

JUDGES AS CULTURAL OUTSIDERS: EXPLORING THE EXPATRIATE MODEL OF JUDGING IN THE PACIFIC

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I. INTRODUCTION

Expatriate judges from New Zealand, Australia and beyond are used in many Pacific Island countries, both as full-time resident members of the judiciary and as part-time non-resident members of appellate courts. At the time of independence in the 1960s-1980s, the expatriate model was used by a number of Pacific Island states to overcome the very real limitations of a small pool of local legal talent, and it continues to be used today. However, the model raises some issues, including what it means for developing an indigenous legal system that reflects and accommodates the values and customs of local society. In the related context of exploring a regional Pacific court of appeal, Mere Pulea has noted:¹

But what kind of justice are we searching for? One that is of ‘high quality’ in the sense of rigid conformity to English legal practices and values? Or do we seek the kind of judgments that are firmly rooted in the Pacific context where judges are attuned to the customs, conditions and the way of life of the people they are judging?

This article explores the role of expatriate judges in the Pacific region.² What are the benefits of this model? What are the challenges? While expatriate judges generally bring a wealth of judicial experience and expertise to their Pacific roles, there are also a number of challenges arising from the expatriate model. In particular, as “cultural outsiders”³ expatriate judges sometimes need to tread a fine line between making culturally inappropriate decisions at one end of the spectrum and taking cultural sensitivity to an

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1 Mere Pulea “A Regional Court of Appeal for the Pacific” (1980) 9(2) *Pacific Perspective* 1 at 9.

2 For the purposes of this article, the “Pacific region” comprises the 14 island members of the Pacific Islands Forum, namely the Cook Islands, Fiji, Kiribati, the Marshall Islands, the Federated States of Micronesia, Nauru, Niue, Palau, Papua New Guinea, Samoa, Solomon Islands, Tonga, Tuvalu and Vanuatu.

3 New Zealand Law Commission *Converging Currents: Custom and Human Rights in the Pacific* Study Paper No 17 (NZLC, Wellington, 2006) at [13.76].

extreme at the other. While a certain amount of deference to local decision makers will sometimes be necessary, a rigorous and independent approach is also expected, in particular of the final court of appeal. The article offers some very preliminary thoughts as to how expatriate judges might find a balance between taking heed of local circumstances while also ensuring a robust and independent approach to judging in the Pacific. Ultimately, it is recommended that further exploration of the concept of deference in this context is required.

Part II of this article considers three types of foreign appeal model currently being used in the Pacific region. Part III considers the benefits of the expatriate model of judging, while Part IV notes some of the challenges. Part V explores the particularly challenging situation where expatriate judges are required to give judgment in cases with a significant cultural or customary element. Part VI suggests that the concept of deference might usefully be employed by expatriate judges to explore the parameters of judicial deference to local decision makers. Part VII offers some tentative conclusions.

II. FOREIGN JUDICIAL MODELS IN THE PACIFIC

Before considering the benefits and challenges of the expatriate model of judging, it is useful to consider the expatriate model of judging as part of a range of foreign judicial models. Dale's 2007 study of Nauru's appellate model discussed three "foreign appeal" models.⁴ He defined a foreign appeal model as one where at least some of the appellate judges of a state are citizens of a foreign state. The "expatriate model" is when expatriate judges are appointed to an indigenous court. This model is currently used in a number of appellate courts in the Pacific region including Samoa, Fiji Islands, Kiribati, Solomon Islands, Tonga and Tuvalu.

The "supranational model" occurs when a state confers appellate jurisdiction on a supranational court. The court itself does not belong to any single country even if one country funds the court. It usually hears appeals from two or more countries. Supranational appellate courts sometimes produce a single jurisprudence. The Privy Council is the supranational appellate court which has had the most influence in the Pacific region. In the Pacific, a right to appeal to the Privy Council still exists for the Cook Islands, Niue, Tuvalu, Kiribati (for Banaban and Rabi Council constitutional issues only) and the Pitcairn Islands.⁵

The third model is what Dale terms "the offshore municipal model." This is where one state arranges for another state's court of appeal to act as its court of appeal also. This model applies in Nauru where the final court of appeal is

4 Gregory Dale "Appealing to Whom? Australia's 'Appellate Jurisdiction' Over Nauru" (2007) 56 ICLQ 641.

5 See <www.jcpc.gov.uk>. For further discussion of this model, and an argument in favour of its demise, see Mike Cook "A Pacific Court of Justice" (LLM Final Paper, Victoria University of Wellington, 2013).

the High Court of Australia. Tokelau, with its appeals from village council to the High Court of New Zealand is also an example, although unlike the Nauru/Australia example, Tokelau is still part of the Realm of New Zealand.

While each of the three models has its particular advantages and disadvantages, the expatriate model appears perhaps to be regarded as the most benign. Dale suggests that “local communities more often welcome judgments of expatriate judges than judgments of supranational courts.”⁶ Nevertheless, a number of challenges still arise from the expatriate model. These are explored further below, following consideration of some of the benefits.

III. BENEFITS OF THE EXPATRIATE MODEL OF JUDGING

There are a number of benefits for those Pacific states that use the expatriate model. At the time of independence, the expatriate model was used to assist small states to overcome the limitations of a small pool of local judicial talent. It enabled the country concerned to access some highly respected legal minds from common law jurisdictions around the region and beyond. Susan Boyd, an Australian diplomat with Pacific experience, has written that “expatriate judges continue to be needed by the common law jurisdictions in our region, especially for the courts of appeal, where a high level of knowledge, a greater experience, and a high level of respect is required.”⁷

An ongoing practical benefit from the continued use of the expatriate model is the associated practical transfer of skills from expatriate judges to local judges. While resources and opportunities for professional development of local judges in the Pacific have increased markedly in recent years,⁸ expatriate judges have a unique opportunity in working alongside local judges to enrich judgment writing, judicial method and judge craft skills. In this sense, expatriate judges, particularly in the case of resident expatriate judges and mixed appellate benches, can be seen as having a dual role as judges and as trainers for local capacity building.

A related practical benefit is that of resources. For Pacific Island states with small populations and limited resources, the expatriate model enables judicial expertise to be accessed for a limited cost. Although even then, this may still be a challenge. Justice Mason of Australia refers to the deferral of a sitting of the Solomon Islands Court of Appeal because of a lack of funds to

6 Dale, above n 4, at 645.

7 Susan Boyd “Australian judges at work internationally: Treason, assassinations, coups, legitimacy of government, human rights, poverty and development” (2003) 77 ALJ 303 at 306.

8 For a discussion of such resources and opportunities, see Sue Farran *Human Rights in the South Pacific: Challenges and Changes* (Routledge-Cavendish, Oxon, 2009) at 249-253.

pay the judges' airfares.⁹ However, with small caseloads, a model which uses part-time non-permanent expatriate appellate judges is likely to be quite cost effective.

Another practical advantage of the expatriate model, particularly in comparison to the supranational model or the offshore municipal model is that, except in the case of teleconferences where the judge may remain offshore, hearings are generally held in country. There is no additional expense for the parties and their lawyers to travel to the court as is the case with the offshore Privy Council. With the supranational model, the judging itself occurs outside the country concerned, and the judges may never even have visited the country. The in-country location of appellate courts with expatriate judges makes them more accessible than either the supranational model or the offshore municipal model. Even so, there are limitations, with some concern expressed at the practice of expatriate judges "parachuting" in for brief periods of time only.¹⁰ The increasing use of teleconferences may also raise similar concern. Here, resident full-time expatriate judges who live in-country can be contrasted with judges who only visit, physically or by teleconference, when their court is sitting.

An often-touted benefit of the expatriate model is that in small societies, the expatriate judge is able to remain truly independent of the concerns that might otherwise cloud the mind of a judge who is a citizen of that country.¹¹ The argument is that, not being a citizen of the country in which he (and it is commonly a "he") is judging, the expatriate judge is, by virtue of being an outsider, able to rise above the concerns of local politics. Boyd writes that expatriate judges are "seen to be above the local political and cultural divisions and cultural expectations which can hamper the delivery of justice."¹² She goes further, and suggests that because Pacific culture tends to emphasise the importance of the community ahead of the individual, and the importance of the family rather than society as a whole, "local judges can come under great pressure in their decision-making, to reach judgments which are not necessarily based on the rule of law."¹³ The non-corrupt administration of justice is, Boyd says, "assisted immeasurably by the services of these expatriate judges."¹⁴ Here, it needs to be noted that the evidentiary basis for Boyd's comments is not clear. Indeed, her views have been critiqued by academic

9 Anthony Mason "Reflections of an Itinerant Judge in the Asia-Pacific Region" (2000) 28(2) *International Journal of Legal Information* 311 at 318.

10 Boyd, above n 7, at 308.

11 Dale, above n 4, at 643.

12 Boyd, above n 7, at 306.

13 At 306.

14 At 307.

Peter MacFarlane, who contrasts his experience that “local judges, every day, are making difficult and controversial decisions in accordance with their judicial Oath without favour or affection.”¹⁵

Writing more recently in the context of Samoan celebrations of 50 years of independence, Professor Tony Angelo has suggested that one of the benefits of the Samoan Court of Appeal, which has comprised expatriate judges during the 50 year post-independence period, has been its conservative “steady as she goes” approach.¹⁶ In particular, he lauds the unanimous decisions of the Court in key constitutional cases, its reluctance to depart from precedent, and the careful way in which the Court has limited its role to interpreting the law and not initiating policy development. The Court, he says, has been “unwilling to interfere in matters which are not strictly legal” and “has a preference for the status quo while indicating, where appropriate, a path for possible future developments.”¹⁷ He also points out that not all expatriate appellate courts in the Pacific region have acted in this way, and indeed some have taken the opposite approach. This last point underscores the need to be careful of generalisations in this context. Much will depend on the approach of individual judges and benches.

A final, albeit unintended, benefit of the expatriate model is the contribution that individual judges may make to the development of a regional Pacific jurisprudence. A number of individual expatriate judges serve on more than one appellate court. This may enable them to cross-pollinate around the region and so over time contribute to the development of a Pacific specific jurisprudence.

IV. CHALLENGES OF THE EXPATRIATE MODEL OF JUDGING

One of the challenges in using the expatriate model of judging is the effect it has on sovereignty. The final appellate court in particular is a “symbol of sovereignty”¹⁸ and an argument can be advanced that any form of foreign judicial model diminishes the sovereignty of the state itself. More broadly, the expatriate model “may undermine a sense of national identity and independence, particularly a sense of ‘ownership’ of the judicial system, and may delay the development of jurisprudence unique to Pacific states.”¹⁹ MacFarlane notes that “an important symbol of independence is lost when foreign judges make judicial determinations on important social, cultural or political matters.”²⁰ At a practical level, this issue may be especially obvious

15 Peter MacFarlane “Some Challenges facing Legal Strengthening Projects” (2006) 4(1) *Journal of Commonwealth Law and Legal Education* 103 at 106.

16 AH Angelo “‘Steady as She Goes’ – The Constitution and the Court of Appeal of Samoa” (2012) 18 *NZACL Yearbook* 145.

17 At 158.

18 MacFarlane, above n 15, at 105.

19 New Zealand Law Commission, above n 3, at [13.75].

20 MacFarlane, above n 15, at 105.

where an appellate court comprised of expatriate judges overturns a decision of the court below given by a local judge, or strikes down a law enacted by the local Parliament.

Another challenge for at least some expatriate judges may arise from the different constitutional arrangements in the relevant Pacific state compared to the judge's home state. Pacific constitutions provide for the Constitution to be "supreme law" which enables the courts to strike down legislation inconsistent with the Constitution. However, some expatriate judges, such as those from New Zealand, are more familiar with the doctrine of parliamentary supremacy, which prevents judges from striking down legislation. It may therefore be something of a conceptual challenge for individual expatriate judges to put on a different hat, as it were, for constitutional cases in Pacific Island states.

A different and quite specific concern with the expatriate model is the use of comparative materials. As might be expected, expatriate judges, particularly non-resident judges, tend to use comparative material from their own jurisdiction, or similar jurisdictions. However, comparative materials need to be used carefully, critically and self-consciously, otherwise there is a risk that unacknowledged and potentially irrelevant values and principles will be incorporated and relevant ones will be ignored.²¹ The use of comparative material from a judge's home jurisdiction means "the pool from which precedent is selected is highly biased towards reflecting principles and values developed in a Western culture."²²

The expatriate model of judging also brings with it the risk that a neo-colonial or imperial attitude may creep into the administration of justice. Much will depend here on the attitude and approach of the individual judge. For example, an expatriate judge in Fiji recently noted that "this is not the first occasion that this court has had to bring to the notice of Senior Counsel several relevant local provisions of the law though being an expatriate judge," implying apparently, that local counsel were remiss.²³ On the other hand, and in a similar context, the Samoan Court of Appeal has noted that, while the judiciary are deemed to be familiar with the laws of the state in which they sit and to take judicial notice of them, to the extent that they lack such knowledge "as is sometimes the case with expatriate judges", they must take care with the assistance of counsel to educate themselves.²⁴

21 Danielle Kelly "Tonga for the Tongans": Culture in Rights Interpretation in the Tongan Constitution" (Master's thesis, University of Auckland, 2010) at 75.

22 At 81.

23 *UB Freight Ltd v Land Transport Authority* [2011] FJHC 659.

24 *Ali'i and Faipule of Siumu District v Attorney-General of Samoa* [2010] WSCA 5.

V. A MAJOR CHALLENGE: THE ROLE OF CULTURE AND CUSTOM

A. *Two judicial approaches*

A key challenge for expatriate judges who are cultural outsiders is whether such judges are able to deliver judgments that have meaning in the local context. There are two opposing attitudes that emerge here. The first view is that there is one objective and neutral “law,” whereby culture, custom and way of life are of little, if any, relevance to the enterprise of judging. Boyd, who for the most part is in favour of the expatriate model, illustrates this view with her dismissal of “political accusations” that law is a colonial “foreign flower.”²⁵ A judicial example of this view can be found in the case of *Attorney-General v Namoa* where Ward CJ, in response to a suggestion that the expatriate judges in the original case were unable to appreciate the true position under the law because they were not Tongan, stated:²⁶

The judges are here to apply the law as it stands and, if that law is such that it is necessary to be Tongan to understand its true meaning, I would venture to suggest it is poorly worded. If the law is clear in its terminology, the nationality of the judge will have no effect upon his interpretation.

The second view is that culture is indeed relevant to the interpretation and application of the law. As noted by Danielle Kelly, in the context of constitutional interpretation in Tonga, culture is intimately linked with identity, and when local culture is seen to be irrelevant to the law, local people lose their identity in that law.²⁷ Similarly, Mere Pulea points out that it does not automatically follow that the greater the measure of detachment or independence of the judge, the better the quality of the judgment. While expatriate detachment may be useful in that a judge does not become embroiled in local politics, “detachment could very well breed an inability to understand the local conditions as values, customs and culture differ from society to society.”²⁸ Expatriate judges may have only a superficial acquaintance with local conditions. In the Papua New Guinea case of *Tatut v Cassimus*, on the issue of “enticement” in the context of adultery, Saldanha J recognised that:²⁹

Parliament, of which the overwhelming majority of members are native-born Papua New Guineans, would be in a better position to formulate a law of enticement appropriate to the circumstances of the country than the expatriate judges of the Supreme Court.

25 Boyd, above n 7, at 307.

26 *Attorney-General v Namoa* [2000] TOSC 13.

27 Kelly, above n 21, at 84.

28 Pulea, above n 1, at 9.

29 *Tatut v Cassimus* [1978] PNGLR 295.

Judges immersed in the local environment are likely to be best able to “understand the pressures, needs and aspirations of the people being judged.”³⁰ The importance of the function of judgment lying “in the hands of those who have an understanding of the society, customs and culture” is particularly relevant in the context of custom law.³¹ MacFarlane has suggested that the expatriate model of judging has particularly negative consequences for the application of customary law. He suggests that expatriate judges are less likely to give emphasis to customary law as a source of law, despite its recognition in most constitutions in the Pacific.³² Jean Zorn suggests that expatriate judges who are unfamiliar with indigenous cultures may worry that they could be led to choose norms that do not actually exist, or to apply such norms incorrectly.³³ Expatriate judges may also miss nuances or qualifications that are important to those living the culture.³⁴ Professor Angelo has referred to the destabilising effect that ignoring traditions, customs and values can have on a small traditional society.³⁵ Another consequence of insufficient emphasis on customary law is the downstream effect this has on indigenous jurisprudence. In the context of Vanuatu, Miranda Forsyth has noted that the development of a Melanesian jurisprudence has been “the Holy Grail” for many in the region since independence, but that “this ideal has singularly failed to materialise in the twenty years since independence.”³⁶

A thorough analytical study of the approaches of individual judges in the difficult context of cases involving custom and culture across a range of jurisdictions is beyond the scope of this short article. However, three cases from the jurisdictions of Tonga, Samoa and Tuvalu provide some indication of how individual expatriate judges are grappling with the challenge of judging as cultural outsiders. These cases should not be taken as in any way representative. Nor is it suggested that local judges would necessarily have decided any of the three cases differently. Each jurisdiction has its own unique challenges and individual decisions depend not only on the individual judge (expatriate or not) but also on the constitutional and legislative framework, the facts of the particular case and the way in which the case was argued before the court. Bearing these qualifications in mind, the cases do nevertheless illustrate two distinct approaches. First, some expatriate judges appear to disregard local circumstances, culture and custom and see themselves as

30 Cook, above n 5, at 27.

31 Pulea, above n 1, at 1.

32 MacFarlane, above n 15, at 104.

33 Jean Zorn “Custom then and now: the changing Melanesian family” in Anita Jowitt and Tess Newton Cain (eds) *Passage of Change: Law, Society and Governance in the Pacific* (Pandanus Books, Canberra, 2003) 95 at 97.

34 Jean Zorn and Jennifer Corrin Care “‘Barava Tru’: Judicial Approaches to the Pleading and Proof of Custom in the South Pacific” (2002) 51 ICLQ 611 at 623.

35 See Angelo, above n 16, at 164, referring to the case of *Teonea v Pule of Nanumaga* [2005] TVHC2; [2009] TVCA 2, itself discussed further below.

36 Miranda Forsyth “Beyond Case Law: Kastom and Courts in Vanuatu” (2004) 35 VUWLR 427 at 427.

applying one “objective” law. Conversely, other expatriate judges pay a large amount of deference to local circumstances, whether it be to the policy choices of Parliament or the decision-making of the executive.

B. Taione v Kingdom of Tonga

The first approach, whereby local culture is disregarded, is illustrated by the case of *Taione v Kingdom of Tonga*.³⁷ This was a case about freedom of expression and the free press. The publishers of the *Taimi 'o Tonga* newspaper challenged the constitutionality of amendments to the Constitution of Tonga and the enactment of the Media Operators Act and the Newspaper Act which all sought to restrict media freedom. The constitutional amendment and the legislation had been enacted after the newspaper published a number of articles seen as critical of the government and the Royal Family. A key issue was the validity of an amendment to clause 7 of the Constitution. Clause 7 of the Constitution protects freedom of expression. The amendment purported to authorise Parliament to enact laws that limited freedom of expression where:

... necessary or expedient in the public interest, national security, public order, morality, cultural traditions of the Kingdom, privileges of the Legislative Assembly and to provide for contempt of court and the commission of any offence.

The case was filed in the Supreme Court and determined by the resident expatriate Chief Justice, Webster CJ. In support of the constitutional amendment, the Crown argued that the concept of freedom of speech in Tonga was governed by codes of appropriate behaviour (*poto*) and that the Constitution was underpinned by fundamental Tongan values of maintaining and enhancing group cohesion. It also argued that restrictions on media were intended to preserve a balance between the right of fair comment and ethical journalism. The Court held that the purported amendment to the Constitution was invalid and unconstitutional and that the Media Operators Act 2003 and the Newspaper Act 2003 were invalid because of inconsistency with the Constitution. Webster CJ noted that the Constitution developed by King George Tupou I in 1875 did not mention Tongan culture, and that the King had specifically sought to give Tonga a modern Western-style constitution. In this context, said Webster CJ, “Tongan culture is not a relevant factor” in the interpretation of the Tongan Constitution.³⁸

Under Webster CJ’s approach, in the absence of a specific reference to culture in the Constitution, culture could not be regarded as a relevant part of the context for constitutional interpretation in its own right. While the

37 *Taione v Kingdom of Tonga* [2004] TOSC 47. For a discussion of the case, see Anna Rosevear “Case Note: *Taione v Kingdom of Tonga*” (2005) 11 Auckland University Law Review 209.

38 *Taione*, above n 37, at 28.

Court's ultimate decision on the invalidity of the constitutional amendment is not questioned, the emphatic rejection of the relevance of Tongan culture to the interpretation of the Tongan Constitution is unfortunate.³⁹

C. Samoa Party v Attorney-General

In contrast to the *Taione* case, in the case of *Samoa Party v Attorney-General*,⁴⁰ the Samoan Court of Appeal, comprised of three expatriate judges, took quite a different approach and accorded "considerable deference" to the assessment of the legislature and executive about the details of the electoral process.⁴¹ This was a case about election corruption, the practice of "treating" and the ability to lodge a petition to challenge an election outcome in such a context. At issue was the constitutionality of a proviso to section 105(1) of the Electoral Act 1963. The effect of the proviso was that an election outcome could not be challenged by an ordinary voter, and could only be challenged by the Election Commissioner or a "significant loser" who polled 50% or more of the votes of the successful candidate. It appears that the legislative intent of the amendment was to combat post-election litigiousness and reduce the number of petitions being filed following each election.

The Court of Appeal agreed with the first instance decision of Sapolu CJ in the Supreme Court and found that the legislation was not unconstitutional. While the Court accepted that among the public interests inherent in the Constitution is an interest in free and fair elections, it did not accept that an election system that fails to include a right to challenge by way of petition for every voter was unconstitutional. Rather, the Court in essence concludes that the public interest is adequately secured by other means including the option of criminal prosecution of a successful candidate engaged in election corruption, a petition by the Election Commissioner, action by Parliament itself and measures designed to prevent corruption before the vote.

The Court's decision in the *Samoa Party* case is in some ways remarkable. On the actual issue of the right to challenge an election outcome via a petition, it was, as the Court itself noted, "striking" that there should be removed from the electoral regime the general right to bring an election petition.⁴² At its most basic level, the Court appeared to accept, at least implicitly, that a certain amount of corruption is to be tolerated as simply part and parcel of elections in Samoa. The practical consequence of upholding the constitutionality of the proviso to s 105(1) of the Electoral Act 1963 is that an unsuccessful candidate will only be able to challenge the election of a moderately corrupt successful candidate. A totally corrupt successful candidate who succeeds, perhaps as a result of his corruption, in decimating his opponent at the polls, will be

39 For a similar conclusion, see NZLC, above n 3, at [9.43].

40 *Samoa Party v Attorney-General* [2010] WSCA 4.

41 Rt Hon Sir Kenneth Keith "Reflections on Some Pacific Constitutions" (2012) 18 NZACL Yearbook 133 at 138. For a discussion of the case itself, see Angelo, above n 16, at 154-156.

42 *Samoa Party*, above n 40, at [41].

virtually unassailable. The unsuccessful candidate in these circumstances, or the ordinary voter in all circumstances, is unable to bring an election petition in his/her own right, and effectively has to rely on the Election Commissioner to do so. Worryingly however, the Court noted that the Commissioner's independence has been compromised in the past – “[w]e were told of an occasion when counsel for the Commissioner are said to have reversed their submissions following a ministerial intervention.”⁴³ Despite this very real and articulated concern, the Court nevertheless placed “particular weight” on the power of the Election Commissioner to bring an election petition, and act as a recipient of concerns expressed by members of the public and unsuccessful election candidates.

The Court also accepted that electoral petitions have a destructive impact on the peace and harmony of village life. The Court viewed it as entirely appropriate that non-matai were barred from challenging the election of matai. Since it is only matai who can stand as candidates, it is only matai who can challenge an election outcome, although only if they have 50% or more of the votes of the successful candidate. This outcome, said the Court, was “entirely understandable in Samoan society” and is consistent with, and even sanctioned by *fa’a Samoa*.⁴⁴ These conclusions, suggested the decision of the Court, uncomfortable as they may seem, should be accepted because they are consistent with Samoan culture. Further, as a developing country with limited resources, it was appropriate to limit expenditure on electoral petitions.

A notable feature of the decision is the extent of deference which the Court accords to Parliament. The Court described Parliament as having “double legitimacy” as the chosen representatives of the people and as composed of matai who are versed in both Christian principles and Samoan tradition.⁴⁵ However, with an apparent indication of some nervousness in relation to the outcome, the Court did note that it “has no power to impose its own ideas; it may do no more than say whether the Constitution has been infringed.”⁴⁶ Ultimately, one is left with the impression that the Court of Appeal might not agree with the choices of Parliament but was reluctant to act in direct opposition to it.

43 At [53(3)].

44 At [46].

45 At [10].

46 At [45].

D. Teonea v Pule of Kaupule of Nanumaga

The third case of *Teonea v Pule o Kaupule of Nanumaga*⁴⁷ concerned freedom of religion in Tuvalu.⁴⁸ It eventually resulted in four separate expatriate judgments, one in the High Court in 2005 and three in the Court of Appeal in 2009. These judgments illustrate aspects of both the approaches discussed above. Mr Teonea, a Tuvaluan resident in Fiji, returned to Tuvalu as a pastor for the Brethren church. The church was registered under the Religious Bodies Registration Act and established a presence in Funafuti. It then sought to expand to other islands including Nanumaga. However, the falekaupule on Nanumaga had resolved that religions other than the established Ekalesia Kelisiano Tuvalu (EKT) would not be permitted, although in fact three other Christian faiths already existed on the island. Mr Teonea began conducting bible classes on the island despite the falekaupule refusing him permission. When these classes became popular, opponents of the church stoned their building and in the interests of safety, the applicant left the island. No action was taken by the local police to identify and charge the perpetrators of the stoning.

The constitutional context for considering the issue was intricate and complex. The Tuvaluan Constitution protected human rights including freedom of religion and also placed strong emphasis on the maintenance of Tuvaluan values and culture. In particular s 29 of the Constitution provided that restrictions could be placed on the exercise of rights which were divisive, unsettling or offensive or which may directly threaten Tuvaluan values or culture. Mr Teonea sought declarations that the falekaupule's decision was contrary to the constitutional guarantees of freedom of belief, expression and association, and freedom from discrimination.

In the High Court, Ward CJ refrained from ruling on the merits of the falekaupule's decision but instead held that the falekaupule had the power to make the decision it did. As the resolution of the falekaupule did not have the status of a law, it was not subject to the requirement to be reasonably justifiable in a democratic society. Ward CJ noted however that the Constitution expressed the desire of the Tuvaluan people to hold to their traditions even if some individual rights are consequently curtailed. In addition there was a legitimate concern that the presence of new religions had caused the erosion of communal spirit on the island. In essence Ward CJ upheld the decision because it was one which the falekaupule was legitimately entitled to make.

⁴⁷ *Teonea v Pule of Kaupule of Nanumaga* [2005] TVHC 2; [2009] TVCA 2.

⁴⁸ For another discussion of the case, see also Angelo, above n 16, at 159-164. For a critique of the first instance High Court decision, see 'Dejo Olowu "When Unwritten Customary Authority Overrides the Legal Effect of Constitutional Rights: A Critical Review of the Tuvaluan Decision in *Mase Teonea v Pule of Kaupule*" (2005) 9(2) *Journal of South Pacific Law* (online).

Three judgments were delivered in the Court of Appeal, with a 2:1 majority overturning the High Court decision. Fisher JA in the majority held that the falekaupule resolutions were laws and so needed to be justified in a democratic society. He noted that the Constitution did not suggest that the scales are always to be weighted in favour of Tuvaluan stability and culture at the expense of constitutional freedoms, and placed weight on the fact that Tuvaluan culture is not frozen in time, suggesting that for Nanumaga to move from “four-foreign-sourced religions to five or more foreign-sourced religions” was acceptable cultural change.⁴⁹ While Fisher JA recognised that balancing the competing values was not an easy task, “in the end ... the time has come to allow the people of Nanumaga their constitutional freedoms” and “the constitutional freedoms should take priority in this case.”⁵⁰

In the minority, Tompkins JA, like Ward CJ, was of the view that the resolutions of the falekaupule were not “laws” and so were not subject to the requirement that they be justified by a balancing exercise. He noted however that if the resolution of the falekaupule were set aside then “the result will be a disaster for that small island community ... [t]he authority of the Falekaupule will have been challenged successfully.”⁵¹ Tompkins JA also acknowledged the limitations of the expatriate appellate court, commenting that “it would not be appropriate for an appellate court with no prior knowledge of Tuvalu or its culture” to overrule the factual finding based on “an impressive body of those very familiar with Tuvaluan culture” that introduction of the Brethren church would be divisive, unsettling or offensive to the Nanumaga community.⁵²

A comment from the third judge Paterson JA, who was in the majority and in essence agreed with Fisher JA that the falekaupule resolutions could not be reasonably justified, highlights the two different approaches on the issue of the degree of latitude to be accorded a local decision maker:⁵³

... the Chief Justice [at first instance] ... accepted that if the actions taken by the Falekaupule were taken as part of the traditional manner of decision-making in the community and were taken because of the Falekaupules’ [sic] reasonable belief that the provisions of section 29 existed, then the Court could not interfere. In my view, it is for the Court in a matter such as this, if there is a challenge to the validity of the resolutions, to objectively assess whether the Falekaupule was within its legal rights to impose the prohibition that it did, and the matter is not to be determined on the subjective combined view of the Falekaupule. If this were not so aberrant decisions of a Falekaupule would become binding without legal challenge.

In Paterson JA’s view then, there is a risk in such a situation that too much deference to the local decision maker could result in almost an abdication of the Court’s function. There is another risk too though - if insufficient

49 *Teonea* [2009], above n 47, at [128]-[132].

50 At [158]-[159].

51 At [35].

52 At [34].

53 At [205].

account is taken of local circumstances, then the Court could be seen as divorced from local realities, or in the words of Tompkins JA “the result will be a disaster for that small island community.” Indeed, the postscript to the *Teonea* case suggests exactly this. Following the Court of Appeal’s judgment, the Parliament of Tuvalu amended the Constitution in order to “protect the island communities of Tuvalu from the spread of religious beliefs which threaten the cohesiveness of island communities”⁵⁴ and enacted the Religious Organisations Restriction Act 2010.

VI. RESOLVING THE TENSION: THE CONCEPT OF DEFERENCE

Clearly then, there is a tension between the cardinal imperative of a robust and independent judiciary and the apparent need, at least in part because of the expatriate component, for some leeway to be accorded in individual cases to the approach of the local decision maker (be it the *falekaupule*, the executive or Parliament). In the *Taione* case, the Court failed to accord any latitude to the expertise of Parliament in explicating limits on freedom of speech in the Tongan context. In the *Samoa Party* case on the other hand, the Court did attempt to take heed of local circumstances, but perhaps with respect, went too far. In *Teonea*, the Chief Justice at first instance and Tompkins JA in the Court of Appeal deferred to the local *falekaupule* as decision maker while the majority on appeal seemingly placed little weight on the *falekaupule*’s assessment of circumstances on the ground. Does too much latitude therefore risk undermining the ability of an expatriate court to deliver a robust decision? Conversely, does an expatriate court blind to relevant local circumstances risk delivering a judgment which overlooks relevant cultural context?

It is important to note that the situation is undoubtedly a delicate one. One assumes that there must, at a personal level, be some discomfort for individual judges with their role in giving judgment in, and sometimes on, another state. This must be particularly so in cases where local culture is a significant part of the factual matrix in a case. An expatriate bench striking down a resolution of the local *falekaupule* or a law enacted by the local Parliament could be, and indeed in *Teonea* was, a controversial outcome. It may lead to suggestions of judicial imperialism. On the other hand, given the practical limitations of expatriate judges grappling with the nuance of local culture, it may perhaps be a more cautious option to exercise restraint and defer to the local decision maker. Such restraint might perhaps be partly a result of recognition by an expatriate bench of its limitations. However, while this may be appropriate in the wider context of the limitations of the expatriate model of judging, it may mean that in individual cases, the court is not fulfilling its duty to give an independent judgment.

54 Constitution (Recognition of Traditional Standards, Values and Practices) Amendment Act 2010, s 4(a).

Too much deference to the local decision maker in order to mitigate the risks associated with an expatriate bench is potentially just as problematic as an expatriate bench failing to fully appreciate the cultural context in which it is operating. So, what can be done at a practical level? As Boyd notes, the challenge for judges operating in such an environment is to be rigorous in administering and interpreting the law, while taking appropriate account of the local operating environment.⁵⁵ Yes, but how?

In the *Samoa Party* case, the Court was upfront about its potential shortcomings in terms of judging in the cultural context. It noted that it had referred to the affidavits on both sides “not in order to make particular findings of fact but to assist us to achieve the understanding of conditions in Samoa of which an informed citizen would be aware.”⁵⁶ While this approach is to be commended, it is suggested that the courts could perhaps go further and use the process of legal reasoning to explain and explore further its underlying approach in such cases. If the courts intend to accord deference to a local decision maker, then explicit discussion of this would be useful.

What exactly is deference?⁵⁷ Deference is a somewhat elusive concept employed by common law judges whereby, out of respect for the legislative or executive branch, the courts decline to make their own independent judgment on a particular matter. Deference is sometimes also described as judicial restraint, a discretionary area of judgment, a degree of latitude or a margin of discretion. Deference has been the subject of much judicial discussion and academic comment in the context of public law, particularly in the areas of administrative law and human rights. The precise rationale given for deference varies. Sometimes it is stated as being grounded in the separation of powers between the judicial and political branches. This justification is linked to the subject matter of the decision under review. In particular, where the case involves issues of social or economic policy or the allocation of resources, greater deference may be paid to the choices made by the political branches. A second rationale is said to be the relative competence or capacity of the courts and the decision maker whose decision is under review, in essence a deferral to the greater institutional expertise or “expert” knowledge of the decision maker. No matter the precise rationale, where deference is to be accorded, various factors are weighed to determine how much deference should be accorded. These factors can include matters such as the subject matter of the case, the nature of any human right at stake and the actual expertise of the decision-making body. Broader considerations include the constitutional allocation of functions, relative institutional expertise, functional suitability

55 Boyd, above n 7, at 307.

56 *Samoa Party*, above n 40, at [52].

57 For useful discussions of the concept of deference, see David Dyzenhaus “The Politics of Deference: Judicial Review and Democracy” in Michael Taggart (ed) *The Province of Administrative Law* (Hart Publishing, Oxford, 1997); TRS Allan “Human Rights and Judicial Review: A Critique of ‘Due Deference’” (2006) 65(3) Cambridge Law Journal 671; Richard Clayton “Principles for Judicial Deference” [2006] JR 109; Michael Beloff “The Concept of ‘Deference in Public Law’” [2006] JR 213.

of different institutions to assess certain questions and the nature of other controls on the decision-making process.⁵⁸ Finally, it is important to note that the precise parameters of deference are by no means settled and, indeed, the very existence of a “doctrine” of deference is itself disputed.⁵⁹

This article does not therefore go so far as to suggest that a doctrine of deference should be adopted wholesale in the Pacific. However, if, as appears to be the case, expatriate judges are on an ad hoc basis implicitly deferring to local decision makers, then it is suggested that explicit discussion and formulation of the parameters of deference in this context could usefully be explored by the courts. In the challenging context of cases involving issues of custom and culture, some notion of deference by a court comprised of expatriate judges to a local decision maker because of the latter’s cultural knowledge may be of particular use. However, such deference should be carefully circumscribed so as not to result in an abdication of judicial function. It is beyond the scope of this short article to further explore the parameters of how deference might apply in such a context, but the recommendation that this be done is strongly made.

VII. CONCLUSION

The expatriate model of judging, used widely in the Pacific region, has many benefits including independence, impartiality and neutrality as well as practical benefits such as access to high quality judges and effective use of limited resources. The expatriate model does, however, also bring with it some challenges, particularly where issues of culture or custom are central to a case. A judicial approach which ignores or overlooks culture is problematic. So too is an alternative approach of according unrestrained latitude to the choices of local lawmakers. A challenge for all judges, but perhaps an extra burden for expatriate judges, is to avoid both making culturally inappropriate decisions at one end of the spectrum and according too much latitude at the other in a well-meaning, but ultimately misguided, attempt to be culturally sensitive. This article suggests that judges should give consideration to developing, applying and explicating the concept of deference in appropriate cases. The notion of deference could be used to both accord latitude to local decision makers where appropriate and set the boundaries of acceptable deference. The concept of deference would potentially add rigour to judgments given by expatriate appellate judges particularly where culture, custom or local circumstances are pivotal. While the concept of deference is well-developed in other contexts, its application in this particular context requires further exploration.

58 Dean Knight “A Murky Methodology: Standards of Review in Administrative Law” (2008) 6 NZJPIL 117 at 139.

59 See Allan, above n 57.

Finally, a word on localisation. The use of the expatriate model of judging in the Pacific is certainly understandable when considered from a historical perspective. At the time of independence, many Pacific Islands simply did not have people trained as lawyers, let alone enough lawyers with sufficient experience to be judges. However, at the time of independence, it was probably envisaged, at least implicitly, that there would be a gradual “localisation” of the judiciary. Papua New Guinea has made significant progress towards localisation. In some other states, appellate courts increasingly have mixed benches, comprising local judges and expatriate judges, including from other Pacific Island states. However, localisation continues to be a slow process, and full localisation is still some way off. However, as a matter of national identity, the judiciary, as one of the three branches of government, should ideally be recruited from the citizenry of the country in which they are administering justice. Until that occurs, it is incumbent on the current expatriate judges to explore the parameters of deference, while at the same time doing all they can to continue to support localisation.