

Samoa Party v Attorney General: Deference and Independence: The Expatriate Model of Judging

Natalie Baird, University of Canterbury
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Samoa Party v AG (CA, 2010)

- Context: elections – corruption - vote buying – electoral petitions
- Proviso to s 105(1) Electoral Act: Electoral petition cannot be brought by a (non-matai) voter or an “insignificant loser”
- Issue: Was the proviso to s 105(1) Electoral Act 1963 constitutional?
- Held: Not unconstitutional; ie the proviso stands.

Critique of CA Decision

- Limitation of electoral petition rights is “striking” and unique.
- Tolerance of corruption:
 - The moderately cf totally corrupt successful candidate.
 - The role of the Election Commissioner.
- Considerable deference to Parliament.
- Deference to the executive branch.
- Use of comparative material.

Foreign Appeal Models

- Expatriate model: Samoa, Fiji Islands, Kiribati, Solomon Islands, Tonga, Tuvalu
- Supranational model: Cook Islands, Niue, Tuvalu, Kiribati
- Offshore municipal model: Nauru, Tokelau

Expatriate Model: Benefits

- Avoids problem of small pool of local talent; access to top legal minds
- Resources
- Geographical location: sits “in country”
- Independence
- Contribution to regional jurisprudence: de facto judicial regionalism

Expatriate Model: Challenges

- The court as a symbol of sovereignty
- Judges as “cultural outsiders”

“But what kind of justice are we searching for? One that is of ‘high quality’ in the sense of rigid conformity to English legal practices and values? Or do we seek the kind of judgments that are firmly rooted in the Pacific context where judges are attuned to the customs, conditions and the way of life of the people they are judging?” (Mere Pulea, 1980)

Expatriate Model: Challenges

- Two views:
 - One neutral, objective law: “The judges are here to apply the law as it stands and, if that law is such that it is necessary to be Tongan to understand its true meaning, I would venture to suggest it is poorly worded. If the law is clear in its terminology, the nationality of the judge will have no effect upon his interpretation.” [per Ward CJ AG v Namoa (TOSC 13)]
 - The significance of culture: “Parliament, of which the overwhelming majority of members are native-born Papua New Guineans, would be in a better position to formulate a law of enticement appropriate to the circumstances of the country than the expatriate judges of the Supreme Court.” [per Saldanha J in *Tatut v Cassimus* [1978] PNGLR 295 (4 August 1978).]
- Custom

Expatriate Model: Challenges

- The constitutional challenge: doctrine of parliamentary sovereignty of the Constitution as “supreme” law
- Use of comparative materials
- Language of the law
- Neo-colonial or imperial attitude
- Fixed term tenure of expatriate judges

Finding a balance between deference and independence

- A delicate situation
- Issue: Does too much deference compromise independence?
 - Deference as a “safe” option
 - Deference as an abdication of court’s function
- What can be done?
 - Explicit presumption of constitutionality
 - Explicit deferral to local circumstances
 - Active engagement with cultural dimension
 - Long-term: Localisation

Questions?

Comment?

Critique?