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An Introduction to Foreign Judges on Domestic Courts

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I INTRODUCTION

Foreign judges sit on domestic courts in over 50 jurisdictions across the world. They serve on ordinary courts in smaller jurisdictions in Africa, the Caribbean, the Pacific, Europe and the Middle East. They sit on the courts of final appeal in Hong Kong and Macau, distinguishing those subnational jurisdictions from mainland China. Foreign judges have served on the constitutional courts of Bosnia-Herzegovina and Kosovo, as mandated by internationalised constitutions designed in response to ethnic conflict. They feature in the new international commercial courts established in Asia and the Middle East. The United Nations and other international bodies have supported the use of foreign judges on hybrid criminal tribunals as well as ordinary courts as part of post-conflict transitional justice. In an emerging trend, internationalised anti-corruption mechanisms in Central America have included foreign judges.

The use of foreign judges runs counter to an assumption that often goes unquestioned: that judges on domestic courts are and should be recruited from and belong to the jurisdiction in which they serve. The practice of foreign judging raises a range of questions. Why do some jurisdictions recruit judges from outside their borders? Do foreign judges perform a distinctive role *vis-à-vis* local domestic judges? Who serves as a foreign judge? How are the ties of nationality, or alternatively the distance of foreignness, significant to adjudication? How does the use of foreign judges affect the accountability and independence of the domestic judiciary and its role in the eyes of other branches of government and the wider community? Does the fact that some or all judges are foreign affect how courts reason, conduct proceedings, and interpret and develop the law? Is the internationalisation of law and judging blurring the boundaries between national and foreign judges, eroding assumptions about the significance of judges' nationality?

This Handbook generates new insights on these questions through a jurisdiction-based comparative approach.[1] Together, the chapters cover most of the 50 jurisdictions in which foreign

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[1] In this it builds on foundational comparative work focusing on courts of constitutional jurisdiction: Rosalind Dixon and Vicki Jackson, 'Hybrid Constitutional Courts: Foreign Judges on National Constitutional Courts' (2019) 57 *Columbia Journal of Transnational Law* 283; Constance Grewe, 'Constitutional and Supreme Courts with

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judges serve, through the examination of particular countries and regions, specialised courts and categories of judges. Two chapters place the contemporary practice of foreign judging in historical context by exploring colonial precedents. Academic analyses by scholars from a range of disciplines are complemented by reflections on the motivations, nature and challenges of foreign judging by judges and officials writing from personal experience. Each chapter provides contextual information about the jurisdiction or region, its legal system(s), and the courts on which foreign judges sit, as well as data on the composition of the courts, details on how foreign judges are appointed and by whom, and the terms and conditions of their service. In addition to rich descriptive detail, the chapters critically examine issues such as the relevance of a judge's nationality and background; different degrees of foreignness; the impetus and rationales for the use of foreign judges; the effect on adjudication and judicial politics; the issues of accountability, independence and legitimacy that can arise; and judicial diversity and representativeness.

Together, the chapters provide the context and analysis necessary to understand foreign judging and its variants and to ground meaningful comparison of this practice across the globe. There are several reasons to engage in comparison of this kind. The first is to open up an understudied phenomenon in comparative judicial studies and comparative law. The prevalence of foreign judging may come as a surprise to some, especially those in jurisdictions where the appointment of a foreign judge is legally not permitted or practically inconceivable. Although the use of foreign judges on domestic courts is often framed as exceptional, this Handbook shows that it is a widespread and evolving practice. A second, functional, purpose of comparison is to support law reform: mutual sharing and understanding of different instances of foreign judging can promote self-reflection and change. For this, understanding the different rationales for foreign judges and the potential effects – intended and unintended – of their presence, is critical. A third, conceptual, purpose of comparison is to understand the significance of foreignness to judging. While there is no single model of foreign judging, understanding the similarities and differences in the practice can build a picture of *how* and *why* the foreignness of a judge matters, and indeed the degree to which it matters at all.

Jurisdictional comparison is not the only way to understand the phenomenon of foreign judging. The movement of judges across national boundaries disrupts 'methodological nationalism'[2] and directs our attention to globalisation in its colonial and contemporary forms, regionalism and transnational mobility. Individual chapters illustrate how perspectives from different disciplines can shed light on diverse aspects of foreign judging. These include examinations of the effect of foreign judging on law, politics and governance from the disciplines of law and politics; socio-legal studies drawing on interviews and surveys; historical inquiries; mobility studies; and personal reflections and biographical accounts of the experiences of judges themselves. Foreign judging is also ripe for social scientific inquiries into judicial behaviour.[3] The information, perspectives and critical analysis presented in this Handbook provide essential background, context and insight into the phenomenon of foreign judging, offering a strong basis for hypothesis formation and future cross-disciplinary research.

International Participation', in *Max Planck Encyclopedia of International Procedural Law* (Oxford: Oxford University Press, 2020); Anna Dziedzic, *Foreign Judges in the Pacific* (Oxford: Hart Publishing, 2021).

[2] The assumption that 'the nation-state is the natural social and political form of the modern world': Andreas Wimmer and Nina Glick Schiller, 'Methodological Nationalism and Beyond: Nation-State Building, Migration and the Social Sciences' (2002) 2(4) *Global Networks* 301.

[3] See, e.g., Peter VonDoepp, 'Politics and Judicial Decision-Making in Namibia: Separate or Connected Realms?', in Nico Horn and Anton Bösl (eds.), *The Independence of the Judiciary in Namibia* (Namibia: Macmillan Education Namibia, 2008), p. 177; Nuno Garoupa, 'Does Being a Foreigner Shape Judicial Behaviour? Evidence from the Constitutional Court of Andorra, 1993–2016' (2018) 14(1) *Journal of Institutional Economics* 181.

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This introductory chapter draws on the chapters to set out a framework for analysing and comparing foreign judges and their institutional contexts. It defines 'foreign judges on domestic courts' as the object of comparison (Section II) and presents a global overview of the practice (Section III). The chapter then disaggregates the range of rationales for the use of foreign judges and shows how each rationale configures the foreign judge in a particular way by valuing different qualities attributed to foreignness and to judges (Section IV). Recognising that rationale alone cannot wholly explain why foreign judges are used in some jurisdictions but not others, Section V considers three features which, while not necessarily causal factors, appear to make some jurisdictions more receptive than others to foreign judges and which shape the role of foreign judges. Section VI turns to examine the implications of foreign judging, focusing on three areas: the identity and role of the judge, judicial independence and accountability, and adjudication. Section VII concludes by forecasting trends in the future evolution of foreign judging.

This analytical framework informs the organisation of the chapters. The Handbook has two tables of contents: one thematic and the other geographic. The thematic table of contents has two main sections. The first, entitled 'Rationales, Motivations and Design', consists of chapters which illustrate the range of rationales and contexts for the use of foreign judges, including as a transitional measure while local judges are unavailable; where the impartiality or distance of foreignness is valued; in post-conflict institution-building; and to enhance the expertise and reputation of the domestic court and/or jurisdiction. Although the recruitment of judges from outside the jurisdiction itself blurs the boundaries between the domestic and international, the organisation of this section makes a broad distinction between domestic drivers for the appointment of foreign judges and international interventions and influences. The second thematic section, entitled 'Implications and Impact', explores the effect of foreign judging in law, politics and society within jurisdictions and across national and regional boundaries. The chapters are grouped into three sub-categories. The first group presents distinctive first-hand accounts from judges and officials, drawing on internal perspectives and personal experiences gained from working within courts that use foreign judges and organisations which support them. The second group of chapters focuses on judicial identity and examines how the foreignness and mobility of judges generate distinctive judicial identities and communities, in the eyes of judges themselves, the legal profession, and the general public at home and abroad. The third group of chapters explores the implications of foreign judging for judicial accountability and independence in authoritarian, democratic and transitional contexts; and the adjudication and the development of the law, with a particular focus on the challenges in pluralist legal systems. The geographic table of contents is intended to assist readers interested in particular jurisdictions.

II DEFINITIONS

A *Foreign Judges*

At first glance, it might be thought that foreignness is a straightforward category or identity attribute, denoting someone from outside. Scratching the surface, however, shows that foreignness is relative, complex and changeable. If the foreigner is someone from the outside, much then depends on how the inside – the internal or the domestic – is defined and understood. In the case of judges, what exactly does the foreign judge stand 'outside' of: the nation-state, the region, the profession or the legal system? Foreignness is also a matter of standpoint and

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perception: after all, 'a foreigner in one place is at home in another'.[4] While it is important to give foreignness some content, particularly to support data collection and typologies for the purposes of study and analysis, it is also important to understand that foreignness is relational and often a matter of degree. Rosalind Dixon and Vicki Jackson have shown how foreign judges have a hybrid quality as insiders and outsiders, with the capacity 'to bridge rather than operate on one side of the outsider–insider divide'.[5] In Chapter 20, Tracy Robinson describes foreign judging in the Caribbean as 'intrinsically protean, and as capturing more than the quality of being an outsider'. Robinson's chapter, along with Anna Dziedzic's study of 'travelling' judges of the Pacific in Chapter 19, suggest that the hybrid quality identified by Dixon and Jackson is, in part, a consequence of the *mobility* of foreign judges, as judges cross jurisdictional and national borders and navigate the outsider–insider divide, creating connections and communities that reduce sharp distinctions between home and abroad.

The foreignness of a judge tends to be defined against two qualities: citizenship and place of professional qualifications. In practice, a foreign judge will often be both a non-citizen and hold legal qualifications and experience in a different jurisdiction. It is worth disentangling the two dimensions, however, as definitional choice and emphasis can indicate different understandings of foreignness.

In some contexts, foreign judges are defined as non-citizens. For example, the foreign judges of the Constitutional Court of Bosnia-Herzegovina must 'not be citizens of Bosnia and Herzegovina or of any neighbouring state'.[6] Meanwhile, laws in Fiji, Marshall Islands, Namibia, Papua New Guinea and Seychelles use citizenship as the criterion to differentiate between local and foreign judges in relation to tenure.[7] Citizenship is a legal status conferred on an individual by the state, and so provides a definitive legal criterion for differentiating between local and foreign judges. Citizenship also emphasises qualities of membership and belonging, which are more often associated with the thicker concept of nationality. However, because membership, belonging and the polity itself can be defined in different ways, so can foreignness. For example, a broad distinction is sometimes made between ethnic forms of nationality in which national membership derives primarily from a common ethnic or cultural group, and civic forms of nationality in which national membership flows from participation in the civic life of the state.[8] The preference for one approach over the other will affect who is considered to belong and who is considered foreign. Bosnia-Herzegovina again provides an instructive example, in that citizens of neighbouring states, in a context where national identity is not contained by state borders, are not eligible to be foreign judges. Taking the opposite approach, legislation in Kuwait, Qatar and the United Arab Emirates permits the appointment of non-citizen judges as long as they are nationals of another Arab state,[9] indicating a preference for non-citizen judges who nonetheless share a regional identity shaped by shared language, religion and legal tradition.

A focus on citizenship leads to a focus on states and state borders. However, several jurisdictions can exist within a state such that judges might share a citizenship but still be considered

[4] Rebecca Saunders, *The Concept of the Foreign: An Interdisciplinary Dialogue* (Lanham: Lexington Books, 2003), p. 3.
[5] Dixon and Jackson (n 1) 291.
[6] Constitution of Bosnia-Herzegovina 1995, art. VI s. 1(b).
[7] Constitution of the Republic of Fiji 2013, s. 110(1), (2); Constitution of the Republic of the Marshall Islands 1979, art. VI s. 1(4); Constitution of the Republic of Namibia 1990, art. 82; Organic Law on the Terms and Conditions of Employment of Judges (PNG), s. 2; Constitution of the Republic of Seychelles 1993, art. 131.
[8] Lynn Jamieson, 'Theorising Identity, Nationality and Citizenship: Implications for European Citizenship Identity' (2002) 34(6) *Sociologia* 507.
[9] Law No. 23 of 1990 on the Organisation of the Judiciary (Kuwait), art. 19; Law No. 10 of 2003 on Judicial Authority (Qatar), art. 27; Federal Law No. 10 of 1973 on the Federal Supreme Court (UAE), art. 4(1). See further Siraj Khan, Chapter 22 in this volume.

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outsiders. For example, judges from the United Kingdom serving on the courts of a British Overseas Territory may share the same citizenship as those in the territory, but they are in effect serving in a jurisdiction with a distinctive legal system and identity. Colonial judges of the past and present are in a similar position.[10] For this reason, several authors in this Handbook define foreign judges not by citizenship, but as judicial officers who come from elsewhere.[11] A degree of foreignness can also arise within a state or territory, for example when judges move across jurisdictional boundaries between subnational units in a federal system (especially when subnational units have a different legal system, such as Quebec within Canada or Scotland within the United Kingdom) or when non-indigenous judges serve on tribal courts.[12] This Handbook focuses on the transnational movement of judges across the borders of nation-states, but in doing so also provides insights into these other dimensions of foreignness.

Foreign judges may also be defined by reference to their professional qualifications and experience from a different jurisdiction. For example, the foreign judges of the Hong Kong Court of Final Appeal are defined as non-resident 'judges from other common law jurisdictions'.[13] Here too, foreignness may also be a matter of degree. Many jurisdictions permit the appointment of foreign judges only from countries with similar legal systems, suggesting that a shared legal tradition might attenuate the foreignness of different legal systems.[14] That said, a shared legal tradition is unlikely to remove all points of difference. As Laurence Burgorgue-Larsen observes in Chapter 12, Andorra's foreign judges are recruited from France and Spain, and while they share in the same European civil law tradition, the different national legal cultures of the judges have a material effect on judicial deliberations and judgment writing.

Conditions of globalisation complicate the categorisation of individuals as foreign and the presumptions that flow from foreignness. People move across borders to live, study and work. Those who move away from their home state might consider themselves members of a diaspora, who retain ties of membership and belonging to their home state but hold formal citizenship in another. They might be dual citizens or become naturalised citizens (as is the case with several judges in Seychelles[15]). Students might go to other countries to study law;[16] indeed for those coming from smaller states this might be the only way to gain legal qualifications. Even those students who study at 'home' in a small state will find their legal education conducted and populated by external actors and sources.[17] Lawyers increasingly travel to work for global law firms and provide legal services across national borders.[18]

[10] See further Mathilde Cohen, 'Judicial Colonialism Today: The French Overseas Courts' (2020) 8(2) *Journal of Law and Courts* 247.

[11] See Tracy Robinson, Chapter 19 and Bal Kama, Chapter 25, both in this volume.

[12] I am grateful to N. Bruce Duthu for pointing out this instance of foreign judging in the United States.

[13] Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, arts. 82 and 92; Hong Kong Court of Final Appeal Ordinance (Cap. 484), s. 12(4).

[14] It is rare for someone from a common law jurisdiction to sit as a judge in a civil law jurisdiction and *vice versa*. Exceptional examples include David Feldman, a Professor of Law from the United Kingdom who served as a judge of the Constitutional Court of Bosnia-Herzegovina, and Jacob Wit, a national of the Netherlands with extensive experience in the Caribbean, who serves as a judge of the Caribbean Court of Justice.

[15] Mathilda Twomey, Chapter 11 in this volume.

[16] Anthea Roberts, 'Cross-Border Student Flows and the Construction of International Law as a Transnational Legal Field', in Bryant Garth and Gregory Shaffer (eds.), *The Globalization of Legal Education: A Critical Perspective* (Oxford: Oxford University Press, 2022), p. 428.

[17] E.g., Gonzaga Puas, Chapter 26 in this volume writes of the continued dominance of United States law in the qualifications to practice law in the Federated States of Micronesia; see also Seán Patrick Donlan, David Marrani, Mathilda Twomey and David Edward Zammit, 'Legal Education and the Profession in Three Mixed/Micro Jurisdictions: Malta, Jersey, and Seychelles', in Petra Butler and Caroline Morris (eds.), *Small States in a Legal World* (Cham: Springer, 2017), p. 191.

[18] Kate Galloway, Melissa Castan and John Flood, *The Global Lawyer* (Chatswood: LexisNexis, 2020).

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Regionalism also creates conditions in which foreignness can become a matter of degree. For example, in the Caribbean there is a high degree of regional integration of the legal profession, shaped by regional law schools, the mutual recognition of legal qualifications across national borders and two regional courts which exercise domestic jurisdiction. One result is an understanding, described by Sir Dennis Byron in Chapter 13, that Caribbean judges, although from other states, are not 'foreign' judges.

Cross-border interactions between courts, judges and lawyers work to create what Anne-Marie Slaughter describes as a 'global community of courts' and an emerging sense that judges are not only representatives of a particular polity but also fellow professionals engaged in a 'common judicial enterprise'.[19] The practice of foreign judging is thus one of many legal phenomena that test the borderlines between domestic and foreign, national and international. This is demonstrated vividly in hybrid criminal tribunals established in states that have experienced conflicts and mass atrocities. These tribunals are created under domestic law and/or by international treaty and are constituted by a mixed bench of local and foreign judges who apply both domestic and international criminal law. In Chapter 10, Harry Hobbs describes how hybrid criminal tribunals serve two political communities – the international community and the people of the state affected – which both have an interest in holding those who commit serious crimes to account, further collapsing clear distinctions between local and foreign judges.

Although there is diversity and change, the category of foreign judge nevertheless continues to have purchase. Despite the mobility associated with globalisation and regionalisation, jurisdictional and state borders still matter, and laws and judges are still closely tied to domestic polities. As long as citizen judges are the norm and foreign judges the exception on domestic courts, it is worth asking why the nationality of adjudicators matters. The study of the exception – foreign judges – is one way to interrogate this question.

B *Domestic Courts*

Domestic courts include ordinary courts in the jurisdiction as well as specialist or ad hoc courts or tribunals created for a particular purpose, for example to try specific crimes or determine transnational commercial disputes. These courts are domestic in two senses: they are established by domestic law and they apply domestic laws. In this, the position of foreign judges on domestic courts differs from that of international judges. International courts are created by agreement between states and resolve disputes according to international or regional law, making it difficult to conceive of international judges as drawn from outside the jurisdiction in the way that foreign judges are. It is fitting that international courts, as institutions of a community of states, be composed of judges of different nationalities. While the nationality of the judges of international courts has received scholarly attention[20] and provides some relevant parallels, foreign judges on domestic courts raise distinctive issues and require separate study.

In many cases, domestic courts are readily identifiable as such. However, as with foreign judges, some courts sit on the margins between the domestic and the international. Some supranational courts, such as the Judicial Committee of the Privy Council, the Caribbean Court of Justice and the Eastern Caribbean Supreme Court, apply domestic law but exist beyond the

[19] Anne-Marie Slaughter, 'A Global Community of Courts' (2003) 44(1) *Harvard International Law Journal* 191, 193.

[20] Freya Baetens (ed.), *Identity and Diversity on the International Bench: Who Is the Judge?* (Oxford: Oxford University Press, 2020); Tom Dannenbaum, 'Nationality and the International Judge: The Nationalist Presumption Governing the International Judiciary and Why It Must Be Reversed' (2012) 45(1) *Cornell International Law Journal* 77.

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territory and serve more than a single state. Hybrid criminal tribunals deliberately combine international and domestic law, judges and legal professionals; while colonial mixed courts provided a different kind of halfway house between the domestic and international legal orders. Regional, hybrid and mixed courts have been included in this collection as judicial institutions that feature judges who, to at least some degree, are foreign, and thus are another incidence of the wider phenomenon of foreign judging.

III A WIDESPREAD PHENOMENON

The use of judges from outside the domestic jurisdiction is not new. Ancient Greek cities imported judges from other regions to determine disputes.[21] Medieval Italian city-states appointed *podestà* recruited from other regions to lead their judiciaries.[22] More recent historical precedents arose as a consequence of European colonisation in the nineteenth and twentieth centuries, with the 'mixed courts' established in non-western nations subject to imperial influence.[23] Today, decolonisation and changing forms of globalisation have created the conditions for new forms of foreign judging to emerge. This section presents a survey of the jurisdictions in which foreign judges serve. It is organised regionally and reflects current and recent practices to 2020.[24]

A *Africa*

Prior to independence, colonial courts in Africa were staffed by Belgian, British, French, German, Italian, Portuguese and Spanish judges appointed by their respective imperial powers. Upon independence, many states lacked legally qualified citizens to fill positions on their courts and so continued to rely on foreign judges.[25] The pace and manner of localisation varied across the continent. In West Africa, where greater numbers of Africans had been admitted as lawyers prior to independence, there was less reliance on foreign judges than in Eastern African states like Kenya.[26]

Today, foreign judges in Africa predominantly sit on ordinary courts in smaller Commonwealth states. In the southern African states of Botswana, Eswatini, Lesotho and Namibia, foreign judges (mostly from South Africa) serve as part-time visiting judges on courts of appeal and as judges in the superior trial courts. In Seychelles, the smallest state in Africa, judges from Botswana, Mauritius, Sri Lanka, Uganda and the United Kingdom sit alongside a growing number of Seychellois judges on the Supreme Court and Court of Appeal. Foreign judges have been a constant in The Gambia throughout authoritarian rule and transition to democracy.

[21] Adele Scafuro, 'Decrees for Foreign Judges: Judging Conventions – Or Epigraphic Habits?', in Michael Gagarin and Adriaan Lanni (eds.), *Symposion 2013* (Vienna: Austrian Academy of Sciences Press, 2014), p. 365. See also Paulo Cardinal, Chapter 6 in this volume, for a historical overview.

[22] Emanuel Wardi, 'The Doge and the Podestà: The Executive and the Judiciary in Late Fourteenth-century Genoa' (2000) 15(2) *Mediterranean Historical Review* 67.

[23] Michel Erpelding, Chapter 16 in this volume; Willem Theus, 'International Commercial Courts: A New Frontier in International Commercial Dispute Resolution? Lessons from the Mixed Courts of the Colonial Era', in Jelena Bäumler et al. (eds.), *European Yearbook of International Economic Law 2021* (Cham: Springer, 2022), p. 275.

[24] Most of these jurisdictions are the subject of chapters of this Handbook and can be identified by reference to the regional table of contents. Further references are cited in the footnotes for those examples not covered by this Handbook.

[25] Rachel L. Ellett, *Pathways to Judicial Power in Transitional States: Perspectives from African Courts* (Abingdon: Routledge, 2013), p. 32.

[26] Rhoda E. Howard, 'Legitimacy and Class Rule in Commonwealth Africa: Constitutionalism and the Rule of Law' (1985) 7(2) *Third World Quarterly* 323, 330.

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In countries where foreign judges no longer sit on ordinary courts, they are sometimes sought for specialist courts. Kenya's Interim Independent Constitutional Dispute Resolution Court, established to hear disputes arising from the constitution making process in 2010, included three foreign judges on its nine-member bench.[27] Rwanda, which had rejected the use of foreign judges to try genocide and conflict-related cases as a 'breach of the sovereignty of the Rwandese people',[28] changed its laws in 2008 to allow two foreign judges to sit on its newly established commercial court.[29] Several African states have established hybrid courts with special jurisdiction to hear conflict-related crimes, including the Special Criminal Court in the Central African Republic and the Extraordinary African Chambers in Chad. The Special Court of Sierra Leone included a majority of foreign judges and, since its dissolution in 2013, a panel of international judges remains available to hear conflict-related cases under a residual mechanism.[30]

B *Caribbean*

Foreign judges sit on the domestic courts of some independent states and overseas territories in the Caribbean. As in Africa, the practice has colonial antecedents but has evolved through economic integration, which has created a mobile legal profession, such that jurisdictions draw readily on regional lawyers and judges. The independent states of Bahamas and Belize appoint foreign judges to their domestic courts. Some jurisdictions have empowered regional courts to adjudicate domestic law. The Caribbean Court of Justice and the Judicial Committee of the Privy Council serve as extraterritorial courts of appeal, with the Caribbean Court of Justice being much closer, institutionally and geographically, to the jurisdictions it serves. The Eastern Caribbean Supreme Court functions as the apex court of six states (Antigua and Barbuda, Dominica, Grenada, Saint Kitts and Nevis, Saint Lucia, and Saint Vincent and the Grenadines) and three territories (Anguilla, British Virgin Islands and Montserrat). Its judges are drawn from these jurisdictions as well as the United Kingdom and from foreign non-member states. The courts of the British Overseas Territories of Turks and Caicos Islands and Cayman Islands include judges from Britain and other Commonwealth countries.

C *Pacific*

The Pacific region, like the Caribbean, encompasses independent states as well as territories with varying degrees of self-government and dependency. Foreign judges sit on ordinary courts in the independent states of Cook Islands, Federated States of Micronesia, Fiji, Kiribati, Marshall Islands, Nauru, Palau, Papua New Guinea, Samoa, Solomon Islands, Tonga, Tuvalu and Vanuatu. In the smallest jurisdictions, all of the judges who sit on the superior courts are foreign; in others foreign judges serve alongside local judges, mainly on the superior trial courts

[27] Constitution of Kenya (Amendment) Act 2008. Laurence Juma and Chuks Okpaluba, 'Judicial Intervention in Kenya's Constitutional Review Process' (2012) 11(2) *Washington University Global Studies Law Review* 287.

[28] Gérard Prunier, *Africa's World War: Congo, the Rwandan Genocide, and the Making of a Continental Catastrophe* (Oxford: Oxford University Press, 2009) 12.

[29] World Bank, *Doing Business 2011: Making a Difference for Entrepreneurs* (Washington, DC: World Bank Publications, 2010) 74.

[30] Tiyanjana Mphepo, 'The Residual Special Court for Sierra Leone. Rationale and Challenges' (2014) 14(1) *International Criminal Law Review* 177.

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and courts of appeal. Some foreign judges reside in the state and serve full time, while others visit periodically for court sittings. The legacies of colonialism continue to be reflected in the cohort of foreign judges, with many of them recruited from former colonial administrators: the United States in the cases of Federated States of Micronesia, Marshall Islands and Palau; and Australia, New Zealand and the United Kingdom in the other Pacific states. There is, however, increasing diversity in the cohort of foreign judges, with the appointment of foreign judges from a range of other Commonwealth jurisdictions.

D *Asia*

In Asia, foreign judges sit in only a few jurisdictions and the practice takes diverse forms. Foreign judges sit on the Courts of Final Appeal in Hong Kong and Macau, Special Administrative Regions of the People's Republic of China. Both are former colonies – of Britain in the case of Hong Kong and Portugal in the case of Macau – that were transferred to Chinese sovereignty in the late 1990s. Hong Kong's common law system and Macau's civil law system are distinct from China's socialist legal system, and foreign judges are a mark of this distinction. In Hong Kong, the five-member bench of the Court of Final Appeal will in most cases include one foreign judge, usually a retired judge from Australia, Canada, New Zealand or the United Kingdom. Portuguese judges have sat on all levels of courts in Macau, although as Paulo Cardinal explains in Chapter 6, their use is declining. Foreign judges also sit in Brunei Darussalam. It has a dual legal system, with Sharia courts presided over by citizen judges and common law courts for civil and commercial matters on which foreign judges (typically from Britain, Hong Kong and Singapore) may sit.

East Timor presents a different context for the use of foreign judges. It became an independent state in 2000, following colonial rule by Portugal and occupation by Indonesia. Its vote for independence sparked extensive violence and a United Nations-led peacekeeping mission assumed responsibility for transitional governance. Between 2000 and 2005, hybrid tribunals comprised of two foreign judges and one Timorese judge were formed to adjudicate serious crimes arising from the conflict. In addition, the United Nations administration worked with the new Timorese government to recruit foreign judges for the ordinary courts. Portuguese judges sat on these courts until 2014, when the Parliament resolved to terminate the contracts of all foreign judges, prosecutors and advisers in the justice sector. Foreign judges also serve in post-conflict Cambodia on a hybrid criminal tribunal established to try serious crimes committed during the Khmer Rouge period.

Three states in Asia – Kazakhstan, Singapore and China – have established international commercial courts. The Astana International Financial Centre Court is a common law court, separate from Kazakhstan's civil law system, with judges from the United Kingdom. The Singapore International Commercial Court has 22 Singaporean judges and 12 foreign judges, recruited from common law and civil law jurisdictions. In contrast, the Chinese International Commercial Court has only Chinese judges, who are assisted by a standing panel of foreign advisers, some of whom are former judges from foreign jurisdictions.

E Middle East

Foreign judges sit on ordinary courts in Bahrain, Kuwait, Qatar and the United Arab Emirates. These foreign judges are recruited from within the Arab region, in particular from Egypt, Jordan, Morocco and Sudan. As in Asia, several jurisdictions have established international

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commercial courts, separate from other domestic courts. The Qatar Civil and Commercial Court, the Dubai International Financial Centre Courts and the Abu Dhabi Global Market Courts provide dispute resolution in transnational commercial and civil matters and foreign judges from a range of common law jurisdictions have been appointed to these courts. Foreign judges also serve on the Special Tribunal for Lebanon, a hybrid criminal tribunal established to prosecute terrorism crimes.

F *Europe*

Courts in the small states of Andorra, Liechtenstein, Monaco and San Marino draw on judges from neighbouring European states. Citizens of France and Spain sit on the Constitutional Court of Andorra. In Liechtenstein, judges from Austria and Switzerland sit with local judges on ordinary courts and the Constitutional Court. Judges of the Supreme Court of Monaco are 'selected from among particularly competent jurists'[31] from France. The judges on San Marino's *Collegio Garante della Costituzionalità delle Norme* are Italian citizens, selected from professors and experienced magistrates.[32]

Foreign judges sit on the Constitutional Courts of Bosnia-Herzegovina and, until 2017, Kosovo, jurisdictions both marred by past conflict. The use of foreign judges in these two jurisdictions is distinctive in several ways: it is mandatory that three of the nine Constitutional Court judges are foreign judges appointed by or in consultation with the President of the European Court of Human Rights.[33] Foreign judges also served on hybrid criminal tribunals in each jurisdiction. United Nations and European Union missions to Kosovo made extensive use of foreign legal personnel, including judges, to deal with war crimes, organised crime, inter-ethnic violence and corruption.[34] In Bosnia-Herzegovina, foreign judges, mostly from western Europe and the United States, served on a specialist court to try serious crimes from 2005 until their mandate ended in 2009.[35]

G *Latin America*

Foreign judges are a rarity in Latin America. In the few instances where foreign judges have been proposed, the idea has been met with strong resistance. For example, in 2016 Colombia established a 'Special Jurisdiction for Peace' to investigate and prosecute those responsible for human rights violations during the internal armed conflict. A proposal that this special procedure involve foreign judges was abandoned in the face of criticism and foreign jurists were given an advisory role only.[36] A more successful, but still limited, role for foreign judges arose in Honduras, which in 2016 established a mission against corruption with foreign personnel including judges whose role included overseeing institutional reform and supervising the prosecution process and other judges.

[31] Sovereign Ordinance No. 2.984 of 16 April 1963, art. 2.
[32] Declaration of Citizens' Rights and Fundamental Principles of San Marino Constitutional Order 1974, art. 16.
[33] Constitution of Bosnia-Herzegovina 1995, art. VI(1); Constitution of the Republic of Kosovo 2008, art. 152.
[34] Michael E. Hartmann, *International Judges and Prosecutors in Kosovo: A New Model for Post-Conflict Peacekeeping* (Washington, DC: United States Institute of Peace, 2003).
[35] Bogdan Ivanišević, *The War Crimes Chamber in Bosnia and Herzegovina: From Hybrid to Domestic Court* (New York: International Center for Transitional Justice, 2008).
[36] Kai Ambos and Susann Aboueldahab, 'Foreign Jurists in the Colombian Special Jurisdiction for Peace: A New Concept of Amicus Curiae?' (*EJIL Talk: Blog of the European Journal of International Law*, 19 December 2017).

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IV RATIONALES

This regional survey demonstrates the range of different contexts in which foreign judges serve on domestic courts. There are a variety of rationales for the appointment of foreign judges, which the chapters in the first thematic section of this Handbook explore in more detail. They identify five broad reasons to use foreign judges on domestic courts: necessity, institution building, distance, expertise and reputation. These rationales are not mutually exclusive; indeed, it is common for several justifications to co-exist in the one context. They are worth disaggregating, as each emphasises different qualities attributed to foreignness and to judges.

A *Necessity*

A rationale that commonly arises in small jurisdictions is the insufficient number of qualified local lawyers and judges willing and able to take up judicial office. Such a shortage might arise because of the small size of the population and the legal community, the depletion of the legal profession during conflict or authoritarian rule, past discriminatory practices that inhibited access to the legal profession, or insufficient remuneration comparable to other legal careers to attract good candidates. Alternatively, there might be a temporary high demand for judges, for example to clear a backlog of cases. In such contexts, foreign judges 'fill gaps' in the judiciary as a transitional measure pending the availability of local candidates. Under this rationale, foreign judges are first and foremost judges, with specialist expertise and professional commitments to impartiality and the law, which make them transferrable across jurisdictional boundaries.[37] In other words, the value of foreign judges under this rationale lies more in their availability to provide judicial services than in their foreignness.

B *Institution Building*

Sometimes, foreign judges are used when there is not only a shortage of judges, but the domestic judicial system is damaged and ineffective. In such cases, foreign judges are sought to fill gaps as well as to help rebuild and strengthen judicial institutions. This use of foreign judges often arises in contexts where there are international missions or interventions. For example, internationally supported post-conflict peacebuilding missions in East Timor and Kosovo were mandated to establish the rule of law, rebuild the institutions of the state, and hold those who committed crimes during the conflicts accountable. Both drew on foreign judges to do so. These missions built on the earlier precedent of the United Nations' assistance to the Democratic Republic of Congo in the 1960s, which recruited international experts including judges to construct the institutions of government.[38] An example of a different kind is the internationalised anti-corruption mission in Honduras, which sought to reform judicial institutions compromised by corruption. There, foreign judges were mandated to 'supervise and evaluate' Honduran officials and reform institutions.[39]

In these examples, foreign judging overlaps with wider efforts by international organisations to provide assistance to 'developing' countries.[40] Here, foreign judges are valued as

[37] Dziedzic (n 1) ch. 8.
[38] Sandra W. Meditz and Tim Merrill, *Zaire: A Country Study* (Washington, DC: Library of Congress, 1993), p. 227.
[39] Arturo Villagrán, Chapter 9 in this volume.
[40] Guy Fiti Sinclair, *To Reform the World: International Organizations and the Making of Modern States* (Oxford: Oxford University Press, 2017), especially ch. 4.

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technical experts with connections to the international community and its development projects and resources. International agencies recruiting foreign judges in these contexts often specify capacity building as part of the judge's role. Foreign judges are sought to mentor local judges and other actors, by transferring skills and modelling high standards of judicial conduct.[41] Foreign judges in such positions might be understood as supervising or upholding internationally approved arrangements.[42] There is a danger that in some cases, foreign judges are or are perceived to be patronising and disrespectful towards local colleagues.[43] However, as Chief Justice Mabel Agyemang shows in Chapter 2, foreign judges who transfer expertise and mentor their colleagues can provide a pathway to end a jurisdiction's dependence on foreign judges.

C *Distance*

A third rationale focuses on foreign judges' distance from domestic politics and interests. Distance, in physical terms, as well as in relationships and pre-conceived opinions, is thought to lend greater assurance of the impartiality of judges and judiciaries. There are different examples of this rationale in practice. In Bosnia-Herzegovina, foreign judges were seen as a way to ensure the neutrality of the Constitutional Court in a context where deep ethnic divisions within the state were likely to be reflected on the bench. A similar model was proposed, but not implemented, in the Constitution and Annan plan for a reunified Cyprus, in which the superior courts were to include judges who were not citizens of Cyprus, Turkey, Greece or the United Kingdom.[44] On this rationale, foreign judges are cast as neutral judges who are not caught up in the political interests of the different groups within the state.

Variations on the distance rationale are common in small jurisdictions. Sometimes, it is broadly framed as the avoidance of conflict of interest in general. Laurence Burgorgue-Larsen in Chapter 12 and Ann Black in Chapter 24 explain that in the small states of Andorra and Brunei Darussalam respectively, legal elites share many connections in government, parliament, legal practice and business, making it difficult for local judges to avoid actual or perceived conflicts of interest. In other contexts, the justification for turning to a foreign judge is more narrowly framed, such as when other judges are unable to hear a case because of the rule against bias,[45] or because of political sensitivities.[46] This rationale casts distance and 'outsider-ness' as the key virtues of a foreign judge.

[41] Sapna Reheem Shaila, Chapter 8 and Arturo Villagrán, Chapter 9, both in this volume.

[42] For example, Samuels proposes that the international community can play a role in enforcing new post-conflict governance structures through judges on constitutional courts, citing Bosnia-Herzegovina and East Timor as examples: Kirsti Samuels, 'Post-Conflict Peace-Building and Constitution-Making' (2006) 6 *Chicago Journal of International Law* 663, 680.

[43] A risk discussed by Harry Hobbs, Chapter 10 in this volume.

[44] Hubert Faustmann and Andrekos Varnava (eds.), *Reunifying Cyprus: The Annan Plan and Beyond* (London: IB Tauris, 2009), pp. 33, 77, 102.

[45] E.g., in Vanuatu, a judge from New Zealand was appointed to hear a defamation case brought by a former magistrate against fellow judicial officers: *Ahelmhalahlah v. Vanuatu* [2018] VUSC 24. For an argument in favour of this narrow rationale over broader formulations in the Pacific, see Dziedzic (n 1) ch. 6.

[46] E.g., cases of *Mokhosi v. Hungwe* [2019] LSHC 9 and *Misick v. The Queen* [2015] UKPC 31; [2015] 1 WLR 3215 (PC Turks and Caicos Islands) discussed by Karen Brewer, Chapter 14 in this volume. See also John Hatchard, *Combating Corruption: Legal Approaches to Supporting Good Governance and Integrity in Africa* (Cheltenham: Edward Elgar, 2014), p. 212.

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D *Expertise*

A fourth rationale is that foreign judges bring knowledge and expertise to the domestic court. Sometimes, this rationale can be a more specific instantiation of 'gap filling': if a local judiciary lacks judges with specialist legal expertise, for example in commercial law, then a foreign judge might be recruited to provide it. Other times, the expertise of foreign judges in the laws of their home jurisdiction is what is valued. As Peter Bußjäger explains in Chapter 4, significant parts of Liechtenstein's legal code are based on Austrian and Swiss law, and judges are bound to interpret those laws in line with the jurisprudence in their country of origin. Foreign judges are therefore recruited from Austria and Switzerland to provide this expertise. Similarly, in Bosnia-Herzegovina and Kosovo, where the European Convention on Human Rights is directly applicable, foreign judges – who are appointed with the involvement of the President of the European Court of Human Rights – assist the Constitutional Courts to interpret and apply this law.[47] Anselmo Reyes in Chapter 5 describes how the Singapore International Commercial Court includes foreign judges from a range of common law and civil law jurisdictions to provide the diversity and knowledge necessary for a court that rules on issues of fact and law from different countries across the world.

This rationale can also be more generalised, as the benefit of *comparative* expertise. Foreign judges bring knowledge and experience of overseas laws, which they can use to inform the development of the law in the jurisdictions in which they sit.[48] In Chapter 3, Justice Joseph Fok shows how foreign judges on Hong Kong's Court of Final Appeal bring their knowledge of other common law countries to bear on the development of the common law of Hong Kong. In this, foreign judging shares similarities with a court's engagement with foreign case law in the deliberative decision-making process.[49] This may be particularly valuable in new or small jurisdictions, which lack extensive local legal precedents and seek to build their jurisprudence with the assistance of foreign legal experience. On this rationale, foreign judges are valued for their expertise in the legal system of their home country or regional or international law.

E *Reputation*

Foreign judges are sometimes appointed to enhance the reputation of the domestic court and the polity in general. A recurring example arises in small jurisdictions with strong, internationalised economies, such as the British Virgin Isles, Brunei Darussalam, Hong Kong, Liechtenstein, and the Gulf states, which provide impartial and professional courts to attract and reassure international businesses and investors. Foreign judges are said to lend confidence and enhance the international image of the judiciary.

Sometimes, foreign judges serve as a visible marker of the difference between courts in the one legal system. For example, in Hong Kong and Macau, foreign judges signal the distinctiveness of their legal systems from that of mainland China, and the qualities of judicial independence

[47] Constance Grewe, Chapter 7 in this volume; see also Constance Grewe and Michael Riegner, 'Internationalized Constitutionalism in Ethnically Divided Societies: Bosnia-Herzegovina and Kosovo Compared' (2011) 15 *Max Planck Yearbook of United Nations Law* 1, 40–2, 48–52.

[48] Dixon and Jackson (n 1) 311–13.

[49] Vicki C. Jackson, *Constitutional Engagement in a Transnational Era* (Oxford: Oxford University Press, 2010) ch. 3; Cheryl Saunders, 'Judicial Engagement with Comparative Law', in Tom Ginsburg and Rosalind Dixon (eds.), *Comparative Constitutional Law* (Northampton: Edward Elgar, 2011), p. 571.

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inherent in those systems.[50] In Chapter 24, Ann Black explains that in Brunei Darussalam, the appointment of foreign judges serves to 'maintain the common law courts' reputation for independence and professionalism in a context of increasing Islamisation of the mixed legal system and in which the Sultan has direct powers of control over the judiciary'. Justice Joseph Fok, a Permanent Judge of the Hong Kong Court of Final Appeal, explains the mechanics of this rationale in Chapter 3 when he writes: 'it is perfectly reasonable to ask, "Would so many eminent serving and retired judges have sat, and continue to sit, in a court in Hong Kong if any of them thought the system was subject to improper interference from outside agencies?"'[51] This rationale takes advantage of the ability of the foreigner to provide an external affirmation of the 'choice-worthiness' of the regime, to domestic and international audiences.[52]

Reputation deals in appearances, and much will depend on who is appointed to be a foreign judge, in terms of their personal eminence and experience as well as their jurisdiction of origin and the intended domestic and external audiences.[53] One effect of the reputation rationale is an emphasis on the symbolic value of foreign judges to the status of the court or the polity. However, as Simon Young cautions in Chapter 18, foreign judges can symbolise different things to different people, from the health of the rule of law on the one hand, to colonialism and foreign interference on the other.

F *Legitimacy and Effectiveness*

Identifying the relevant rationale(s) for the appointment of foreign judges allows for a critical assessment of the legitimacy and effectiveness of foreign judging in a particular context. Several lines of inquiry arise. Does the claimed rationale address circumstances that in fact exist in practice? (For example, is there really a shortage of qualified local candidates for judicial appointment?) Are foreign judges the best way to address the problem identified? (For example, if there is a shortage of local candidates mainly because the pay and conditions of judicial office are poor, a better response may be to improve such conditions rather than import judges.) Does the practice of foreign judging achieve the desired purpose? Chapters 7, 8 and 9 – by Constance Grewe on Bosnia-Herzegovina and Kosovo, Sapna Reheem Shaila on East Timor and Arturo Villagrán on Honduras respectively – undertake such inquiries and question whether foreign judges met their mandate, and whether that mandate was appropriate and achievable at all.

Sometimes, one or more of the five rationales is used as a cover to disguise bad reasons for making use of foreign judges. One questionable aim is the appointment of foreign judges as a continuance of colonialism, so that a foreign legal system dominates and controls the development of domestic law. Colonial mixed courts, for example, were created as 'instruments of foreign domination' to protect the economic interests of powerful foreign states in the host polity under the cover of the colonial 'civilising' mission.[54] In Chapter 26,

[50] See in particular Paulo Cardinal, Chapter 6 in this volume.

[51] Joseph Fok, 'The Use of Non-Local Judges in Overseas Jurisdictions' (2017) 23(1) *Journal of the Commonwealth Magistrates' and Judges' Association* 28, 31. See also Albert H.Y. Chen and P.Y. Lo, 'Hong Kong's Judiciary under "One Country, Two Systems"', in H.P. Lee and Marilyn Pittard (eds.), *Asia-Pacific Judiciaries: Independence, Impartiality and Integrity* (Cambridge: Cambridge University Press, 2017), pp. 131, 136.

[52] Bonnie Honig, *Democracy and the Foreigner* (Princeton: Princeton University Press, 2001), pp. 75, 109.

[53] Nuno Garoupa and Tom Ginsburg, *Judicial Reputation: A Comparative Theory* (Chicago: University of Chicago Press, 2015), especially pp. 169, 193.

[54] Michel Erpelding, Chapter 16; Siraj Khan, Chapter 22 in this volume.

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Gonzaga Puas explains how the entrenchment of United States law in the Federated States of Micronesia continues to benefit United States lawyers and marginalise Micronesian lawyers. Another problematic rationale is a preference for foreign judges because they serve with limited protections on tenure and are thus susceptible to political influence. In Chapter 21, Rachel Ellett shows that in southern African states foreign judges on short term contracts are 'less threatening' to authoritarian regimes 'because they can easily be dismissed without dismantling the democratic window-dressing critical for regime legitimacy'. Similar practices of control and interference were adopted in The Gambia, which Satang Nabaneh discusses in Chapter 23.

The five rationales are presented here from the point of view of the jurisdiction using foreign judges. Individuals have their own reasons and justifications for taking up a judicial appointment in a foreign jurisdiction. First-hand reflections provide fascinating insights into the motivations of judges themselves. In this, it is important to recognise the diverse circumstances of candidates for foreign judicial appointments – some are lawyers, some are serving or retired judges, others are academics – and all come from different countries across the world. As such, personal motivations vary. Appointments overseas might enable lawyers to pursue a judicial career, or allow judges to continue their career after reaching the mandatory retirement age in their home jurisdiction.[55] Sometimes judicial service in a foreign jurisdiction is more lucrative in terms of pay and conditions than opportunities at home, either because of the affluence of the host state or because the positions are funded by international donors. In Chapter 2, Chief Justice Agyemang describes how she decided to take up an opportunity to serve as a judge overseas out of a sense of service and for her own professional development, with the support of the Chief Justice in her home country Ghana. While she initially intended to return to her home country, she has instead carved out an internationalised judicial career across several Commonwealth jurisdictions.

The motivations of foreign judges, like rationales for their use, are important for understanding how foreign judging is practiced and sustained in different contexts. Rationales can serve as a guide, so that the legal frameworks and practices of foreign judging are tailored to realising the goals sought. Rationale provides a touchstone for justifying who is recruited to be a foreign judge; design choices about the competences, tenure and conditions of judicial service; and strategies for building judicial culture in how foreign judges and local judges interact: in other words, the 'who, when, how and by what means' of foreign judging.[56]

V INFLUENCES

Identifying rationales does not wholly explain why foreign judges feature in some jurisdictions and not others. After all, not every small jurisdiction, not every ethnically divided state, and not every judiciary seeking to enhance its reputation seeks foreign judges. Comparing the jurisdictions that use foreign judges suggests three features which, while not strict causal factors, appear to make some jurisdictions more receptive than others to foreign judges, namely size; a common law legal system; and the degree of, and receptiveness to, international involvement in the jurisdiction.

[55] On the ethics and opportunity for judicial service post retirement, and motivations of foreign judges serving on international commercial courts generally, see Alyssa S. King and Pamela K. Bookman, 'Traveling Judges' (2022) 116(3) *American Journal of International Law* 477, 515–18.

[56] Dixon and Jackson (n 1).

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A *Size*

One relevant factor is the size of the jurisdiction. Of the 42 jurisdictions in which foreign judges serve on ordinary courts[57] 30 are small states or territories with populations of less than 1.5 million.[58] In small jurisdictions, the cohort of law graduates and lawyers which supply candidates for judicial appointment are also likely to be small. They have smaller administrations and officials are often given multiple roles, limiting scope for specialisation.[59] Economies of scale mean there may not be demand for a full-time court, especially at the superior and appellate levels, while the cost per capita of maintaining such courts is high. Sharing judges (and other personnel) across jurisdictions can be a cost-effective way of providing judicial services. In small jurisdictions, where 'everyone knows everyone', judges are also likely to have close ties to government and others in the community, creating risks of bias or conflicts of interest which also justify the appointment of foreign judges.

B *Legal System*

The nature of the legal system also appears significant. Again, taking the 42 jurisdictions in which foreign judges serve on ordinary courts, 24 have common law systems, 11 have civil law systems, and 7 have systems that mix common and civil law.[60] This raises the question: Is there something about the common law that makes it more receptive to foreign judges? One point of distinction between common law and civil law systems is the role of the judge. Common law is created and developed by judges, reasoning by analogy from case to case to build a body of law. In contrast, in the civil law tradition, judges are portrayed as 'the mouth of the law', applying codified law to resolve disputes. The differences and similarities between the two legal systems are of course much more nuanced than these caricatured descriptions suggest.[61] Even so, theorising connections between 'ideal models' of the judicial role and receptiveness to foreign judges produces mixed results. On the one hand, both systems expect judges to have skills that are transferrable across national borders: common law judges draw on a shared tradition of legal analysis and reasoning by analogy, while civil law judges are experts in reading and applying pre-existing legal codes. On the other hand, both also value direct knowledge of local law and its context: 'creative' common law judges develop the law in response to local context, while civil law judges are expected to have specific and expert knowledge of the content of national legal codes.

A second point of distinction which may be more telling is the structure of judicial careers. Civil law systems tend to have bureaucratic judiciaries, in which judges are recruited early in their legal careers and trained and promoted within the judiciary. As a result, the judiciary tends to be closed, not only to foreign judges, but also to established citizen lawyers. In contrast, judges in common law systems tend to be recruited from the legal profession after a period in

[57] That is, excluding ad hoc or specialist courts such as international criminal tribunals and international commercial courts.

[58] Based on estimates for 1 July 2020 from United Nations Department of Economic and Social Affairs Population Division, 'World Population Prospects, The 2019 Revision' (United Nations, June 2019).

[59] Marlene Jugl, *Country Size and Public Administration* (Cambridge: Cambridge University Press, 2022), pp. 20–4.

[60] Many of these jurisdictions are mixed in the sense that they also include customary law (as in many African and Pacific states) or Islamic law (as in Brunei Darussalam and the Middle East) but the distinction of interest here is the common law-civil law divide.

[61] John Henry Merryman and Rogelio Ṕerez-Perdomo, *The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin America*, 3rd ed. (Stanford: Stanford University Press, 2007), p. 47.

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legal practice, with the degree of experience generally being commensurate with the seniority of the judicial appointment. While in practice the distinction is not so sharp,[62] especially when it comes to constitutional courts,[63] the relative openness of the judicial career structure in common law jurisdictions might facilitate the appointment of foreign judges.

An alternative hypothesis is that it is not the common law *per se* that makes jurisdictions more receptive to foreign judges, but the experience of British colonisation. A common feature of European colonisation of the nineteenth and twentieth centuries was the importation of imperial law to colonial outposts and its enforcement by imperial judges, at least in areas of colonial activity.[64] Notably, however, while many newly independent former British colonies continued to recruit foreign judges from the United Kingdom and other common law jurisdictions, few former colonies of continental European imperial powers did so. One reason for this may lie in efforts by institutions such as the Colonial Legal Service and the Privy Council to transition from institutions of empire to institutions of the Commonwealth by diversifying their membership and adjudicating in a way that was responsive to local needs.[65] Another reason may be the centrality of the English bar in legal education across the empire, and later the Commonwealth. Sir Dennis Byron, in Chapter 13, describes his experience studying law and entering the Inns of Court alongside students from across the Commonwealth, and becoming part of 'a legal association, with an international flavour, defined by common concepts of the rule of law'. These institutions and practices provided the models and the personal connections to support the forms of foreign judging adopted by common law states at the time of their independence and thereafter.

C *International Involvement*

A third potential influence, which, like the influence of the legal system is difficult to trace with precision, relates to the receptiveness or vulnerability of the jurisdiction to international involvement in its governance. Those who reject the use of foreign judges often claim that it is inconsistent with sovereignty.[66] The use of foreign judges does not necessarily infringe international sovereignty (which protects states from interference by other states) or domestic sovereignty (the ultimate political authority and source of laws within a polity). A state and its people may, through law, authorise a foreign judge to exercise judicial power on behalf of the state without infringing sovereignty of either kind.[67] Sovereignty claims do, however, have symbolic purchase, reflecting the idea that judging is a power of the state and so ought to be only

[62] Peter H. Russell, 'Judicial Recruitment, Training and Careers', in Peter Cane and Herbert M. Kritzer (eds.), *The Oxford Handbook of Empirical Legal Research* (Oxford: Oxford University Press, 2010), p. 523.

[63] Grewe (n 1) para. 39.

[64] The policy of indirect rule left some kinds of matters in the hands of local authorities. For an example, see the bifurcation of 'native courts' and 'common law courts' in colonial Tanzania, discussed in Ellen R. Feingold, *Colonial Justice and Decolonization in the High Court of Tanzania, 1920–1971* (Cham: Palgrave Macmillan, 2018), ch. 3.

[65] Rohit De, '"A Peripatetic World Court" Cosmopolitan Courts, Nationalist Judges and the Indian Appeal to the Privy Council' (2014) 32(4) *Law and History Review* 821; Paul Mitchell, 'The Privy Council and the Difficulty of Distance' (2016) 36(1) *Oxford Journal of Legal Studies* 26.

[66] See, e.g., Joseph Marko, 'Foreign Judges: A European Perspective', in Simon N. M. Young and Yash Ghai (eds.), *Hong Kong's Court of Final Appeal: The Development of the Law in China's Hong Kong* (Cambridge: Cambridge University Press, 2014), pp. 637–65.

[67] See the evaluation by Arturo Villagrán in Chapter 9 in this volume, in response to claims that internationalised anti-corruption missions in Central America infringe sovereignty.

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exercised by judges who are also 'of the state'. In this, assertions of sovereignty against foreign judges echo arguments against 'foreign judges' on international courts[68] and the citation of foreign law by domestic courts.[69]

Foreign judges tend to feature in jurisdictions that are, or have been, subject to a high degree of international influence, whether as a result of colonisation, geopolitical power dynamics, or intervention in response to conflict or perceived 'state failure'. The provision of foreign judges is often framed as part of wider 'rule of law assistance' to developing states to support economic development or to rebuild judiciaries in conflict-affected contexts.[70] Foreign judges are far more likely to travel from 'core' to 'periphery' jurisdictions, such that Australian and New Zealand judges serve on Pacific island courts, South Africans on courts in southern African states, and judges from the United Kingdom on newly established international commercial courts.[71] States in the Global North that use foreign judges are subject to their own geopolitical pressures, as seen for example in the small European states of Andorra and Liechtenstein which balance their foreign judges in equal number from powerful neighbouring states. Analysing the deployment and recruitment of foreign judges through the lens of international relations and the global political economy situates the practice of foreign judging as an instantiation of the relationships between states in a globalised, but unequal, world.

VI IMPLICATIONS AND IMPACT

The study of foreign judges is motivated by the intuition that foreignness matters. The chapters in the second thematic section of the Handbook explore the implications and impact of foreign judges in practice. Some effects are intended and may form part of the rationale for the appointment of foreign judges, discussed in Section III of this chapter; while other consequences arise independently and perhaps unintentionally. The chapters suggest three broad areas in which foreignness matters.[72] The first is that the identity characteristics of judges – and foreignness in particular – matter for the representativeness of the judiciary, with consequences for how judges and judiciaries are regarded by the communities they serve and those outside it. Secondly, the use of foreign judges can affect the accountability and independence of the judiciary, in positive and negative ways. The third area relates to the effect that the foreignness of judges has on adjudication and the development of the law. These issues contribute to the legitimacy of courts and judges, in the normative and the sociological sense[73] and map on to fundamental debates in judicial and legal studies. A focus on foreign judges draws attention to potential gaps and blind spots in the literature and exposes distinctive vulnerabilities in jurisdictions that have foreign judges.

[68] One example is the popular initiative 'Swiss law instead of foreign judges – initiative for self-determination' put to referendum in 2018, which sought to limit the effect of international law in Switzerland.

[69] E.g., in the United States: Austen L. Parrish, 'Storm in a Teacup: The US Supreme Court's Use of Foreign Law' [2007] *University of Illinois Law Review* 637.

[70] Sinclair (n 40).

[71] See Dziedzic (n 1) ch. 2; Rachel Ellett, Chapter 21 in this volume; King and Bookman (n 55) respectively.

[72] See Dziedzic (n 1) ch. 4 for a theoretical discussion of how qualities that are understood to accompany nationality – knowledge, membership and identity – are significant to these three aspects of judging.

[73] Normative legitimacy explains why the decisions of a court or judge are morally binding and why people and governments obey them, while sociological legitimacy arises when people perceive the court and judges to have binding authority of that kind: Fabienne Peter, 'Political Legitimacy', in Edward N. Zalta (ed.), *Stanford Encyclopedia of Philosophy* (Stanford: Stanford University, 2017).

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A *Identity, Representation and the Judicial Role*

Studies of judicial behaviour seek to understand whether and how identity attributes such as gender, race, religion and professional background affect the ways in which judges discharge their role and the qualities of the judiciaries on which they serve. The inclusion of foreign judges adds another, understudied, identity attribute to a judiciary. Foreignness carries layers of meaning. Section II of this chapter showed how foreignness might link to other identity characteristics such as nationality, place of origin or background. And, as Laurence Burgorgue-Larsen explains in Chapter 12, a judge has many different identity characteristics of which foreignness is only one, and perhaps not even the most significant one, when it comes to judging.

Literature on judicial diversity examines the importance of a judiciary whose composition reflects the community it serves, in terms of gender, ethnicity, religion and other identity attributes.[74] The inclusion of foreign judges on a domestic court makes the judiciary 'unreflective' in the sense that it is composed, at least in part, of judges of a different nationality and sometimes also of a different ethnic and cultural identity to the community.[75] This sense of difference is sometimes compounded by history, especially where foreign judges are drawn from former colonising powers. It is argued that reflectiveness enhances public confidence in the judiciary and the law because it visibly connects the court to the community. As Harry Hobbs shows in Chapter 10, the desire to promote local ownership and embed courts in the affected community led to the increasing inclusion of local judges and greater public confidence in international criminal justice. In some contexts, however, the presence of foreign judges does not signify disconnection from the domestic community so much as connections to a foreign or international community, which itself enhances public confidence: Hong Kong and Macau are examples.

Questions of identity and representativeness affect *who* is appointed a foreign judge. In the early years of independence, some African states undertook a process of 'Africanisation' of their judiciaries as a 'stepping stone between a colonial and a localised Bench'.[76] Recruiting black judges from other African states and the Caribbean in preference to white judges was a statement against the racial hierarchies of colonialism.[77] In Chapter 19, Anna Dziedzic identifies a trend in some Pacific states to recruit judges from within the Pacific region or common law countries of the Global South, lessening reliance on the traditional (and former colonial) donor states. She argues that this provides a counter-narrative to colonialist framings of both self-government in the Pacific and hierarchies of global movement.

Another implication of some forms of foreign judging is the potential for it to 'reimagine' the judicial role in a distinctive way. Some cohorts of foreign judges develop their own communities which shape understandings of the foreign judge's role. In Chapter 17, Paul Swanepoel explains how the judges who served as part of the Colonial Legal Service imagined a community around a particular understanding of the professional role of colonial judges. The long history of foreign judging across the Commonwealth, examined by Karen Brewer in Chapter 14, has fostered the idea of the 'Commonwealth judge' who feels at home in any number of Commonwealth

[74] Sophie Turenne, 'Fair Reflection of Society in Judicial Systems', in Sophie Turenne (ed.), *Fair Reflection of Society in Judicial Systems: A Comparative Study* (Cham: Springer, 2015); Lizzie Barmes and Kate Malleson, 'Lifting the Judicial Identity Blackout' (2018) 38(2) *Oxford Journal of Legal Studies* 357.

[75] Anna Dziedzic, 'Foreign Judges on Pacific Courts: Implications for a Reflective Judiciary' [2018] *Federalismi, Special Issue No 5*.

[76] Feingold (n 64) p. 201.

[77] Ellett (n 25) p. 56. Although leaders in some states, such as Tanganyika, rejected Africanisation as racially discriminatory: Feingold (n 64) pp. 168–9.

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jurisdictions. As judges are deployed as technical experts by international organisations in post-conflict contexts, a new category of 'international judge' may be emerging.[78] The role of foreign judges – as perceived in their own eyes and by others – might differ in important ways to that of purely domestic or international judges. It might, for example, require emphasising those aspects of judging that facilitate the transfer of judges across different jurisdictions, such as professionalism and technical legal expertise, while de-emphasising those aspects of judging that tie judges to a jurisdiction and a community.[79] In Chapter 22, Siraj Khan explains that the idea of the judge as conciliator is part of legal tradition in the Middle East and North Africa region, and grounds a judicial role on shared customary and religious values which transcend state borders. Alternatively, it might require judges to assume additional roles beyond adjudication. Sapna Reheem Shaila and Arturo Villagrán in Chapters 8 and 9 show how foreign judges might be positioned to perform a diplomatic or mediating function between local and international actors or to model particular kinds of judicial qualities. These judicial identities are not apposite in all circumstances and might be strongly resisted by actors in hosting jurisdictions and by judges themselves. The point is that judicial identities can form around understandings of foreignness, as well as through personal and professional connections between judges as a consequence of the practices of foreign judging.

B *Independence and Accountability*

Judges and judiciaries are expected to be independent and accountable. Judicial independence requires that an individual judge should not be biased towards a party or outcome of the case before him or her, and that the judiciary as an institution should be protected from unwarranted interference by the political branches of government or other powerful actors. Judicial independence is to be balanced with accountability,[80] which, like independence, has both individual and institutional dimensions.[81] Judges are bound to uphold the law in accordance with their oath of office. Open courts, the provision of reasons for decisions and the appeal process support the accountability of judges in discharging this responsibility. Judges are also held to high standards of professional conduct, which may be enforced through judicial complaints mechanisms. In addition, as officials who exercise public power in a democracy, judges are – at least indirectly – accountable and responsive to the people.[82]

Foreign judging multiplies the entities involved in the provision of judicial services, such that independence and accountability 'must be pursued simultaneously on several different social and political planes'.[83] The government, legal profession and wider community in the

[78] Although it should not be assumed that 'international judges' are necessarily distant from their home jurisdictions. In the different but analogous context of international courts, see e.g., findings that international judges identify first and foremost as national elites rather than cosmopolitan transnationals: Mikael Rask Madsen, 'Who Rules the World? The Educational Capital of the International Judiciary', in Bryant Garth and Gregory Shaffer (eds.), *The Globalization of Legal Education: A Critical Perspective* (Oxford: Oxford University Press, 2022), pp. 403–27.

[79] Dziedzic (n 1) ch. 8.

[80] Stephen B. Burbank, 'What Do We Mean by "Judicial Independence"?' (2003) 64 *Ohio State Law Journal* 323.

[81] Peter H. Russell, 'Toward a General Theory of Judicial Independence', in Peter H. Russell and David M. O'Brien (eds.), *Judicial Independence in the Age of Democracy: Critical Perspectives from around the World* (Charlottesville: University Press of Virginia, 2001), pp. 1–24.

[82] Mark Tushnet, 'Judicial Accountability in Comparative Perspective', in Nicholas Bamforth and Peter Leyland (eds.), *Accountability in the Contemporary Constitution* (Oxford: Oxford University Press, 2013), pp. 57–74.

[83] David Feldman, 'The Independence of International Judges in National Courts: Lessons from Bosnia Herzegovina', in Shimon Shetreet and Christopher Forsyth (eds.), *The Culture of Judicial Independence: Conceptual Foundations and Practical Challenges* (Boston: Martinus Nijhoff Publishers, 2012), p. 229.

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jurisdiction in which foreign judges serve is one plane. A foreign judge's home jurisdiction is another, encompassing the government authorities responsible for approving and facilitating judicial service overseas[84] as well as the judiciary, legal profession and wider community whose attitudes can influence who serves as a foreign judge and where.[85] A third plane consists of the international organisations and donor institutions that facilitate or fund positions for foreign judges. These disparate actors are both potential sources of influence as well as mechanisms for accountability for foreign judges.

The chapters highlight three issues of independence and accountability that apply in distinctive ways to foreign judges: procedures for selection and appointment; insecurity of tenure; and the dynamics of distance and membership in the community.

(i) Appointment Process

The procedures for selecting and appointing judges are important for independence and accountability. They seek to ensure that judges are appointed on merit, protecting the judiciary from politically motivated appointments and influence. Appointment procedures are also an *ex ante* mechanism of democratic accountability, connecting judges to the society they serve, by placing responsibility for judicial appointment in the hands of elected institutions, such as executives or parliaments, and/or in a commission that includes representatives of the government, judiciary, legal profession and wider community. Issues of democratic accountability are heightened in relation to courts of constitutional jurisdiction, but are perhaps of less concern, for instance, on international commercial courts where the jurisdiction exercised by foreign judges is confined to a specialist area.

In many cases, the domestic authorities ordinarily responsible for judicial appointments are also responsible for appointing foreign judges, so that the decision to appoint a foreign judge and the selection of the particular candidate is in the hands of the jurisdiction concerned. The selection of a foreign judge does, however, invite the participation of external entities. Sometimes, this is a formal legal requirement, such as the involvement of the President of the European Court of Human Rights in the appointment of foreign judges to the Constitutional Courts of Bosnia-Herzegovina and Kosovo, or the Co-Princes in Andorra. Even where appointment is formally in the hands of a domestic authority, the practicalities of foreign judging open up the selection of judges to the influence of external actors. Local authorities are likely to be at a disadvantage in identifying and assessing foreign candidates. As a result, the personal reputation of the foreign judge and his or her home jurisdiction might assume importance as an external measure of the candidate's credentials and suitability. Authorities might also rely more heavily on recommendations from other judges, continuing 'tap on the shoulder' methods of recruitment which are not only opaque and undemocratic, but likely to counter efforts to make judiciaries more diverse and representative. In Chapter 21, Rachel Ellett shows that informal, executive-dominated appointment procedures in southern African states have resulted in the predominance of white male South Africans in the cohort of foreign judges in the region.[86] Secondment programs, such as those in the Middle Eastern states examined by Siraj Khan in

[84] See, e.g., W.K. Hastings, 'A Personal Journey Through the Rule of Law in Kiribati' [2021] *Judicature International*.

[85] See, e.g., criticisms of British and Canadian judges serving in Hong Kong, and of Irish and New Zealand judges serving in Dubai, discussed by Simon N.M. Young in Chapter 18 and Siraj Khan in Chapter 22, both in this volume. See Jennifer Corrin, 'Judge or Be Judged: Accepting Judicial Appointment in an Unlawful Regime' (2009) 16(2–3) *International Journal of the Legal Profession* 191.

[86] See also Peter Brett, 'The New Politics of Judicial Appointments in Southern Africa' [2022] *Law & Social Inquiry* 1.

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Chapter 22, might effectively delegate the choice of judge to the sending jurisdiction, removing any meaningful participation by domestic authorities. The involvement of international donor agencies may also complicate the process, in positive and negative ways. In Chapter 23, Satang Nabaneh writes that in The Gambia, the recruitment of judges through international development schemes had the effect of side-lining the Judicial Service Commission although it did provide some transparency and due diligence by advertising positions and vetting candidates. These benefits were lost, however, when The Gambia withdrew from the Commonwealth and began to recruit foreign judges in their personal capacity. Finally, as Chief Justice Mathilda Twomey and Rachel Ellett demonstrate in Chapters 11 and 21 respectively, the politicisation of the body responsible for making or recommending judicial appointments adversely affects judicial independence and accountability in the appointment of foreign and local judges alike. Chief Justice Twomey explains that in Seychelles, the politicisation of the appointments body is a 'lingering effect' of foreign judging. A citizenship requirement operated to exclude foreign chief justices from serving on the commission in the past, and although there are now Seychellois judges eligible to be members, none have been appointed, effectively excluding judicial representation.

Foreign judges, by definition, are 'outsiders' and appointment processes provide one way to connect foreign judges to the domestic polity, conferring democratic legitimacy on both the decision to recruit foreign judges and the selection of particular judges.[87] The practicalities of foreign judging, and the distance between foreign judges and the authorities and community in the hosting jurisdiction, however, present challenges to the assessment and selection of candidates, with potential implications for the merit, diversity and democratic credentials of judicial appointments.

(ii) Tenure

Security of tenure is a key component of judicial independence. It requires that judges serve in office until a specified age of retirement or for a specified period of time, during which they may not be removed except for reasons of incapacity or misbehaviour, following a process set out in law.

The standard set of protections for judicial independence and security of tenure are not available, or apply differently, when it comes to foreign judges.[88] Permanent tenure, secure remuneration and guaranteed pensions are tailored to judiciaries in which judges serve their entire careers in the one jurisdiction until retirement. They do not apply as easily to mobile foreign judges whose service is often temporary, part-time or ad hoc. Adjustments to international standards and principles of judicial independence and accountability may be required to protect foreign judges and the judiciaries on which they serve from distinctive threats to their independence and integrity.

Several jurisdictions distinguish between foreign and local judges for the purposes of tenure by providing that citizen judges serve until a specified age of retirement, while foreign judges are appointed to serve for a period of months or years.[89] Even where the law makes no express distinction, foreign judges are often appointed for fixed terms as a matter of practice, utilising provisions for acting or deputy judges. This is not always the case: Bosnia-Herzegovina, Palau

[87] Dixon and Jackson (n 1) 322–3; Dziedzic (n 1) pp. 160–8.
[88] For discussion see Anna Dziedzic, Chapter 19; Tracy Robinson Chapter 20, both in this volume.
[89] Jurisdictions that make such a distinction include Brunei Darussalam, Fiji, Hong Kong, Macau, Marshall Islands, Namibia, Papua New Guinea, Seychelles, and the United Arab Emirates.

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and San Marino are examples of jurisdictions in which foreign judges serve for the same terms as other judges. And in some cases, such as Eswatini, Qatar and Tonga, all judges, foreign or national, serve for periods determined by the executive.

There are pragmatic and principled reasons for the appointment of foreign judges for short terms.[90] Short-term appointments can support secondment arrangements between courts, which enable foreign judges to serve overseas while retaining a position in their home jurisdiction.[91] Where foreign judges are supported by foreign aid or international donor agencies, a short-term appointment may be preferred over a longstanding financial commitment. Sometimes, they make up for shortcomings in the appointment process by providing a 'trial period' for both the jurisdiction and the judge. A more principled justification arises where foreign judges are a transitional measure pending localisation, as it means there will be a judicial position readily available when a qualified citizen becomes eligible for appointment.

The appointment of judges on short renewable terms is not, however, in keeping with standard safeguards for judicial independence. In relation to the independence of individual judges, the concern is that judges will be influenced to decide cases in the interests of those responsible for renewing their appointment, rather than independently on the merits of each case. It is sometimes claimed that this concern does not arise as sharply for foreign judges who have judicial careers or pensions in their home jurisdictions and so are not as dependent on reappointment. The case of *Bolkiah v. Brunei Darussalam*, analysed by Ann Black in Chapter 24, raised the question of whether the fact that a foreign judge was appointed on a short-term contract renewable at the discretion of the Sultan compromised impartiality. The courts held it did not, emphasising the position and reputation of the judge, who had an 'unblemished reputation nearing the end of a long and distinguished career' and a 'reasonably adequate pension provision'. The Privy Council held it would be 'fanciful' to think that such a judge would 'break his judicial oath and jeopardise his reputation in order to curry favour with the Sultan and secure a relatively brief extension to his contract'.[92] Not all foreign judges are in this position, however, and some may wish to retain their appointments for reasons of personal security and financial stability. The argument relies on the personal circumstances of the foreign judge (and protections for judicial independence in his or her home jurisdiction, such as a secure pension) to compensate for deficiencies in the structural frameworks for judicial independence in the hosting jurisdiction.

In relation to the independence of the judiciary as a whole, the appointment of foreign judges on short renewable terms provides a tool for authoritarian leaders to control the judiciary. In Chapter 23, Satang Nabaneh shows how short-term appointments, combined with the executive's power to dismiss judges, were used by The Gambia's authoritarian leader to create a compliant judiciary that would rule in favour of the regime. In Chapter 21, Rachel Ellett shows how in the southern African states of Botswana, Lesotho and Eswatini, the appointment of foreign judges on short terms provides illiberal regimes with the opportunity to influence judicial composition and decision making.

[90] See Carl B. Ingram, 'The Length of Terms of Judges in the Pacific and Its Impact on Judicial Independence', in *Land Law and Judicial Governance in the South Pacific: Comparative Studies* (Wellington: New Zealand Association for Comparative Law, 2011), vol. XII, pp. 375–83; Derek Schofield, 'Maintaining Judicial Independence in a Small Jurisdiction', in John Hatchard and Peter Slinn (eds.), *Parliamentary Supremacy and Judicial Independence: A Commonwealth Approach* (London: Cavendish Publishing, 1999), pp. 73–80; Dziedzic (n 1) ch. 6.

[91] Gabriela Knaul, 'Addendum to Report of the Special Rapporteur on the Independence of Judges and Lawyers: Mission to Qatar', UN Doc A/HRC/29/26/Add.1 (29th Session of the Human Rights Council, 31 March 2015), p. 11.

[92] *Bolkiah (HRH Prince Jefri) v. Brunei Darussalam (No 3)* [2007] UKPC 62; [2008] 2 LRC 196 (PC Brunei Darussalam) at [21].

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Some jurisdictions have introduced legal changes to protect against these risks to judicial independence. In Seychelles, the 1993 Constitution, which marked a shift to multiparty democracy, specifies that foreign judges are to be appointed for one term not exceeding seven years, with reappointment only in 'exceptional circumstances'.[93] In East Timor, the court created a presumption that a judge's appointment will be renewed as long as there is a need for the judge in the legal system.[94] These examples offer potential models for jurisdictions seeking the flexibility of short-term appointments for foreign judges while also maintaining protections for judicial independence.

Foreign judges are also susceptible to improper removal from office. A foreign judge serving on a short-term contract can be removed by non-renewal or termination of that contract. A foreign judge who visits a jurisdiction periodically to sit on an appellate court is effectively removed if the Chief Justice no longer invites that judge to sit on the bench. As non-citizens, foreign judges are subject to control by domestic immigration authorities and there are examples where foreign judges' work visas have been revoked and they have been deported.[95] Again, the mobility of foreign judges extends the sites for potential interference. The government of a judge's home state might impose sanctions and travel restrictions on officials serving in certain jurisdictions;[96] it might also use overseas assignments as a way to remove certain judges from its own courts.[97] A donor agency might decide to discontinue funding for a foreign judge. While external actors outside of the jurisdiction can influence the capacities and tenure of foreign judges in these ways, they can also at times operate to check interference in judicial independence. The extra-legal removal of a foreign judge is likely to garner international attention, in the judge's home state and beyond, and with it the potential for criticism or consequences for an offending jurisdiction or organisation.[98] However, as Tracy Robinson notes in Chapter 20, the mobility of foreign judges often means that when judicial independence is under threat, individual judges can simply move on, foreclosing debate and reform on structural issues.

(iii) Membership, Responsibility and Accountability

In some contexts, foreign judges are valued because they are distant from politics and personal connections within the jurisdiction. However, membership of the community can operate as a mechanism of accountability, which is lost, or at least attenuated, when a judge is foreign.

On international courts, judges' ties of nationality are treated with caution. The concern that judges will tend to favour their own nation's interests (whether from a sense of allegiance, familiarity or self-interest) has led international courts to develop procedures to remove or counterbalance judges adjudicating cases that involve parties from their home jurisdiction.[99] Similarly, in international commercial arbitration, nationality is a key factor in perceptions of impartiality, and provision for at least one tribunal member of a different nationality to the parties is common.[100] In contrast, on domestic courts, a sense of allegiance to the state and its people is

[93] Constitution of Seychelles 1993 (n 7) art. 131(3), (4).
[94] *Decision regarding the appeal of Judge Ivo Rosa against the non-renewal of his contract by the Superior Council for the Judiciary* (Court of Appeal, 31 December 2008).
[95] See Sapna Reheem Shaila, Chapter 8, Karen Brewer Chapter 14, and Anna Dziedzic, Chapter 19, all in this volume, for examples from East Timor and the Pacific.
[96] As occurred in relation to Fiji following the 2006 coup: Dziedzic (n 1) p. 33.
[97] Siraj Khan, Chapter 22 in this volume.
[98] Dixon and Jackson (n 1) p. 315.
[99] Dannenbaum (n 20).
[100] Anselmo Reyes, Chapter 5 in this volume; Ilhyung Lee, 'Practice and Predicament: The Nationality of the International Arbitrator (With Survey Results)' (2008) 31 *Fordham International Law Journal* 603.

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fundamental to judicial office. In many jurisdictions, judges take an oath of allegiance as well as the judicial oath. As public officials, judges act on behalf of the state and its people, representing its laws. Foreign judges serving on domestic courts are in a different position. They tend not to be seen as representatives of their states in the way that judges on international courts are,[101] nor are they as fully embedded in the domestic jurisdiction as national judges. To paraphrase Tracy Robinson in Chapter 20, a foreign judge might be a judge *for* the state but can never be a judge *of* the state.

Paul Kahn theorises a judge's connection to the polity by citizenship as a critical component of the judicial responsibility to uphold and develop the law on behalf of the community.[102] For Kahn, a national judge – as a citizen and as part of the political structure – shares in the people's responsibility for the law as it is and as it may become, and from this position is able to speak for the state and its people when articulating the law. He argues that this is a reason for the United States to reject foreign judges – or as he terms it, an 'international bureaucratic corps of judges'. For those jurisdictions that accept foreign judges, his argument highlights how *membership* provides a form of accountability. This can be seen, for example in debates in Hong Kong about whether and how foreign judges can be 'patriots' given their divided loyalties, discussed by Simon Young in Chapter 18. Even without the language of sovereignty and patriotism, there is a sense in which judges are accountable to the people for their decisions because judges too are a part of the people and invested in their community, their government and their laws. Most foreign judges serve temporarily and are likely to feel a greater sense of attachment by way of allegiance to their home jurisdiction, or by way of professionalism to their role as a judge. Unlike citizen judges, they do not have to live by the laws they have a hand in shaping. Most (although not all) foreign judges have the option to live and pursue their careers elsewhere. If it comes to it, most foreign judges can leave.

C *Adjudication, Judicial Review and the Development of the Law*

Several chapters explore the effect that the presence of foreign judges has on how courts adjudicate disputes and, in the process, apply and develop the law. In other work, Anna Dziedzic theorises a relationship between foreign judging and adjudication based on two dimensions of knowledge that foreign judges bring to their role.[103] First, foreign judges face a knowledge *gap*, in the sense that, generally speaking, foreign judges will not have the same depth of knowledge of the law of the jurisdiction and the social and political context in which it operates as a local judge. Second, foreign judges have knowledge *reach*, in that they will have knowledge and experience of the legal systems of their home and perhaps other jurisdictions that expand the expertise of the court.

The knowledge gap gives rise to challenges in interpreting and applying the law in a way that responds to local context. As Sir David Baragwanath points out in Chapter 15, this challenge is not unique to foreign judges: in diverse, multicultural and pluralist societies, all judges must 'look above the limits of one's own education and experience, and search for answers congruent with the values of the unfamiliar society illuminated by a vision of its highest standards'. Foreign judges, however, are at a particular disadvantage, especially where the laws and legal

[101] Ruth Mackenzie, Kate Malleson, Penny Martin and Philippe Sands, *Selecting International Judges: Principle, Process, and Politics* (Oxford: Oxford University Press, 2010), p. 31.

[102] Paul Kahn, 'Independence and Responsibility in the Judicial Role', in Irwin P Stotzky (ed.), *Transition to Democracy in Latin America: The Role of the Judiciary* (Boulder: Westview Press, 1993), p. 73.

[103] Dziedzic (n 1) ch. 5.

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systems differ from those of the jurisdiction in which they were educated and predominantly work. The difficulties are particularly acute in areas of law that are nationally distinctive and in legal pluralist jurisdictions which encompass legal systems and cultures with which judges are unfamiliar.[104] Gonzaga Puas examines these issues in Chapter 26 on the Federated States of Micronesia. He explains how the dominance of the legal system by judges and lawyers from the United States has eroded the role of Indigenous custom in the resolution of legal disputes and inhibited the development of a distinctively Micronesian constitutional jurisprudence. This is despite provisions in the Constitution recognising Indigenous values and an explicit requirement that court decisions be consistent with the 'customs and traditions, and the social and geographical configuration of Micronesia'.[105]

The issue is not simply foreign judges' lack of knowledge about an unfamiliar legal system, but also the influence of guiding assumptions about law and the judicial role that apply in their home jurisdiction. Bal Kama explores these dimensions of judicial culture in Chapter 25 on Papua New Guinea, a legal pluralist country in which Indigenous custom is a source of law and where a transformative constitution gives judges expansive powers to intervene in the social development of the state. Kama argues that foreign judges, who are recruited mainly from Australia, tend to be unfamiliar with the history and intention behind Papua New Guinea's transformative constitution and unduly influenced by the judicial philosophy of legalism predominant in Australia, and as a result are reluctant to take a more activist judicial role. In Chapter 21, Rachel Ellett identifies a similar dynamic in southern African jurisdictions, where foreign judges have tended to take a narrow, formalistic interpretation of the law, rather than pursue a more activist rights-based jurisprudence. For Ellett, this illustrates the 'imported nature of the African state, the idea that it is floating above citizens rather than rooted in the identities, customs and values of the citizens'. This shows that knowledge is not the only dimension of foreignness that influences adjudication. One objection to the development of the law via judicial interpretation is that it is undemocratic, a concern that is particularly acute when a court exercises its power to interpret or invalidate legislation.[106] The democratic objection justifies a limited and restrained approach to adjudication. Where a more activist judicial role is contemplated, however, one response to the democratic objection is to emphasise the democratic credentials of judges, who as members of the community can claim to understand and share in the aspirations and values of the people.[107] Foreign judges lack this connection, further limiting the democratic legitimacy of a more activist judicial role.

It is not inevitable that foreign judges take a conservative approach. In Chapter 16, Michel Erpelding shows how the international composition of colonial mixed courts was used to argue in favour of judicial activism, because international judges could dissociate themselves from national interests and uphold the 'treaty-based bill of rights' (the economic rights and concessions granted to foreigners within the mixed courts' jurisdiction). It may be that in some contexts, and perhaps notably where domestic judges have a mandate to enforce regional or international human rights law, conditions favour more 'activist' foreign judges. It is an area ripe for further theorising and study.

[104] Natalie Baird, 'Judges as Cultural Outsiders: Exploring the Expatriate Model of Judging in the Pacific' (2014) 19 *Canterbury Law Review* 80.

[105] Constitution of the Federated States of Micronesia 1978, art. XI s. 11.

[106] For one of many studies, see Jeremy Waldron, 'The Core of the Case against Judicial Review' (2006) 115(6) *Yale Law Journal* 1346.

[107] Dziedzic (n 1) pp. 95–6, 197–8.

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Literature on judicial behaviour emphasises the importance of institutional strength to the capability of courts and judges to adjudicate independently and effectively. It is argued that courts and judges should act strategically to maintain the viability and authority of judicial institutions, utilising techniques of incremental activism to avoid damaging political backlash on the one hand, and institutional incapacity and irrelevance on the other.[108] Sir David Baragwanath in Chapter 15 describes this as managing competing dictates with *la prudence et l'audace*, avoiding both rashness and timidity. Alex Schwartz, in his study of Bosnia-Herzegovina, has argued that foreign judges are poorly situated to engage in strategic calculations, because they do not have local knowledge of the political and institutional context in which the court operates.[109] The appointment of foreign judges for short terms or temporary visits might also prevent them taking a longer-term strategic approach to adjudication. Some chapters suggest that foreign judges' mandate might militate against any such strategic role altogether. In Chapter 8, Sapna Reheem Shaila argues that in East Timor, the push to uphold ideal standards of judicial independence through the use of foreign judges who engaged in strong judicial review against government actions was counterproductive because in this transitional context, Timorese judges needed the support of charismatic political leaders in order to establish a strong judiciary in the long term. Constance Grewe, in Chapter 7, shows how the rationale for foreign judges (the pacification of ethnic conflict) in Bosnia-Herzegovina is at odds with the legitimacy of the court because the 'realisation of the judges' rationale helped to weaken or even undermine the court's authority'. These studies suggest that a foreign judge's capacity to engage in judicial strategy is limited not only by knowledge, but by the rationale for foreign judges and the roles expected of them.

While foreign judges might suffer from a knowledge gap in relation to local law and context, they bring knowledge of their own jurisdictions, and in some cases specialist knowledge of areas of law. Chapters 3 and 18 by Justice Joseph Fok and Simon Young respectively explain how in Hong Kong, foreign judges provide expertise on the common law as well as comparative knowledge of how it has developed in their home jurisdictions, which has been of great assistance to the Court of Final Appeal in developing the common law of Hong Kong. Similarly, a foreign judge expert in European law can share that knowledge with domestic courts in Europe. Hybrid criminal tribunals and international commercial courts take advantage of judges' specialist expertise to ensure consistent or harmonised laws and procedures.[110] Even without the goal of harmonisation, Chief Justice Agyemang notes the general benefit of 'pollinating' judiciaries with lessons learned in other countries, as foreign judges share their experiences in judiciaries abroad and at home.[111]

[108] Erin F. Delaney, 'Analyzing Avoidance: Judicial Strategy in Comparative Perspective' (2016) 66(1) *Duke Law Journal* 1; Rosalind Dixon, 'Strong Courts: Judicial Statecraft in Aid of Constitutional Change' (2021) 59(2) *Columbia Journal of Transnational Law* 298.

[109] Alex Schwartz, 'International Judges on Constitutional Courts: Cautionary Evidence from Post-Conflict Bosnia' (2019) 44(1) *Law and Social Inquiry* 1.

[110] Although some degree of fragmentation is likely: John D. Jackson and Yassin M. Brunger, 'Fragmentation and Harmonization in the Development of Evidentiary Practices in International Criminal Tribunals', in Elies van Sliedregt and Sergey Vasiliev (eds.), *Pluralism in International Criminal Law* (Oxford: Oxford University Press, 2014), pp. 159–86; Alyssa S. King, 'Global Civil Procedure' (2021) 62(1) *Harvard International Law Journal* 223.

[111] See generally Dixon and Jackson (n 1) pp. 311–13. One way to measure this is to study citations to foreign law in judicial decisions by foreign judges: see, e.g., Stephen Eliot Smith, 'The Way We Do Things Back Home: Do Expatriate Judges Preferentially Cite the Jurisprudence of Their Home Countries?' (2013) 13(2) *Oxford University Commonwealth Law Journal* 331; Anna Dziedzic, 'Foreign Judges of the Pacific as Agents of Global Constitutionalism' (2021) 10(2) *Global Constitutionalism* 351.

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There are ways for judiciaries to minimise the knowledge gap and associated legitimacy issues and maximise the benefits of knowledge reach. Two strategies that appear across the jurisdictions covered in this Handbook are first, to confine the competence or kinds of matters that foreign judges adjudicate; and second, to promote mixed benches of local and foreign judges.

(i) Competence

A distinction may be drawn between judiciaries in which foreign judges sit on ordinary courts with wide jurisdiction and those in which foreign judges are confined to specialist courts or to hearing particular kinds of matters. Confining foreign judges to specialist courts can serve to emphasise that foreign judges provide specialist expertise and to exclude foreign judges from hearing matters that are deemed to be more national or local, either because of the expertise required (such as indigenous customary law or religious law) or for reasons of accountability and sovereignty (such as constitutional law or national security matters).[112] Sometimes, foreign judges are excluded from the panels responsible for granting leave to appeal, reducing their influence over the docket of cases before the court. One risk, however, of confining competence in this way is that it might signal distrust in foreign judges or be seen as interference in judicial independence.[113]

(ii) Mixed Benches

Some concerns about foreign judging may be alleviated by foreign judges sitting with local judges on mixed benches of the court. This promises the best of both worlds when it comes to sharing local and foreign knowledge and expertise. It can also help the court to speak to local and international audiences, in ways that help to secure its reputation, sociological legitimacy or international support, where that is thought to be required. Whether to have mixed panels and the proportion of local to foreign judges may be set out in law[114] or left to the discretion of the court.

Mixed benches of foreign and local judges can produce their own, distinctive dynamics. The working procedures of the court – in particular the methods for assigning cases, the role of the judge rapporteur, and the role of the President or Chief Justice – affect how mixed benches work in practice. Laurence Burgorgue-Larsen, reflecting on her experience as a judge of the Constitutional Court of Andorra in Chapter 12, describes how the language barriers and the different legal cultures of the Spanish and French judges manifested in different styles of judgment writing and judicial conferencing. In contrast, in Chapter 3 Justice Joseph Fok describes the collegiality of the Hong Kong Court of Final Appeal, fostered by the length of stay of foreign judges in Hong Kong, which permits foreign judges to contribute to hearings, judicial discussions, judgment writing and public engagements.[115]

[112] See discussion by Anselmo Reyes in Chapter 5 in this volume comparing the Singapore International Commercial Court with the Hong Kong Court of Final Appeal; and by Michel Erpelding in Chapter 16 in this volume on specialisation as a solution to the problem of mixed courts.

[113] See, e.g., debates in Hong Kong and Macau about the exclusion of foreign judges from national security related cases: Paulo Cardinal, Chapter 6 and Simon N.M. Young, Chapter 18, both in this volume.

[114] See, e.g., Constitution of the Principality of Liechtenstein 1921, art. 105 which limits the number and proportion of foreign judges who may sit on the bench of the Constitutional Court and in the judiciary as a whole; Hong Kong Court of Final Appeal Ordinance (Cap. 484), s. 16(1) which permits only one foreign judge to sit on the five-member bench.

[115] See also Justice William Gummow, 'Judges from Other Common Law Jurisdictions in the Hong Kong Court of Final Appeal' (Speech at Foreign Judges on Domestic Courts Workshop, University of Hong Kong, 3 May 2021).

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Judges on mixed benches may also have to navigate the politics of separate judgments and dissent. Not every legal tradition permits separate concurring or dissenting judgments, but in those that do, special significance is sometimes given to the judgments of foreign judges. In Chapter 7, Constance Grewe relates that in Bosnia-Herzegovina, dissenting opinions by foreign judges are rare, but emerged in cases relating to ethnic quotas, reflecting the mission of the foreign judges to promote multi-ethnicity. In Chapter 6, Paulo Cardinal traces instances in which Portuguese judges have dissented in public law cases in Macau, reflecting their role to uphold the values of Macau's civil law system. In some contexts, the authorship of judgments also attracts attention. One study observes that foreign judges in Hong Kong have been writing fewer judgments in politically sensitive cases, and attributes this to the increasingly politicised context in which they work.[116] In Chapter 25, Bal Kama notes a trend in the Papua New Guinea Supreme Court towards single judgments of 'the court', which he notes obscures the identity of the author and allows foreign judges to dominate the reasoning, especially where other members of the court perceive them as experts.

VII THE FUTURE OF FOREIGN JUDGING

Foreign judging is a diverse and evolving phenomenon. The pace of change is facilitated by the fact that the appointment of foreign judges is almost always a transitional rather than permanent arrangement. Sometimes, the transitional nature of foreign judges is made explicit in the law or the terms of the court's mandate, as for example in East Timor and Kosovo. In others, it is implied by the rationale for the use of foreign judges pending localisation or the development of the expertise and capacities of local judges. How then, does the use of foreign judges in a particular jurisdiction come to an end? Foreign judges may be phased out by attrition and the preferential appointment of local judges when the rationale for foreign judges ceases to apply. Sometimes, there is a contraction of jurisdiction, as in Brunei Darussalam where, as Ann Black explains in Chapter 23, a policy of Islamisation has been incrementally extended to more parts of the legal system, thereby confining the jurisdiction of the common law courts on which foreign judges serve. Regional integration may work to redefine 'foreignness' and in that way bring foreign judging to an end, or at least change its dynamics, as in the Caribbean. In other cases, however, such as southern Africa and the Pacific, foreign judging is likely to continue for some time because of the needs of small states, but potentially also out of habit or strategic policy drift. In other words, although transitional, in some contexts foreign judging has become entrenched over time.

The course of decolonisation suggests that the use of foreign judges on ordinary courts might be diminishing, as the number of local candidates for judicial appointment increases and jurisdictions pursue policies of localisation. However, the use of foreign judges at the interface of domestic and international pursuits – on transnational commercial courts, on hybrid criminal tribunals in post-conflict transitions, and to combat corruption – seems likely to continue and even expand. The mobility of law, and the judges and lawyers who practise it, will increase in the context of globalisation, whether through regional integration, cross-border legal disputes, the internationalisation of areas of law (such as human rights, commerce and technology), and myriad other tendencies towards global law.[117] The experience of the COVID-19 pandemic

[116] Stuart Hargreaves, 'Canaries or Colonials?: The Reduced Prominence of the "Overseas Judges" on Hong Kong's Court of Final Appeal' (2021) 16(2) *Asian Journal of Comparative Law* 187.

[117] See, generally, Jean-Bernard Auby, *Globalisation, Law and the State* (Portland: Hart Publishing, 2017).

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highlighted the potential of digital technology to support 'borderless' adjudication and in some contexts has transformed judicial practices in ways that facilitate remote access and, potentially, new forms of foreign judging. Rather than being anachronistic or anomalous, foreign judges on domestic courts may be prescient of the future.

Despite these developments, it seems unlikely that law and adjudication will be fully internationalised. Hybridity – as expressed through the use of local and foreign judges, rather than fully internationalised judging – better reflects the emerging forms of legal pluralism across local, state, regional and international legal systems and regimes. Comparative study of the practice of foreign judging on domestic courts in the past and the present provides insights that can help judges and judiciaries understand and navigate this globalised and pluralistic legal context. The studies in this Handbook show that foreign judges flourish in a range of contexts. They contain important lessons on the success and durability of foreign judging, as well as on the practicalities of adjudication on hybrid or internationalised domestic courts. They also provide insights into resolving conceptual issues facing contemporary courts, such as the complexities and potential collapse of categories of nationality and foreignness, and the legacies of colonisation and past mobilities in shaping the current conditions of legal globalisation. In these practical and conceptual ways, the studies of foreign judging in this Handbook chart distinctive dynamics of judging of relevance beyond their own jurisdictional borders.

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