The Role of Foreign Judges in the Pacific: Past, Present and Future

The Hon. A S Bell, Chief Justice of New South Wales[1]

There is a long and fascinating history surrounding the role played by foreign judges in the courts of nations of the Pacific, both during colonial times and post-colonisation. That history is not uniform nor is it static. The common law and its preference for protecting the rights of individuals has sometimes created tension with customary rights especially in relation to land. While for the most part positive and invariably well-intentioned, the role played by foreign judges in the last three decades has often been ad hoc, has not always been appreciated and has occasionally been problematic. On other occasions, the treatment of some foreign judges has also been deeply problematic. The overall contribution has nonetheless been significant in the promotion of the rule of law and the development of local judiciaries.

Introduction

1 Together with the Legislature and the Executive, the Judiciary in a democratic polity is traditionally and properly regarded as the third arm of government and that is so whether or not Montesquieu's notion of the separation of powers is constitutionally enshrined or entrenched.

2 Within this democratic framework, it is often assumed (even if not theoretically mandated) that judges sitting on domestic courts will inevitably be citizens of the countries in which they sit. However, in many nations in the South Pacific, it has been noted that as many as three-quarters of all judges are foreign.[2] Perhaps less surprisingly, many of the emergent international commercial courts in Singapore, the Middle East and elsewhere**,** draw on judges (usually

[1] This paper was delivered at the Australian Judicial Officers Colloquium in October 2023. An earlier version of it was delivered to the Conference of Chief Justices of Asia and the Pacific and to the Judicial Branch of LAWASIA in Sydney in November 2022. The Chief Justice acknowledges the invaluable assistance of his Research Director, Ms Meghan Malone, in the preparation of this paper.
[2] A Dziedzic, *Foreign Judges in the Pacific* (Hart, 2021) at 1.

retired from domestic appointments) from a range of different sovereign states, as does the Hong Kong Court of Final Appeal.[3]

3 There is certainly a very long tradition of expatriate judging in the Pacific and that is the focus of this article. A number of preliminary points ought to be made.

4 First, when one speaks of Pacific Island nations, the temptation to generalise must be avoided. First, they vary enormously in terms of their size. Papua New Guinea has a population of over 10 million, and is almost twice the size of New Zealand. The next most populous is Fiji with almost 950,000 followed by the Solomon Islands with almost 750,000, almost a third larger than Tasmania and three times as large as the Northern Territory which is approximately the same size in terms of population as Samoa (226,168). Vanuatu has some 335,658 people, Kiribati 133,000, Tonga 108,000, the Marshall Islands 42,000 and then one drops to Nauru, Tuvalu, the Cook Islands and Palau which have 10-20,000 people each. The population of Niue is less than 2000, as is that of Tokelau.

5 Thus, when one speaks of foreign judging in the Pacific, the vast differences in the size of the respective populations must be appreciated, and this also carries consequences for the kinds of issues and challenges that confront the various judiciaries of each of the Pacific nations. It should also be appreciated that there is a significant Pacific diaspora, with many Pacific Island people living in Australia and New Zealand. This has led in New Zealand to the establishment of "Pasifika" Youth Courts within the District Court of New Zealand which are held at Pasifika churches and community centres with a judge facilitating hearings with the assistance of Pasifika Elders.

6 Secondly, although custom including customary laws play a significant role in the legal systems of Pacific nations, especially but not only in relation to land, one must also be extremely careful not to generalise or "homogenise"

[3] Currently, that Court has as non-permanent judges retired judges of the UK Supreme Court (6), the High Court of Australia (4), including two former Chief Justices, and a former Chief Justice of Canada. In relation to international commercial courts, see AS Bell "An Australian International Commercial Court - Not A Bad Idea or What a Bad Idea?" (2020) 94 ALJ 24.

discussion about the rich and diverse customs not only as between Pacific nations but also within many such nations where customs vary from island to island, or even between village to village. This point is powerfully made in a very significant study undertaken by the New Zealand Law Commission published in 2006 entitled "Converging Currents – Custom and Human Rights in the Pacific".[4] This study also explored the difficulties and challenges which may attend the proof of custom and customary practices in the formal setting of court proceedings.[5]

7 Such customs often reflect notions of collective and community rights, based upon the family and the village. Their potential to clash with individual rights which tend to be recognised and upheld by common law principles is obvious, and has been the source of some tension in some Pacific Island States, as observed in the foreword to a recent publication in relation to the legal systems of the Pacific.[6] Some Pacific Island Constitutions such as that of Tuvalu expressly limit human rights in order to maintain customary or cultural practices.[7] The role and importance of custom is also preserved by statute such as Papua New Guinea's *Underlying Law Act* 2000.[8] Customary practices also extend in some Pacific nations to methods of dispute resolution, at least in relation to some areas of law. In some nations, as will be seen, this has been institutionalised in the form of local land courts.

8 Most Pacific jurisdictions continue to share a common law tradition with Australia and New Zealand but supplemented by strong and closely held customs. Our nations have historically been connected through the British Commonwealth of nations, with the Privy Council acting as the common supranational apex court. As recently as February last year, the Privy Council gave judgment in an appeal from the Cook Islands (current population 17,044).[9]

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[4] *Converging Currents* see especially chapters 12 and 13. See also AH Angelo and J Avia "It's a long time since 1877: the Persistence of Custom"(2021) 26 CLJP/JDCP 163.
[5] See also Angelo and Avia (n 4) at 165.
[6] J Corrin and T Angelo (eds) *Legal Systems of the Pacific: Introducing Sixteen Gems* (Insentia, Cambridge, 2021) at viii.
[7] *Converging Currents* at [12.21]. See also at [12.38].
[8] See also *Converging Currents* at [13.69].
[9] *Framhein v Attorney General of the Cook Islands* [2022] CK-UKPC 1; [2022] UKPC 4. The applicant was a resident of the Cook Islands who carried out the duties and responsibilities of his father who

That particular, institutional point of commonality no longer unites us as it once did but notwithstanding the shrinking nature of its appellate jurisdiction and the increasing political independence of many Commonwealth nations in the Pacific in the last 50 years, our shared history and tradition is ongoing and has allowed judges from Australia and New Zealand to continue to serve in the Pacific.

9 Notwithstanding the effective disappearance of the Privy Council's unifying role, the biennial Conference of Chief Justices of Asia and the Pacific provides an important forum for leaders of judiciaries from across a very large region to connect with one another in an effort to improve the administration of justice and to develop innovative solutions to common problems. In recent years, judges sitting in the Pacific have been more heavily represented in these forums with technology greatly facilitating this interaction in circumstances where the cost of travel for judges from very small jurisdictions is prohibitive.

10 This paper explores the historical and present role of foreign judges in the Pacific and considers the various rationales for their appointments and the contributions they have and may continue to make. It also considers some of the complexities and problematic aspects of the role of foreign judges. The position is not entirely straightforward and free from complexity as the events in Kiribati in 2022 discussed later in this paper illustrate.

11 At the outset, the work of Dr Anna Dziedzic whose excellent monograph, *Foreign Judges in the Pacific* (Hart, 2021) should be acknowledged. It provides a scholarly and informative synopsis of the role that Australian and New Zealand judges have played in the administration of justice in the South

holds the title of Apai Mataiapo, one of the traditional leaders of the Cook Islands. The claims were brought against the Attorney General, sued on behalf of the Crown and the Minister of Marine Resources. The decisions of the Minister which were challenged concerned the scale of fishing for tuna in the seas which comprise the Cook Islands' Exclusive Economic Zone ("EEZ"). Two separate but related sets of issues were raised. The first concerned the role of Akono'anga Maori, the customary law of the Cook Islands as it relates to the conservation and management of fishing stocks in the Cook Islands' waters and also of the role of the traditional leaders of the Cook Islands as the exponents of that custom. The second set of issues concerned the relationship between the Cook Islands law-making process carried out pursuant to the Cook Islands Marine Resources Act 2005 and the work of the international fora in which the fishing nations, including the Cook Islands, cooperate to manage and control the utilisation of the natural resources of the Pacific Ocean.

Pacific.[10] Also to be noted is the work of H.P. Lee and Marilyn Pittard who are the editors of *Asia-Pacific Judiciaries: Independence, Impartiality and Integrity* and in particular the chapters in this work on Fiji and Vanuatu.

Foreign judges – colonial history and post-independence

12 Expatriate judging in the Pacific has a long history which is largely tied to colonialism. Under the Third Charter of Justice, the jurisdiction of the Supreme Court of New South Wales, administered by English lawyers who had come to the colony, extended over not only over "civil, criminal or mixed jurisdiction in all cases whatsoever as fully and amply to all intents and purposes in New South Wales and Van Diemen's land respectively and all and every islands and territories which now are or hereafter may be subject to or dependent upon the respective governments thereof" but also to all matters within the jurisdiction of the courts of King's Bench, Common Pleas and Exchequer in England and all matters over which the admirals had power committed in the islands of New Zealand, Otaheite or any other island country or place situate in the Indian or Pacific Oceans.[11]

13 Just as was the case when the British colonised Australia and New Zealand, when territories in the Pacific were annexed throughout the mid-19th century, the legal system of the colonising power and its judges were transported to the Pacific nation. Foreign judges in this era were seen as "agents of colonialism rather than independent arbiters of justice".[12]

14 For instance, the State of Papua New Guinea evolved from the unification of British Papua and German New Guinea, both of which were colonised in 1884. In the German territory, a German judge was appointed to establish a judicial system, but local clan leaders and their assistants were recruited to aid in dispute resolution. Meanwhile, in the British territory, colonial judicial officers were appointed to administer a summary judicial system. After Australia

[10] See also, A Dziedzic, "Judiciaries Upholding Judicial Independence in Pacific Island States" (2019) 96(9) *Australian Law Journal* 621.
[11] *New South Wales Act 1823* (UK).
[12] B Kama, "Expectations of Foreign Judges in the Implementation of Papua New Guinea's "Home-Grown" Transformative Constitution" (2022) 24(1) *Asian-Pacific Law & Policy Journal* 1 at 10-11.

obtained its own legal independence, it became the colonial administrator of British Papua in 1905 and German New Guinea in 1920. As Britain had done, Australia continued to send its own judges to sit on courts in Papua New Guinea, including on what were called the "Courts of Native Matters and Native Affairs". This practice persisted until the late 1960s when legal education and judicial positions became available to the local population in Papua New Guinea,[13] although Australian lawyers, including sitting Australian judges, continue to sit on the courts of Papua New Guinea.

15 Between the 1960s and 1980s, most states in the Pacific became independent. Thereafter, they developed their own legal systems and courts. Nonetheless, close ties to colonial legal systems were retained.[14]

16 Complex, pluralistic legal systems were baked into the constitutional arrangements of many of the Pacific states. For instance, in the Solomon Islands post-independence, the Constitution is the supreme law.[15] However, by way of s 76 of the Constitution, some English legislation as well as the rules of common law and equity are preserved and operate in conjunction with local customary law.[16]

17 As Pacific nations achieved independence, many of their constitutions were also drafted to provide for the ongoing appointment of foreign judges. For instance, s 80(2) of the Constitution of the Solomon Islands provides that a person who is not a citizen of the Solomon Islands and is over the age of sixty years may be appointed to its High Court or Court of Appeal for a term of years and shall cease to hold office at the expiration of that term.

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[13] B Kama, "Expectations of Foreign Judges in the Implementation of Papua New Guinea's "Home-Grown" Transformative Constitution" (2022) 24(1) *Asian-Pacific Law & Policy Journal* 1 at 13.
[14] A Jowitt, "The Nature and Functioning of Pacific Legal Systems" (2009) 13(1) *Journal of South Pacific Law* 1 at 4; see generally, J Corrin, T Newton and D Paterson, *Introduction to South Pacific Law* (Cavendish Publishing Limited, 1999).
[15] *The Constitution of the Solomon Islands 1978*, s 2.
[16] See, also, s 615 of the *Cook Islands Act 1915* (NZ), s 6(1) of the *Kiribati Act 1989* and s 6 of the *Tuvalu Act 1987*. See also, generally, D Paterson, "The Application of the common law and equity in countries of the South Pacific" (1997) 21 *The Journal of Pacific Studies* 1.

18 It should also be noted that, even after independence, foreign judges continued to hear appeals from the Pacific via the Privy Council. Appeals from Tuvalu, the Cook Islands and Niue to the Privy Council remain possible.[17] "Offshore municipal models" also persisted. Under these arrangements, the final court of appeal of another state, typically a colonial power, acted as the court of appeal for a Pacific nation. For instance, Nauru's final court of appeal was formerly the High Court of Australia.

Backgrounds of foreign judges

19 Foreign judges in the Pacific have predominantly been drawn from Australia, New Zealand and the United Kingdom.[18] This not only reflects colonial relationships and the ongoing relevance of English common law and equitable principles in most legal systems in the Pacific but is also, in the case of Australian and New Zealand judges, a product of geographic proximity.

20 There are however increasing numbers of judges drawn from other post-colonial common law nations. For instance, the Fijian courts now have a heavy representation of Sri Lankan judges. The President of the Fijian Court of Appeal is Dr Jayantha de Almeida Gunerantne and the Resident Justice of Appeals is Justice Chandana Prematilaka. Both judges were formerly senior legal practitioners in Sri Lanka. In addition, Justice Madan B Lokur, a former justice of the Supreme Court of India and former Chief Justice of Anhdra Pradesh was appointed to the non-resident panel of the Supreme Court of Fiji in 2019, and his term has recently been renewed.

21 The former President of the Nauruan Court of Appeal was Dr Shirani Bandaranayake, who was formerly the first female Chief Justice of Sri Lanka and a legal academic. The Court's acting President is Justice Rangajeeva Wimalasena, a former Si Lankan magistrate and District Court judge before

[17] N Baird, "Judges as Cultural Outsiders: Exploring the Expatriate Model of Judging in the Pacific" (2014) 19 *Canterbury Law Review* 80 at 81.
[18] Dziedzic (n 1) 27.

becoming a judge of the High Court of Fiji in 2018 and the first judge of that Court's Anti-Corruption Division in 2021.

22 There are now also an increasing number of judges appointed from other Pacific nations. When Sir Anthony Mason sat as President of the Solomon Islands Court of Appeal, he sat alongside Sir Mari Kapi, a judge of Papua New Guinea. Today, Sir Albert Rocky Palmer, Chief Justice in the Solomon Islands, sits on the Court of Appeal in Nauru alongside Justice John Muria, also from the Solomon Islands, and Justice Colin Makail, who hails from Papua New Guinea. They are joined on Nauru's Court of Appeal by Justice Filimone Jitoko, a local Nauruan who was formerly a judge of the Fijian High Court. The Chief Justice of Vanuatu, Vincent Lunabek, sits as a judge on the Court of Appeal in the Solomon Islands alongside Justice Les Gavara-Nanu, who is also a judge of the PNG Court of Appeal. The present Chief Justice of the Nauruan Supreme Court, Daniel Fatiaki, is Fijian born and was formerly a judge of the Supreme Court of Vanuatu and the Chief Justice of Fiji.

23 Nations like Palau, the Federated States of Micronesia, the Marshall Islands and Guam which have a colonial past and legal connection associated with the United States continue to appoint foreign judges from the United States and other current and former US territories. For instance, Chief Justice Daniel Cadra of the Marshall Islands, an American lawyer who was formerly a magistrate in the Alaskan Court System, was appointed as an Associate Judge of the Marshall Islands High Court in 1995 and Chief Justice of that court in 1996, a Senior Judge on Palau's Land Court and Justice of the appellate division of Palau's Supreme Court in 1999 and, in 2003, accepted a first 10 year appointment as the Chief Justice of the Marshall Islands Supreme Court which was renewed in 2013.[19] Similarly, nations including New Caledonia, French Polynesia and Wallis and Futuna retain a legal connection with France. There continues to be a right of appeal from Courts of Appeal in these Pacific nations

[19] "Bios of Senior Judges and Staff – Supreme Court Chief Justice Daniel N. Cadra" *Republic of the Marshall Islands Judiciary* (online, undated) <https://rmicourts.org/the-judiciarys-courts-and-personnel/senior-judges-and-staff/>.

to the Court of Cassation in Paris and in some states, such as French Polynesia, judges are still appointed from France.

24 Although some foreign judges in the Pacific have never held other judicial appointments and were drawn straight from practice in their home jurisdictions,[20] the majority of foreign judges sitting in the Pacific continue to serve as judges in their home jurisdiction. For instance, New Zealand Maori Land Court judge, Justice Craig Coxhead, is the Chief Justice of Niue and a judge of the Cook Islands. The Chief Justice of New Zealand, Dame Helen Winkelmann, is also Chief Justice of Tokelau.

25 Justices Collier and Logan of the Federal Court of Australia recently resumed sitting in person in the Supreme Court Papua New Guinea, pursuant to a longstanding arrangement with the Papua New Guinean judiciary.[21] Justice Collier also recently sat as a judge of the National Court in civil matters in the Madang and East New Britain provinces.[22] No doubt the recent abolition of the death penalty in Papua New Guinea has removed a barrier that may have dissuaded other foreign judges from accepting judicial office in that country.

26 An Australian lawyer who is now a permanent judge of the National and Supreme Court of Papua New Guinea is Justice Teresa Berrigan. She is a former federal and international war crimes prosecutor and is the judge administrator of Papua New Guinea's National Court Crime, Fraud and Corruption Track.

27 Both Justice Bruce McPherson and Justice Glen Williams, former members of the Queensland Court of Appeal, used their leave entitlements to sit a couple of times a year in the Solomon Islands. Justice Richard White of the New South Wales Court of Appeal and Justice Stephen Estcourt of the Supreme Court of

[20] Dziedzic (n 1) 34.
[21] This arrangement commenced in 2011 but due to the COVID-19 pandemic, Justices Collier and Logan did not travel to Papua New Guinea between February 2020 and January 2022. Their Honours continued to determine matters on the papers during this period: Federal Court of Australia, 'International Development & Cooperation – 20 Year Retrospective' (no date provided).
[22] Federal Court of Australia, 'International Development & Cooperation – 20 Year Retrospective' (no date provided).

Tasmania are also judges of the Supreme Court of Tonga and Court of Appeal of that country together with a number of New Zealand judges. Recently, two sitting judges of the Queensland Court of Appeal, Justice Philip Morrison and Justice Jean Dalton, were also appointed to the Court of Appeal of the Kingdom of Tonga.

28 However, a large number of foreign judges who serve in the Pacific are retired judges. For example, Justice Glen Williams continued to sit as a member of the Solomon Islands Court of Appeal following his retirement from the Supreme Court of Queensland, and following her retirement from the court, Justice Margaret Wilson was also appointed as a judge of the Court of Appeal in the Solomon Islands. Retired Chief Justice (and former Governor) of Queensland, the Honourable Paul De Jersey AC CVO KC, was also appointed to the Tongan Court of Appeal. Justice John Mansfield, formerly of the Federal Court of Australia, continued his work on the Vanuatu Court of Appeal following his retirement. Justice John von Doussa, also a former judge of the Federal Court, continues to sit on the Vanuatu Court of Appeal. He first heard cases as an additional judge of the Vanuatu Supreme Court in 1993 and also held appointments to the Supreme Courts of Nauru and Fiji.

29 One of the most notable Australian and New Zealand judges in the Pacific in terms of longevity of connection and distinction of contribution was Justice Ken Handley AO, formerly of the New South Wales Court of Appeal.

30 Whilst his Honour sat on the New South Wales Court of Appeal, Justice Handley also served as a part time Judge of the Fiji Court of Appeal from 1996 to 2003, and as a part time Judge of Fiji's Supreme Court from 2003 to 2009. Following his Honour's retirement from the NSW Court of Appeal, Justice Handley held dual appointments to the Courts of Appeal in Tonga and Kiribati.

31 During Justice Handley's time on the Fiji Court of Appeal, he sat on the *Prasad* case,[23] which was a significant constitutional judgment of legal and political

[23] *Republic of Fiji v Prasad* (unreported, Fiji Court of Appeal, Casey J, Barker, Kapi, Ward and Handley JJA, 1 March 2001).

significance in Fiji and the Commonwealth of Nations. That case was brought by Mr Chandrika Prasad, a farmer who had been forced from his home in the aftermath of a coup, against the Republic of Fiji. Mr Prasad obtained a declaration that the Constitution of Fiji had not been displaced by the coup and was still in force. The interim government appealed this decision, submitting the question of its own legality to the Fijian Court of Appeal. When the Court of Appeal also held that the Constitution remained in effect, the interim government, by and large, accepted the Court's decision, owing in large part to the bench anchoring its decision in local norms.

32 Former Chief Justice Spigelman, who also sat occasionally on the Supreme Court of Fiji, described the Prasad case in a tribute to Justice Handley on his retirement as follows:

> "Together with your fellow judges you arrived at a time of considerable tension in Fiji, personally protected by the army and special branch, amid a high level of security at the airport, at your hotel and in and around the court. This included snipers on the roof of the court building and a personal escort of two special branch officers when out walking, to whom was added a jeep full of soldiers when you went to church, to face the particular hazards of that expedition.
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> The court unanimously held that the Constitution remained in force as the supreme law of Fiji. The military installed government accepted your decision and resigned. The new President dissolved Parliament, called a general election, albeit reappointing the government on a caretaker basis. This was the most dramatic possible affirmation of the significance of the rule of law. It is a contribution you may be called upon to make again and, one trusts, to do so soon. I know from my own direct experience when I myself sat as a judge of the Supreme Court of Fiji, on a constitutional case of considerable significance but with a lower sense of threat than you experienced, just how much your own role was appreciated in that nation."

33 Justice Gerard Winter was appointed to the Fijian High Court in 2003 where he also dealt with various cases arising out of the 2000 coup in Fiji. His Honour continued to serve on that court until shortly after the 2006 coup, before taking up work with the United Nations and then as a Judge of the District Court of New Zealand. In September 2023, Justice Winter was appointed to the Fijian Court of Appeal. Judge Paul Geoghegan, also of the New Zealand District

Court, sat on the Supreme Court of Vanuatu between March 2016 and March 2018, and again between February and May 2023.

34 Of the foreign judges who serve in the Pacific, some will reside permanently in those Pacific states for the duration of their appointments. Other will visit only for particular cases or sittings. Judges who hold appointments to multiple courts, either in their home jurisdictions or elsewhere in the world, will naturally be non-resident judges. The residency or otherwise of a foreign judge may have implications for the role they play in the administration of justice in the Pacific.

35 It should also be noted that although the composition of benches in Australia, New Zealand and the United Kingdom has drastically changed in recent years, the vast majority of foreign judges who accept appointments in the Pacific continue to be men. Only 7% of the foreign judges serving in the nine Pacific nations surveyed by Dr Dziedzic in her work were women.[24]

Appointment processes

36 Foreign judges are appointed to office in the Pacific by a variety of routes.

37 Typically, the relevant Constitution will prescribe a process for the appointment of all judges which applies to foreign and local judges alike. For example, s 106 of the Constitution of Fiji prescribes the Chief Justice, President of the Court of Appeal and Judges of the Supreme Court and Court of Appeal are to be appointed by the President, on the recommendation of either the Prime Minister and the Attorney-General or the Judicial Services Commission following consultation with the Attorney-General. Section 105(1) provides that a person will not be qualified for those offices unless they have held "high judicial office

[24] A Dziedzic, "Women Judges, Local Judges, Foreign Judges: Methods of Collecting and Analysing Data on Gender and Pacific Judiciaries" *IACL-AIDC Blog* (online, 9 November 2021) <https://blog-iacl-aidc.org/2021-posts/2021/11/9/women-judges-local-judges-foreign-judges-methods-of-collecting-and-analysing-data-on-gender-and-pacific-judiciaries-7z6nl>.

in Fiji or another country" or have "had not less than 15 years post-admission practice as a legal practitioner in Fiji or in another country".

38 Three means have been identified by which foreign judges are recruited for appointment to office in the Pacific: informal transnational networks between, for instance, Chief Justices or Attorney-Generals, advertisements, and established formal relationships between courts, judges and regional bodies with centralised lists of judges willing to serve on overseas courts or longstanding donor court relationships like those currently in place between the Federal Court and PNG.

39 In an unpublished paper "Judicial Administration in the Pacific", former Chief Justice of Kiribati, William Hastings, described his appointment process as starting when he responded to a request for expressions of interest sent via email to all New Zealand District Court Judges. He went on:

> "It is hard to find a job description for 'Chief Justice'. The email calling for expressions of interest set out some of the criteria… It did not mention the constitutional aspects of the position, nor the "softer" skills required to maintain visibility at various functions and a physical presence in the outer islands to promote access to justice for all in Kiribati, regardless of island of residence."

Why appoint foreign judges

40 Four general rationales have been offered for the appointment of foreign judges to courts in the Pacific, [25] each of which warrants some exploration.

Foreign aid, localisation and capacity building

41 First, it has been suggested that in the Pacific, the most common rationale for the appointment of foreign judges is as a transitional measure pending the development of a suitably qualified local profession[26] and second, that foreign

[25] Dziedzic (n 1) 188.
[26] Ibid 2.

judges are able to assist in expediting this process of localisation by building the capacity of local lawyers.[27]

42 In this respect, foreign judges may be seen to represent a personalized form of foreign aid. By providing experienced judges to Pacific nations with often relatively new legal systems, limited resources and small populations, nations like Australia and New Zealand can provide considerable judicial experience at low or minimal cost. Former Chief Justice Hastings observed:

> "The salary of the Chief Justice of Kiribati was AUD 40,0000, about 1/8th of my salary as a District Court Judge, so I could only take up the position as a secondment under which I would retain my New Zealand warrant and salary, and have my Kiribati salary paid to the New Zealand government. I essentially became a Pacific aid project aligned with New Zealand's goals of strengthening judicial independence and the rule of law in the Pacific."

43 When serving in the Pacific, foreign judges may expedite the process of localisation and build local capacity by sitting with local judges. This was recognised by the Papua New Guinean Constitutional Planning Committee in 1974 which reasoned that, because Papua New Guinean lawyers were not trained until the 1960s, foreign judges would need to be relied upon as a transitional measure post-independence. However, an Assistant Judge system was developed to give local lawyers with at least three years experience the opportunity to sit with and learn from experienced foreign judges.[28] As of 2022, 85% of judges in Papua New Guinea are local judges.[29]

44 Foreign judges may also build the capacity of local legal professionals in the Pacific and contribute to localisation through extrajudicial work. When appointed as a Supreme Court Judge of Nauru in October 2022 to assist in clearing a backlog of migration appeals, Matthew Brady KC was able to build local capacity in the Pacific on a more informal basis by running interactive advocacy sessions with the Nauru Law Society. Similarly, Justices Collier and

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[27] Ibid 190.
[28] Constitutional Planning Committee, *Papua New Guinea Constitutional Planning Committee Final Report* (1974), Ch 8 at [34]-[38].
[29] B Kama, "Expectations of Foreign Judges in the Implementation of Papua New Guinea's "Home-Grown" Transformative Constitution" (2022) 24(1) *Asian-Pacific Law & Policy Journal* 1 at 8.

Logan have facilitated and delivered a variety of judicial and legal educational activities in Papua New Guinea for judges and other legal professionals.[30] Throughout 2022, Justice Logan ran virtual and in-person workshops across the Pacific on subjects such as commercial litigation, civil litigation and the preparation of pleadings and statutory interpretation.

45 It should also be noted that there are also numerous formal programs through which Australian and New Zealand judges contribute to legal education and the development of judiciaries in the Pacific. The Pacific Judicial Integrity Program run by the Federal Court in partnership with the Papua New Guinea Centre for Judicial Excellence, among other things, aims to facilitate a regional judicial mentoring network. Twelve Pacific Island judiciaries are participating in the program, namely Fiji, Nauru, Palau, Papua New Guinea, Samoa, Solomon Islands, Tonga and Vanuatu. After 2025, the program will be transferred to the Papua New Guinea Centre for Judicial Excellence to administer.[31]

46 The Pacific Justice Sector Programme run by the Te Kura Kaiwhakawa Institute of Judicial Studies out of New Zealand provides a similar service for judges in partner countries: the Cook Islands, the Federated States of Micronesia, Fiji, Kiribati, Nauru, Niue, Palau, PNG, Marshall Islands, Samoa, Solomon Islands, Tokelau, Tonga, Tuvalu and Vanuatu.[32]

47 So, too, the Judicial Commission of New South Wales has had a long association of collaboration with the judiciary of Papua New Guinea in in the provision of capacity-building assistance. Delegations from the Supreme and National Courts of Papua New visited the Commission in August and September 2022 and February– March 2023 to liaise with Commission's IT staff about the PNG Integrated Criminal Case System Database (ICCSD) and the PNG Legal Information Network (PNGLIN) services that the Commission hosts.

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[30] Federal Court of Australia, 'International Development & Cooperation – 20 Year Retrospective'.
[31] Federal Court of Australia, 'International programs contribution to the Court's 2021-2022 Annual Report'.
[32] "Pacific Justice Sector Programme" *Te Kura Kaiwhakawa Institute of Judicial Studies* (undated) <https://pjsp.govt.nz/>. *Converging Currents* at [13.22] referred to the provision of judicial benchbooks to many Pacific Island countries under the Pacific Judicial Development Program.

48 Also to be noted is work done by the Australian Bar Association and various State Bar Associations with local lawyers in the Pacific to assist in legal training and advocacy. Since 2002, for example, VicBar has conducted advocacy training workshops, advanced appellate workshops, and advanced advocacy skills workshops for lawyers from the Public Solicitors Office, the Office of the DPP, the Attorney-General's Office and the Department of Justice in Papua New Guinea, the Solomon Islands, Vanuatu and Tonga, the Cook Islands, Nauru & Fiji. The Queensland Bar has also had a significant engagement in respect of advocacy training in the Pacific, including providing up to two spots for Papua New Guinea practitioners in the Queensland Bar Practice Course as well as a significant number of online, live and interactive CPD training sessions specifically tailored for the South Pacific, as well as access to the Bar Association's internal CPD library. Training up of advocates contributes significantly to the development of the next generation of local judges in Pacific jurisdictions. There is also a Pacific Legal Association of which Justice Hament Dhanji of the Supreme Court of New South Wales is currently patron.

49 In terms of judicial outreach, an issue of principle arises as to whether judicial assistance should be provided on a direct "court-to-court" basis (ie arranged directly between courts) or whether it should be organised or at least approved by or through the executive governments of the respective countries involved. Should sitting judges be involved at all in judicial outreach which transcends national borders? If so, but at the behest of government, do questions of judicial independence arise?

Reputation of the foreign court

50 A third reason for the appointment of foreign judges to courts in the Pacific is that foreign judges may bolster the reputation and authority, and thus build both respect for and the jurisprudence of, Pacific courts.[33]

51 In December 2022, a series of appeals from decisions of the Refugee Status Review Tribunal brought under the Nauruan *Refugees Convention Act 1972*

[33] Dziedzic (n 1) 192.

which were dealt with by Justices Brady and Wheatley, both Queensland barristers appointed to the Supreme Court of Nauru expressly for the purpose of dealing expeditiously and effectively with a backlog of refugee matters. These decisions relied almost exclusively on Australian administrative law decisions.[34]

52 Additionally, the Nauruan Court of Appeal, comprised of President Dr Bandaranayake and Justice Wimalasena from Sri Lanka and Justice Makail from PNG, in *Republic v ERJ* [2022] NRCA 2, allowed an appeal against a determination of the first-instance judge, the Chief Justice, acquitting the Respondent of an offence of rape of a child under the age of 16. When considering complex issues such as the admissibility of expert medical evidence and the power of appellate courts to substitute a verdict of acquittal entered after a judge alone trial with a conviction, the Court relied on authority not only from Australia, the United Kingdom and New Zealand but also the Solomon Islands, Samoa, Fiji and Papua New Guinea.[35]

53 By contributing to and enhancing the quality of the jurisprudence generated by Pacific courts, Pacific nations may be able to attract greater foreign investment and attention from international organisations.[36] Chief Justice Salika of Papua New Guinea has indicated that, although the vast majority of judges in Papua New Guinea are now locals, foreign judges could continue to be appointed for their experience in particular areas of law.[37] That has occurred and reference has already been made to Justice Berrigan in that regard. For example, Papua New Guinea is heavily reliant on extractive industries such as mining, logging and petroleum. Foreign judges who have dealt more frequently with international trade and commercial law in their home jurisdictions strengthen

[34] See, eg, *TTY152 v Republic of Nauru* [2022] NRSC 26, *HFM045 v Republic of Nauru* [2022] NRSC 27, *QLN136 v Republic of Nauru* [2022] NRSC 32 and *YAU026 v Republic of Nauru* [2022] NRSC 31.
[35] See also, *Adun v Republic* [2022] NRCA 6 in which the same bench relied on an equally broad spectrum of authority in deciding issues arising out of an Appeal by a Member of Parliament against his conviction and sentence for offences occurring during an altercation with a refugee who he had commissioned to perform work on his property.
[36] R Dixon and V Jackson, "Hybrid Constitutional Courts: Foreign Judges on National Constitutional Courts" (2019) 57 *Columbia Journal of Transnational Law* 283 at 289-290; Dziedzic (n 1) 180.
[37] B Kama, "Expectations of Foreign Judges in the Implementation of Papua New Guinea's "Home-Grown" Transformative Constitution" (2022) 24(1) *Asian-Pacific Law & Policy Journal* 1 at 9.

the reputation of the Papua New Guinean judiciary as being able to deal with complex commercial disputes arising in these areas and consequently, promote foreign investment in the nation.[38]

Impartiality and independence

54 A fourth and important rationale for the appointment of foreign judges to courts in the Pacific relates to the values of impartiality and independence.[39] Although this observation may be perceived in a post-colonial world as an outmoded view,[40] to quote from Dr Dziedzic's work:

> "As outsiders, foreign judges are distanced from the personal, political and professional connections that are regarded as inevitable in small communities.[41] In the Pacific, this argument is reinforced by cultural values of reciprocity and communal harmony, the hierarchical structure of some Pacific societies, and the extended kinship or 'wantok' ties embedded in community relations.[42] These social values are regarded by several external commentators,[43] as well as by some in Pacific communities,[44] as a burden on local judges' impartiality. Foreign judges, free from these social connections and cultural demands, are thought to

[38] See, also, A Patel and S Naidu, "Interview With the Honourable Chief Justice Sir Gibbs Salika, Chief Justice of Paua New Guinea" in W C Wallace, M M Berlin and D K Das, *Trends in the Judiciary: Interviews with Judges Across the Globe (Volume 4)* (Taylor & Francis Group, 2021) 175.
[39] Dziedzic (n 1) 193-194.
[40] M Goddard, *Substantial Justice: An Anthropology of Village Courts in Papua New Guinea* (Berhahn Books, 2009) at 30.
[41] D Schofield, "Maintaining Judicial Independence in a Small Jurisdiction" in J Hatchard and P Slinn (eds), *Parliamentary Supremacy and Judicial Independence: A Commonwealth Approach* (Cavendish Publishing, 1999) at 73–74; W Veenendaal, *Politics and Democracy in Microstates* (Routledge, 2015) at 187.
[42] Wantok (one-talk) means, broadly, a member of the same group, and indicates the reciprocal ties within and between tribal, filial or kinship groups: J Nonggorr, "The Maintenance of Judicial Independence and Integrity in Papua New Guinea: Some Recent Developments" (1992) 18 *Commonwealth Law Bulletin* 1181 at 1188.
[43] S Boyd, "Australian Judges at Work Internationally: Treason, Assassinations, Coups, Legitimacy of Government, Human Rights, Poverty and Development" (2003) 77 *Australian Law Journal* 303 at 306; K King, "Order from the Court: Judiciaries as a Bulwark Against Legislative Corruption in Vanuatu", *The Global Anticorruption Blog* (18 December 2015); T Mellor and J Jabes, *Governance in the Pacific: Focus for Action, 2005–2009* (Asian Development Bank, 2004) at 37; W F S Miles, *Bridging Mental Boundaries in a Postcolonial Microcosm: Identity and Development in Vanuatu* (University of Hawaii Press, 1998) at 167–168.
[44] R L Kautoke, "The Jury System in Tonga" (2009) 13 *Journal of South Pacific Law* 8 at 18; J A Keniapisia, "Judges from Other Commonwealth Jurisdictions Serving in the High Court and Court of Appeal of Solomon Islands, Paper presented at the 20th Commonwealth Law Conference, Melbourne (22 March 2017) at 6; P F Sapolu et al, "Law and Custom" in M Meleisea, P Schoeffel Meleisea and E Meleisea (eds), *Samoa's Journey 1962–2012: Aspects of History* (Victoria University Press, 2012) 18 at 25–26.

provide greater impartiality and in turn support public confidence in the judiciary."

55 Heavy religious influences and the small populations of many nations in the South Pacific may also mean that the impartiality of local judges is compromised or perceived to be compromised. While local judges may often recuse themselves where they feel that the *wantok* system could affect their decision-making, Chief Justice Lunabek of Vanuatu has also spoken of the daily challenges for local judges of maintaining the appearance of impartiality in their communities.[45]

56 The absence of personal, political and cultural connections to local communities may render foreign judges more independent from other members of the court. They are less likely to have pre-existing judicial relationships on the Pacific island benches.[46]

57 The importance of foreign judges being "outsiders" cannot be understated in nations like Fiji that have experienced generations of political upheaval which is heavily associated with racial division. Fiji has two main ethnic groups: 54% of the population is Indigenous while 38% are Indo-Fijians, and relations between them have been fractious. There is also significant religious differences in the nation with 64% of the country being Christian, 28% being Hindu and 7% Muslim. In this context, the appointment of foreign judges has ensured that "the politics of race [did] not cast an all-enveloping shadow over the judiciary" and the administration of justice.[47]

58 Foreign judges who accept appointments in the Pacific following their retirement in another jurisdiction may also be perceived as more impartial because they are entitled to a fixed pension and benefits from their home jurisdiction thereby reducing their susceptibility to financial pressure. With

[45] M Forsyth, "The Vanuatu Judiciary: A Critical Check on Executive Power" in H.P. Lee and M Pittard (ed), *Asia Pacific Judiciaries: Independence, Impartiality and Integrity* (Cambridge University Press, 2018) 354 at 368.
[46] Dixon and Jackson (n 35) 309-310.
[47] Venkat Iyer, "The Judiciary in Fiji: A Broken Reed?" in H.P. Lee and M Pittard, *Asia-Pacific Judiciaries* (Cambridge University Press, 2018) 109 at 128.

some exceptions, foreign judges are also free to enter and leave the jurisdiction if there is political upheaval which offers them greater insulation from local political pressures.[48]

59 Accordingly, it is hardly surprising that foreign judges are regularly involved in highly politically sensitive cases, including those concerning the validity and outcomes of elections. For example, this year in *Matenga v Williams* [2023] CKHC 4, Justice Kit Toogood, formerly a judge of the New Zealand High Court, sat as a judge of the High Court of the Cook Islands to determine the qualifications of several electors in the August 2022 elections in the Cook Islands. Similarly, in *Helu v Electoral Commission* [2023] TOCA 6, a bench of the Tongan Court of Appeal comprised of Justice Randerson (from New Zealand) and Justices White and Morrison (from Australia), held that persons who had an outstanding judgment debts against them were not constitutionally disqualified from being elected to the Tongan Legislative Assembly as one of nine Nobles' Representatives, but could not be elected as People's Representatives.

60 In *Tuuau v Leota* [2022] WSCA 4, the Samoan Court of Appeal, comprised of Justices Harrison, Asher and Young (all from New Zealand) sat with Justice Tuala-Warren, a local Samoan and the second woman to serve as a Supreme Court judge. The Court was tasked with interpreting s 44 of the Samoan Constitution in the wake of the controversial 2021 Samoan general election which saw a historic change in government[49] and various members of parliament implicated in corruption, bribery and electoral offences.[50]

61 Section 44 of the Constitution provides that 10% of the Samoan Legislative Assembly must be women. If, after a general election, that quota is not met, then the women with the highest number of votes from that election are to be appointed as additional members until the quota is met. The Supreme Court

[48] Dixon and Jackson (n 35) 306.
[49] See, eg, J Fraenkel, "Samoa's 2021 election: The end of a one-party state?" *East Asia Forum* (online, 19 April 2021) <https://www.eastasiaforum.org/2021/04/19/samoas-2021-election-the-end-of-a-one-party-state/>.
[50] See, generally B Tabangcora, "An Analysis of the 2021 Electoral Decisions of Samoan Courts" (2021) 26 *Comparative Law Journal of the Pacific* 107.

had held that where a woman who has won a constituency seat vacates the seat and a man is elected to fill the seat in a by-election, an additional woman with the highest number of votes from that election or the previous election must be appointed as an additional member.[51]

62 In upholding the appeal, the Court of Appeal determined that s 44 does not require that where any seat held by a woman is vacated, a woman must always replace her as an additional member of Parliament. Rather, it was held that where a woman who holds a constituency seat steps down and a man is elected to replace her in a by-election, if the 10% quota is not met, then there will be no by-election and the seat must be filled by the available woman candidate with the next highest number of votes. Alternatively, if the 10% quota is still met, then there is no additional member required.[52] Ultimately, this meant that the first respondent had been invalidly sworn in as a member of Parliament.

63 In *Public Prosecutor v Kalosil* [2015] VUSC 135, 15 members or approximately 30% of the Vanuatu Parliament, including the Deputy Prime Minister, Speaker and four members of cabinet, were convicted by Justice Mary Sey, a Gambian judge, in Vanuatu Supreme Court of 53 counts of corruption offences. It should be noted that all trials before the Vanuatu Supreme Court are by judge alone.[53] The case was a landmark one and although there were some calls in the wake of the decision for Justice Sey to be deported, her decision was largely respected. After the verdict, several of the parliamentarians found to be corrupt are rumoured to have attempted to form a musical band.[54]

Problems associated with foreign judges in the Pacific

64 Although, as has been seen, there are at least four strong rationales for the appointment of foreign judges to courts in the Pacific, there are also several potential disadvantages and risks associated with the Pacific's reliance on expatriate judging. Australian and New Zealand judges have found themselves

[51] *Tuuau v Masipau; Leota v Electoral Commissioner* [2022] WSSC 1.
[52] *Tuuau v Leota* [2022] WSCA 4 at [49]-[50].
[53] *Swanson v Public Prosecutor* [1998] VUCA 9; *Public Prosecutor v Kalosil* [2015] VUSC 135 at [11].
[54] Forsyth, (n 45) at 361-362 citing B Makin, "Convicted MPs launch new musical career on Facebook" *Vanuatu Daily Digest* (online, 2016).

sitting on cases in foreign courts where the legality of certain political activity has been challenged in the courts, in a number of cases against the background of military coups.

Undermining sovereignty

65 There is a real tension in the Pacific between historical colonial ties and hard won and proud independence. In what has been labelled as a "sovereignty paradox" it has been suggested that the Pacific's reliance on foreign judges may undermine sovereignty and the sense of ownership Pacific states have over their legal system.[55] Pacific nations have adopted Constitutions which draw heavily on Western legal ideals in order to gain international recognition as sovereign states but continue to require skilled foreigners to interpret those Constitutions and administer core institutions of the state.

66 Some of the implications for Pacific sovereignty associated with the appointment of foreign judges, especially in constitutional cases, are exemplified by the recent Samoan Court of Appeal decision in *Ropati v Attorney General* [2023] WSCA 2. The case arose out of the abolition of the "old" Land and Titles Court and the establishment of a new Land and Titles Court in Samoa in 2020. The Land and Titles Court, which was a German colonial invention,[56] is presided over by a President, who was formerly required to be qualified as a Judge of the Samoan Supreme Court, sitting alongside Samoan judges and assessors. The Land and Titles Court's jurisdiction has always been deeply cultural and customary and encompasses matters concerning Matai titles and customary land as well as appeals from decisions of village councils. 81% of Samoan land falls under the matai titles system making the Land and Titles Court a very significant institution.[57]

[55] P MacFarlane, "Some Challenges facing Legal Strengthening Projects" (2006) 4(1) *Journal of Commonwealth Law and Legal Education* 103 at 106.
[56] See, ss 72 and 103.
[57] C Land, "One Boat, Two Captains: Implications of the 2020 Samoan Land and Titles Court Reforms for Customary Law and Human Rights" (2021) 52 *Victoria University of Wellington Law Review* 507 at 508.

67 In 2020, the Samoan Parliament passed the *Land Titles Act 2020* in conjunction with a number of other constitutional amendments. Broadly, the changes removed the Supreme Court's supervisory jurisdiction over the Land and Titles Court, thereby elevating it to a stand-alone court of equal status to the Supreme Court, and entrenched the Land and Titles Court in the Constitution giving it "supreme authority over the subject of Samoan customs and usages". Provisions were also enacted which gave the Judicial Services Commission, whose members are largely appointed by the Executive Government, an unlimited power to dismiss judges, thereby abolishing the former requirement that a judge could only be removed by a two-thirds vote of the Legislative Assembly on grounds of misbehaviour or mental impairment. The legislative changes had obvious, and concerning, implications for the rule of law in Samoa.[58]

68 Prior to the 2020 Act, the Appellant had been the President of the Land and Titles Court in Samoa. In April 2019, he was convicted of a violent criminal offence but a vote in the Legislative Assembly to remove him from office did not pass. In the course of additional appointments to the Land and Titles Court being made in 2021, an issue arose as to the extent to which the 2020 Act had effectively revoked the Land and Titles Court appointment of the Appellant and the appointments of the other pre-existing judges and assessors. This gave rise to a first round of litigation in which the Chief Justice, sitting alongside Justices Nelson and Tuatagaloa, all of whom are Samoans by birth, held that the pre-existing judges of the Land and Titles Court only had jurisdiction to the extent provided for by the 2020 Act – namely, in relation to petitions filed before the commencement of the 2020 Act concerning matters arising under the previous legislation.[59]

69 The 2020 Act was thereafter amended to provide that the Samoan judges of the old Court, but not the President, were to transition to become judges of the new Court. The Prime Minister then wrote to the Appellant to advise that she

[58] For a discussion of these amendments in their broader socio-political context in Samoa see, F Ey, "Samoa's constitutional crisis: Undermining rule of law" *The Interpreter* (online, 8 May 2020) <https://www.lowyinstitute.org/the-interpreter/samoa-s-constitutional-crisis-undermining-rule-law>.
[59] *President of the Land Titles Court v The Attorney-General* [2022] WASSC 8.

intended to remove him as President. Another person was then sworn in as the President of the new Land and Titles Court.

70 The Appellant commenced new proceedings which asked the Supreme Court to consider:

> "whether s 67 of the [2020 Act] means the [Appellant] was summarily dismissed without cause as the President of the Court when that Act came into force, and if he was not, can he nevertheless be subsequently dismissed whilst he is carrying out his duties under the transitional provisions of the Act?"

Whilst the substantive proceedings were being determined, the Appellant also sought interim declarations as to his status as President and entitlement to receive a salary and benefits.

71 At first instance, the Chief Justice considered that the interim declarations should be granted if reasonably necessary to preserve the position of the Appellant and considered both whether there was a serious issue to be tried and the balance of convenience. Although his Honour accepted that there was a serious issue to be tried, he refused to make the interim declarations sought on the balance of convenience holding that:

> "The administration of justice requires that I give proper weight to the interests of those affected by the uncertainties to the new LTC system caused by the continued delay in the appointment of Judges under the Act, and a President under the Constitution."[60]

The Chief Justice did not go on to consider whether an interim declaration should be made in respect of the Appellant's entitlement to a wage whilst the proceedings were being determined.

72 Given the appointment of another person to fill the Presidential vacancy on the Court, on appeal, the Appellant did not press his application for an interim declaration as to his Presidential status. However, the Samoan Court of Appeal, comprised of three New Zealand judges: Justices Harrison, Asher and Young,

[60] *Ropati v Attorney-General* [2022] WASSC 76 at [13].

otherwise allowed the appeal and issued an interim declaration that the Appellant be paid a lump sum equivalent to his salary whilst the substantive proceedings concerning his dismissal were being determined.

73 In upholding the appeal and overturning the decision of the local Chief Justice, their Honours were required to consider issues which they identified as being of "high importance"; namely, whether the Court of Appeal had jurisdiction to hear appeals from interlocutory decisions of the Supreme Court and whether the Appellant's appeal was excluded due to principles of res judicata on the basis of the first round of litigation as well as questions surrounding the independence of the Samoan judiciary.

74 Ultimately, the Court held that there was a serious question to be tried in respect of the President's dismissal and that, contrary to the findings of the Chief Justice, their Honours' "discomfort at the notion that a senior judge can be removed from office in the way contended for … and particularly without compensation"[61] meant he was entitled to an interim declaration that he should be paid a salary and allowance. Their Honours went on to say the following with respect to the 2020 Act and the Land and Titles Court:

> "The current position is a result of an ill-drafted constitutional and legislative provision that did not address whether the President and Samoan judges of the old Land and Titles Court should automatically take over the corresponding roles in the new Land and Titles Court. This was such an obvious issue that it should have been addressed squarely and explicitly at the time. The failure to do so has brought about the present imbroglio …
>
> One of our major concerns is that the incoherence of the relevant provisions … may dictate an incoherent outcome…
>
> …[T]he complexities of the current situation and unsatisfactory nature of some of the possible outcomes mean that a practical negotiated solution is likely to produce the best ultimate result."[62]

[61] *Ropati v Attorney General* [2023] WSCA 2 at [62].
[62] Ibid at [65]-[67].

75 This approach may be contrasted with that of the Chief Justice at first instance whose view was that the "Court should be slow to interfere with judgment calls made by those empowered by the Constitution".[63]

76 As such, on one view, the *Ropati* decision, in which an entirely foreign Court of Appeal overturned a local Chief Justice on issues of enormous local constitutional and political significance, could be interpreted as undermining the political and judicial sovereignty of Samoa in that it is, as was put by Dr Dziedic citing the work of Peter Macfarlane on the subject, "akin to saying that these independent states are not ready or able to be self-governing."[64] On another view, these foreign judges were no doubt able to bring both a wealth of constitutional and statutory interpretation experience to a decision of enormous importance and a more impartial mind than local judges who may have been more culturally or politically embroiled in the dispute.

77 It is also interesting to observe that amendments to Samoa's Constitution in 2020, which accompanied the introduction of the 2020 Act, introduced a requirement that a bench of the Court of Appeal include only one 'overseas non-Samoan Court of Appeal judge'.[65] The purpose of the constitutional amendments made at this time was to "elevate custom as a source of law and integral part of the constitutional system of Samoa" and were "a response to the feeling that the constitution, legislation and the courts emphasise Western law and institutions and marginalise custom".[66]

Lack of cultural and local knowledge

78 Consideration of the *Ropati* case feeds neatly into a consideration of a second problem associated with the appointment of foreign judges: the extent to which local custom and culture factors into decision-making. Consistent with Dr Dziedzic's view that "*who* a judge is matters, because it serves to connect

[63] *Ropati v Attorney-General* [2022] WASSC 76 at [14].
[64] P MacFarlane, "Some Challenges Facing Legal Strengthening Projects in Small Pacific Island States" (2006) 4(1) *Journal of Commonwealth Law and Legal Education* 103 at 105-106.
[65] *Constitution Amendment Act 2020* (Samoa), cl 4, inserting new s 74(1).
[66] A Dziedzic, "Debating constitutional change in Samoa" *The Interpreter* (online, 5 May 2020) <https://www.lowyinstitute.org/the-interpreter/debating-constitutional-change-samoa>.

judicial office with the law, the state and the people,"[67] custom is extremely important in the Pacific and, thus, its application by judges in decision-making serves to foster connection with and trust in the judiciary.

79 On this point, former Kiribati Chief Justice Hastings described the phenomena of being a foreign judge in a criminal case in a nation with a unique culture and custom:

> "I saw a number of faces peering into the courtroom (I would have said they were pressed against the window panes, but there was no glass in these courthouse windows) observing me, an I-matang [foreigner], wearing someone else's hair and a heavy black calf-length robe in 32C heat, speaking in a language that people who lived here did not speak and barely understood, applying law from a foreign country in a different age to a man in the dock who was clearly bewildered by the whole process."

80 Some foreign judges may entirely reject the notion that there is a role for custom in decision-making. For instance, in *Taione v Kingdom of Tonga* [2004] TOSC 47, a case concerning the constitutional validity of limitations placed on the free press in Tonga, Webster CJ, who hailed from the United Kingdom, made several comments about the process of constitutional interpretation. His Honour's judgment has been subsequently described as an "emphatic rejection of the relevance of Tongan culture to the interpretation of the Tongan constitution."[68]

81 Alternatively, where a Pacific nation's Constitution or laws expressly provide that custom and culture are to play a role in legal decision-making, there is a risk that foreign judges may place insufficient weight on culture and custom or lack the appropriate level of local knowledge to accurately take it into account.[69]

82 In *Teonea v Pule of Kaupule of Nanumaga* [2009] TVHC 2, Mr Teonea sought declarations that resolutions made by the Falekaupule (a traditional assembly

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[67] Dziedzic, pg 208.
[68] Baird (n 17) at 88-89.
[69] See, eg, J Zorn, "Custom then and now: the changing Melanesian family" in A Jowitt and T Newton Cain (eds, *Passage of Change: Law, Society and Governance in the Pacific* (Pandanus Books, 2003) 95 at 97.

of elders) on the Tuvaluan island of Nanumaga, which has approximately 800 inhabitants, were unconstitutional. Mr Teonea, a citizen of Fiji, was a pastor in the Brethren Church. He came to Nanumaga seeking to convert the residents to the church and ultimately converted over 50 people. The Falekaupule then passed a resolution that had the effect of banning the Brethren Church from seeking converts in Nanumaga. Nonetheless, Mr Teonea continued meetings at the church and in response, young men in the community stoned the church building in protest. Ultimately, after discussions with community leaders, Mr Teonea and the other leaders of the Brethren Church left the island.

83 Mr Teonea sought declarations that these resolutions impermissibly constrained the rights of Tuvaluans to freedom of religion, as enshrined in s 23 of the Constitution, on the basis that they were not "reasonably justifiable in a democratic society" pursuant to s 15 of the Constitution. To the contrary, it was argued that, in accordance with s 29 of the Constitution, the resolutions were permissible as restrictions on the exercise of rights which, if exercised, may be divisive, unsettling or offensive to the people or may directly threaten Tuvaluan values or culture.

84 At first instance, Ward CJ, a New Zealander, held that the Falekaupule had power to make the decision it did, and that the decision was not a "law" such that it was not subject to the constitutional requirement that it be justified in a democratic society. Nonetheless, his Honour was satisfied that the introduction of the church was likely to be divisive and unsettling such that the resolutions were justified.

85 In the Court of Appeal, Ward CJ's decision was overturned by a 2:1 majority with three separate judgments being written, all by New Zealand expatriate judges. Fisher JA held that even if the Falekaupule resolutions were not themselves law, they were at least acts done under law for the purposes of s 15 of the Constitution. His Honour recognised that the Constitution gave rise to competing considerations: on the one hand, the need to protect constitutional rights and freedoms and, on the other hand, the need to promote Tuvaluan culture and custom. Fisher JA held that the Constitution did not give rise to an

intention that the scale should always be weighed in favour of Tuvaluan stability and culture at the expense of constitutional freedoms. His Honour held that the resolutions went much further than they needed to protect stability on Nanumaga and that there were more moderate ways in which the disruptive effects of intrusive conduct by new religions could be validly controlled. Paterson JA, although he wrote separately, shared the views of Fisher JA that the resolutions were laws, or acts done under law, which were not reasonably justified in a democratic society.

86 In contrast, Tompkins JA in the minority held that Ward CJ was correct to find that the Falekaupule's decision was not a "law" such that the constitutional requirement that it be reasonably justified did not apply. Even if it did, his Honour held that although freedom of religion was of great significance, there was little doubt that the presence of the Brethren Church was divisive, unsettling and offensive. In so holding, his Honour took into account the nature of the small island community and considered that in such communities, disagreements and divisiveness will be more destructive than in larger, less isolated places. Tompkins JA also emphasised that, "it would not be appropriate for an appellate court with no prior knowledge of Tuvalu or its culture to overrule" the factual finding of the Falekaupule itself that the introduction of the Brethren Church may be divisive, unsettling or offensive. Ultimately, his Honour considered that "the protection of Tuvaluan values and culture should be the dominant consideration" and that the social breakdown which might result from the introduction of further religion into the community of Nanumaga is a consequence which far outweighs the benefit to members of the Church being able to exercise their constitutional rights.

87 Issues concerning the role of custom and culture do not only arise in constitutional matters. Rather, they are perhaps most frequently raised in land and property disputes. For Indigenous peoples throughout the South Pacific, land is "an ancestral trust committed to the living for the benefit of themselves and generations yet unborn" and is the "most valuable heritage of the whole

community".[70] For this reason, as demonstrated by the *Ropati* case, many Pacific nations have dedicated land courts.

88 In *Tahega v Kapaga* [2020] NUCA 2, the Court of Appeal of Niue, comprised of Justices Isaacs, Reeves and Armstrong, all New Zealand judges, were required to determine whether Justice Coxhead, also a New Zealand judge, had erred in appointing the Respondent as the *leveki mangafaoa* (trustee or guardian of a family estate which has rights, title, estate or interest in Niuean land).

89 However, such issues can also arise in different areas such as family, succession and even criminal law. For instance, in *Acting Public Prosecutor v Aumane, Boku, Wapulae, and Kone* [1980] PNGLR 510, a five judge bench of the Supreme Court of Papua New Guinea, which included three Australian judges, was called upon to consider the role that custom should play in sentencing. The Respondents in the case were three men who were each convicted of the murder of a woman who was accused of being a sorceress. There is a strong customary belief in the existence of witchcraft and sorcery throughout Papua New Guinea and those beliefs continue to prompt violent offending.[71]

90 The trial judge sentenced each to three months imprisonment and ordered that they pay the deceased's youngest son five native pigs. The State appealed from the trial judge's sentence on the basis that it was manifestly inadequate. The Court unanimously agreed that the trial judge had no jurisdiction to impose a customary sentence which required that the Respondents pay the deceased's son the pigs. Their Honours also agreed that the Respondents should be resentenced. However, there was a difference of opinion on the Court concerning the role that custom ought to play in the sentencing exercise.

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[70] See, eg, J Corrin, "Customary Land in Solomon Islands: A Victim of Legal Pluralism" (2011) 12 *Comparative Law Journal of the Pacific* 277 at 277-278 citing G Zoloveke, in P Larmour (ed) *Land in Solomons* (Institute of Pacific Studies, 1979) at 4.

[71] R Auka et al, "Sorcery and Witchcraft Related Killings in Papua New Guinea: The Criminal Justice System Response" in R Auka, B Gore and P Koralyo, *Talking it Through: Responses to Sorcery and Witchcraft Beliefs and Practices in Melanesia* (ANU Press, 2015) 241. See also *Converging Currents* at [12.59]-[12.61].

91 Local Chief Justice Kidu and Justices Greville Smith and Andrew (both Australian judges), in separate judgments, held that the trial judge erred in giving considerable weight to the Respondents' traditional customary belief in sorcery. Meanwhile, Kidu J, a local Papua New Guinean judge, with whom Kearney DCJ, an Australian judge, agreed, held that although the trial judge had no jurisdiction to order that the Respondents pay the pigs, such customary matters could be taken into account in determining the length of a sentence. Moreover, his Honour considered that cultural matters like the Respondents' belief in sorcery may be strong mitigating factors but that the trial judge was still obliged to impose an appropriate sentence as contemplated by Parliament.

92 Today, the greater availability of local judges in Papua New Guinea means that similar questions about the role of custom in sentencing may no longer need to be decided by foreign judges.

93 Concerns about foreign judges being insufficiently familiar with local custom and law may be less pronounced in relation to resident, rather than non-resident, judges who have had the opportunity to immerse themselves in the local community. They may also be mitigated by the appointment of foreign judges from other places in the Pacific who may generally have a greater appreciation for the diversity of custom and tradition within Pacific nations.[72]

Perceived or subconscious lack of impartiality, post-colonialism and politics

94 Third, and relatedly, although their perceived independence is one of the strongest rationales for the continued appointment of foreign judges to courts in the Pacific, the impartiality of foreign judges may be called into question in some cases.

95 In at least one case in the Pitcairn Islands Court of Appeal, *Warren v R* [2015] PNCA 1, an offender appealed from a decision of the Pitcairn Islands Supreme Court not to grant a permanent stay of his prosecution on the basis that "is

[72] M Pulea, "A Regional Court of Appeal for the Pacific" (1980) 9(2) *Pacific Perspective* 1 at 9.

impossible to get a fair trial by foreign judges, not being nationals of Pitcairn".[73] In dismissing the appeal, Potter, Blanchard and Hansen JJA, all New Zealand judges, reasoned that the argument was hard to take seriously given the absence of any Pitcairners who were competent to conduct the trial and the considerable similarities between criminal law in Pitcairn and other common law jurisdictions. However, the argument does raise some interesting questions.

96 It is possible that foreign judges may have a foreign partial perspective on national issues which reflects former colonial or hegemonic power. Aside from some examples of intra-Pacific judicial appointments as well as the increasing practice of drawing judges from other post-colonial developing states such as Sri Lanka, foreign judges tend to travel from large developed states to smaller, developing states and rarely, if ever, in reverse. This brings with it the risk that neo-colonial attitudes may creep into the administration of justice" although "[m]uch will depend here on the attitude and approach of the individual judge".[74]

97 One way in which this may occur is through the material and principles cited by foreign judges. Foreign judges in particular are more likely to employ the ideas and materials of their own jurisdiction or other common law jurisdictions with which they are familiar. They may do so especially where novel cases arise and there is little local or regional case law to refer to.[75] While, as noted earlier, citing such material may improve the international legal reputation of the Pacific court, giving such precedent priority over local custom and attitudes could reflect Western biases.[76]

98 At times, this has led to tension between Pacific islands governments and courts comprised largely of foreign judges. In *Public Prosecutor v Nahau Rooney (No 2)* [1979] PNGLR 448, only four years after Papua New Guinea became independent, its Minister for Justice, Nahau Rooney, was convicted of contempt after writing directly to the Chief Justice and commenting on the radio

[73] At [126].
[74] Baird (n 17) 85.
[75] S Farran, "'Paddling a canoe with an oar made of oak': the enduring legacy of British law in the Pacific island states" (2012) 63(3) *Northern Ireland Legal Quarterly* 323 at 329.
[76] See, eg, D Kelly, "Tonga for the Tongans: Culture in Rights Interpretation in the Tongan Constitution" (LLM Thesis, University of Auckland, 2010) at 75.

that she had “no confidence in the Chief Justice and other judges” because these “foreign judges … [were] only interested in the administration of foreign laws”. This was a response to a decision of the Court, which at that time was comprised entirely of expatriate Australian judges who had held office as judges of the Supreme Court of the Territory of PNG immediately prior to independence, to issue an injunction against the deportation of a non-citizen. The Prime Minister then exercised Executive power to release the Minister for Justice from prison which prompted the resignation of the Chief Justice and five other Australian judges from the bench.[77]

99 Similarly, it is not always a given that foreign judges will not be as embroiled in political conflict as local judges. Although the Fijian experience has been that foreign judges overwhelmingly make positive contributions to society, following the 2006 coup in Fiji which saw Chief Justice Fatiaki removed from office and replaced by Chief Justice Anthony Gates, foreign judges were deeply involved in factionalism and political hostility. Justice Nazhat Shameem, a Fijian judge, intervened to seek to prevent Justice Michael Scott, a British national who at various times also served as a judge in the Solomon Islands and Kiribati and as Chief Justice of Tonga, hearing an appeal from a criminal case she had decided at first instance on the basis that “the level of hostility between Scott JA and herself was such that Scott JA would be biased in determining the appeal”. Justice Scott had also written to then Chief Justice Fatiaki in 2003 accusing Justice Shameem and foreign judges, then Justice Gates and Justice John Byrne, of “grave misconduct”.[78]

100 Three Australian lawyers, Francis Douglas QC, Randall Power and Ian Lloyd, sat as the Fijian Court of Appeal, finding in 2007, that the seizure of power in 2006 by Commodore Bainimarama was illegal, as was the dismissal of the then Prime Minister Qarese (for whom Bret Walker appeared) and the dissolution of

[77] J Logan, “A Year in the Life of an Australian Member of the PNG Judiciary” (SSGM Discussion Paper No 16, 2015) at 12.
[78] Iyer (n 47) 125.

Parliament. The Court overturned a three member panel of the High Court of Fiji, comprising Gates, Byrne and a local Fijian lawyer.[79]

101 The impartiality of foreign judges may also be compromised by a lack of security of tenure and short-term appointments. Dr Dziedzic calls this a "classic red flag" for judicial independence in the sense that such appointments provide opportunity for governments to stack courts with judges who they think will be sympathetic to their interests and to pressure judges to decide cases in a particular way in order to secure reappointment.[80] For instance, in Fiji, foreign judges can only be appointed on short three year terms which can be renewed while citizens appointed as judges have security of tenure and a mandatory retirement age of either 70 or 75 depending on the court to which they are appointed.[81]

102 This issue has been thrown into sharp relief by recent events in Kiribati where in May 2022, President Taneti Maamau suspended Chief Justice Hastings soon after he made orders supporting the application by High Court justice and Australian citizen David Lambourne to stay in the country.

103 Kiribati, a nation of 120,000 people, is a republic made up of 32 atolls and one remote coral island in Micronesia.[82] Its court system relies almost entirely on foreign judges, which in the years from 2000 to 2019 made up 95% of Kiribati's judiciary.[83] That figure includes Justice Lambourne, who was appointed to the High Court of Kiribati in July 2018. Justice Lambourne is a long-term resident of Kiribati and was formerly the nation's solicitor general, having practised law in Kiribati for several decades. His wife, Tessie Lambourne, has been leader of the opposition since 2020.

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[79] *Qarase v Bainimarama* [2009] FJCA 9

[80] A Dziedzic, "Judiciaries Upholding Judicial Independence in Pacific Island States" (2019) 96(9) *Australian Law Journal* 621 at 623.

[81] Constitution of Fiji, art 110.

[82] L Craymer, "Kiribati suspends appeals court judges as constitutional crisis worsens" *Reuters* (online, 6 September 2022) <https://www.reuters.com/world/asia-pacific/kiribati-suspends-appeals-court-judges-constitutional-crisis-worsens-2022-09-06/>.

[83] Dziedzic (n 1) 24.

104 His Honour's appointment took effect on 1 July 2018. No term was specified in the instrument for this appointment and no contract of employment was entered into.[84] In February 2020, Justice Lambourne left Kiribati to attend a conference in Australia, anticipating a brief and uneventful trip. Instead, his Honour found himself stranded after the COVID-19 pandemic hit and, before long, embroiled in a constitutional controversy that saw him unable to return home to Kiribati for almost two years.

105 After spending most of 2020 in Australia, Justice Lambourne travelled to Fiji to await a seat on one of the repatriation flights operating to Kiribati. Despite his efforts over the following months, Justice Lambourne was refused entry on the basis his immigration permit had expired.[85] His Honour was told that Kiribati's government would only issue a work permit to allow him entry if he signed a contract that fixed his term at three years. Justice Lambourne initially declined, but eventually signed the contract "as a matter of practical necessity" after the government stopped paying his salary and refused to allow him on any of the eight repatriation flights.[86] Under the contract, Justice Lambourne's judicial appointment would expire nine weeks later, on 30 June 2021.

106 Six days after the Beretitenti, Kiribati's combined head of state and government, signed the contract, Kiribati's Parliament passed an amendment to the *High Court Judges (Salaries and Allowances) Act 2017* (Kiribati). Section 5(1) of the Act originally provided that tenure would be as stated in the instrument of appointment. The amendment required that "the appointment of a judge must be made on a fixed term", and was to apply to "new and existing judges".[87]

107 In August 2021, after payment of his salary again ceased, Justice Lambourne initiated proceedings against Kiribati's Attorney-General, Tetiro Semilota.

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[84] Francois Kunc, 'Current Issues' (2022) 96 *Australian Law Journal* 621, 622.
[85] Ibid.
[86] Ibid; Kieran Pender, 'Kiribati's attempts to keep stranded Australian judge out of the country ruled unconstitutional' (The Guardian, 20 November 2021) <https://www.theguardian.com/world/2021/nov/20/kiribatis-attempts-to-keep-stranded-australian-judge-out-of-the-country-ruled-unconstitutional>.
[87] Kunc (n 45) 623.

108 In his case before the High Court of Kiribati, Justice Lambourne argued that the legislative amendment and the executive's actions in signing the contract and refusing him entry to Kiribati were unconstitutional interferences with security of tenure and judicial independence.[88]

109 In November 2021, a landmark judgment by the nation's Chief Justice Hastings, overturned the government's actions, declaring them unconstitutional.[89] His Honour's reasons put judicial independence front and centre. Chief Justice Hastings held that nothing in Kiribati's Constitution required the appointment of judges on a fixed term: judges could be validly appointed until a specified age of retirement or indeed, indefinitely for life. Further, a judicial appointment could not be limited by a contract entered into at a later date, nor could legislation fetter the discretion granted by the *Constitution* to the Beretitenti to specify the term for judicial appointments.[90]

110 The High Court held that as no term was specified in Justice Lambourne's instrument of appointment, the only interpretation consistent with judicial independence was that Justice Lambourne was appointed for an indefinite period. The application of the legislative amendment to "existing judges" – in effect to Justice Lambourne alone – was also struck down as effectively seeking to remove the judge from office in a manner inconsistent with the *Constitution*.[91]

111 Following this decision, and an article published by him which was perceived to be critical of the Kiribati Government,[92] Chief Justice Hastings faced a conduct tribunal regarding allegations of misconduct and bias. The tribunal prompted his resignation in July 2022 and subsequently, the Attorney-General of Kiribati, Tetiro Semilota, was appointed as Acting Chief Justice.[93]

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[88] Ibid.
[89] *Lambourne v Attorney-General* [2001] KIHC 8.
[90] Kunc (n 45) 623.
[91] Ibid.
[92] W K Hastings, 'A Personal Journey Through the Rule of Law in the South Pacific" *Judicature International* (online, November 2021) <https://judicature.duke.edu/articles/a-personal-journey-through-the-rule-of-law-in-the-south-pacific/>.
[93] T Manch, "New Zealand judge resigns from top-ranking Kiribati judicial position" *Suff.co.nz* (online, 9 December 2022) <https://www.stuff.co.nz/national/politics/130691168/new-zealand-judge-resigns-from-topranking-kiribati-judicial-position>.

112 In early September 2022, the government suspended the three remaining senior judges who also blocked the deportation of Justice Lambourne in a hearing in August. Those Court of Appeal justices – Paul Heath, Peter Blanchard and Rodney Hansen – are retired New Zealand judges.[94] The Law Council of Australia, Commonwealth Lawyers Association and the Fiji Law Society are among the organisations that have strongly condemned the Kiribati government's actions. The crisis remains unresolved. Earlier this year, Opposition MP, Sir Ieremia Tabai, called for answers. With only Justice Semilota, aided by a commissioner, hearing cases in the country, there is reportedly a considerable backlog in the courts.[95]

113 The recent experience in Kiribati has echoes of the experience of two Australian judicial officers on Nauru. In 2014, Nauru deported its only magistrate, Australian Peter Law, also alleging misconduct. The following intervention by the country's Chief Justice, Geoffrey Eames (a former judge of the Supreme Court of Victoria) who issued an injunction restraining Mr Law's deportation, led to the cancellation of his visa. Foreign judicial officers were also expelled from East Timor in October 2014 after a court ruled in favour of U.S. oil and gas company, ConocoPhillips, in cases related to disputed tax assessments.[96]

Delays

114 Reliance on foreigners to decide cases may create delay, both in relation to the development of a domestic legal profession and in relation to the hearing of matters. Reflecting on his time as President of the Solomon Island's Court of Appeal, Sir Anthony Mason noted that there was one occasion when a sitting of the court was cancelled because there was no money available for the

[94] Michael Pelly, 'Kiribati has no judiciary (and Australian lawyers are fired up)' (online, *Australian Financial Review*, 8 September 2022) <https://www.afr.com/policy/foreign-affairs/lawyers-fire-up-over-attack-on-kiribati-judges-20220907-p5bga0>.
[95] D Wiseman, "'People are suffering': Kiribati's judicial crisis" *RNZ* (online, 6 April 2023) <https://www.rnz.co.nz/international/pacific-news/487450/people-are-suffering-kiribati-s-judicial-crisis>.
[96] S Paul, "East Timor kicks out judges over ConocoPhillips tax fight" *Reuters* (online, 5 November 2014) <https://www.reuters.com/article/timor-australia-lng/east-timor-kicks-out-judges-over-conocophillips-tax-fight-idUSL4N0SV2TU20141105>.

government to pay for the flights of the foreign judges.[97] Sir Anthony also suggested that delays could arise in the judgment writing process due to the complexities of communicating with fellow judges based elsewhere in the world after they each returned home from the Pacific.[98] Again, such delays may not arise where foreign judges are resident in the Pacific. Further, technological advancements in the years since Sir Anthony sat in the Solomons Islands have greatly facilitated communication.

115 In this context, the use of AVL can facilitate remote hearings of matters by foreign judges without Pacific nations needing to bear the costs of transporting those judges to the Pacific. While this might deal with the problem of delays, it gives rise to all of the issues associated with remote hearings that courts around the globe experienced during the pandemic, including the real possibility of unfairness to the parties, the erosion of the legitimacy of the judicial system and the absence of the collegiality and direct interpersonal interaction which defines the legal profession.[99]

116 Delays may also arise out of the need for translation in cases involving foreign judges. Former Chief Justice Hastings has reflected on the fact that the language of the Magistrates' Courts in Kiribati is Kiribati but the language of the High Court is English such that all records of proceedings before the Magistrates' Courts had to be translated for the purposes of conducting appeals. Moreover, he said the following with respect to the running of trials in English where foreign judges are involved:

> "Even though the lawyers' and witnesses' mother tongue is Kiribati, the lawyers asked the witnesses questions in not perfect but good enough English. The court interpreter interpreted each question into Kiribati for the witness. The witness answered in Kiribati, which was then interpreted back into English. It was never a direct translation in either direction, and each time presented at least four points in which accuracy

[97] Sir A Mason, "Reflections of an Itinerant Judge in the Asia-Pacific Region" (2000) 28(2) *International Journal of Legal Information* 311 at 318.
[98] Ibid 317.
[99] See, eg, M Legg and A Song, "The Courts, The Remote Hearing and the Pandemic: From Action to Reflection" (2021) 44(1) *UNSW Law Journal* 126 and the Hon. A.S. Bell, "The Court of Appeal and the Coronavirus" [2020] (Winter) *Bar News* 36.

could be lost…I was left with the impression that the interpretation was pretty broad-brush and risked layer upon layer of inaccuracy."

117 There is also some argument that rather than serving as a temporary measure pending localisation, the appointment of foreign judges to Pacific courts has actually delayed the localisation of legal professions in Pacific nations.

118 Papua New Guinea has the greatest degree of localisation. The Supreme Court of Samoa is increasingly comprised of local judges as is the Supreme Court of Vanuatu.[100] However, nations such as Fiji continue to draw almost exclusively on foreign judges to make up its Court of Appeal and Supreme Court. While Dr Dziedzic suggests that this may be a product of the political unrest which caused many Fijian lawyers and judges to leave the nation, there is at least some argument to be made that the ongoing appointment of foreign judges, where such appointments are not accompanied by the kind of training and mentorship programs for local lawyers which have been run very successfully in Papua New Guinea, has stalled the process of localisation.[101]

Lending legitimacy to foreign regimes

119 Another issue which may be raised by the appointment of foreign judges to some courts in the Pacific is that foreign judges who accept appointments to nations with autocratic governments or which lack independent judiciaries, may, rather than being perceived as a bulwark against violations of the rule of law in these states, be perceived as lending legitimacy to those regimes. This issue may be particularly prevalent for those judges who continue to hold appointments to other courts, including in their home jurisdictions.

120 These issues have been helpfully discussed by former Chief Justice Robert French who, while a judge of the Federal Court, was appointed a judge of the Supreme Court of Fiji alongside Justices Ron Sackville and Mark Weinberg of the Federal Court and Justices Keith Mason, David Ipp and Ken Handley from the NSW Court of Appeal. The appointment of these judges to the courts in Fiji

[100] Dziedzic (n 1) 39.
[101] Ibid 43.

took place about a year before the December 2006 military coup which saw an interim government installed by the military. Their appointments were all due to expire at the end of 2008 or in early 2009. Six judges: Queensland's Justice Bruce McPherson and Justices Thomas Eichelbaum, Ian Barker, Tony Ford, Peter Penlington and Robert Philip Smellie from New Zealand resigned from the court in September 2007.

121 Justice French reflected that two questions confronted the remaining foreign judges after the coup: (1) whether they should continue in office and (2) whether, when their current commissions expired, they should accept renewed appointments. His Honour's view was that by continuing to decide cases until the expiry of their appointments, the judges were not taking a view on the lawfulness of the military government in Fiji but, that it would be inappropriate to accept the renewed appointments promised by the interim government. His Honour wrote that while "it has been [a] privilege to be able to contribute to the rule of law in Fiji and, indirectly, to the development of the legal profession and the local judiciary …, accepting appointment to the highest court of that country by a military government the lawfulness of which is under significant challenge comes at too high a price."[102]

122 Sri Lankan foreign judges who accepted appointments in Fiji following the coup were subject to some criticism in the Sri Lankan media. It was argued that by accepting appointments in Fiji, Sri Lankan nationals were made servants of a military dictatorship who did not respect the importance of an impartial judiciary and that this might undermine the capacity of these judges to independently decide cases in courts in Sri Lanka.[103]

[102] Robert French, "Judges in Fiji face interim problem" 2 May 2008 https://www.mkri.id/index.php?page=web.Berita&id=2102.
[103] See, eg, U Kurukulasuriya, "Can We Expect Justice and Independence from Servants of Military Dicators?" *Colombo Telegraph* (online, 30 October 2011) <https://www.colombotelegraph.com/index.php/can-we-expect-justice-and-independence-from-servants-of-military-dictators/>.

Conclusions

123 The practice of expatriate judging in the Pacific has a long history which, while persisting to this day, is also evolving with both increased localisation and increased participation by the judges of some Pacific Island states sitting as part of the judiciary of other Pacific Island states. The role of Sri Lankan lawyers, especially in Fiji, has also been noticed. Although foreign judges make and have made enormous contributions to the law and justice in the Pacific, their appointments and roles are not without complexity.

124 Justice Logan has proposed that a South Pacific Final Court of Appeal staffed both by foreign judges and the growing number of local Pacific judges may be a means of dealing with some of the issues discussed in this paper.[104] Although the idea has not yet taken root, Justice Logan has suggested that the creation of such a court would reflect "a realisation that smaller jurisdictions inevitably find it difficult adequately to staff high quality ultimate appellate courts" and could be a means of providing "a [more] coherent body of precedent than current, ad hoc arrangements whereby smaller South Pacific nations individually constitute final appellate courts with the assistance of judges drawn from other South Pacific nations".[105]

125 Similarly, Justice Winter, now a member of the Fijian Court of Appeal, has argued that "resources, environment, criminals, terrorists and citizens are largely borderless" and that "the economic, political and social development of the Pacific necessarily demands the development of regional law".[106] His Honour has suggested that this could be facilitated by the creation of one Pacific regional court, hosted in one Forum country, with original and appellate jurisdiction to administer justice and hear cases referred to it by state parties or

[104] Similar earlier proposals have also been made: see, Sir Moti Tikaram, "Address to the First South Pacific Judicial Conference" (Samoa, January 1972) and Mere Pulea, "A Regional Court of Appeal for the Pacific" (1980) 9(2) *Pacific Perspective* 1.
[105] Logan (n 77) 9.
[106] G Winter, "One South Pacific. One Regional Court. Three Case Studies" in N Boister and A Costi (eds), *Regionalising International Criminal Law in the Pacific* (NZACL/ALCPP, 2006) 221 at 235-236.

as ordered by state courts with a primary focus on certain types of trans-Pacific disputes.[107]

126 This, together with the development of a Pacific jurisprudence, is an interesting notion, not itself uncontroversial given the diversity of custom and the importance of respect for autochthonous traditions and sovereignty.

[107] Ibid 238-239.