



A Regional Final Court of Appeal for the South Pacific?

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In his *Narrative of the surveying voyages of His Majesty's Ships Adventure and Beagle*² Charles Darwin, the great British naturalist and geologist opined of the finches found in the Galápagos 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.

¹ © J. A. Logan 2014. Moral right of authorship asserted. The views expressed in this paper, though derived from my experience as a serving judge, are personal, not institutional. They do not represent the views of either the Federal Court of Australia or of the Supreme and National Courts of Papua New Guinea. I express my gratitude to Mrs Joanna Fear, Library Manager at the Federal Court of Australia's Queensland District Registry Library for her valuable research assistance in relation to the preparation of this paper.

² Darwin, Charles (1839), *Narrative of the surveying voyages of His Majesty's Ships Adventure and Beagle between the years 1826 and 1836, describing their examination of the southern shores of South America, and the Beagle's circumnavigation of the globe. Journal and remarks. 1832–1836 III*, London: Henry Colburn, pp 461-462; Darwin Online: <http://darwin-online.org.uk/content/frameset?viewtype=text&itemID=F10.3&pageseq=480> (Accessed 1 March 2014).

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*,³ Dr Mere Pulea,⁴ 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.⁵ 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”.⁶

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.⁷

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.⁸ 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.

³ M Pulea, *A Regional Court of Appeal for the Pacific*, Pacific Perspective, (1980) Vol 9, No 2. p 1 (Pulea).

⁴ Dr Mere Pulea is a sometime judge of the Family Division of the former High Court of the Fiji Islands, later of the University of the South Pacific.

⁵ Pulea, p 5.

⁶ Ibid.

⁷ My Federal Court of Australia colleague, Justice Bernard Collier, also holds an additional commission as a judge of the Supreme and National Courts of Papua New Guinea. Another Federal Court colleague, Justice John Mansfield holds an additional commission as a judge of the Supreme Court of Vanuatu. Justice Raynor Asher of the New Zealand High Court of Justice also holds an additional commission on that court. The Hon John von Doussa AO served on that court while a Federal Court judge and continued so to do after retirement. Justices Robert French, Ron Sackville and Mark Weinberg held additional commissions on the Supreme Court of Fiji while serving on the Federal Court of Australia, as did Justices Keith Mason and Ken Handley when serving on the NSW Supreme Court. Justices Peter Connolly and Glen Williams of the Queensland Supreme Court served on the Court of Appeal of the Solomon Islands, as did Justice Michael Kirby when President of the NSW Court of Appeal. Justices James Burchett, Jeffrey Spender and Michael Moore were each members of the Court of Appeal of Tonga while serving as Federal Court judges. These are but examples, for the list is far from complete, especially with respect to New Zealand. The holding of additional, Pacific judicial commissions is not confined to the Australian and New Zealand senior judiciary. Sir Mari Kapi notably served as a judge of the Court of Appeal of the Solomon Islands when Chief Justice of Papua New Guinea.

⁸ Pulea, p 5.

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.⁹

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 Throne¹⁰ at the Opening of Parliament.¹¹ 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

⁹ Swinfen, David, *Imperial Appeal*, The Debate on the Appeal to the Privy Council, 1833-1966, Manchester University Press, 1987 (Swinfen), p 179.

¹⁰ "The Gracious Speech", as it is traditionally termed.

¹¹ Swinfen, pp 180-181.

*could be, and would be, a watchful guardian of human rights and an expositor 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.*¹²

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.¹³ 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.¹⁴

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,¹⁵ 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".¹⁶

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

¹² Hansard, *House of Commons Debates*, Vol 520, pp 105-106, 3 November 1953: <http://hansard.millbanksystems.com/commons/1953/nov/03/debate-on-the-address-first-day> (accessed 2 March 2014).

¹³ Swinfen, p 181, referring at fn 7 to Hughes H, *The Judicial Autonomy of the Dominions* (1931).

¹⁴ Swinfen, p 183.

¹⁵ s 74, *Australian Constitution*. Inter se matters are there defined as "any question, howsoever arising, as to the limits inter se of the Constitutional powers of the Commonwealth and those of any State or States, or as to the limits inter se of the Constitutional powers of any two or more States".

¹⁶ Menzies, Robert, *Afternoon Light, some memories of men and events*, Cassell Australia, 1967, p 324 (Menzies).

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.¹⁷

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.¹⁸ 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 position¹⁹ otherwise is a patchwork:

- Australia – New appeals to the Judicial Committee in matters arising under Federal law were abolished in 1968;²⁰ all such appeals in 1975²¹ 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 Australia²² and not restored upon independence in 1975. The

¹⁷ Menzies, pp 324-325.

¹⁸ Source: Judicial committee of the Privy Council website: <http://jcpc.uk/about/role-of-the-jcpc.html#Commonwealth> (Accessed 2 March 2014).

¹⁹ Save where separately footnoted, the source in respect of the position concerning the appellate system of justice in respect of each these countries is Corrin, Jennifer and Paterson, Don, *Introduction to South Pacific Law*, 3rd Edn, Palgrave Macmillan, 2011.

²⁰ *Privy Council (Limitation of Appeals) Act 1968* (Aus).

²¹ *Privy Council (Limitation of Appeals) Act 1975* (Aus).

²² s 4, *Privy Council (Limitation of Appeals) Act 1968* (Aus).

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.²³ 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 jurisdiction²⁴ 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.²⁵ On and from 21 March 1977, pursuant to an agreement made between Nauru and Australia and related legislation adopting that agreement,²⁶ 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.

²³ Constitution of the Solomon Islands, s 85(1).

²⁴ s 54, *Nauru Act 1965* (Aus), repealed by the *Nauru Independence Act 1968* (Aus).

²⁵ s 57(1), *Nauru Constitution*.

²⁶ s 75(i), *Australian Constitution* (as a matter arising under a treaty and therefore in Australia, strictly an exercise of original jurisdiction by the High Court); *Nauru (High Court Appeals) Act 1976* (Aus); s 57(2), *Nauru Constitution and Appeals Act 1972* (Nauru), as amended by the *Appeals (Amendment) Act 1976* (Nauru).

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.²⁷

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,²⁸ 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 difference, as one might imagine after such a passage of time since acquisition, was a very considerable

²⁷ *Land Clauses Consolidation Act 1845* (UK).

²⁸ *Ben v Suva City Council* [2008] FJSC 17, para 3.

sum indeed. The legislation was cast in general terms and provided for an assessment of “compensation” by the court.

The enduring worth of the worth of the common estate of law is very much on display in the judgement of the Fiji Supreme Court. Drawing upon precedent from English courts, decisions of the Judicial Committee in Canadian²⁹ and Hong Kong³⁰ appeals and the High Court of Australia,³¹ 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.³²

The judgement 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.³³

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.

²⁹ *Inglewood Pulp and Paper Company Ltd v New Brunswick Electric Power Commission* [1928] AC 492.

³⁰ *Director of Buildings and Lands v Shun Fung Ironworks Ltd* [1995] 2 AC 111.

³¹ *Marine Board of Launceston v Minister for the Navy* (1945) 70 CLR 518.

³² *Raja Vyricherla Narayana Gajapatiraju v Revenue Divisional Officer, Vizagaopatam* [1939] AC 302.

³³ *Federal Commissioner of Taxation v Interhealth Energies Pty Ltd (No 2)* (2012) 204 FCR 423.

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.³⁴

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 Court³⁵ 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

³⁴ Swinfen, p 218, note 1 (reference only).

³⁵ *Newman v New Zealand* (2012) 206 FCR 1.

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 Zealand³⁶ but not in Australia. Australian High Court authority³⁷ 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. Obligated 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.

³⁶ *R v Accused* [1993] 1 NZLR 385.

³⁷ *S v The Queen* (1989) 168 CLR 266 at 276 per Dawson J; affirmed in *KBT v The Queen* (1997) 191 CLR 417, in turn applying *Johnson v Miller* (1937) 59 CLR 467 at 486-487.

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".³⁸ 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 amended³⁹ 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.*⁴⁰

³⁸ Constitution of the Independent State of Papua New Guinea, Schedule 2, Sch. 2.2.2.

³⁹ s 41, *Law and Justice Legislation Amendment Act 1988* (Aus).

⁴⁰ Explanatory Memorandum in respect of the Law and Justice Amendment Bill:
http://www.austlii.edu.au/au/legis/cth/bill_em/lajlab1988352/memo_1.html (Accessed 4 March 2014).

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.⁴¹ 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*)⁴² 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.*⁴³

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.⁴⁴

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 LJ 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".⁴⁵ 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

⁴¹ Financial Times, 30 September 2013: <http://www.ft.com/cms/s/0/5340b848-2787-11e3-8feb-00144feab7de.html#axzz2v40vMp9Z> (Accessed 5 March 2014).

⁴² [1948] 1 KB 223 at 228.

⁴³ Aronson, Mark and Groves, Matthew, *Judicial Review of Administrative Action*, 5th Edn, Lawbook Co 2013, p 365, [6.440].

⁴⁴ See, for example, *Kuntun v Junias* [2006] PGSC 34; SC929.

⁴⁵ [2003] QB 1397 at 1413.

danger” of bias.⁴⁶ In Australia, the test is differently formulated, “reasonable apprehension of bias”.⁴⁷ 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.⁴⁸ 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 Court⁴⁹ 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

⁴⁶ *R v Gough* [1993] AC 646.

⁴⁷ *Webb v The Queen* (1994) 181 CLR 41; *Ebner v Official Trustee in Bankruptcy* (2001) 205 CLR 337.

⁴⁸ *Roylance v General Medical Council* [2000] 1 AC 311 at 319.

⁴⁹ *Application by Herman Joseph Leahy* [2006] PGSC 37; SC981; *PNG Pipes Pty Limited and Sankaran Venugopal v Mujo Sefa, Globes Pty Limited and Romy Macasaet* (1998) SC592.

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”.⁵⁰ 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.⁵¹

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

⁵⁰ World Bank website, Law and Justice Institutions Section, “Just development” web page: <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTLAWJUSTINST/0,,contentMDK:23524548~menuPK:8500414~pagePK:210058~piPK:210062~theSitePK:1974062~isCURL:Y,00.html> (Accessed 4 March 2014).

⁵¹ Dam, Kenneth, *The Law-Growth Nexus The Rule of Law and Economic Development*, Brookings Institution Press, Washington DC, 2013, p 1. Dam is a former United States Deputy Secretary to the Treasury and Deputy Secretary of State. He is Max Pam Professor Emeritus of American and Foreign Law and senior lecturer at the University of Chicago. He is also a senior fellow of the Brookings Institution. In Chapter 5, the theme of his work, evident from the quote, is both developed and evidenced relation to the Judiciary.

independence⁵² 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*⁵³ 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 UNICTRAL Model Law on Cross-Border Insolvency⁵⁴ 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 tilted 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.⁵⁵ 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

⁵² See, for example, from Guyana *Persaud v Plantation Versailles & Schoon Ord Ltd* (1970) 17 WIR 107 at 132 and, from Australia *Viro v R* (1978) 141 CLR 88.

⁵³ (2012) 293 ALR 699.

⁵⁴ Adopted for Australia by the *Cross-Border Insolvency Act 2008* (Aus).

⁵⁵ *Williams v Simpson (No 5)* [2011] 2 NZLR 380.

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.⁵⁶ 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.*⁵⁷

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

⁵⁶ As to this, see Pollard, Duke, *The Caribbean Court of Justice - Closing the Circle of Independence*, Caribbean Law Publishing Co, Kingston, 2004 (Pollard), Chap. 1. The Hon Duke Pollard is from Guyana and served as a member of the CCJ from 2005 until his retirement in 2010. The account in this paper of the features of the CCJ is drawn from Chap 1 and from the website of the CCJ: <http://www.caribbeancourtjustice.org>.

⁵⁷ Pollard, p. 1.

academia but includes two lay persons with the President of the CCJ as chair.⁵⁸ 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”.⁵⁹

What benefits, if any, has the CCJ brought? According to its President, The Right Honourable Sir Dennis Byron,⁶⁰ 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, enforceable 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.

⁵⁸ In detail and as per the CCJ website (<http://www.caribbeancourtsofjustice.org/about-the-ccj/rjlsc> Accessed 4 March 2014), the membership is:

- “(a) the President who shall be the Chairman of the Commission;
- (b) two persons nominated jointly by the Organisation of the Commonwealth Caribbean Bar Association (OCCBA) and the Organisation of Eastern Caribbean States (OECS) Bar Association;
- (c) one chairman of the Judicial Services Commission of a Contracting Party selected in rotation in the English alphabetical order for a period of three years;
- (d) the Chairman of a Public Service Commission of a Contracting Party selected in rotation in the reverse English alphabetical order for a period of three years;
- (e) two persons from civil society nominated jointly by the Secretary-General of the Community and the Director General of the OECS for a period of three years following consultations with regional non-governmental organisations;
- (f) two distinguished jurists nominated jointly by the Dean of the Faculty of Law of the University of the West Indies, the Deans of the Faculties of Law of any of the Contracting Parties and the Chairman of the Council of Legal Education; and
- (g) two persons nominated jointly by the Bar or Law Associations of the Contracting Parties.”

⁵⁹ Revised Agreement Establishing the Caribbean Court of Justice: <http://www.caribbeancourtsofjustice.org/court-instruments/revised-agreement-establishing-the-trust-fund> (Accessed 4 March 2014).

⁶⁰ Byron, Dennis, *The CCJ Developing Caribbean Jurists and Jurisprudence*, Paper delivered at the 8th Regional Law Fair, QECS Bar Association, Antigua, 16 September 2013.

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.⁶¹

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

⁶¹ An appeal is not to lie to the High Court of Australia from the Supreme Court of Nauru:

- (a) where the appeal involves the interpretation or effect of the Constitution of Nauru;
- (b) in respect of a determination of the Supreme Court of Nauru of a question concerning the right of a person to be, or to remain, a member of the Parliament of Nauru;
- (c) in respect of a judgment, decree or order given or made by consent;
- (d) in respect of appeals from the Nauru Lands Committee or any successor to that Committee that performs the functions presently performed by the Committee; or
- (e) in a matter of a kind in respect of which a law in force in Nauru at the relevant time provides that an appeal is not to lie to the High Court.

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 a 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 CCJ 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?