

The Judiciary:

Introductory remarks by Chief Justice Anthony Gates

Mr Vice President,

Members of the Human Rights Council,

Fellow Delegates to the Working Group,

In 2009, the entire Judiciary of Fiji was dismissed. Over the next succeeding months and indeed years, the premier task was to ensure that there was a functional judiciary in existence. Without a judiciary, there could be no redress for victims of sexual crimes, or for victims of road accidents seeking damages.

Immediately, all members of the Fijian Judiciary were placed on travel bans by both Australia and New Zealand. This made the task of recruitment even more difficult. The Judiciary as a vital institution of state was hardly buttressed by these measures. Nonetheless, some applicants did come forward to offer their services. However, it was often impossible for local applicants to do so since for instance, they may have had children who were already studying at university in those countries whose visas could be cancelled, or they had a family member who needed specialist medical treatment such as for cancer, and at times urgently. The bans deterred suitably qualified persons who might have served and who possessed these personal circumstances.

Sri Lanka generously and commendably offered assistance by allowing members of its judiciary to be seconded. It should be noted we have judges serving from 4 other jurisdictions as well as Sri Lanka.

The second issue of concern was to ensure that the judiciary had a substantial training program in place. Key areas of their work were to be covered such as Tax, Family Law, and Employment Relations but also training was to extend to human rights issues and to professional awareness matters such as sensitivity to gender issues and children in the court. Training is compulsory. The amount

of training in terms of days has been increased. The judiciary is open to training input and assistance from specialist NGOs. This is an area which needs further development. The judiciary welcomes approaches in this regard, not least from NGOs, who for various reasons hitherto have felt unable to volunteer their services with training. After all, a modern democratic state needs to draw ideas from a wide variety of sources if balanced, developed improvements are to be achieved.

Another session of gender training is taking place this Friday and 2 days are set aside in January 2015. Sometimes, there are cases where the approach to gender issues is incorrect or inadequate. Whilst welcoming approaches with regard to gender training, it is not possible to discuss individual cases with NGOs. The judiciary must remain scrupulously impartial and not subject to administrative applications concerning one only of the litigants before the court. The advice already tendered in response to such approaches or letters is for the organisation to seek the intervention of the DPP in a criminal case with a view to appeal. The director of Legal Aid might be approached in a family court case or civil case.

Torture during interrogation has been a longstanding problem in Fiji. Members of the police or prisons' service or others in authority have thought they had a right to impose an extrajudicial punishment on an arrested suspect or on an escaped prisoner, irrespective of what the court might eventually do by way of punishment. These attitudes are based upon a cultural misconception, a practice also prevalent in Europe some time ago, but within living memory. After interrogation, with improper methodology, the suspect at trial disputes the alleged confession. To ascertain whether the confession was obtained voluntarily, the courts hold a trial within a trial. This is sometimes a lengthy process occupying several days or weeks of court time. This could be avoided.

To that end, the Judiciary has provided money from its own budget to the police to kickstart a project for the video interviewing of all suspects in custody. The judiciary will provide additional funds and also training for the investigators. Funds are offered in this way firstly, because it is right that institutions combine their help to achieve the elimination of impropriety and

violent treatment. Secondly, it is offered to ensure a more efficient justice system, one that is both just and forensically accurate and correct.

The judiciary is both accountable and independent. Since 2007, all courts in Fiji sit in open court. There are no more sittings held in a judge's chambers. The only exceptions are in the case of the taking of a child's evidence required by law to be held in closed court, or for matters involving trade secrets, copyright, or national security where application is made to close the court.

Access to justice is also a matter included in training sessions. We anticipate working with UNICEF in this area to include training, benchbooks, and the use of screens for child witnesses. The main courthouse in Suva has just added new lifts for the disabled, a crèche, and a room for vulnerable witnesses. A programme of courthouse extensions is underway and such facilities will be included where resources permit.

Installation of video recording to cover all court proceedings is underway. Most courts have audio recording but by early 2015, all courts will be provided with video facilities for the recording of their proceedings. This assists in the speedy preparation of records for appeal purposes and assists in the early listing and hearing of appeals, as well as in providing a record of the trial. All participants behave much better when their conduct is captured in this way for later observation, be they counsel or judge.

Whether a judiciary is truly independent, fair, and competent, can to some extent be assessed by observing the conduct of judicial trials and hearings. Judgments are also to be examined. Are the decisions logical, and arrived at by cogent reasoning without intellectual perversity? The answer can be arrived at by looking at the decisions of the judiciary published on the judiciary website or on PaLii.

It has been insinuated that the Fiji judiciary is somehow not independent and that it is subject to the direction and control of the government. I refute that. Under the 2013 Constitution, the appointments system for judicial officers is now considerably less subject to political influence or control. Appointees are

made to the subordinate Judiciary by the Judicial Services Commission. The commission must consult the Attorney General, that is, "consult" not obtain "concurrence or approval". So if there is disagreement over an appointment, it is for the Judicial Services Commission ultimately and alone to make the final decision. In some quarters, comment has been misguided and it has been erroneously suggested that the government controls these appointments.

In the case of the appointment of senior judges, the commission must also consult the Attorney General upon the proposed appointment and his or her concurrence is not a prerequisite before the Commission can send its specific recommendation to the President, who is the appointing authority.

The appointment of the two most senior judges, that is the Chief Justice and the President of the Court of Appeal are made by the President on the advice of the Prime Minister, following consultation by the Prime Minister with the Attorney General [section 106 (1) Constitution]. These are the only two judicial appointments controlled by the government of the day. The 1997 constitution had the same procedure. Similar appointment procedures exist in other jurisdictions. Apart from these two appointments, the judiciary is appointed either directly by the Judicial Services Commission or by the President upon the recommendation of the JSC.

The Commission consists of 5 members [section 104 Const]. Presently, 2 of the 5 are women, 1 is a senior member of the Bar and the other, a representative of civil society. These arrangements for judicial appointment are a noticeable improvement from those of the 1997 Constitution and have considerably reduced political influence in the appointment process. The meetings of the Commission are video recorded with a secondary backup audio recorder. Minutes are transcribed and DVDs burnt for record purposes, and copies of both delivered to the line minister.

The Constitution [section 97] provides:

(a) for the independence of the judiciary from the legislative and executive branches of government

- (b) prohibits interference with the judicial function of the courts and unreasonable interference with the administrative functioning of the courts.
- (c) that it is the duty of parliament and cabinet through legislative and other measures to assist and protect the courts to ensure their independence, impartiality, accessibility, and effectiveness.
- (d) that Parliament must ensure adequate financial and other resources to enable the judiciary to perform its functions.
- (e) that the judiciary has control over its own budget and finances.

In effect, the judiciary is now to be fully autonomous, new protections introduced in the 2013 Constitution.

One final comment on a matter occasionally raised, the subject of ouster clauses, the denying of access to the courts for certain types of redress. The following procedure has been directed by me to be applied in all cases where the applicability of ouster clause is challenged, namely such cases must be listed before a judge for argument. The judge will then rule on that jurisdictional matter. Cases are not to be rejected by registry staff when such cases are first filed. Discussions will be ongoing with organisations such as the ILO who are to be welcomed in offering training sessions for judges and lawyers in relevant areas. Arising and developing from these exchanges, it is possible the new Parliament may seek to revisit its existing laws.

