ is a good illustration of the element of fairness. His Honour said:

Thus, one of the essential features of discovery, deriving as it does from the equitable rules of the former Court of Chancery, is fairness. Its function is to ensure, not only that so far as possible there should be no surprises at the trial, but also that, before the trial, each party should be informed or be capable of becoming informed of all the relevant material evidence, whether in the possession of the opposite party or not, so that he can make an intelligent appraisal of
the strength or weakness of the respective cases of the parties either for the purpose of the trial or for the purpose of arriving at a fair or favourable settlement or compromise.

Both the formal courts and mediation try to achieve fairness through rules, practices and procedures that apply equally to all the parties. A good example is the right of address in Court as well as in mediation. Also both processes work hard to ensure that each of the parties that go before them have equal time and opportunity to present their cases. This highlights another important factor which is equality. Both processes endeavour to grant equal opportunity to those who have conflicts or disputes to have equal access to their processes and participate equally to ultimately arrive at an outcome that takes into account all of their (parties) positions, arguments or interests. Additionally, both process, try to bring about prompt resolution of the disputes brought before them and in so doing minimize the time and costs it takes for the parties and those involved in the processes. Finally, both processes try to ensure that the decisions or the outcome arrived at finally resolves all matters in dispute between the parties.

However, when one closely examines each of the above factors, mediation stands out way ahead of the formal courts when it comes to prompt resolution of conflicts, less costs, equal access to justice and equal participation and finality in the outcome. Of course this requires further clarification. In PNG, we have had histories of litigation running over 10 to 17 years with deaths on either side in some cases. When court annexed mediation was finally introduced, those cases resolved within a matter of hours to just a few days depending on the nature of the cases and the number of parties involved. Parties had spent over millions of Kina in legal and other fees and charges and took a very long time without even getting close to a final and lasting outcome. On the other hand, mediation costs were far less and took a lot less time and resulted in clear, certain and lasting outcomes. In those mediations as is the case with all other mediations, the people who stood to be affected, from the adults including females to younger adults and children who could otherwise have been suppressed or prevented were involved and did participate in the mediations through a process that allowed for their views to be aired and considered. As a result, outcomes that accommodated most of the parties concerns and interests were reached. This was possible with the processes taking place in their own locality and or setting and safe avenues provided by the mediation process.

What happened in those mediations and other mediations makes the mediation process completely different from the courts. In the courts, a person with a dispute goes to a lawyer if he can afford one and the lawyer then determines how the client’s case is to be pleaded and run in court from start to finish. The lawyer does all of the talking and the process is concluded by a judge or magistrate making a final decision. The client or the parties in dispute hardly have a direct say in the final outcome of their cases. Even the lawyer is restricted in what he can do and put before a court on behalf of his client because for instance, he has to work within the technical requires of say the law of evidence or the law and practice on pleadings and so on.

The most important feature that sets mediation or ADR apart as a better form of dispute resolution compared to the court in all cases, except for a few clearly identifiable cases, is its ability to bring about finality in the outcome. Mediation enables the parties in dispute to explore all possible options for an efficient and effective resolution of their dispute and settle upon one that best meets both of their needs and interests and one they can live with. Hence a majority of mediated outcomes last longer and do not return to the courts. On the other hand the court process will usually have expressed legislative provisions that prevent appeals or reviews once a final court of appeal or reviewed has considered the matter and has come to a decision. If it is not in the written law, well accepted legal principles like res judicata or issue estoppel ensures there is no further litigation. If it were not in the written law, well accepted legal principles like res judicata or issue estoppel ensures there is no further litigation. If it were not for these principles or kinds of legislative provisions, there would be endless appeals upon appeals or reviews upon reviews given that people usually do not readily accept a defeat. Hence finality is reached only as a matter of procedure rather than as final outcome on the merits.
Cases not suitable for mediation

Research and experience around the world and this author’s own limited experience demonstrate that, nearly all kinds of cases are suitable for mediation. Accepting and moving from that position, most of the discussions worldwide is around the kind of factors that render a matter not suitable for mediation and the list is relatively very short. The statement below by the UK Civil Court Mediation Manual is a very good summary of that position:

Most mediation providers suggest that nearly all cases are suitable for mediation. However, as a general rule, the following cases are generally regarded as inappropriate for mediation and should therefore not be considered for mediation at allocation stage:

- where a legal precedent is needed to clarify the law or inform policy;
- where settlement would not be in the public interest;
- where protective proceedings are required, such as injunctions; or
- where summary judgment is appropriate.

The Hong Kong Judiciary’s website covering amongst others ADR reiterates that position and adds to the list of cases presenting the following kinds of challenges:

- there is a genuine dispute requiring the court to give a declaratory relief; and
- in family disputes involving child abuse, domestic violence, etc, to avoid undue influence or where the parties are in a severely disturbed emotional or psychological state, such that they cannot represent themselves or focus on the needs of their children.

To the above list, I would add cases in which there is a need or a requirement for:

- an interpretation of a Constitutional or other statutory provision; or
- a resolution of a genuine dispute over the meaning and application of a particular provision in a contract or an instrument; or
- a determination of preliminary issues such as questions on jurisdiction, condition precedents, statutory time bar and validity of a claim; and/or
- a public sanction as in a criminal cases is needed for public health and safety.

In some cases, and more so after a determination of preliminary issues such as the ones presented in second last item in the above list, the substantive matters could still be referred to mediation. This includes even after the determination of an application for injunctive relief unless such reliefs are permanent in nature. This author has in at least three cases granted interim injunctive orders and directed the parties to resolve their disputes through mediation. This they did successfully resulting in a final disposal of the cases within two months of filing.

Paula Young in what could be taken as a detailed look at this aspect in her article “The ‘What’ of Mediation: When Is Mediation the Right Process Choice?” concludes and this author agrees that:

As mediators, lawyers, and their clients gain more experience with mediation, fewer and fewer types of disputes will seem less amenable to the process. Even if mediation only succeeds in improving the parties’ communication, in identifying their underlying interests, in narrowing the issues in conflict, or in helping them more carefully evaluate their litigation option, it can move the dispute towards a quicker, more cost effective resolution.

Imperative for Cooperation

People generally tend to dislike disputes. Unfortunately, it is part of human nature to have disputes which are brought upon by many factors, such as claims of interest and rights over land, basic human needs, rights and freedoms and many more. Once caught up in a dispute many prefer an early, if not, an immediate resolution of their disputes, if that were possible at little or no costs so they can move on in life, their employment, business and other enjoyable pursuits. The formal courts, as already noted, demonstrate a clear slowness in delivering on that wish or aspiration of our people. It is this author’s submission that this has been the case not because the formal system is incapable of delivering on that objective. Instead the main contributing factor has been inundation of the formal courts’ lists with matters that should not have entered the court system at the first place. Clear examples of these are, for instance, simple debt claims and all other claims that
require the people involved telling the truth or a better understanding of the reasons for the conflict and resolving them through direct or assisted negotiations. Hence, there is an inevitable imperative for each of the processes to work collaboratively and cooperatively. A good start in that regard, should be a deliberate decision and action directing and ensuring only those matters not suitable for mediation and or a form of ADR to progress to court while all the rest to be progressed and resolved through mediation and or a form of ADR.

Judges and hence the courts role in that respect would be most critical and important. It is accepted the world over that judges and courts are important gate keepers. For it is the Judges and the courts that can choose to allow the unnecessary overloading problem and its consequences to continue or welcome and embrace the intervention of mediation and ADR and use them to their advantage and bring the backlog problem under control and proceed onto delivering on our people’s objective of prompt resolution of their disputes at less costs and within shorter timeframes. This writer notes that, earlier on, many judges were opposed to mediation and there was a serious debate on the question of whether Judges should support mediation and other forms of ADR. It is now no longer an issue. The challenge now is more of how can the courts make effective use of mediation and other forms of ADR.

Experience in PNG gives us a good idea about what mediation and ADR can do for the courts. The Chief Justice, Sir Salamo Injia Kt., introduced a case docketing system a little over a year ago from today. That saw Judges being allocated cases for each of them to manage from beginning to final dispositions. Most judges were not able to go past 200 cases last year except for two judges who disposed of more than 800 cases each. Of the two, one of them used mediation and ADR processes and skills to bring about final outcomes without long drawn out trials. The other’s large number of disposition was on account of summary determinations of cases on the basis of want of prosecution. Most of these did not result in any appeal or reviews. That meant a substantial reduction in the number of cases that would have entered the Supreme Court’s appeals list. The imperative to work collaboratively and cooperatively is necessitated by the fact that the formal courts and the various forms of ADR and more so mediation have only one destination to arrive at and that destination is called justice. That destination can easily be reached because the formal courts and the various ADR processes all have the following set of indispensable principles and objectives like a set of traffic rules, which, if followed, can enable people to reach their ultimate destinations safely:

1. Impartiality in the process and one facilitating or presiding;
2. Fairness in the processes and administration of them and the eventual outcomes;
3. Equality in both access to justice and participation in the process by those affected by the dispute and having a meaningful say in its resolution;
4. Promptness with little or no delays in delivering the final outcome;
5. Less costly from filing to final disposition; and
6. Real finality in the resolution of the problem.

Current use of Mediation

Notwithstanding the benefits of using mediation and ADR, not all courts or judges and magistrates are using this useful tool. This may be due to:

1. a lack of education, knowledge and information about the existence and use of this tool; or
2. a lack of court rules and or other positive legislation compelling or requiring the use of these processes; or
3. a lack of knowledge and skill necessarily required to appropriately use the mediation and ADR process; and
4. a deliberate decision not to use mediation and ADR.

These are problems that can be easily overcome through:

1. Appropriately packaged and delivered information and training around the existence and use of mediation and other forms of ADR and the kinds of skills and techniques required for their effective use;
2. Enactment of appropriate legislation and court rules requiring and encouraging the use of mediation and other forms of ADR for the resolution of the disputes or conflicts.
that do not feature in the list of cases not suitable for mediation; and

3. Finally, for those who make a deliberate decision not to use mediation and forms of ADR, they could be encouraged to try these processes out and allow themselves to be guided by the results of their trials.

PNG's ADR Program

As the PNG experience may demonstrate, the full potential of mediation and other forms of ADR can be realized through a properly development and use of this tool by the judiciary. This requires good leadership and commitment from the Chief Justices and all judges. The judiciary in PNG is encouraged by the good results that are coming through its court annexed ADR program. The program has the necessary legislative foundation and framework and is led by its Chief Justice Sir Salamo Injia Kt., with the working support of the ADR Committee.

With some support from IFC, over 8 basic mediation skills trainings have been packaged and delivered to all judges, magistrates, some lawyers and other professionals. It has a total of 105 mediators who are accredited both in PNG and Australia. Out of that, 22 are fully accredited and 83 are provisionally accredited. Programs are now well in place to help get the 83 provisionally accredited mediators fully accredited through a process of co-mediation with experienced mediators in real cases. The 22 fully accredited mediators have been able to dispose of more 300 cases by mediation with more than 80% success rate. Some of these actual mediations have provided the avenue for practical hands on training for some of the provisionally accredited mediators with some of them progressing to full accreditation. The Chief Justice has just directed the ADR Committee to focus more on this program with a view to getting the remaining 83 provisionally accredited mediators to full accreditation by or before the end of the year. This has come about after the Judges have resolved to have 60% of the cases pending on the court's list disposed of by mediation. The ADR Committee is already taking steps to give effect to this important decisions, which includes advanced planes to have more than 150 to 200 cases resolved by mediation next month through the co-mediation program. Most importantly, for the first time in PNG, the Chief Justice has been able to secure sufficient funding for this and other projects in addition to the judiciary’s normal operational expenditure for the year. The Committee is working on having a mediators hand book ready in time for the many co-mediations for the assistance of the mediators. At the same time, the Committee is working on a Judges Mediation Handbook to assist Judges with their task of referring matters to mediation.

The ADR Project has already packaged and delivered over 8 ADR awareness workshops throughout the country. That has attracted interest in using mediation and expression of interests from both the private and the public sectors for assistance in designing and implementing their own internal conflict resolution process featuring mainly mediation. Once the full accreditation of the provisionally accredited mediators is achieved, the focus will turn to picking up on the interests and deliver on those wishes. It is envisaged that the end result of all of this will be an increased use of ADR and mediation resulting in more and more final resolution of conflicts which will enable the formal courts to discharge their duties and responsibilities with increase competence, quality and in ways that are less time consuming and very cost effective. Ultimately this will enable the judiciary to stay on top of its list from around a 2 years delay period to hopefully disposal of cases within the same year of filing.

Conclusion

For a long time, the formal court system has been the main process for resolving disputes and has been overburdened. Now mediation with other forms of ADR are fast becoming accepted worldwide as preferred forms of dispute resolution. All these have one destination to reach and that is, deliver justice to our people. That being the case, there is an imperative for collaboration and cooperative function between the formal courts and mediation and other forms of ADR to better deliver justice. Mediation and other forms of ADR are very useful tools that can produce outcomes that can speak well of the judicial system provided it is properly developed and applied correctly with good and strong judicial leadership. This will in turn enable the courts to discharge their broader role of promoting peace and nation building in addition to staying on top of their case lists. A failure to appreciate the goodness of mediation and other forms of ADR either by inadvertence or by deliberate choice is a choice to remain with the problems of backlog and its related consequences.
On 9 December 2010 judgment was delivered in a highly publicised prosecution of 18 people for breaches of the Arms Act 1981. The judge’s decision was one of a number of pre-trial rulings in the matter. The following words appeared as a banner at the top of the judgment: ‘THE JUDGMENT IS NOT TO BE PUBLISHED (INCLUDING ANY COMMENTARY, SUMMARY OR DESCRIPTION OF IT) IN NEWS MEDIA OR ON INTERNET OR OTHER PUBLICLY ACCESSIBLE DATABASE OR OTHERWISE DISSEMINATED TO THE PUBLIC UNTIL FINAL DISPOSITION OF TRIAL OR FURTHER ORDER OF THE COURT. PUBLICATION IN LAW REPORT OR LAW DIGEST IS PERMITTED.’

Immediately following delivery of the judgment the appellant, S, published an article on his websites, commenting on the ruling and including a hyperlink to the judgment: by clicking on the link, the reader would have immediate access to a copy of the judgment. The judge subsequently varied the original order to allow reporting of the outcome of the judgment. S published another article on the matter on his websites. The Solicitor General applied to the High Court for a finding that S’s actions in publishing the statements constituted a deliberate, persistent and unjustifiable disregard for the High Court order and an assault on its authority. The High Court upheld the Solicitor General’s application, finding that the suppression order was binding on S, that he published the judgment on his websites in breach of the order and that his breach was deliberate and in contempt of court. The High Court sentenced S to six weeks’ imprisonment.

S appealed to the Court of Appeal against the finding of contempt and the sentence imposed, arguing that the court had no inherent power to make the order in question; in the alternative S argued that s 138 of the Criminal Justice Act 1985, which provided that courts had the power to forbid the report of proceedings, removed any common law power to suppress publication of judgments. The Court of Appeal had to decide, inter alia, whether its decision in Taylor v A-G [1975] 2 NZLR 675, recognising the High Court’s inherent jurisdiction to make suppression of publication orders, correctly represented the law of New Zealand.

HELD: Appeal dismissed.

1) The High Court had an inherent power to order suppression or postponement of publication of its judgments. The scope of the court’s inherent power to regulate its own proceedings relevantly included orders which: (a) permanently suppressed publication of the names of witnesses giving evidence at trial, (b) bound the world at large, (c) operated past the date of completion of the proceedings, (d) operated to suppress publication outside the courtroom of information or events occurring within the court, (e) applied to cases where the subject matter was governed by statute, provided the order was not in contra-distinction and (f) partially postponed publication of a judgment or part of it until final disposition of the proceeding by trial. Protection of fair trial rights had long been a dominant consideration for courts when exercising inherent powers. Criminal proceedings had become the subject of increasingly intense public scrutiny. Both the established and social media were the vehicles. Courts were particularly conscious of the risks to fair trial rights posed by modern means of electronic dissemination of material. Suppression orders, directed at what could or could not be published about proceedings outside the courtroom, were a preventative strategy employed by courts to protect the statutory right to a fair and public hearing by an independent and impartial court. Their purpose was to ensure that independence and impartiality by keeping from potential jurors information which might unfairly influence or prejudice a trial or possibly deter people from seeking justice or participating in its administration. The court’s inherent power to regulate its procedures, for the ultimate objective of fairness, was the most flexible and effective means of achieving that purpose. Orders postponing publication represented...
only a partial and temporary intrusion upon the principle of open justice, while seeking to protect fair trial rights. Such orders were neither absolute nor blanket; while deferring the date of general publication until after trial, they allowed limited publication in established law reports. Once the existence of an inherent power in a court to regulate its procedures was accepted, courts should be free to settle its boundaries and develop the law according to their perception of domestic conditions and policy considerations. The courts were best placed to assess local societal conditions justifying the power to make orders. Contempt had traditionally been a creature of the common law and its expansion properly fell within the role of the High Court in protecting the due administration of justice. In recognising the inherent power to postpone publication, New Zealand law had settled on striking the balance in favour of the right to a fair trial whenever it conflicted with freedom of expression and the principle of open justice, and then only on a limited and temporary basis.

Per curiam. (i) Although the courts have used the terms ‘inherent jurisdiction’ and ‘inherent power’ loosely and, at times, interchangeably, these are distinct concepts. The authority of courts to make suppression orders derives from their inherent powers to regulate procedure and ensure fairness and not from the High Court’s inherent jurisdiction.

(ii) From a New Zealand perspective English decisions, currently contrary to New Zealand law, present a number of difficulties, reflecting a restrictive, apparently policy-driven, approach which recognises a power to make a non-publication order only where it is authorised by statute but no inherent power to make orders binding on the world at large. While accepting that the reporting of certain open court proceedings must be postponed, the Privy Council does not countenance a common law power to enforce this objective, relying on judicial warnings where the position is not governed by statute.

(iii) In enacting the Criminal Procedure Act 2011, Parliament has essentially accepted the Law Commission’s advice to retain Taylor v A-G [1975] 2 NZLR 675 and not interfere with the High Court’s inherent power to make suppression orders. Parliament’s approach can be construed as an acceptance of the importance of that power’s flexibility within the court’s overriding responsibility to exercise its powers to ensure a fair trial.

(iv) Contempt proceedings are neither fundamentally civil nor criminal. Rather, they are a unique summary process with certain protective features similar to those found in criminal proceedings. Previous distinctions between the two categories of contempt are no longer relevant, given that the same criminal standard of proof applies with common rights of appeal.

(2) The empowering provisions of s 138(2) were directed towards suppressing publication of events which occurred during the course of a sitting ‘of any court dealing with any proceedings in respect of an offence’ and also to excluding the public or sitting in camera. Parliament’s confirmation in s 138(5) that the statutory powers ‘are in substitution for any such powers that a court may have had under any inherent jurisdiction’ reinforced the specific purpose and effect of s 138(2). The suppression order made in the 9 December 2010 judgment was of publication of the judgment itself. On its plain meaning s 138 did not extend to a judgment which was the court’s own product, in contrast to evidence or submissions, the subjects of s 138(2), which were the products of witnesses or counsel. Therefore the court’s inherent jurisdiction to suppress publication of a judgment was not ousted by s 138(5).

(3) The sentence of six weeks’ imprisonment imposed on S following the finding of contempt was not manifestly excessive. A sentence of one half of the maximum might be viewed as lenient in the circumstances. The High Court properly imposed a sentence of imprisonment designed to deter and denounce S’s conduct. S knew or must have known, like any reasonable or well-informed observer, that the suppression order was made to protect the fair trial rights of the accused.

(4) Decisions of the House of Lords were persuasive but not binding authority in New Zealand. Their persuasiveness depended on two interrelated factors: (i) the applicability of the particular House of Lords decision to New Zealand law and (ii) the consistency of the particular decision with any decision of the Supreme Court of New Zealand since it was established on 1 January 2004. Decisions of the Privy Council were in a different category. Those given on appeals from New Zealand remained binding unless and until reversed by the Supreme Court. Decisions of the Privy Council on appeal from other jurisdictions would be, following the Supreme Court’s establishment in 2004, of persuasive value only.
In 2009 the second respondent wrote an article published by the first respondent in The Nation entitled ‘Will the judiciary come to the party?’ and sub-titled ‘Chief Justice Richard Banda needs to rally his troops behind the Constitution of 2005’ which, inter alia, contemplated judicial consideration of cases concerning fundamental rights and multi-party democracy in Swaziland. A second article published by the first respondent was entitled ‘Speaking My Mind’ and, inter alia, described the Acting Chief Justice at an official event marking the opening of the legal calendar as ‘behaving like a high school punk’ and having beaten his chest, calling himself ‘Makhulu Baas’, a term described by the respondents as meaning ‘big boss’. The applicant, the Attorney General, acting under a delegation of authority to prosecute issued by the Director of Public Prosecutions under s 162(5) of the Constitution of Swaziland Act 2005, lodged applications with the High Court calling on the respondents to show cause why they should not be committed and punished for criminal contempt of court. The applicant contended that the first article sought to influence the judiciary’s consideration of fundamental rights cases and that it impugned the honour, dignity, authority, independence and impartiality of the judges of the Supreme Court and the High Court by ‘poisoning the fountain of justice’ and that the article was in contempt of court. The applicant contended that the second article demeaned the Acting Chief Justice and was in contempt of court. The application was opposed by the respondents who contended, inter alia, that the summary procedure was unlawful and unconstitutional, that the Attorney General lacked jurisdiction under s 77 of the Constitution to prosecute either in his own right or acting under delegated authority and that the two articles did not constitute contempt of court, as s 24 of the Constitution guaranteed the respondents’ freedom of expression and the opinions expressed in the articles fell within the bounds of legitimate comment and criticism.

HELD: Constitutionality of summary procedure and of delegation of prosecutorial power upheld. Respondents found guilty of contempt of court.

(1) The Crown had discretion to prosecute the offence of contempt of court either summarily or under the ordinary criminal procedure. Section 139(3) of the Constitution provided that the superior courts were courts of record and had the power to commit for contempt of themselves and all such powers as were vested in a superior court of record immediately before the commencement of the Constitution. That subsection did not prescribe the procedure for committal for contempt and the procedure applicable prior to the coming into force of the Constitution was still applicable. The Constitution did not abolish the common law summary procedure but reaffirmed it. The summary procedure did not offend against the presumption of innocence provided by s 21 of the Constitution nor did it erode the usual safeguards accorded to accused persons. The founding affidavit in summary contempt proceedings set out the basis of the application and the particulars of the charge against the respondent in sufficient detail to enable him to plead. The court merely issued a rule nisi calling upon the respondent to show cause why they should not be committed and punished for criminal contempt of court. The respondent was given an opportunity to respond to the allegations and was entitled to file a notice to raise points of law if the allegations did not disclose an offence. It was a principle of the law that no person should be punished for contempt of court unless the offence charged against him was distinctly stated with sufficient particularity to enable him to respond to the allegations; in addition, he was given an opportunity to file an answering affidavit. The respondent was allowed a reasonable opportunity to place before the court any explanation of his evidence as well as submissions of fact or law. Unlike the ordinary criminal procedure, the personal liberty of the respondent was not interfered with. He was not arrested by the police and compelled to institute bail proceedings to regain his liberty prior to the trial. Prior
to issuing the rule nisi the court had to be satisfied that a prima case against the accused had been made; that requirement was in accordance with the presumption of innocence. The onus of proof in summary proceedings rested with the applicant and did not shift to the respondents. The applicant had to bear the onus of proving the commission of the offence beyond reasonable doubt. The respondents were entitled to legal representation before and during the hearing. They were entitled to call witnesses and file supporting and confirmatory affidavits in terms of court rules and could appeal against the decision of the court to the Supreme Court. It followed that the procedure was not unlawful or unconstitutional.

(2) The court had to balance freedom of expression with protection of the administration of justice. The right to freedom of expression under 24(3)(b)(iii) of the Constitution was limited to the extent that was reasonably required for the purpose of ‘maintaining the authority and independence of the courts’ and the court had power to interfere only when the bounds of moderation and fair and legitimate criticism had been exceeded. Contempt of court was a public remedy and it was not intended to vindicate the reputation of an individual judge. It was intended to maintain public confidence in the administration of justice and to ensure that it was not undermined. The protection and maintenance of the rule of law and the rights and freedoms guaranteed by the Constitution depended on the public confidence in the administration of justice. In the instant case, the first article had a tendency to bring the administration of justice into disrepute. Concerning the article’s criticism of a particular Supreme Court decision, s 146(5) of the Constitution provided that the Supreme Court was not bound to follow the decisions of other courts and that it might depart from its own decisions if they were wrongly decided. It was accordingly open to the litigants in that case to approach the court to review the decision. The attack on the Supreme Court was therefore unnecessary and was not justified in law. Furthermore, there was a limit beyond which the courts, in their liberal interpretation of the Constitution, could influence multi-party democracy in the face of s 79 of the Constitution, which expressly provided that ‘the system of government for Swaziland is a democratic, participatory, tinkhundla-based system which emphasises devolution of State power from the Central government to tinkhundla areas and individual merit as a basis for election or appointment to public office’. The remedy for proponents of multipartism did not lie with the courts but with the nation as a whole by constitutional amendment. The second article was a scurrilous attack on the then Acting Chief Justice as a judge. The article unlawfully and intentionally violated and impugned his dignity and authority and it was calculated to lower his authority and interfere with the administration of justice. It followed that the first and second respondents were guilty of contempt of court.

(3) Under s 77 of the Constitution of the Kingdom of Swaziland Act 2005, the Attorney General was the principal legal adviser to the government, an ex-officio member of Cabinet, an adviser to the King on any matter of law, provided guidance in legal matters to Parliament; assisted ministers in piloting Bills in Parliament, drafted and signed all government Bills to be presented in Parliament, drew or perused agreements, contracts, treaties, Conventions and documents in which the government had an interest and represented the government in courts or in any legal proceedings to which the government was a party, as well as consulting with the Director of Public Prosecutions in matters of national security. Section 162(5) of the Constitution provided, inter alia, that the powers of the Director of Public Prosecutions to institute criminal proceedings against any person before any court in respect of any offence might be exercised by the Director in person or by subordinate officers acting in accordance with the general or special instructions of the Director. Prima facie the Attorney General was not a subordinate officer of the Director; however, when he acted by virtue of delegated authority, he was in law subordinate to the Director on the basis that he prosecuted in accordance with the special instructions of the Director. Moreover, in the absence of a specific constitutional provision allowing the Attorney General to prosecute the instant matter, such power was implied, inherent and was a constitutional prerogative by virtue of his position as the principal legal adviser to the government. It followed that the Attorney General was entitled to institute proceedings against the respondents.
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