

THE LENGTH OF TERMS OF JUDGES IN THE PACIFIC AND ITS IMPACT ON JUDICIAL INDEPENDENCE

*Hon Carl B Ingram**

In May, French Polynesia Premier President Olivier Aimot and United States Senior Circuit Judge J Clifford Wallace invited me to survey Pacific Judicial Conference (PJC) justices and judges and to report to you on the length of terms of judges and its impact on judicial independence. The concern they raised is that in certain PJC jurisdictions the terms for judicial officers are relatively short and if a judge wishes to be reappointed, he or she may directly or indirectly favour those who have much to say about reappointment. On the other hand, they reasoned, longer terms – that is, terms for life or until a specified retirement age – foster greater independence. This paper presents the result of my survey.

L'auteur porte ses réflexions sur les conséquences attachées à la durée des affectations des juges auprès des juridictions des petits Etats du Pacifique. Il met notamment en exergue les difficultés rencontrées par les magistrats qui, nommés pour une première durée, souhaitent rester en poste. Ceux-ci risquent en effet, selon l'auteur, de devenir des obligés de ceux qui leur accorderont ce renouvellement, de telle sorte que leur indépendance risque d'être compromise.

I SHORT TERMS FOR CERTAIN PJC JUDGES: PROBLEMS AND SOLUTIONS.

I contacted PJC justices and judges as requested and received responses from 26 of the approximately 32 PJC jurisdictions. I thank those who responded and will attach a summary of the responses to my paper.

As one might expect, the responses provide us with both good news and bad news. The good news is that in most PJC jurisdictions (approximately 2/3) judicial appointments to the higher courts (that is, appellate courts and general jurisdiction trial courts) are for life or until a specified retirement age. The bad news is that in

* Chief Justice of the High Court of the Republic of the Marshall Islands.

PJC jurisdictions at least two categories of judicial appointments for shorter terms may undermine judicial independence:

1. the appointment of expatriate judges for very short terms, as short as 1 to 4 years, and
2. the appointment of judges for a fixed term less than life or until a specified retirement age.

A Short-term Contracts for Expatriate Judges

This first category of potentially problematic appointments, the appointment of expatriate judges for very short terms, occurs in the following PJC jurisdictions: in the Cook Islands for up to 3 years, East Timor [unreported], the Marshall Islands 4 to 10 years, Kiribati 2 years, Nauru 4 years, Papua New Guinea 3 years, Tonga 2 years, and Vanuatu 2 years.

There are at least two reasons given in support of short-term contracts for expatriate judges: (1) the risks associated with hiring little-known and untested expatriates; and (2) the risks associated with hiring older judges (65 years of age and older).

In the Marshall Islands, the practice of giving expatriate hires 2-year contracts is a holdover from the Trust Territory days (1948 to 1986). The TT Government used, and now the Marshall Islands Government uses, 2-year contracts to rid itself of expatriate employees who turn out to be much better on paper than in the flesh or who do not adapt to island life. Over the past 30 years, I have met and worked with such people. Government concerns about little-known expatriate employees are valid, and it is not inappropriate for the government to balance these concerns against concerns for judicial independence.

On the other hand, what if an expatriate has proven him or herself with years of competent, if not exemplary, service? Then the above rationale for the 2-year contract vanishes. If the employee has demonstrated that he or she can do the work and adapt to the environment, then why not give him or her a long-term contract if no indigenous candidate is available?

To this, governments may still argue that since they hire older expatriate attorneys and judges for judicial positions, they contract with them for relatively short terms due to concerns over their future mental and physical health and limited on-island healthcare services.

However valid government concerns over little-known or older expatriate hires might be, they can be addressed by evergreen contracts: contracts for 2 to 4 years (the longer the better) that automatically renew unless notice of non-renewal is

given by the government 60 to 90 days prior to expiration of the current term. That is, without affirmative action by the government, the contract renews. Given governmental inertia, an evergreen contract (although not ideal) gives employees an added measure of security and independence over the standard contract, while at the same time addressing the government's legitimate concerns about untested and older expatriate hires.

However, where the expatriate judge is younger and is well known to the government, a longer-term contract would be the better option. A longer fixed term, but not for life, appointment (say for an appointment for 10 to 12 years) would foster greater independence than a short-term evergreen contract, while giving governments the option to appoint a qualified indigenous attorney at the term's end.

B Appointments for a Fixed Term

The second category of potentially problematic appointments in PJC jurisdictions is the appointment of judges for fixed terms as the primary method of appointment. Fixed-term appointments for less than life or until retirement can expose judges who seek renewal to political pressure and reprisal. This problem is particularly acute in some small-island jurisdictions where judicial appointments are relatively short and any decision the judge makes may offend not only the losing party, but also his or her extended family. On the other hand, some argue fixed-term appointments for less than life or until retirement terms make for a more accountable judiciary.

Among PJC jurisdictions, the use of fixed-term appointments falls into three subcategories: appointments renewable by commission action, appointments renewable by executive/legislative action, and appointments renewable by retention election.

The first subcategory, retention by commission action, includes Hawaii and Papua New Guinea. I will describe Hawaii's system in some detail, because I believe it may serve as a useful model.

In Hawaii, the Governor appoints Supreme Court, Intermediate Court of Appeals, and Circuit Court judges for 10-year terms from a list of 4 to 6 candidates nominated by the Judicial Selection Commission. The Supreme Court Chief Justice appoints the District and Family Court judges for 6-year terms from a list of at least 6 candidates nominated by the Commission. All appointments are confirmed by the Senate. It is, however, the Commission alone that determines if a judge is retained.

The Commission comprises 9 members, who are selected for staggered 6-year terms. The Governor selects 2, the Senate 2, the House 2, the bar 2, and the Chief

Justice 1. No more than 4 members may be attorneys. None can be members of the executive or legislature. The Commission was established by constitutional amendment to be nonpartisan, balancing the need for both accountability and judicial independence and moving the retention decision a step away from partisan politics.

Papua New Guinea also uses a commission. PNG's commission both appoints and renews its judges for 10-year terms, except that the Chief Justice of the Supreme Court is appointed by a committee of political leaders upon nomination by the commission. The PNG commission differs from Hawaii's in that the PNG commission includes elected politicians, the Minister of Justice and a member of the opposition. So rather than having a nonpartisan commission like Hawaii, PNG has a bipartisan commission. This bipartisan approach apparently reduces the effects of partisan politics, but on its face it does not insulate the decision making process from politics as much as Hawaii's commission.

The second subcategory of fixed-term appointments found in PJC jurisdictions, retention by executive/legislative action, includes Kosrae with appointments for 6-year terms, Pohnpei with appointments for 12-year terms, Yap with appointments for 6-year terms, and United States Territorial District Courts in Guam and the Northern Mariana Islands with appointments for 10-year terms.

As noted above, in very small island jurisdictions, where judges are required to make hard decisions week after week, short 6-year terms, like those in Kosrae and Yap, expose judges who seek renewal to political pressure and reprisal. I have heard of judges in both Kosrae and Yap who sought renewal but who were not retained for what some said were political reasons. Although some judges have been reappointed despite having made hard principled decisions, other have not.

If island governments insist on fixed-term judicial appointments to enhance accountability, then the judiciaries should consider seeking terms of at least 10 to 12 years renewable by a nonpartisan selection commission, such as in Hawaii. Leaving the renewal decision to a nonpartisan commission, as opposed to executive/legislate action, moves the renewal decision at least one step away from the politicians while enhancing both accountability and independence. The commission is no guarantee against political pressure, but it seems to help.

The third subcategory of judicial appointments for a fixed term, appointments renewable by retention election, includes judicial appointments in California, Guam, and the Northern Mariana Islands. In California appellate judges are appointed for 12-year terms and trial court judges for 6-year terms, in Guam for 10 and 7-year terms, and in the Northern Mariana Islands for 8 and 6-year terms.

Retention elections are very controversial. Supporters argue that through retention elections judges are directly accountable to the voting public. Detractors argue retention elections turn judges into politicians. From discussions I have had with judges facing direct elections or retention elections, they often must raise more money to secure judicial office or to survive the retention election than the position's salary would justify. This means judges must seek political contributions from those with a stake in the courts: the very attorneys and parties that appear before them. Also, judges in the United States often campaign on a "tough on crime" platform to get elected or retained. It is hard to see how such a system fosters a disinterested, impartial, and independent judiciary.

In a recent United States Supreme Court case, the Court in a 5-4 decision held that the chief justice of the West Virginia Supreme Court of Appeals should have removed himself from deciding a case involving an energy company, where the company's chief executive had spent \$3 million to help get the judge elected to the bench. Instead of removing himself, the judge twice joined 3-to-2 majorities to throw out a \$50 million verdict against the company. One Internet article reported former Colorado Supreme Court Justice Rebecca Kourlis as saying the ruling could fuel efforts to choose judges through independent commissions or other means. "Recusal motions will become more frequent in cases filed before judges that are standing for election," she said. She predicted that would raise public doubts about the integrity of an elected judiciary.

However, even if retention elections are workable in very large jurisdictions, it seems that for the same reasons 6-year terms in Kosrae and Yap are too short, retention elections may be problematic for small-island jurisdictions, such as the Northern Mariana Islands, where any decision a judge makes may offend not only the losing party, but also his or her extended family. Even more so than in a large jurisdiction like California, a principled decision in a small, closely-related community can leave a judge vulnerable in a retention election. I understand that this has happened at least once in the Northern Mariana Islands.

If governments insist on judicial appointments for a fixed term to ensure greater accountability, then the Hawaii model with the renewal decision made by a nonpartisan commission (although not perfect) seems to be the best option, at least one step away from partisan politics.

C Summary

To conclude, two categories of judicial appointments for short terms potentially undermine judicial independence in PJC jurisdictions: very short-term appointments for expatriate judges and appointments for a fixed term less than for life or until retirement. Alternatives to very short-term expatriate contracts include

evergreen contracts for older judges and longer fixed-term contracts for younger judges. An option for the renewal of fixed-term judicial appointments is renewal by a nonpartisan judicial selection commission.

Thank you for your attention. I would be pleased to answer any questions that you have.

II RESPONSES FROM PACIFIC JUDICIARIES

In researching the assigned topic, the length of terms of judges in the Pacific and its impact on judicial independence, I sent an email request for information to the conference participants. I received replies from justices and judges in 26 Pacific Judicial Conference (PJC) jurisdictions.

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| 1. American Samoa | 14. New South Wales |
| 2. Australia – Federal | 15. New Zealand |
| 3. California | 16. Northern Mariana Islands |
| 4. Chuuck | 17. Palau |
| 5. Cook Islands | 18. Papua New Guinea |
| 6. East Timor | 19. Pohnpei |
| 7. FSM – National Courts | 20. Queensland |
| 8. Guam | 21. Samoa |
| 9. Hawaii | 22. Solomon Islands |
| 10. Kiribati | 23. Tonga |
| 11. Kosrae | 24. United States – Federal |
| 12. Marshall Islands | 25. Vanuatu |
| 13. Nauru | 26. Yap |

My thanks goes to justices and judges who responded.

The results reveal a board spectrum of judicial appointments from terms for life or until a specified retirement age to terms as short as one-year. Generally, the higher the court's level, the longer the judge's term, and if the judge is a citizen or resident of the jurisdiction, he or she is appointed for a longer term than a noncitizen or non-resident.

A Jurisdictions with Life Tenure Appointments

In 7 of the 26 reporting PJC jurisdictions, judges (except expatriate judges, where permitted, and some lower court judges) are appointed for life:

1. American Samoa (High Court and District Court judges serve on good behaviour, Associate High Court judges serve until 70 years of age),
2. Chuuck (Supreme Court Judges serve for life, municipal court judges serve for 6-year terms),

3. East Timor (all judges serve for life, except for expatriate judges appointed for a fixed term),

4. FSM National (Supreme Court judges serve for life),

5. Palau (all judges, including expatriate judges, serve for life),

6. Tonga (all senior judges serve for life, except expatriate judges are subject to 1 to 2 year contracts by their home-country funding agencies), and

7. United States (Supreme Court, Circuit Court of Appeals, and District Court judges serve for life; bankruptcy judges serve 14-year terms, magistrate judges 8-year terms, and Territorial District Court judges 10-year terms).

B Jurisdictions with Secure Tenure until Retirement Age

In 10 of the 26 reporting PJC jurisdictions, judges (except expatriate judges, where permitted, and some lower court judges) are appointed to serve until a specified retirement age:

1. Australia Federal Judiciary (High Court, Federal Court, and Family Court justices and judges serve until 70 years of age and Magistrate Court judges serve until 65 years of age),

2. Cook Islands (resident judges serve until 70 years of age; however, non-resident judges (which the current judges are) serve for a term of not more than 3 years),

3. Marshall Islands (Supreme Court and High Court judges serve until 72 years of age; however, non-citizen judges (which the current judges are) serve for a fixed term (currently 4-10 years), Traditional Rights Court judges serve 4-10 years, District Court judges serve 10 years, and Community Court judges serve 4 years),

4. Nauru (Supreme Court judges serve until 65 years of age, however Nauru has no resident Supreme Court judges and relies on Kiribati's High Court judge to try cases on an as needed basis),

5. New South Wales (judges serve until 72 years of age),

6. New Zealand (judges serve until 70 years of age),

7. Queensland (judges serve until 70 years of age, and magistrates until 65 years of age),

8. Samoa (Supreme Court judges serve until 68 years of age, District Court judges until 62 years of age, and Land and Titles Court judges until 65 years of age subject to extensions),

9. Solomon Islands (Court of Appeal and High Court judges serve until 70 years of age, magistrates until 55 years of age, and local court and customary land court judges for life subject to fitness to continue), and

10. Vanuatu (Supreme Court judges serve until 68 years of age, magistrates until 55 years of age, and expatriate judges for 2-year terms).

C Jurisdictions with Fixed-term Appointments for Less than Life or Until Retirement

In 9 of the 26 reporting PJC jurisdictions, higher court judges are appointed for a fixed term less than life or until retirement age:

i. In 2 of the 26 PJC jurisdictions, judges are appointed for a fixed term subject to renewal by a commission:

(1) Hawaii, judges are appointed for a fixed term subject to renewal by a nonpartisan commission (Supreme Court, Intermediate Court of Appeals, and Circuit Court judges for 10-year terms and District court judges for 6-year terms), and

(2) Papua New Guinea, judges are appointed and subject to retention by a bipartisan commission except that the Chief Justice of the Supreme Court is appointed by a committee of political leaders (citizens judges are appointed for 10-year terms, subject to retirement at 60 years of age with the possibility of extension until 65 years of age; and non-citizen judges are appointed for up to 3 years subject to the same retirement provisions that citizen judges are).

ii. In 4 of the 9 PJC jurisdictions, judges are appointed for a fixed term subject to reappointment by executive/legislative action:

(1) Pohnpei (Supreme Court judges serve for 12-year terms with reappointment by executive/legislative action),

(2) Kosrae (State Court judges serve for 6-year terms with reappointment by executive/legislative action),

(3) Yap (State Court judges serve for 6-year terms with reappointment by executive/legislative action), and

(4) United States Territorial District Courts for Guam and the Northern Mariana Islands (judges serve for 10-year terms with reappointment by executive/legislative action).

iii. In 3 of the 9 PJC jurisdictions, judges are appointed for a fixed term and are subject to retention elections:

(1) California (Supreme Court and Appellate Court justices are appointed for 12-year terms with renewal by retention election, and Superior Court judges are appointed for elected for 6-year terms with renewal by reelection),

(2) Guam (Supreme Court justices are appointed for 10-year terms and Superior Court judges for 7-year terms with renewal by retention election), and

(3) Northern Mariana Islands (Supreme Court justices are appointed for 8-year terms and Superior Court judges for 6-year terms with renewal by retention election).

D Jurisdictions without Specific Provisions for the Length of Judicial Terms

There is only one jurisdiction of the 26 where the term of judges is not specified in the constitution or by act. That jurisdiction is Kiribati. In Kiribati, High Court judges serve for their appointed terms (for however long the appointment is). In practice, the sole judge, an expatriate, has been appointed for five two-year terms over the past 10 years.

