

# Hybrid Constitutional Courts: Foreign Judges on National Constitutional Courts

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*Foreign judges play an important role in deciding constitutional cases in the appellate courts of a range of countries. Comparative constitutional scholars, however, have to date paid limited attention to the phenomenon of “hybrid” constitutional courts staffed by a mix of local and foreign judges. This Article addresses this gap in comparative constitutional scholarship by providing a general framework for understanding the potential advantages and disadvantages of hybrid models of constitutional justice, as well as the factors likely to inform the trade-off between these competing factors. Building on prior work by the authors on “outsider” models of constitutional interpretation, it suggests that the hybrid constitutional model’s attractiveness may depend on answers to the following questions: Why are foreign judges appointed to constitutional courts—for what historical and functional reasons? What degree of local democratic support exists for their appointment? Who are the foreign judges, where are they from, what are their backgrounds, and what personal characteristics of wisdom and prudence do they possess? By what means are they appointed and paid, and how are their terms in office structured? How do the foreign judges approach their adjudicatory role? When do foreign*

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*judges exercise their role? Exploration of these questions is informed by interviews of judges who have served on three jurisdictions' appellate courts that include foreign judges. Ultimately, the Article suggests that the value of having foreign judges on a national court may well depend on their partial "domestication"—through some meaningful degree of domestic support for the role of such judges and through the foreign judges' own approach to constitutional appellate decision-making, such that they occupy a truly hybrid position between that of constitutional "outsider" and "insider."*

INTRODUCTION .....	285
I. HYBRID CONSTITUTIONAL TRIBUNALS .....	294
II. POTENTIAL ADVANTAGES.....	303
A. Knowledge and Experience in Law Generally .....	304
B. Independence and Impartiality.....	305
C. Comparative Engagement and Relational Benefits .....	311
III. POTENTIAL DISADVANTAGES .....	317
A. Lack of Local Knowledge.....	317
B. Lack of Independence and of Democratic Legitimacy ..	319
1. Lack of Independence and Impartiality .....	319
2. Lack of Perceived Democratic Legitimacy .....	321
C. Fostering Dependency and Lack of Incentives to Develop Local Judging Capacity .....	325
IV. FACTORS INFORMING THE TRADE-OFF: WHY FOREIGN JUDGES, WHO, BY WHAT MEANS, HOW, AND WHEN? .....	325
A. Why Foreign Judges: Necessity, Benefit & Domestic Support for Their Appointment .....	326
B. Who the Foreign Judges Are .....	332
C. By What Means: How a Court Is Appointed and Constituted & the Broader Transnational Context .....	337
1. Mode of Appointment .....	337
2. Composition of a Court .....	339
3. Broader Transnational Context.....	342
D. How Judges Approach the Task: Deference, Use of Foreign or International Law, and Capacity-Building...	343

1. Deference in Making Factual and Legal Judgments .....	344
2. Approach to Transnational Sources of Law .....	346
3. Support for Local Lawyers, Judges, and Law Students .....	349
E. When: The Timing and Time-Frame for Foreign Judicial Involvement.....	350
CONCLUSION .....	353

## INTRODUCTION

The use of foreign law in constitutional cases in the U.S. Supreme Court was especially controversial in the 2000s, when members of Congress threatened to impeach justices who cited foreign law.<sup>1</sup> Two members of the Court received death threats for citing foreign constitutional materials.<sup>2</sup> Nonetheless, some justices continue to find transnational developments relevant in constitutional cases.<sup>3</sup>

Imagine, then, if it were built into the structure of the U.S. Supreme Court that one of the Court's nine justices were appointed from *outside the U.S.*—i.e., that he or she were a non-citizen living outside the United States. To a U.S. audience, the idea of a foreign justice may seem almost heretical; if U.S. judges citing foreign law can arouse so much controversy, then the idea that the President could nominate non-resident foreign citizens as federal judges seems quite fanciful. In some constitutional systems, however, the idea of foreign judges serving on national courts is not only relatively uncon-

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1. Tom Curry, *A Flap over Foreign Matter at the Supreme Court*, NBC NEWS (Mar. 11, 2004), [http://www.nbcnews.com/id/4506232/ns/politics-tom\\_curry/t/flap-over-foreign-matter-supreme-court/#.WhkFY2iCw2w](http://www.nbcnews.com/id/4506232/ns/politics-tom_curry/t/flap-over-foreign-matter-supreme-court/#.WhkFY2iCw2w) [<https://perma.cc/6J4F-VYQT>]; Adam Liptak & Robin Toner, *Roberts Parries Queries on Roe and End of Life*, N.Y. TIMES (Sept. 15, 2005), <https://www.nytimes.com/2005/09/15/politics/politicsspecial1/roberts-parries-queries-on-roe-and-end-of-life.html> [<https://perma.cc/9DJH-QAWL>]; *Foreign Law Bill Irks Ginsburg*, CONN. L. TRIB. (Oct. 3, 2005) at 989, available in Lexis Advance Legal News.

2. Tony Mauro, *Ginsburg Discloses Threats on Her Life: In Speeches, Justice Says She and Sandra Day O'Connor Were Targeted Because of Use of Foreign Law in Cases*, LEGAL TIMES (Mar. 20, 2006), available in Lexis Advance Legal News.

3. See STEPHEN BREYER, *THE COURT AND THE WORLD: AMERICAN LAW AND THE NEW GLOBAL REALITIES* 4–7, 236–43 (2015).

troversial but is also a long-standing constitutional reality.<sup>4</sup>

Some countries have a long history of courts comprised solely of foreign judges hearing appeals.<sup>5</sup> For much of the twentieth century, the Judicial Committee of the Privy Council served as the final court of appeal for many countries in the British Commonwealth,<sup>6</sup> and most Privy Counsellors were from the United Kingdom or from countries other than those from which the appeal was brought.<sup>7</sup> Several countries in the Caribbean, Indian Ocean, and Pacific still allow appeals to the Privy Council.<sup>8</sup> Others allow a regional court, such as the Eastern Caribbean Supreme Court or Caribbean Court of Justice, to serve as their highest court of appeals on criminal and civil matters.<sup>9</sup> Both courts rely on a mix of national and foreign judges.<sup>10</sup>

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4. For examples of important scholarly work noting and exploring this phenomenon, see generally Simon NM Young, *The Hong Kong Multinational Judge in Criminal Appeals*, 26 L. IN CONTEXT 130 (2008); Anna Dziedzic, *Foreign Judges on Pacific Courts: Implications for a Reflective Judiciary*, in 5 JURISDICTIONS AND PLURALISMS: THE TEMPTATION OF A REFLECTIVE JUDICIARY 63 (Mia Caielli et al. eds., 2018).

5. Nauru, for example, until recently allowed the High Court of Australia to serve as the final court of appeal in non-constitutional cases. See *Appeals (Amendment) Act 1974* (Nauru); *Nauru (High Court Appeals) Act 1976* (Cth) (Austl.). But see David Child, *Pacific Island of Nauru Scraps Link to Australian Appeal Court*, AL JAZEERA (Apr. 4, 2018), <https://www.aljazeera.com/news/2018/04/pacific-island-nauru-scraps-link-australian-appeal-court-180402110835476.html> [<https://perma.cc/URE2-4GNP>] (reporting the repeal of the policy allowing High Court of Australia to hear appeals from Nauru). See also *infra* note 20.

6. See, e.g., *Jurisdiction*, JUDICIAL COMM. OF THE PRIVY COUNCIL, <https://www.jcpc.uk/about/jurisdiction.html> [<https://perma.cc/P5PT-RN63>]; Shantel A. McDonald, *A True Sense of Independence: The Abolishment of United Kingdom's Influence towards the Legal Affairs of the Commonwealth Caribbean*, 22 ILSA J. INT'L & COMP. L. 133, 136–38, 145–46 (2015) (in relation to the Commonwealth Caribbean).

7. William Maley, *Trust, Legitimacy and the Sharing of Sovereignty*, in RE-ENVISIONING SOVEREIGNTY: THE END OF WESTPHALIA? 287, 294 (Trudy Jacobsen et al. eds., 2008); *Role of the JCPC*, JUDICIAL COMM. OF THE PRIVY COUNCIL, <https://www.jcpc.uk/about/role-of-the-jcpc.html> [<https://perma.cc/6HQU-GLW8>].

8. For example, the Privy Council is the final court of appeal for Bermuda, Mauritius, the Cook Islands, Niue, Kiribati, Trinidad and Tobago, and Tuvalu. See JUDICIAL COMM. OF THE PRIVY COUNCIL, *supra* note 7.

9. See *Court Overview*, E. CARIBBEAN SUPREME COURT, <https://www.eccourts.org/court-overview/> [<https://perma.cc/67GG-FZ7M>] (noting jurisdiction to hear appeals from Antigua and Barbuda, the Commonwealth of Dominica, Grenada, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, and the British Overseas territories of Anguilla, British Virgin Islands, and Montserrat); *Caribbean Court of Justice*, INT'L JUSTICE RESEARCH CTR., <https://ijrcenter.org/regional-communities/caribbean-court-of-justice/> [<https://perma.cc/7RZH-G8LB>] (noting jurisdiction of the court to hear claims arising under the treaty establishing the Caribbean Community and Common Market and, for a small number of countries that so agree—i.e., Barbados, Belize, and Guyana—as a replacement for the Privy Council in hearing appeals in civil and criminal cases from national courts).

In another group of countries and territories, foreign judges sit together with local judges on appellate courts. Foreign judges now sit or have recently served on the final or intermediate courts of appeal of Hong Kong (which is a special administrative region now part of China),<sup>11</sup> Brunei,<sup>12</sup> the Seychelles,<sup>13</sup> Bermuda,<sup>14</sup> Belize,<sup>15</sup> the Gambia,<sup>16</sup> Lichtenstein,<sup>17</sup> Monaco,<sup>18</sup> Namibia,<sup>19</sup> Nauru,<sup>20</sup> Botswa-

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For discussion of this dynamic, see, e.g., Andrew N. Maharajh, *The Caribbean Court of Justice: A Horizontally and Vertically Comparative Study of the Caribbean's First Independent and Interdependent Court*, 47 CORNELL INT'L L.J. 735, 736–38 (2014); Ezekiel Rediker, *Courts of Appeal and Colonialism in the British Caribbean: A Case for the Caribbean Court of Justice*, 35 MICH. J. INT'L L. 213, 214, 243–44 (2013); Tracy Robinson & Srif Bulkan, *Constitutional Comparisons by a Supranational Court in Flux: The Privy Council and Caribbean Bills of Rights*, 80 MODERN L. REV. 379, 380, 380 n.9 (2017).

10. To serve on the Eastern Caribbean Supreme Court, prior judicial service “in some part of the Commonwealth” is required. See E. CARIBBEAN SUPREME COURT, *supra* note 9. For the Caribbean Court of Justice, “The judges are not only drawn from the Caribbean Region.” *The Caribbean Court of Justice*, CARIBBEAN CMTY. (CARICOM), <https://caricom.org/the-caribbean-court-of-justice> [<https://perma.cc/3BY2-TYD6>].

11. Young, *supra* note 4, at 130–31; Eric C. Ip, *The Politics of Constitutional Common Law in Hong Kong Under Chinese Sovereignty*, 25 WASH. INT'L L.J. 565, 590–94 (2016); Anthony Mason, *Sharing Expertise with the Developing World*, 26 ALT. L.J. 7, 8 (2001); Anthony Mason, *The Hong Kong Court of Final Appeal*, 2 MELB. J. INT'L L. 216, 217 (2001); Peter Wesley-Smith, *Judges and Judicial Power Under the Hong Kong Basic Law*, 34 H.K. L.J. 83, 83–85 (2004); James Lee, *Foreign Judges in Hong Kong and Singapore: Evaluating Reciprocity of Influence in Private Law* (unpublished manuscript, 2018) (on file with the *Columbia Journal of Transnational Law*); P.Y. Lo, *Hong Kong's Two Constitutional “Outsiders,”* I-CONNECT (Feb. 1, 2013), <http://www.iconnectblog.com/2013/02/hong-kongs-two-constitutional-outsiders/> [<https://perma.cc/BQ9G-YBEK>].

12. Young, *supra* note 4, at 133.

13. Stephen Eliot Smith, *The Way We Do Things Back Home: Do Expatriate Judges Preferentially Cite the Jurisprudence of Their Home Countries?*, 13 OXFORD U. COMMONWEALTH L.J. 331, 332 (2013).

14. Young, *supra* note 4, at 135.

15. Smith, *supra* note 13, at 332.

16. See, e.g., *id.* at 332; *Jammeh Appoints Six Foreign Judges to Supreme Court to Hear His Petition*, THE NATION (Lagos, Nigeria) (Dec. 30, 2016), <http://thenationonlineng.net/jammeh-appoints-six-foreign-judges-supreme-court-hear-petition/> [<https://perma.cc/Z2AP-JRP9>].

17. Smith, *supra* note 13, at 332.

18. *Id.*

19. PETER VON DOEPP, INST. PUB. POL'Y RESEARCH, POLITICS AND JUDICIAL DECISION MAKING IN NAMIBIA: SEPARATE OR CONNECTED REALMS? 1 (2006), <http://ippr.org.na/wp-content/uploads/2010/06/BP39.pdf> [<https://perma.cc/DA2G-6RQD>].

20. Anna Dziedzic, *A New Court for Nauru*, LOWY INST.: THE INTERPRETER (Aug. 8, 2018 12:30 PM), <https://www.lowyinstitute.org/the-interpreter/new-court-nauru> [<https://perma.cc/7M7Z-75DV>] (noting historical role of judges of the High Court of Australia in

na,<sup>21</sup> Lesotho,<sup>22</sup> Swaziland,<sup>23</sup> Fiji,<sup>24</sup> Vanuatu,<sup>25</sup> Papua New Guinea,<sup>26</sup> Kiribati,<sup>27</sup> Samoa,<sup>28</sup> the Solomon Islands,<sup>29</sup> Tonga,<sup>30</sup> and Tuvalu.<sup>31</sup> They also sit on post-conflict constitutional courts such as the Constitutional Courts of Bosnia-Herzegovina (“BiH”) and of Kosovo.<sup>32</sup> Although most of these are relatively small jurisdictions, taken together, a significant number of jurisdictions use or have used foreign judges in their domestic courts.

However, legal scholars have paid limited attention to this phenomenon of “internationalized” or “hybrid” domestic courts, especially those hybrid courts that decide domestic constitutional issues.<sup>33</sup> The idea of hybrid tribunals, which involve foreign and na-

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acting as the highest appellate body for Nauru, and the announcement of the creation of a new domestic Court of Appeal, but staffed largely by foreign judges).

21. Yash Ghai, *Themes and Arguments*, in HONG KONG’S COURT OF FINAL APPEAL: THE DEVELOPMENT OF THE LAW IN CHINA’S HONG KONG 1, 24–25 (Simon N.M. Young & Yash Ghai eds., 2014).

22. *Id.*

23. *See, e.g., id.*

24. *See, e.g.*, Venkat Iyer, *The Judiciary in Fiji: A Broken Reed?*, in ASIA-PACIFIC JUDICIARIES 109, 128–30 (H.P. Lee & Marilyn Pittard eds., 2018); Susan Boyd, *Australian Judges at Work Internationally: Treason, Assassinations, Coups, Legitimacy of Government, Human Rights, Poverty and Development*, 77 AUSTRALIAN L.J. 303, 305 (2003); Sue Farran, *Palm Tree Justice? The Role of Comparative Law in the South Pacific*, 58 INT’L & COMP. L.Q. 181, 183 (2009); Mason, *Sharing Expertise*, *supra* note 11, at 8; Smith, *supra* note 13; Dziedzic, *supra* note 20.

25. Boyd, *supra* note 24, at 305; Smith, *supra* note 13, at 332; Dziedzic, *supra* note 20.

26. Boyd, *supra* note 24, at 305; Mason, *Sharing Expertise*, *supra* note 11, at 7; Smith, *supra* note 13, at 332; Dziedzic, *supra* note 20.

27. Boyd, *supra* note 24, at 305; Smith, *supra* note 13, at 332; Dziedzic, *supra* note 20.

28. Boyd, *supra* note 24, at 305; Mason, *Sharing Expertise*, *supra* note 11, at 7–8; Smith, *supra* note 13, at 332; Dziedzic, *supra* note 20.

29. Boyd, *supra* note 24, at 305; Mason, *Sharing Expertise*, *supra* note 11, at 8; Smith, *supra* note 13, at 332; Dziedzic, *supra* note 20.

30. Boyd, *supra* note 24, at 304–05; Mason, *Sharing Expertise*, *supra* note 11, at 7; Smith, *supra* note 13, at 332; Dziedzic, *supra* note 20.

31. Boyd, *supra* note 24, at 306; Smith, *supra* note 13, at 332.

32. Alex Schwartz, *International Judges on Constitutional Courts: Cautionary Evidence from Post-Conflict Bosnia*, 44 L. & SOC. INQ. (forthcoming, 2019) (manuscript at 7); Donike Qerimi, *The Mandate of EU Judges in Kosovo’s Constitutional Court: Complicated Yet Legal*, LONDON SCH. OF ECON.: LSEE BLOG (Sept. 19, 2014), <http://blogs.lse.ac.uk/lsee/2014/09/19/the-mandate-of-eu-judges-in-kosovos-constitutional-court-complicated-yet-legal/> [https://perma.cc/ZX79-Y8F4].

33. For some notable exceptions, see generally Young, *supra* note 4 (comparing Hong Kong and Brunei); Dziedzic, *supra* note 4 (on the Pacific); Schwartz, *supra* note 32 (on the

tional judges sitting together on a single tribunal, is quite familiar in international criminal law.<sup>34</sup> Yet scholars have given little systematic attention to similar questions regarding the role of foreign judges on national constitutional tribunals. There are important studies of the role of foreign judges on specific courts,<sup>35</sup> but few attempts to analyze the role of foreign judges on national courts in a systematic, comparative way.<sup>36</sup>

This Article attempts to address this gap by exploring the general advantages and disadvantages of foreign participation on national constitutional courts. It builds on our prior joint work on the general phenomenon of constitutional interpretation by “outsiders,” or actors outside a jurisdiction.<sup>37</sup> At the same time, it acknowledges the distinctly hybrid quality of foreign judges as both constitutional outsiders and insiders when they serve on another country’s national constitutional court.

There are at least three broad sets of potential advantages to the appointment of foreign judges to national tribunals: First, the infusion of both formal and informal knowledge and experience from outside the jurisdiction, creating opportunities for both broad and deep forms of comparative constitutional “engagement”; second, the potential for greater relative independence and impartiality on the

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Constitutional Court of Bosnia-Herzegovina); Constance Grewe & Michael Riegner, *Internationalized Constitutionalism in Ethnically Divided Societies: Bosnia-Herzegovina and Kosovo Compared*, in 15 MAX PLANCK YEARBOOK OF UNITED NATIONS LAW 1 (A. von Bogdandy & R. Wolfrum eds., 2011) (on BiH and Kosovo); Josef Marko, *Foreign Judges: A European Perspective*, in HONG KONG’S COURT OF FINAL APPEAL, *supra* note 21, 637, at 642 (comparing Hong Kong and BiH); Anna Dziedzic, *Right to Liberty, Unconstitutional Constitutional Amendments, and Foreign Judges in PNG*, INT’L ASS’N OF CONSTITUTIONAL LAW: IAACL-ADIC BLOG (May 31, 2016), <https://blog-iacl-aicd.org/2016-posts/2016/5/31/analysis-right-to-liberty-unconstitutional-constitutional-amendments-and-foreign-judges-in-png/> [<https://perma.cc/V2X6-BQYQ>] (comparing courts in the Pacific).

34. See, e.g., Harry Hobbs, *Hybrid Tribunals and the Composition of the Court: In Search of Sociological Legitimacy*, 16 CHI. J. INT’L L. 482 (2016); Neha Jain, *Conceptualising Internationalism in Hybrid Criminal Courts*, 12 SING. Y.B. INT’L L. 81 (2008); Laura A. Dickinson, Comment, *The Promise of Hybrid Courts*, 97 AM. J. INT’L L. 295 (2003); Sarah M.H. Nouwen, ‘Hybrid Courts’: *The Hybrid Category of a New Type of International Crimes Courts*, 2 UTRECHT L. REV. 190 (2006).

35. See *supra* note 33.

36. Exceptions to this general lack of attention to the role of foreign judges on national courts include Marko, *supra* note 33, at 642 (comparing Hong Kong and Bosnia); Young, *supra* note 4, at 135–36, 137, 140–42 (comparing Hong Kong and Brunei); Dziedzic, *Right to Liberty*, *supra* note 33 (comparing courts in the Pacific).

37. See generally Rosalind Dixon & Vicki C. Jackson, *Constitutions Inside Out: Outsider Interventions in Domestic Constitutional Contests*, 48 WAKE FOREST L. REV. 149 (2013).

part of individual judges and, thus, of the bench as a whole; and third, the creation of potential channels for increased outsider attention by foreign governments, public international organizations, and non-governmental organizations (“NGOs”), both to certain kinds of unconstitutional practices by national governments and to positive developments in the rule of law.

Conversely, there are at least three broad sets of potential downsides to foreign judges as national constitutional judges: First, they may lack sufficient local contextual knowledge to appropriately perform the constitutional function; second, they may be perceived not as independent and impartial but rather as having a distinctly foreign—and partial rather than impartial—perspective on national constitutional controversies, reflecting the (for some) unwelcome influence of former colonial or hegemonic powers, and lacking local democratic legitimacy; and third, reliance on foreigners to sit on domestic courts may delay rather than hasten the development of domestic lawyers’ capacity or willingness to sit as judges on their own country’s courts.

How these advantages and disadvantages balance out within any given country, we suggest, will largely depend on a range of contextual factors, including several relating to the courts and judges themselves. These include *why* foreign judges are appointed to a court; the degree of local democratic support that exists for their appointment; *who* the foreign judges are (including their nationality, temperament, reputation, and abilities); *by what means* they are appointed and paid; *how* their terms in office are structured; *how* foreign judges approach their adjudicatory role (including their relationship with local judges); and *when* they exercise their role. All of these considerations may matter to the perceived legitimacy of foreign judges and to their effectiveness in serving on national tribunals.<sup>38</sup>

In some ways, the advantages, disadvantages, and trade-offs we associate with hybrid courts are similar to those we previously identified as applying to constitutional interpretation by “outsiders” generally.<sup>39</sup> They also overlap with those of hybrid models of international criminal justice.<sup>40</sup>

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38. Cf. Young, *supra* note 4, at 147 (suggesting that the impact of foreign judges will largely be a contextual question).

39. See generally Dixon & Jackson, *supra* note 37.

40. Cf. Hobbs, *supra* note 34, at 494–98, 513–20; SARAH WILLIAMS, HYBRID AND INTERNATIONALIZED CRIMINAL TRIBUNALS: SELECTED JURISDICTIONAL ISSUES 204 (2012); Laura A. Dickinson, *The Relationship Between Hybrid Courts and International Courts: The Case of Kosovo*, 37 NEW ENG. L. REV. 1059, 1064–71 (2003); Etelle R. Higonnet,

There are, however, important differences. While bringing an outsider perspective to the role of national judge, foreign judges on national tribunals are not designed to be entirely “outsiders” to the constitutional system. Their nationality, prior training, and experience may be outside the jurisdiction, but their constitutional role and authority come from inside the national constitutional system. The benefit to having such judges on national courts may thus depend on their capacity to *bridge* rather than operate on one side of the outsider-insider divide, or to occupy a truly hybrid position between constitutional “outsider” and “insider.”<sup>41</sup>

Some of the factors contributing to this bridging capacity may elude structural or institutional analysis; instead, they may depend on the temperament, personality, and individual skill set of particular judges. Moreover, the reasons for choosing to have foreign judges in the first place may affect the hybrid system’s chances of being viewed as a success. For example, one might expect that having foreign judges serve on a high court in order to help sustain its independence in the face of political regime change will prove more successful, at least in its early years, when that court takes over from a court that had a reputation for independence, as in Hong Kong, than a court established as part of a constitutional “peace treaty” whose overarching goal is to diminish violence among warring factions, as in BiH.<sup>42</sup>

Other factors may also contribute to the success of hybrid constitutional courts. For instance, the presence of strong domestic support for the role of foreign judges, which may co-occur with a system of judicial appointment that gives local authorities significant influence over the appointment of foreign judges, is likely to be more conducive to success than where there is strong domestic opposition to foreign judges. Foreign judges with strong ingoing experience and reputations may be more likely to have the requisite skills and personal incentives to contribute positively. Court structures and practices that avoid giving foreign judges too dominant a role—for ex-

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*Restructuring Hybrid Courts: Local Empowerment and National Criminal Justice Reform*, 23 ARIZ. J. INT’L & COMP. L. 347, 356–71 (2006). See also a more general discussion of related trade-offs on international courts in Jerrey L. Dunoff & Mark A. Pollack, *The Judicial Trilemma*, 111 AM. J. INT’L L. 225, 229–42 (2017); Paul Mahoney, *The International Judiciary—Independence and Accountability*, 7 L. & PRAC. INT’L CTS. & TRIBUNALS 313, 322–39 (2008); Vladimir Tochilovsky, *International Criminal Justice: Strangers in the Foreign System*, 15 CRIM. L. FORUM 319, 333–34 (2004).

41. Cf. Elizabeth M. Bruch, *Hybrid Courts: Examining Hybridity Through a Post-Colonial Lens*, 28 B.U. INT’L L.J. 1, 1, 5–7 (2010).

42. See *infra* notes 60–72, 84–92 and accompanying text.

ample, by making foreign judges a minority rather than a majority on a judicial panel—may also avoid some foreseeable risks of resentment.

But across jurisdictions, we conclude, the value of having foreign judges on a national court will depend importantly on a range of context-specific factors, involving not only the selection and performance of judges, but broader sociopolitical factors as well.

Our research focused particularly on hybrid courts deciding constitutional questions in three specific jurisdictions and included interviews with judges who serve or have served on those courts: the Hong Kong Court of Final Appeal; the Court of Appeal (an intermediate appellate court) and the Supreme Court of Fiji;<sup>43</sup> and the Constitutional Court of BiH.<sup>44</sup> Each of these represents a somewhat different model of a “hybrid” constitutional court. These courts were selected, in part, because their foreign judges were known and reasonably accessible to us to be interviewed and, in part, because they have some quite different characteristics.<sup>45</sup> While far from comprehensive, the interviews with the judges of these courts provided us

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43. Formally, the Supreme Court of Fiji is the highest court, with jurisdiction to review decisions of the Court of Appeal. 2013 CONSTITUTION OF THE REPUBLIC OF FIJI § 98(3); *See also* INT’L BAR ASS’N HUMAN RIGHTS INST. REPORT, DIRE STRAITS: A REPORT ON THE RULE OF LAW IN FIJI 17–18 (2009) (discussing the history of the court). However, the Supreme Court was not convened for periods of time following the 2000 and 2006 coups. It was abolished by decree after the 2000 coup, Republic of Fiji, Administration of Justice Decree 2000 No. 5 (May 29, 2000), [http://www.paclii.org/fj/promu/promu\\_dec/aojd2000285/](http://www.paclii.org/fj/promu/promu_dec/aojd2000285/) [<https://perma.cc/HPW9-RJBW>], but it was restored following the High Court’s decision in *Prasad v. Republic of Fiji*, [2000] FJHC 121, [www.paclii.org/fj/cases/FJHC/2000/121.html](http://www.paclii.org/fj/cases/FJHC/2000/121.html) [<https://perma.cc/T9PH-CLHN>] (upheld by the Court of Appeal in *Republic of Fiji Islands v. Prasad*, [2001] FJCA 2, <http://www.paclii.org/fj/cases/FJCA/2001/2.html> [<https://perma.cc/9G28-3UWD>]). A full bench of the Supreme Court was not convened for all of 2007, in the wake of the 2006 coup.

44. For Hong Kong, we interviewed Sir Anthony Mason, the Hon. Murray Gleeson, AC, and the Hon. James Spigelman, as former and current non-permanent judges of the Hong Kong Court of Final Appeal (“HKCFA”), and Andrew Li, the former Chief Justice of Hong Kong. For Fiji, we interviewed Francis Douglas, QC, the Hon. Kenneth Handley, the Hon. Keith Mason, and the Hon. James Spigelman, as members of the Court of Appeal and Supreme Court. And for Bosnia-Herzegovina’s Constitutional Court, we spoke with Professors David Feldman, Constance Grewe, and Joseph Marko, each of whom served on the Constitutional Court of Bosnia-Herzegovina at different times. All interviews were conducted by Professor Rosalind Dixon. Professor Vicki Jackson reviewed transcripts or summaries as available. On the overlapping experiences of interviewees on various foreign courts, see *infra* note 125.

45. They were also made possible, in several instances, by the disproportionate role played by Australian judges on both the HKCFA and Fiji Supreme Court and Court of Appeal. One of us was largely based at UNSW Sydney while conducting the research for this paper and has previously worked for a member of the Australian judiciary.

with helpful additional insights about both the inner workings of each court and the challenges and opportunities of hybrid constitutional judging.

Each of the courts we selected corresponds to a different model of hybrid constitutional court: (1) a high-capacity court seeking to bolster its global reputation and independence (Hong Kong); (2) courts in a small jurisdiction seeking to bolster their capacity and independence (Fiji); and (3) a new court attempting to play a role in democratic peace-building and power-sharing among formerly warring components (BiH). These “models” are fluid, and different courts may ultimately straddle different categories. Fiji, for example, is not only a small jurisdiction seeking to enhance judicial capacity and impartiality but arguably is a country with a history of ethnic conflict, and it thus shares some similarities with BiH.<sup>46</sup> These three models and case studies are not intended as exhaustive; the scope and generality of our findings is necessarily limited by the fact that we consider only three models of hybrid constitutional courts and give detailed consideration to only one jurisdiction in each category.<sup>47</sup> We thus leave to others to add to or modify these categories and refine the conclusions we reach. Our contribution, however, is to introduce general categories and concepts to a debate that so far has been largely focused on specific countries and cases, and thus to create the basis for a more truly comparative approach to scholarship in this area.

The remainder of the Article is divided into five parts. Part I explores the phenomenon of hybrid constitutional courts, examples of the phenomenon, and its different variants, including the three hybrid constitutional court models described above. Part II explores the advantages of such models, especially for countries with high levels of social mistrust or a small domestic legal profession. Part III considers the disadvantages, especially where foreign judges are viewed as externally imposed. Part IV explores contextual questions affecting the likelihood of these advantages and disadvantages actually materializing, including: why foreign judges are appointed in the first place; the degree of local democratic support for their appointment;

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46. See *infra* notes 183–193 and accompanying text.

47. Further case studies of jurisdictions that, like Fiji, had for a time following independence all-foreign national high courts might illuminate whether such a model is necessarily time-limited or whether there are conditions under which the legitimacy of the all-foreign national bench endures; more case studies of post-conflict hybrid courts, like that in BiH, might provide more of an empirical foundation for conclusions about how to structure appointments, terms, and composition to help mitigate foreseeable risks of tensions.

who the foreign judges are; by what means they are appointed, and how their terms in office are structured and financed; how they approach their role; and when they do so. Part V offers a brief conclusion on the challenges of studying the role of foreign judges in hybrid constitutional tribunals and the possibilities that such study will illuminate larger issues in comparative constitutional law.

## I. HYBRID CONSTITUTIONAL TRIBUNALS

Although international and special tribunals including judges from multiple countries have become increasingly common,<sup>48</sup> our focus is on the distinct role played by foreign judges as members of a country's own domestic constitutional tribunal or high appellate courts. We generally focus on the highest national courts empowered to decide constitutional questions, for two reasons: first, because our expertise is in constitutional law, and second, because such courts, empowered to review and strike down acts of other parts of the government, are likely to be viewed as having the most sensitive jurisdiction over important public law issues.

To begin with, it is important to clarify what we mean by a "foreign" judge in this context. There are courts around the world with justices who were born outside the relevant country, or even who are citizens of another country.<sup>49</sup> Such judges, however, may be viewed and may function as long-standing members of the national legal and political community. By "foreign" judge, in this context, we mean an individual who is a citizen *and* resident of another country, and who received his or her primary legal training and experience in another country, and is thus an "outsider" to a national legal system.<sup>50</sup> Our interest is focused on domestic constitutional courts

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48. See Young, *supra* note 4; Dziedzic, *supra* note 4; Lo, *supra* note 11; Smith, *supra* note 13.

49. In Hong Kong, for example, there are some lower court judges who are long-time residents of Hong Kong but citizens of the United Kingdom or of another country. See, e.g., Zheping Huang, *A British Judge in Hong Kong Is One of China's Most Hated People on the Internet*, QUARTZ (Feb. 20, 2017), <https://qz.com/914979/a-british-judge-in-hong-kong-david-dufton-is-one-of-chinas-most-hated-people-on-the-internet/> [<https://perma.cc/NW7W-JZDM>].

50. Many judges, of course, straddle this border between true insider and outsider; they have sufficiently strong ties to a foreign jurisdiction that they are not true outsiders. Justice Kenneth Handley is a good example from the Court of Appeal of Fiji. While an Australian citizen and long-time resident of Australia, he visited and lived in Fiji at different points throughout his life. See Interview with Kenneth Handley, Former Judge of the NSW Court of Appeal, Vice President of Court of Appeal of Tonga, and Former Judge of the Courts of

where foreign judges serve alongside national judges—courts we term “hybrid constitutional courts,” meaning, constitutional or high appellate national courts that decide constitutional questions and whose members include both foreign and local judges.

Hybrid constitutional courts can take a variety of forms. Some are limited in their jurisdiction, while others exercise general appellate jurisdiction over all constitutional, common law, and statutory appeals.<sup>51</sup> In some systems foreign judges are involved only in appellate matters or the ultimate appellate court of appeal, whereas in other legal systems foreign judges may play a role at every level, including at trial-court levels.<sup>52</sup> Thus, some hybrid courts are part of a broader system of hybrid justice, whereas others operate against the backdrop of a more ordinary national legal system.

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Appeal of Fiji, Tonga, and Kiribati (Nov. 17, 2017); Email from Kenneth Handley, Former Judge of the New South Wales Court of Appeal, Vice President of Court of Appeal of Tonga, and Former Judge, Court of Appeal of Fiji, Tonga, and Kiribati (Dec. 13, 2017) (on file with the *Columbia Journal of Transnational Law*). Conversely, some national judges spent significant time abroad prior to becoming judges. Sir Buri Bidu, Chief Justice of Papua New Guinea, was educated and worked in Australia, for instance. See Boyd, *supra* note 24, at 307. See Part IV *infra* for further discussion.

51. In BiH, for example, foreign judges play a role only in constitutional, as opposed to non-constitutional, matters. See Schwartz, *supra* note 32, at 6–7; Grewe & Riegner, *supra* note 33, at 45. But other hybrid courts enjoy broader jurisdiction. For example, the Court of Appeal of Fiji has jurisdiction to hear all appeals from final judgments of the High Court “in any manner arising under this Constitution” (2013 Fiji Const., § 99(4)), as well as to hear a range of civil and criminal appeals (2013 Fiji Const. § 99(5); Court of Appeal Act (Fiji). Administration of Justice Decree 2009 (Fiji), § 7). Similarly, the HKCFA’s jurisdiction includes jurisdiction to hear appeals, by leave, “from any judgment of the Court of Appeal in any civil cause or matter” and “in any criminal cause or matter” from any final decision of a court from which no other appeal lies. See Hong Kong Final Court of Appeal Ordinance, §§ 4, 22, 30, 31.

52. For example, in Vanuatu and Samoa, foreign judges sometimes preside over trials involving allegations of corruption or misconduct by high-level members of the government. See, e.g., Public Prosecutor v. Kalosil [2015] VUSC 135, <http://www.paclii.org/vu/cases/VUSC/2015/135.pdf> [<https://perma.cc/2K9P-S9KW>], *aff’d* Kalosil v. Public Prosecutor [2015] VUCA 43 [Vanuatu], <http://www.paclii.org/vu/cases/VUCA/2015/43.pdf> [<https://perma.cc/F6AF-5Z98>] (where an expatriate judge, Justice Mary Sey from Gambia, found members of Vanuatu’s cabinet, and other Government MPs, guilty of corruption). See also Boyd, *supra* note 24, at 305 (discussing *Police v. Vitale*, an unreported decision of the Samoan Supreme Court from April 2000 in which an Australian judge, Justice Andrew Wilson, convicted two former Samoan MPs of assassinating a Samoan cabinet minister); *Samoa Ex-Ministers Get Death for Murder*, INDEP. ONLINE (Apr. 14 2000, 6:33 AM) <https://www.iol.co.za/news/world/samoa-ex-ministers-get-death-for-murder-34523> [<https://perma.cc/AQ56-C3L6>]; Miranda Forsyth & James Batley, *What the Political Corruption Scandal of 2015 Reveals about Checks and Balances in Vanuatu Governance*, 51 J. PAC. HIST. 255, 259 (2016) (discussing the *Kalosil* case, mentioned above, and its aftermath).

Some hybrid courts are semi-permanent, with foreign judges appointed to a national court for a fixed, renewable term. Others are more ad hoc, with foreign judges appointed on a temporary basis to hear specific appeals, or even to deal only with a single case. In Namibia, for example, while foreign judges have played a long-term role on the Supreme Court, there has been at least one instance of a purely ad hoc form of outsider judging: in that case, a judge from outside the jurisdiction was appointed on a temporary basis to hear a specific appeal, on the basis that all local judges were too close to the facts of the case to be perceived as truly impartial (because the parties to the case involved or were related to local judicial officers).<sup>53</sup>

The reasons why a country may accept or choose to adopt a hybrid constitutional court model are numerous—some historical, some functional. As one of us has noted elsewhere with Tom Ginsburg, political elites often rely on a variety of constitutional mechanisms to provide them with a form of “insurance” against certain personal and political risks,<sup>54</sup> risks that may arise from both within-country and outside-the-country pressures. Outgoing colonial powers have long used such mechanisms to protect the property and economic interests of their citizens, as well as their individual liberty and security. If foreign judges have links to the relevant outgoing power, they also can be seen to contribute to such protections.

Other countries may choose to adopt a hybrid model for more autonomous reasons. They may do so as a means of promoting judicial independence and legal stability, thus enhancing domestic and international business confidence, increasing the quality and prestige of their national judiciary and its expertise in both constitutional and commercial matters, protecting judicial independence and impartiality to be able to protect minority rights or interests, or overcoming a shortage in the pool of suitably qualified domestic lawyers available

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53. See, e.g., OLIVER C. RUPPEL & LOTTA N. AMBUNDA, NAMIB. INST. FOR DEMOCRACY, THE JUSTICE SECTOR & THE RULE OF LAW IN NAMIBIA: FRAMEWORK, SELECTED LEGAL ASPECTS AND CASES 34 (2011), [http://www.nid.org.na/images/pdf/democracy/Framework\\_Namibian\\_Justice\\_Sector.pdf](http://www.nid.org.na/images/pdf/democracy/Framework_Namibian_Justice_Sector.pdf) [<https://perma.cc/EJ5M-JHSS>] (noting how a South African judge was appointed in Namibia to hear a trial involving charges of rape against a sitting member of the Supreme Court). Who is an insider and who an outsider is relative and depends, of course, on context; insiders and outsiders may exist even within a single national federal State, especially where there are distinct indigenous communities. See, e.g., Rosalind Dixon, *Legal ‘Outsiders’ Rather than ‘Insiders’ to Head Royal Commission*, UNSW LAW (Aug. 5, 2016), <http://www.law.unsw.edu.au/news/2016/08/legal-outsiders-rather-insiders-head-royal-commission> [<https://perma.cc/BY3T-AHC5>].

54. Rosalind Dixon & Tom Ginsburg, *The Forms and Limits of Constitutions as Political Insurance*, 15 INT’L J. CONST. L. 988, 994–96 (2017).

for judicial appointment.<sup>55</sup> Or, as noted earlier, a hybrid constitutional court may have developed as part of peace negotiations to end a civil war, in which both sides are in need of and at the same time inclined to be mistrustful of an independent umpire over the terms of the agreement. Economic factors, including the cost of maintaining a full-time, full bench of judges, as well as the availability of donor States to finance “outsider” or foreign judges, may also contribute to the adoption of hybrid systems.<sup>56</sup> The reasons for adopting a hybrid approach may well bear on the relative weight of the different potential advantages and downsides such an approach offers in different contexts.

As noted above, there are at least three distinct but overlapping sub-types of hybrid arrangement of outsider and insider judging on constitutional courts: (1) high-capacity courts seeking to bolster their global reputation or independence; (2) courts in small jurisdictions seeking to bolster their capacity or independence; and (3) new courts attempting to play a role in democratic peace-building or power-sharing.

The three sets of courts we focus on—the Hong Kong Court of Final Appeal (“HKCFA”), the Fiji Supreme Court and Court of Appeal, and the Constitutional Court of Bosnia-Herzegovina—are arguably among the more important examples in each category. The HKCFA has a twenty-year jurisprudence involving foreign non-permanent judges.<sup>57</sup> In the last fifteen years the Fiji Supreme Court and Court of Appeal have delivered some of the most significant constitutional decisions in the region.<sup>58</sup> And the Constitutional Court

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55. Cf. YASH GHAI, HONG KONG’S NEW CONSTITUTIONAL ORDER: THE RESUMPTION OF CHINESE SOVEREIGNTY AND THE BASIC LAW 281–334 (1997).

56. Dziedzic, *supra* note 4, at 69.

57. See, e.g., Ghai, *supra* note 21; Lo, *supra* note 11; Young, *supra* note 4. Singapore recently created another hybrid court, the International Commercial Court in Singapore, that aims to attract international commercial disputes as a high-capacity court. That court does not have jurisdiction over constitutional issues and, unlike the HKCFA, was not negotiated as part of a transfer of sovereignty from one larger power to another. See generally Andrew Godwin, Ian Ramsay & Miranda Webster, *International Commercial Courts: The Singapore Experience*, 18 MELB. J. INT’L L. 219 (2017).

58. See, e.g., Brij V. Lal, “The Process of Political Readjustment”: *The Aftermath of the 2006 Fiji Coup*, in THE 2006 MILITARY TAKEOVER IN FIJI: A COUP TO END ALL COUPS? 67, 70 (Jon Fraenkel, Stewart Firth & Brij V. Lal, eds. 2009); Noel Cox, *Republic of Fiji v. Prasad: A Military Government on Trial*, 2001 N.Z. ARMED F. L. REV. 5, 9 (2001); Anne Twomey, *The Fijian Coup Cases: The Constitution, Reserve Powers and the Doctrine of Necessity*, 83 AUSTRALIAN L.J. 319, 320–27 (2009); George Williams, *Republic of Fiji v Prasad: Introduction*, 2 MELB. J. INT’L L. 144, 148 (2001); George Williams, *The Case That Stopped a Coup? The Rule of Law and Constitutionalism in Fiji*, 1 OXFORD U.

of Bosnia-Herzegovina has operated for longer than the hybrid courts in Cyprus and Kosovo, and has delivered many more constitutionally significant decisions.<sup>59</sup> Thus, these courts are arguably prototypical examples of the three types of hybrid courts, in ways that make them potentially valuable in generating broader insights.

The HKCFA is arguably the leading—some might even say only real—example of the first kind of hybrid court. As noted above, it has a twenty-year jurisprudence involving foreign non-permanent judges. In 1997, Hong Kong experienced a major legal and political transition. The United Kingdom transferred sovereignty over Hong Kong to China pursuant to the terms of a 1984 “handover” agreement between the two countries.<sup>60</sup> The agreement, however, also recognized the distinctive legal and political system of Hong Kong by endorsing the notion of “one country, two systems,” and giving Hong Kong the status of a “special administrative region” (“SAR”).<sup>61</sup> In preparation for the transition, the National People’s Congress adopted a Basic Law providing for the constitutional arrangement of Hong Kong as a SAR, and recognizing the ongoing status of Hong Kong as a common law legal system.<sup>62</sup> As we explain further in Part IV, this transitional context is central to understanding the role played by for-

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COMMONWEALTH L.J. 73, 73 (2001); Rachel Pepper, Back to the Future: *Qarase v Bainimarama*, Address at the International and Comparative Perspectives on Constitutional Law Conference, Melbourne Law School (Nov. 27, 2009), <http://www.lec.justice.nsw.gov.au/Documents/Speeches%20and%20Papers/PepperJ/PepperJ271109QARASEvBAINIMARAMA.pdf> [<https://perma.cc/8ELP-2B5C>].

59. In relation to Cyprus, a hybrid court called the Supreme Constitutional Court operated between 1960 and 1964. See *FAQ*, SUPREME COURT OF CYPRUS, [http://www.supremecourt.gov.cy/judicial/sc.nsf/DMLfaq\\_en/DMLfaq\\_en?OpenDocument](http://www.supremecourt.gov.cy/judicial/sc.nsf/DMLfaq_en/DMLfaq_en?OpenDocument) [<https://perma.cc/67TU-65PE>]; see also Marko, *supra* note 33, at 639. There have been recent proposals in Cyprus to revive the idea of hybrid judging (as part of a unification plan), but so far those proposals have not been implemented. See Michael Theodoulou, *The Peace Plans: 2004 Annan Plan*, CYPRUS MAIL ONLINE (Dec. 29, 2016), <https://cyprus-mail.com/2016/12/29/peace-plans-2004-annan-plan/> [<https://perma.cc/APR7-52E3>].

In relation to Kosovo, and its current hybrid court, see generally Grewe & Riegner, *supra* note 33, at 39–40; Visar Morina, *The Newly Established Constitutional Court in Post-Status Kosovo: Selected Institutional and Procedural Concerns*, 35 REV. CENT. & EAST EUR. L. 129, 137 (2010); Enver Hasani, *The Role of the Constitutional Court in the Development of the Rule of Law in Kosovo*, 43 REV. CENT. & EAST EUR. L. 274 (2018).

60. See, e.g., LO PUI YIN, *THE JUDICIAL CONSTRUCTION OF HONG KONG’S BASIC LAW: COURTS, POLITICS AND SOCIETY AFTER 1997*, at 15–66 (2014).

61. See *id.*

62. See *id.* The Basic Law is intended to establish the foundational law governing the status of Hong Kong. In some respects, it is like a constitution; in Germany, the name given to the national constitution is the Basic Law. See generally P.Y. LO, *THE HONG KONG BASIC LAW* (2011).

eign judges in Hong Kong.

Part of the transition included terminating the Privy Council's appellate jurisdiction over Hong Kong (the Privy Council being a judicial body that sits in London and is made up primarily of U.K. judges).<sup>63</sup> With the transfer of sovereignty over Hong Kong from the United Kingdom to China, the Privy Council's jurisdiction as the highest appellate judicial body for Hong Kong was terminated and its functions largely transferred to a new "Court of Final Appeal" for Hong Kong (the HKCFA). Under the Hong Kong Basic Law, the HKCFA was constituted as the highest judicial body for the adjudication of both common law appeals and constitutional cases in Hong Kong (subject to certain required referrals to or opportunities for review by a nonjudicial body in China).<sup>64</sup> The Basic Law also provided for the possibility that foreign non-permanent judges might sit on the court.<sup>65</sup> An ordinance governing the HKCFA, referred to as the "CFA Ordinance," likewise authorizes the appointment of foreign judges for three-year renewable terms,<sup>66</sup> and provides generally that the panel of the court hearing each appeal should be comprised of five judges, including the Chief Justice (or a permanent judge designated to sit in his place), three permanent judges designated by the Chief Justice, and one non-permanent judge from either Hong Kong or overseas, in any given case.<sup>67</sup>

Since 1997, the court has appointed a significant number of non-permanent foreign judges from the United Kingdom, Australia, and New Zealand,<sup>68</sup> and more recently from Canada.<sup>69</sup> It has also established a *de facto* convention whereby one non-permanent foreign

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63. Judicial Committee Act 1833, 4 Will. 4 c. 41 (Eng.); Hong Kong Reunification Ordinance, No. 110, (1997) 3 O.H.K., § 6(3).

64. THE BASIC LAW OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION OF THE PEOPLE'S REPUBLIC OF CHINA, art. 82 (H.K.). The Hong Kong Basic Law was enacted in 1990, to become effective in 1997.

65. *Id.*; Hong Kong Court of Final Appeal Ordinance (1997) Cap. 484, 16, §16.

66. Hong Kong Court of Final Appeal Ordinance (1997) Cap. 484, 14, §14; Simon N.M. Young & Antonio M Da Roza, *Judges and Judging in the Court of Final Appeal: A Statistical Picture*, 8 H.K. LAWYER 23, 24 (2010).

67. Hong Kong Court of Final Appeal Ordinance (1997) Cap. 484, 16, §16.

68. *See, e.g.*, Ghai, *supra* note 21, at 1–5; Lo, *supra* note 11; Young, *supra* note 4, at 130.

69. Sean Fine, *Former Chief Justice Beverly McLachlin Nominated for Hong Kong's Top Court*, GLOBE & MAIL (Mar. 21, 2018), <https://www.theglobeandmail.com/canada/article-beverley-mclachlin-nominated-for-hong-kongs-top-court/> [https://perma.cc/9449-342B].

judge usually sits on an appeals panel.<sup>70</sup> Non-permanent foreign judges on the court have contributed to the development of the jurisprudence of the HKCFA in a range of constitutional, common law, and commercial cases.<sup>71</sup> As discussed below, Sir Anthony Mason, the former Chief Justice of Australia, has had a significant influence on the Court's constitutional jurisprudence.<sup>72</sup>

If the HKCFA is the only clear example of the first model of hybrid courts (being a high-capacity court seeking to bolster its global reputation while securing local autonomy), there are, in contrast, a number of jurisdictions falling into the second and third categories of "hybrid" models—that is, of courts that operate in small jurisdictions with limited resources, or courts that operate in a post-conflict power-sharing context.

Among relatively small jurisdictions, the Constitutions of Liechtenstein and Monaco permit the appointment of foreign judges.<sup>73</sup> There are notable examples in the Caribbean and Africa of relatively small, resource-constrained jurisdictions using foreign judges to increase overall judicial independence and capacity.<sup>74</sup> In the Pacific, foreign judges play a central role in the day-to-day functioning

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70. See Young & Da Roza, *supra* note 66, at 25 (noting that "the law does not require an overseas judge to sit in each case, but Chief Justice Li has developed such a convention, resulting in 97% of all cases having an overseas [non-permanent judge]").

71. Cf. Ghai, *supra* note 21, at 25–27; Young, *supra* note 4, at 133–35; Young & Da Roza, *supra* note 66, at 25. On common law and commercial cases, see *infra* notes 198–199 and accompanying text. On constitutional cases, see Simon N.M. Young, *Constitutional Rights in Hong Kong's Court of Final Appeal*, 27 CHINESE (TAIWAN) Y.B. INT'L L. & AFF. 67, 79 (2009); Joseph Fok, Judges from Other Common Law Jurisdictions in the Hong Kong Court of Final Appeal, Address at Commonwealth Law Conference, 13–14 (Mar. 22, 2017), [https://www.hkcfa.hk/filemanager/engagement/sc/upload/43/D5\\_The%20Use%20of%20Non-local%20Judges%20in%20Overseas%20Jurisdictions.pdf](https://www.hkcfa.hk/filemanager/engagement/sc/upload/43/D5_The%20Use%20of%20Non-local%20Judges%20in%20Overseas%20Jurisdictions.pdf) [<https://perma.cc/EL8H-NTFC>].

72. See *infra* notes 203–204 and accompanying text.

73. See VERFASSUNG DES FÜRSTENTUMS LIECHTENSTEIN [Constitution of the Principality of Liechtenstein] 1921, § 102(1) (as amended by LGBl 2003, no 186); Richterdienstgesetz [Judicial Service Act] 2007 (Liech.), §14; Ordonnance n. 2.984 sur l'Organisation et le Fonctionnement du Tribunal Suprême [Ordinance no. 2984 on the Organisation and Functioning of the Supreme Court] 1963 (Monaco), § 2; Liech. Const., art. 105 (indicating that a majority of the judges on the Liechtenstein Constitutional Court must be citizens of Liechtenstein); *The Supreme Court*, GOV'T OF THE PRINCIPALITY OF MONACO, <https://en.gouv.mc/Government-Institutions/Institutions/Justice/The-Supreme-court> [<https://perma.cc/D8DG-WXPF>] (indicating that in practice the judges who are appointed to the Monaco Supreme Court are French).

74. Ghai, *supra* note 21, at 25 (Lesotho and Botswana); Norman Tjombe, *Appointing Acting Judges to the Namibian Bench: A Useful System or a Threat to the Independence of the Judiciary?*, in THE INDEPENDENCE OF THE JUDICIARY IN NAMIBIA 229, 233–34 (Nico Horn & Anton Bösl eds., 2008).

of a range of national courts operating in small States or jurisdictions.<sup>75</sup>

Fiji is a leading example of the second model of hybrid courts, those established in small jurisdictions to build capacity in the face of limited resources.<sup>76</sup> Fiji formally achieved independence in 1970, and since then has had both a number of military coups and different constitutions—i.e., the Constitutions of 1970, 1987, 1990, 1997, and 2013.<sup>77</sup> A common feature of all these constitutions, however, has been a role for foreign—i.e., non-citizen, non-resident—judges in the administration of justice in Fiji. The Fijian appellate courts relied on foreign judges from the United Kingdom, Australia, and New Zealand, until fairly recently.<sup>78</sup> Only in 1980 (ten years after becoming an independent country), with the appointment of Sir Timoci Tuivaga, did Fiji first appoint a local lawyer as Chief Justice.<sup>79</sup>

Since then, foreign judges have also played a prominent role in both ordinary appeals and in the resolution of key constitutional controversies.<sup>80</sup> Indeed, the Fiji Court of Appeal has been staffed primarily by foreign judges for most of its time in operation.<sup>81</sup> Foreign judges also played a critical role in helping resolve constitutional controversies surrounding the legality of the 2000 attempted coup

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75. See, e.g., Natalie Baird, *Judges as Cultural Outsiders: Exploring the Expatriate Model of Judging in the Pacific*, 19 CANTERBURY L. REV. 80, 80–81 (2013); Dziedzic, *supra* note 4, at 64, 67, 68–69; Mason, *Sharing Expertise*, *supra* note 11, at 67–68; Smith, *supra* note 13, at 331–32; Anna Dziedzic, *Constitutional Adjudication by Foreign Judges in the Pacific*, 1 (paper presented at the Public Law Conference 2018, the Frontiers of Public Law) (on file with the *Columbia Journal of Transnational Law*).

76. See *infra* note 93 (indicating that until quite recently there was no law school dedicated only to Fiji).

77. The following paragraph draws heavily on analysis of the Fijian context and experience in Rosalind Dixon, *Constitutional Rights as Bribes*, 50 CONN. L. REV. 767, 801–09 (2018).

78. See Jennifer Corrin, *Judge or Be Judged: Accepting Judicial Appointment in an Unlawful Regime*, 16 INT'L J. LEGAL PROF. 191, 194 (2009).

79. See Aqela Susu, *Sir Timoci Tuivaga Dies at 84*, FIJI SUN (Dec. 31, 2015, 10:02 AM) <https://fijisun.com.fj/2015/12/31/sir-timoci-tuivaga-dies-at-84/> [<https://perma.cc/APC7-SUV5>]; BRIJ V. LAL, HISTORICAL DICTIONARY OF FIJI, xlii (2015).

80. At first instance, the judges are almost all long-time local residents, though some have foreign citizenship. See, e.g., INT'L BAR ASS'N HUMAN RIGHTS INS'T, *supra* note 43, at 39; Dziedzic, *supra* note 4, at 7.

81. See Dixon, *supra* note 77, at 803; Venkat Iyer, *The Judiciary in Fiji: A Broken Reed?*, in ASIA-PACIFIC JUDICIARIES: INDEPENDENCE, IMPARTIALITY AND INTEGRITY 109 (H P Lee & Marilyn Pittard, eds. 2018); Baird, *supra* note 75, at 81.

by Speight, and the 2006 coup by Bainimarama.<sup>82</sup> Indeed, foreign judges continue to play an important role in the Fijian judiciary post-coup, though the identity of the foreign judges appointed has shifted notably in the last twelve years—first toward practicing lawyers rather than judges, or judges who have served on foreign lower rather than appellate courts, and second, toward judges trained in Sri Lanka rather than Australia (or New Zealand and the United Kingdom).<sup>83</sup>

Of “power-sharing” post-conflict courts with foreign judges, BiH’s is perhaps the leading example.<sup>84</sup> Following the civil war in BiH in the early 1990s, parties to the conflict agreed to a framework for peace set out in the Dayton Accords. This framework also involved a broad system of consociational government, or ethnically-based power sharing among Serbs, Croats, and Muslims (or “Bosniaks”) set out in a new Constitution of Bosnia and Herzegovina, itself an appendix to the Dayton Accords.<sup>85</sup> This system also extended to the courts, including the war crimes court, Human Rights Chamber, and new Constitutional Court. Foreign judges have also played a prominent role in each of these judicial institutions. A majority of the Human Rights Chamber, including the president of the court, were foreign judges.<sup>86</sup> Foreign judges were also the majority of judges in the early years of BiH’s local war crimes chamber.<sup>87</sup> And

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82. Graham Leung, *The Impact of the Coup on Fiji’s Judiciary*, in *THE 2006 MILITARY TAKEOVER IN FIJI*, *supra* note 58, at 291; Sina Emde, *Feared Rumours and Rumours of Fear: The Politicisation of Ethnicity During the Fiji Coup in May 2000*, 75 *OCEANIA* 387 (2005); Jon Fraenkel, *The Origins of Military Autonomy in Fiji: A Tale of Three Coups*, 67 *AUST. J. INT’L AFFAIRS* 327, 338 (2013); Steven Ratuva, *The Military Coups in Fiji: Reactive and Transformative Tendencies*, 19 *ASIAN J. POL. SCI.* 96, 111–13 (2011).

83. See, e.g., *Fiji Installs Two More Sri Lankan Magistrates*, *RADIO N.Z.* (Jun. 6, 2017), <https://www.radionz.co.nz/international/pacific-news/332371/fiji-installs-two-more-sri-lankan-magistrates> [<https://perma.cc/2S5E-8KP7>]; *Fiji Appoints Former Sri Lankan Judge as Resident Magistrate*, *DAILY MIRROR* (Jan. 13, 2017), <http://www.dailymirror.lk/article/Fiji-appoints-fmr-Sri-Lankan-judge-as-Resident-Magistrate-122116.html?fbrefresh=1546204504> [<https://perma.cc/BX6T-748S>].

84. On the concept of a power-sharing court, see generally Sujit Choudhry & Richard Stacey, *Independent or Dependent? Constitutional Courts in Divided Societies*, in *RIGHTS IN DIVIDED SOCIETIES* 89 (Colin Harvey & Alexander Schwartz eds., 2012); Ghai, *supra* note 21, at 25; Stefan Graziadei, *Power Sharing Courts*, 3 *CONTEMP. S.E. EUR.* 66 (2016). According to Graziadei, courts in this category arguably include the apex courts in Belgium, the regional court of Bowen/Bolzano in South Tyrol/Italy, the Court of Serbia and Montenegro, the Constitutional Court of the Czech Republic, and the Cypriot Supreme Court. *Id.* at 86–89.

85. Dayton Accords Annex 4. See U5/98, ¶ 19.

86. Bruch, *supra* note 41, at 11–12; Marko, *supra* note 33, at 642.

87. David Re, *The Court of Bosnia and Herzegovina*, *BAR NEWS*, Summer 2008/2009, 32, 34.

Article VI of the Constitution further provides that there shall be a constitutional court for BiH comprised of six local and three foreign judges. Two of the local judges are selected by the assembly of the Republic of Srpska and four by the House of Representatives of the Federation of Bosnia-Herzegovina,<sup>88</sup> so that in practice there are two Serb, two Croat, and two Bosnian judges on the court. The three foreign judges are thus “intended to prevent ethnic outvoting,” as well as to contribute expertise and experience to the court.<sup>89</sup> They have also played a central role in a range of high-profile decisions by the Court—including cases on the implementation of the Dayton power-sharing principles, and the scope for sub-national units to adopt programs, holidays, or national symbols that reflect the language or ethnic and cultural traditions of one ethnic sub-group.<sup>90</sup>

The Bosnia-Herzegovina Constitutional Court has a substantial, twenty-year track record, unlike some other “power-sharing” hybrid courts. The 1960 Constitution of Cyprus arguably created the first “power-sharing” court of this kind: it provided for a court comprised of one Greek, one Turkish, and one international judge; this court, as noted earlier, lasted only until 1964.<sup>91</sup> And the Constitutional Court of Kosovo has a mix of Albanian, Serb, and international judges, although this court was only established in 2009.<sup>92</sup>

## II. POTENTIAL ADVANTAGES

Having briefly canvassed some of the circumstances in which “hybrid” approaches for including foreign judges in domestic appellate courts have been adopted, in this part we seek to identify, from an internal perspective, what insiders to the constitutional system might see as advantages in using foreign judges. These include: knowledge and expertise; independence and impartiality; and com-

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88. Bosn. & Herz. Const. art. VI; *See* Marko, *supra* note 33, at 642.

89. Grewe & Riegner, *supra* note 33, at 41.

90. *Id.* at 40; Graziadei, *supra* note 84, at 84–85.

91. *See* CHRISTELLA YAKINTHOU, POLITICAL SETTLEMENTS IN DIVIDED SOCIETIES: CONSOCIATIONALISM AND CYPRUS 55 (2009); Thomas Ehrlich, *Cyprus, the “Warlike Isle”*: *Origins and Elements of the Current Crisis*, 18 STAN L. REV. 1021, 1040 (1966); Schwartz, *supra* note 32, at 3–4; *supra* note 59.

92. NICOLE MANSFIELD, CREATING A CONSTITUTIONAL COURT: LESSONS FROM KOSOVO 7 (2013), <https://ewmi.org/sites/ewmi.org/files/OrgFiles/EWMIOPSKosovoConstitutionalCourt.pdf> [<https://perma.cc/M9WQ-VW4B>]; Donike Qerimi, *Kosovo Constitutional Court Debate: ‘Instead of a Reply—Comparing Apples and Oranges’*, S.E. EUR. BLOG (Sept. 22, 2014), <http://eprints.lse.ac.uk/80466/> [<https://perma.cc/JPM8-3ZHK>]; Qerimi, *supra* note 32.

parative/relational engagement.

### *A. Knowledge and Experience in Law Generally*

Some countries simply do not have a large or experienced domestic legal profession from which national judges can be drawn. This may be the product of the small size of a jurisdiction, which makes it difficult to fill many key governmental roles.<sup>93</sup> But it may also be exacerbated by low levels of economic development, a history of communist or military rule, or recent conflict. Many low-income countries do not have the resources to train lawyers in large numbers or invest in high-quality legal education. Countries under communist control or under military rule may have placed limited emphasis on formal legal training, and thus produce only a small number of qualified lawyers capable of serving in a post-communist or post-authoritarian legal system. Lawyers may also be linked to the political opposition in certain conflict situations, so that they are forced to flee the country or they are killed by the government, with the result that few lawyers remain in the country available to serve after the conflict is over.<sup>94</sup> Some may also be unwilling to serve in a new post-conflict constitutional system.<sup>95</sup>

Against this background, foreign judges may bring important capacities to impart legal knowledge about the ordinary workings of a court and how a new or fragile court might or should interact with the political branches of government. Almost all foreign judges bring some knowledge about the practical workings of a court system in another jurisdiction (i.e., their home jurisdiction). This can be es-

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93. For example, until recently Fijians who wanted to study law did so through the University of the South Pacific (“USP”), “an international institution providing legal training to students from at least 12 different Pacific Island countries,” and, because the law school is located in Vanuatu, the “majority of USP law students are still resident in Fiji and study the course online.” Aidan Ricketts, *Teaching Constitutional Law to Fiji Students: The Separation of Powers and the Rule of What?*, J. AUSTRALASIAN L. TCHRS. ASS’N 207, 207, 211 (2009). The USP law school was established in 1994, *School of Law*, UNIV. OF THE S. PACIFIC (Jan. 7, 2019), <https://www.usp.ac.fj/index.php?id=518> [<https://perma.cc/FL5T-P4M3>], and the Fiji National University conferred its first law degrees in May 2018, Vilimaina Naqelevuki, *FNU Produces First Law Graduates*, FIJI TIMES (May 23, 2018) <https://www.fjitime.com/fnu-produces-first-law-graduates/> [<https://perma.cc/ACP2-NFYC>]. See also *infra* note 175 and accompanying text.

94. This was the case in Cambodia, for example. See Dolores A. Donovan, *Cambodia: Building a Legal System from Scratch*, 27 INT’L LAWYER 445, 445 (1993).

95. This has arguably been the case in Kosovo, for example. See Grewe & Riegner, *supra* note 33, at 37 (noting “the unwillingness of considerable segments of the Serbian elites and population to actually participate in central institutions” in Kosovo).

pecially valuable to a new court, particularly if its members lack experience in ordinary day-to-day judging and the administration of justice.

Some courts also face special challenges of sociological legitimacy.<sup>96</sup> Any court, and especially a newly created court, will face challenges creating a jurisprudence that can command respect from domestic legal and political audiences.<sup>97</sup> But some courts may face special legitimacy challenges: They may be designed to replace a court widely seen as corrupt or incompetent, and thus face the challenge of overcoming widespread popular distrust of the judiciary. Or they may face a political context in which major political parties or players are ambivalent—or even overtly hostile—to the constitutional project or to judicial review of constitutional questions. Some foreign judges, especially those with prior judicial experience, may have a valuable capacity to contribute informal knowledge and guidance about how best to navigate institutional challenges of this kind.

### *B. Independence and Impartiality*

A second set of potential advantages is that foreign judges may be more independent from powerful local actors. The independence of the judiciary is one of the most widely shared constitutional principles<sup>98</sup> and is often viewed as related to the ability to be impartial. It has intrinsic value for citizens, as a protection of individual rights, and more instrumental value for governments, as a tool for promoting foreign investment, or increasing the value of political bargains and bargaining.<sup>99</sup> Yet judicial independence can also come under strain from a variety of directions. Governments may threaten to alter a court's jurisdiction or budget if judges do not adopt a given constitutional or legal position. They may threaten to reduce the salary or retirement benefits of judges, or even compromise the safety of

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96. On the notion of sociological legitimacy, see Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1795–96 (2005).

97. See Erin F. Delaney & Rosalind Dixon, *Introduction*, in COMPARATIVE JUDICIAL REVIEW 5–7 (Erin F. Delaney & Rosalind Dixon eds., 2018).

98. See VICKI JACKSON, CONSTITUTIONAL ENGAGEMENT IN A TRANSNATIONAL ERA 98–101 (2010).

99. See Daniel A. Farber, *Rights as Signals*, 31 J. LEGAL STUD. 83, 84–85 (2002) (suggesting that legal reform in developing countries is a signal that the country is serious about economic reform); William Landes & Richard Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J. L. & ECON. 875, 877–89 (1975) (describing the benefit of an independent judiciary to interest groups that seek to enforce legislation over the long term).

judges and their families, if they do not rule in favor of the government in certain cases.<sup>100</sup> Some governments may be willing to remove judges and replace them with judges loyal to the government to ensure a ruling that favors the government.<sup>101</sup>

Most local judges will have limited ability to withstand pressures of this kind. They may attempt to resist such pressures, but find that over the long-run such resistance comes at great personal cost to themselves and their families. Even those who do resist may also simply be replaced by other, more sympathetic judges in ways that render this resistance futile.

Foreign judges, in contrast, may have two advantages over their local counterparts in this context. They may have a fixed pension or other benefits in the home jurisdiction (and possibilities for earning income there), which make them less susceptible to direct personal pressure by the regime.<sup>102</sup> And if they are removed from their judicial office, they can (usually) immediately leave the jurisdiction at limited cost to themselves and their family.<sup>103</sup> They thus often enjoy greater insulation from local political pressures, especially in authoritarian or quasi-authoritarian regimes.

This relatively greater capacity for judicial independence can have important benefits for citizens (and other persons within the jurisdiction), the political system, and the government itself. For citizens and other residents, it can mean there is a greater chance of independent and impartial enforcement of all constitutional guarantees—including individual and minority rights.<sup>104</sup> For the political system, greater assurance of judicial independence may help

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100. On the relationships between financial and physical security and judicial independence, see Vicki C. Jackson, *Judicial Independence: Structure, Context, Attitude*, in JUDICIAL INDEPENDENCE IN TRANSITION 19, 36–39, 53–56 (Anja Seibert-Fohr ed. 2012).

101. See, e.g., Aziz Z. Huq & Tom Ginsburg, *How to Lose a Constitutional Democracy*, 65 UCLA L. REV. 78, 169 (2018); Kim Lane Scheppele, *First, Let's Pick All the Judges*, N.Y. TIMES (Mar. 10, 2012), <https://krugman.blogs.nytimes.com/2012/03/10/first-lets-pick-all-the-judges/> [<https://perma.cc/PL4J-3Z8A>] (on Hungary).

102. Whether this is the case depends, of course, on who the judges are. See *infra* Part IV.B.

103. For example, in 2009, when Australian judges Ian Lloyd QC, Randall Powell SC, and Francis Douglas QC were removed from the Fiji Court of Appeal by General Bainimarama, Powell and Douglas were already en route back to Sydney and able simply to resume a busy private practice at the Sydney bar. See Kate McClymont, *A Judge for Four Days as Fiji Flails*, THE AGE (Apr. 11, 2009), <https://www.theage.com.au/world/a-judge-for-four-days-as-fiji-flails-20090410-a2ws.html> [<https://perma.cc/9JBX-ZR97>].

104. For the intersection between this question and ideas about the credibility of constitutions as forms of insurance, compare Dixon & Ginsburg, *supra* note 54, at 1000–03.

preserve or foster competitive political parties by, inter alia, lowering the stakes of losing any particular election and providing a potential check on efforts by a government in power to prevent fair political competition.<sup>105</sup>

And for governments and business interests, judicial independence can mean that foreign investors are more likely to believe statements by governments that they intend to respect foreign investment contracts, even in an environment that is not generally committed to liberal, legalist values.<sup>106</sup> Over time, it can also provide broader reassurance to the international community that the government continues to be committed to judicial independence and the rule of law. As Justice Fok notes in the context of Hong Kong, most eminent foreign judges could be expected to resign from a court whose independence was compromised.<sup>107</sup> By simply remaining on a court, such judges thus provide a potentially valuable signal to the global community of the ongoing independence of that court.

Foreign judges may also have additional independence and impartiality advantages in certain contexts, especially in small jurisdictions. In such jurisdictions, there will often be long-standing personal relationships between members of the local business and political community, and also high levels of ongoing personal contact.<sup>108</sup> The small number of schools and universities in these countries often means that business and government leaders are educated together. The small number of businesses and civil society groups can mean that business and political leaders work together, or interact professionally repeatedly.<sup>109</sup> And in jurisdictions that are small in both

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105. See, e.g., Matthew C. Stephenson, “*When the Devil Turns . . .*”: *The Political Foundations of Independent Judicial Review*, 32 J. LEGAL STUD. 59, 84 (2003); Dixon & Ginsburg, *supra* note 54, at 1002.

106. Cf. Farber, *supra* note 99 (discussing costly signals). On liberal legalism, see, e.g., LAURA KALMAN, *THE STRANGE CAREER OF LEGAL LIBERALISM* (1996); Lester Mazor, *The Crisis of Liberal Legalism*, 81 YALE L.J. 1032 (1972).

107. See, e.g., Fok, *supra* note 71, ¶ 24 (labelling this the miner’s “canary” function of foreign judges in respect of judicial independence). Cf. Corrin, *supra* note 78, at 197 (noting that following the 2006 Fiji coup, several foreign judges had resigned from the appellate bench there by late 2007).

108. In Fiji, for example, many able and qualified local lawyers have close links to senior members of rival political communities (e.g., Indian-Fijians or Ethno-Fijians) and are thus seen to lack the impartiality needed to serve on the Supreme Court or Court of Appeal. Interview with Francis Douglas, QC, Former Judge, Fiji Court of Appeal (Jun. 27, 2017).

109. This, of course, is ultimately a question of degree, as is the question of the “size” of a jurisdiction. Cf. Rosalind Dixon & Sean Lau, *The Gleeson Court*, in *THE HIGH COURT, THE CONSTITUTION AND AUSTRALIAN POLITICS* 284 (Rosalind Dixon & George Williams eds., 2015) (suggesting that compared to the United States, the relatively small size of the

population and size, sheer spatial proximity will often encourage high degrees of interaction. In some small jurisdictions, such as in those in the Pacific, connections of this kind may also be interwoven with a complex set of kinship-ties.<sup>110</sup> Relationships of this kind can undermine the actual and perceived independence of the judiciary in commercial and other private law cases and in constitutional cases.<sup>111</sup>

Foreign judges, in contrast, are likely to have fewer and thinner historical ties to the local business or political community than domestic judges. They may also have limited ongoing contact with members of the local community, so that they are likely, and are perceived likely, to be more independent of local interests than local judges in key cases.<sup>112</sup>

In a post-conflict context that has democracy-building and power-sharing as goals, there are likewise potential benefits to constitutional judging by “outsiders” in advancing the perceived impartiality of a court. Since the regime-changing democratic-transitions era of the late 1980s and early 1990s, scholars have increasingly come to view as an essential component of a sustainable democracy the availability of an impartial court system for the resolution of disputes, both involving private parties and the government. Some view the emergence of constitutional review by an independent court as a form of “insurance” against political losses in one election turning into

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Australian legal profession makes it easier for the government to make predictable judicial appointments).

110. See, e.g., Anna Dziedzic, *Foreign Judges in the Pacific: Guidelines in Support of Judicial Independence*, 10 (paper presented at the UNSW Comparative Constitutional Law Roundtable, Sydney, Dec. 7–8, 2017) (noting “the practical reality in the Pacific . . . [is] that judges work in small, isolated communities where they have family and community connections to many people”) (unpublished paper on file with the *Columbia Journal of Transnational Law*).

111. On this point, but also noting disagreement by some with the implication that local judges lack impartiality, see Dziedzic, *supra* note 4, at 69.

112. Cf. Dziedzic, *supra* note 4, at 69. Consider as examples the role of foreign judges in hearing cases involving alleged corruption or misconduct involving high-level members of the government in Vanuatu and Samoa. See *supra* note 52; *Kalosil v Public Prosecutor* [2015] VUCA 43 [Vanuatu] (where a foreign judge found a large number of Cabinet members guilty of corruption). See also Forsyth & Batley, *supra* note 52, at 259, 273. On the Solomons, see Boyd, *supra* note 24, at 605 (discussing the *Police v Leafa Vitale and Toi Aukuso* case from Samoa). There is no guarantee, of course, that the appointment of foreign judges will in all circumstances promote judicial independence. See Dziedzic, *supra* note 4, at 83–84 (noting that in Fiji, “serious concerns have been raised about interference by the executive or military government with judicial independence. . . . [T]he concern is not so much that the judges are foreign, but rather that foreign judges are particularly susceptible to influence by a powerful executive that determines their appointment and tenure.”).

larger and more entrenched losses.<sup>113</sup> Other scholars focus more on the role of courts in protecting the rights of small minorities not otherwise protected in electoral democracies.<sup>114</sup> And a recent history of ethnic violence between different subgroups in a single polity can represent an extreme case in which members of any one group will not be viewed as impartial by members of another group.<sup>115</sup> Under these circumstances, having “outsider” foreign judges may help develop a relatively independent and impartial high court.

Foreign judges may also enjoy greater independence *from other members of the court*, in ways that prove valuable to promoting actual and perceived judicial independence and impartiality in certain cases. This is especially relevant where judges themselves become parties to constitutional litigation, or where there are challenges to the fitness for office or impartiality of certain judges.<sup>116</sup>

But it can also be true generally. One important aspect of judicial independence, as former Australian judge Dyson Heydon has

113. *See supra* note 105.

114. *Cf.* JOHN HART ELY, *DEMOCRACY AND DISTRUST* 135–80 (1980) (arguing that judicial review is most needed where minorities are being excluded from democratic representative processes or to protect fundamental rights); *cf.* Samuel Issacharoff, *Constitutionalizing Democracy in Fractured Societies*, 82 *TEX. L. REV.* 1861, 1864–67 (2004) (focusing on the role of courts in stabilizing democracy in ethnically divided societies, including through minority rights protection).

115. This concern evidently motivated the requirement in the Dayton Agreements and the Constitution of Bosnia-Herzegovina for the appointment of judges from outside of BiH and not from any neighboring States. General Framework Agreement for Peace in Bosnia and Herzegovina, Bosnia and Herzegovina-Croatia-Yugoslavia, annex 4, art. VI(1)(a), (b), Dec. 14, 1995, 35 *I.L.M.* 75 (1996) [hereinafter *Dayton Peace Accords*]; Marko, *supra* note 33, at 640–42. Interestingly, an effort to amend the Constitution to remove foreign judges in 2008 was ultimately unsuccessful, largely because of a perception among Bosniak and some Croat leaders of the continued need for some form of international monitoring of the terms of the Dayton Peace Accords. Interview with David Feldman, Former Judge, Constitutional Court of Bosnia-Herzegovina (Nov. 20, 2017).

116. Such claims might arise, for example, where a judge is accused of having committed a crime. *See, e.g.,* Tristan Clavel, *Colombia Judicial Corruption Scandal Expands with Fmr Top Judge’s Arrest*, *INSIGHT CRIME* (Sept. 21, 2017), <https://www.insightcrime.org/news/brief/colombia-judicial-corruption-scandal-expands-fmr-top-judge-arrest/> [<https://perma.cc/PG8Z-5HKP>]; *Indonesian Court Jails Ex-Judge for Eight Years in Graft Case*, *REUTERS* (Sept. 4, 2017), <https://www.reuters.com/article/us-indonesia-corruption/indonesian-court-jails-ex-judge-for-eight-years-in-graft-case-idUSKCN1BF142> [<https://perma.cc/737W-6SU9>]. *Cf.* Ed Adamczyk, *Federal Judge Facing Sexual Misconduct Accusations Resigns*, *UPI* (Dec. 18, 2017), <https://www.upi.com/Federal-judge-facing-sexual-misconduct-accusations-resigns/2421513610141/> [[perma.cc/HH4S-M5MG](https://perma.cc/HH4S-M5MG)] (noting that complaints of sexual misconduct against a judge in the Ninth Circuit Court of Appeals [on the U.S. West Coast] had been transferred, by the Chief Justice of the United States, to the Second Circuit Court of Appeals [on the East Coast] for evaluation).

noted, is the principle of mutual or “internal” independence—or independent judgment by each and every member of a court.<sup>117</sup> If a court becomes too polarized, this may also undermine independence of this kind: some judges may be too close to others to exercise truly independent judgment, whereas others may have too much animosity toward fellow judges to exercise impartial judgment about whether or not to join their opinion. Foreign judges, in this context, will also often have greater distance—or independence—from pre-existing judicial relationships, in ways that may enhance their ability to exercise more impartial judgment, and, perhaps, to try to promote more open-minded decision-making by other members of the tribunal.

Recent experience with foreign judges in Fiji provides an example. As disputes have arisen in Fiji over the legality of various military coups, there have also been increasing internal divisions within the local Fijian judiciary.<sup>118</sup> Some commentators attribute this to a division between more “pragmatic” and “constitutionalist” judges; others to broader socio-political divisions, or personal divisions within the court.<sup>119</sup> Internal division within the judiciary can pose a threat to actual or perceived judicial independence: In one criminal appeal, in 2005, tensions between local judges were so great that a lower court judge sought to intervene in the appeal, to ask that a particular appellate judge be disqualified for bias against her.<sup>120</sup> Having foreign judges available in this context offered a source of apparent impartiality about and independence from these internal tensions. This particular controversy was ultimately diffused when the matter was referred by the Chief Justice to an Australian judge, Justice Handley, who rejected the idea of intervention by a sitting judge, and whose decision was then accepted by all sides.<sup>121</sup>

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117. J.D. Heydon, *Threats to Judicial Independence: The Enemy Within*, 129 L.Q. REV. 205, 209–12 (2013). Cf. Jackson, *supra* note 100, at 49–50, 74–83 (discussing different practices concerning individual or collective opinions).

118. INT’L BAR ASS’N HUMAN RIGHTS INST., *supra* note 43, at 39; Lal, *supra* note 58, at 75.

119. See INT’L BAR ASS’N HUMAN RIGHTS INST., *supra* note 43, at 39–40.

120. See *id.* at 65–66. The Fiji Court of Appeal had rejected the defendant’s challenge to his conviction; on further appeal to the Supreme Court, the trial court judge sought to intervene. The “local judges” among whom there was tension included a U.K. citizen who had lived in Fiji for more than a decade. See *id.*; *Appointment of Chief Justice of Tonga*, PACIFIC SCOOP (Aug. 29, 2010), <http://pacific.scoop.co.nz/2010/08/appointment-of-chief-justice-of-tonga/> [<https://perma.cc/ABZ2-NCVQ>].

121. *Id.* The situation arose when Justice Robert French (a highly regarded Australian judge, who was later Chief Justice of Australia) fell ill and was unable to sit on the appeal, and was replaced by a local long-term resident judge.

### C. Comparative Engagement and Relational Benefits

Third, foreign judges may contribute to the capacity of a court to engage with comparative and international sources; their presence may also promote broader transnational relationships that may be helpful to protecting the role of the court.

Engagement with transnational legal sources can have a number of benefits: it can give a domestic court an opportunity to compare its arguments against those made by foreign courts in comparable cases; allow a court to learn from the doctrinal developments or innovations of other courts seeking to address common problems; or even provide insights into the substantive content of constitutional principles through more careful reflection about the evolving content of those norms globally or domestically.<sup>122</sup> In some countries, international law has been integrated into norms of constitutional status, or the domestic constitution may bear a particular relationship to international bodies of law, to whose appreciation foreign judges with expertise in international law may contribute.<sup>123</sup>

Such engagement with foreign and international law can also occur through other channels. Any judge may travel abroad or participate in international exchanges or conferences, gaining exposure to a range of general comparative constitutional developments.<sup>124</sup> They may likewise read comparative scholarship, and thereby learn about general constitutional developments. Or the parties, or amici, in a case may cite comparative constitutional practices. Often, the most useful—and legitimate—forms of comparative engagement will occur via this kind of briefing and argument by parties or amici.

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122. See generally JACKSON, *supra* note 98; Rosalind Dixon, *A Democratic Theory of Constitutional Comparison*, 56 AM. J. COMP. L. 947 (2008).

123. BiH is a case in which the constitution itself was negotiated as part of an international peace treaty, including the provisions for appointment of some foreign judges by the President of the European Court of Human Rights. See generally Grewe & Riegner, *supra* note 33, at 12; Christopher McCrudden & Brendan O'Leary, *Bosnia as a Consociation*, in COURTS AND CONSOCIATIONS 21, 30–31 (Christopher McCrudden & Brendan O'Leary eds., 2013). In notable cases, international law, including the Vienna Convention on the Law of Treaties and the European Convention on Human Rights, has proven relevant to the Court's reasoning. See e.g., Decision U-5/98, Const. Ct. of Bosn. & Herz. (July 1, 2000), which has been the subject of disagreement between the foreign judges and some other judges of the court. See *infra* note 255.

124. See, e.g., ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* (2004) (on informal judicial networks); see also JACKSON, *supra* note 98, at 96–97 (noting meetings of commonwealth judges). It is possible that judges willing to travel to and sit as a foreign judge in another jurisdiction are more likely to have broader comparative knowledge than most domestic judges.

Not all constitutional systems, however, have a tradition of amicus briefs being filed or accepted—or of foreign lawyers practicing in a jurisdiction. Local lawyers may also have limited expertise in comparative developments, and limited time (and budget) to research and brief such issues or consult foreign experts. Foreign judges in this context may have an important capacity to contribute to greater comparative constitutional engagement—simply by providing a ready source of reference and knowledge about foreign and international law. Some foreign judges also have experience in more than one jurisdiction; one of the notable features of the current system of hybrid constitutional justice, worldwide, is that some judges have served on more than one foreign or transnational court, and thus bring overlapping sources of knowledge to bear in their role on each court.<sup>125</sup> This is in part because many hybrid constitutional courts operate within countries that share a common law legal system (but not all do, as BiH demonstrates).<sup>126</sup>

Foreign judges may also help contribute, in this context, to appropriately “thick” or critical forms of comparative engagement; they may draw attention to the downsides or limits to foreign doctrinal developments, as well as their advantages. Foreign judges are likely to be aware of formal and informal criticisms of—or glosses on—their own court’s judgments or those of other courts in their own country and can help make their colleagues aware of these nuances. They may also be attuned to relevant differences between their home country and the jurisdiction in which they are sitting.<sup>127</sup> Each of

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125. See, e.g., Young, *supra* note 4, at 130 (noting role of Lord Cooke and Sir Anthony Mason on multiple foreign courts); *id.* at 139–40 (noting overlap between Hong Kong, Brunei, Cyprus, and the European Court of Human Rights); Mason, *Sharing Expertise*, *supra* note 11 (noting overlap in the Pacific). See also the overlap in the role of judges we interviewed, such as Sir Anthony himself (on the courts in Hong Kong, Fiji, and the Solomons), Handley (in Fiji, Kiribati, and Tonga), and Spigelman (Hong Kong and Fiji). See Interview with Sir Anthony Mason, Former Chief Justice of Australia, Former Non-Permanent Judge of the Hong Kong Court of Final Appeal, Former Judge of the Supreme Court of Fiji, President of the Solomon Islands Court of Appeal, and Judge of the Permanent Court of Arbitration (Mar. 17, 2017); Handley Interview, *supra* note 50; Interview with James Spigelman, Former Chief Justice of New South Wales, Judge of the Fiji Supreme Court, and Non-Permanent Judge of the Hong Kong Court of Final Appeal (Nov. 16, 2017).

126. See discussion *infra* at note 226.

127. See, e.g., the role of Murray Gleeson NPJ in drawing attention to differences between Hong Kong and Australia, and thus the limits of Australian authority, in *Leung Chun Ying v. Ho Chan Yan Albert* [2013] 16 H.K.C.F.A.R. 735, 764–65 ¶ 38 (Ma, C.J., noting this point by Gleeson NPJ in the course of argument), as discussed in the Hon. Mr. Justice Joseph Fok, PJ, Speech to the Law Council of Australia Hong Kong Chapter: The Influence of the Australian Judges on the Hong Kong Court of Final Appeal 22–23 (Nov. 3, 2016), available at <https://www.hkcfa.hk/filemanager/speech/en/upload/182/LCA%20HK%>

these factors may vary from judge to judge and context to context.<sup>128</sup>

Apart from the benefits of comparative engagement, there are potential benefits arising out of the relationships that may be nurtured through participation by foreign judges. Many countries depend on a mix of foreign aid, trade, and investment to sustain their economies, with some countries in the Global South especially dependent on foreign aid for this purpose.<sup>129</sup> The presence of foreign judges may make their home countries, NGOs, or international organizations more inclined than they would otherwise be to provide such aid—especially for much-needed financial support for court staff, translation, or court buildings.<sup>130</sup> For foreign judges who are sitting or retired judges, it may also mean that their home *courts* are more willing

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20Chapter%20speech.pdf [https://perma.cc/4HPD-8VGE].

128. Although this Article focuses on the benefits and drawbacks of using foreign judges on national courts from an internal perspective, there may be other benefits and detriments from the perspective of communities beyond the particular country. Many countries have mandatory retirement ages or term limits that remove judges from office while they are still well-functioning. *See generally* BRIT. INST. OF INT’L & COMPARATIVE LAW, THE COMMONWEALTH, THE APPOINTMENT, TENURE AND REMOVAL OF JUDGES UNDER COMMONWEALTH PRINCIPLES: A COMPENDIUM AND ANALYSIS OF BEST PRACTICE (2015). In Hong Kong, there is no mandatory retirement age for non-permanent judges, *see* Ghai, *supra* note 21, at 25, and several Australian judges have served there after reaching the mandatory retirement age in Australia. Opportunities for such experienced judges to bring their knowledge and judgment to bear in other countries may enable those judges to continue to contribute to the creation of high-quality judgments that can benefit not only those within but also those outside a particular State. So, too, might the added understanding of their new jurisdiction that a foreign judge may acquire and bring back to his or her home State. However, there may be drawbacks to the outsider community as well: for example, a possible loss of willingness of such former judges to engage with legal projects that benefit their home countries because the reputational and travel incentives of being a foreign judge may be so attractive, or losses to international peace where use of a foreign judge in troubled countries backfires so as to increase instability in a region. Full exploration of the benefits and costs to foreign judges, their home countries, and the international community from foreign court use of judges having, as it were, “international senior status,” is beyond the scope of this Article.

129. *See* SWED. AGENCY FOR DEV. EVALUATION, FOREIGN AID, ECONOMIC GROWTH AND EFFICIENCY DEVELOPMENT: A DATA ENVELOPMENT ANALYSIS APPROACH (2007), <https://www.oecd.org/derec/sweden/foreignaid.pdf> [https://perma.cc/3FK7-LEB3]. On aid dependency of countries in the Pacific, *see, e.g.,* Jonathan Pryke, Rising Aid Dependency in the Pacific, DEVPOLICY BLOG (Sept. 17, 2013), <http://www.devpolicy.org/rising-aid-dependency-in-the-pacific-20130917/> [https://perma.cc/CT3D-VXNY]; Net Official Development Assistance and Official Aid Received (Current US\$), Data, WORLD BANK, <https://data.worldbank.org/indicator/dt.oda.all.d.cd> [https://perma.cc/R5X2-7424].

130. In BiH, for example, the UNDP, EU, and other donor countries have all played an important role in financing the creation of the courtrooms and court infrastructure necessary to conduct war crime trials in local, hybrid courts. *See Re, supra* note 87, at 38.

to provide relevant legal and technical assistance. This might include judicial training, exchanges, and access to library and research assistance.<sup>131</sup>

Of course, in some cases the causal arrow may run in the opposite direction: foreign governments or courts may attempt to promote the appointment of their own nationals as foreign judges as part of a broader package of development aid, focused on the rule of law and reform of the judicial sector. Foreign judging may thus largely follow from foreign attention to a jurisdiction, in this context, and not the reverse. But the two dynamics may still be mutually reinforcing over time.

Foreign attention to constitutional courts and their decisions may have additional benefits for promoting compliance with those decisions; the enforcement of constitutional constraints cannot be taken for granted in many countries. Rather, the likelihood of constitutional compliance may depend on prevailing understandings about the rule of law and the mandatory (or non-mandatory) nature of court decisions or other official acts purporting to give effect to constitutional requirements; the existence of political and social movements willing and able to mobilize in support of constitutional compliance; and the mobilization of outsiders, including transnational NGOs and foreign governmental or intergovernmental organizations (“IGOs”) to apply pressure.<sup>132</sup> Constitutional engagement by outsiders, such as foreign legal scholars commenting on an issue, may also affect the effectiveness of mobilization of this kind.<sup>133</sup>

If foreign governments that provide high levels of aid or investment are drawn into a dialogue about compliance with domestic constitutional constraints, this may add pressure on local government actors to comply with those constraints. Assuming compliance with domestic constitutional constraints is normatively valuable, one potential advantage to foreign judges in this context may be their “relational” benefits—or capacity to attract foreign attention of this kind

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131. See, e.g., COMMONWEALTH MAGISTRATES’ AND JUDGES ASSOCIATION, <https://cmja.org> [<https://perma.cc/8VJ3-GX8N>]; PACIFIC JUDICIAL STRENGTHENING INITIATIVE, <http://www.fedcourt.gov.au/pjsi> [<https://perma.cc/HXT8-5F3F>]. We are indebted to Anna Dzedzic for this point. For the potential broader relational benefits, including greater judicial exchange and engagement between countries, consider the role of foreign NPIs in encouraging broader contact and cooperation between the Hong Kong, Australian, and Canadian judiciaries. See Fok, *supra* note 127, at 25.

132. See Dixon & Jackson, *supra* note 37, at 168–69 (discussing relational benefits of outsider interpretation).

133. See *id.*, at 137, 159, 172 (describing outsider interventions on constitutional issues in Honduras).

to national constitutional controversies.<sup>134</sup>

Foreign judges invited to serve on domestic courts will often have an existing public profile or reputation in their home jurisdiction, which means that their actions abroad will attract some degree of national interest. This, by itself, can mean that there is greater attention paid by foreign governments—or media outlets—to the decisions of a hybrid court on which they sit. In some cases, it may also mean that foreign governments are more willing to trust the decisions of a court as providing an independent and impartial interpretation of national constitutional requirements. The same is true for foreign NGOs and IGOs: foreign judges may be known to these organizations in ways that increase their attention to constitutional contests elsewhere and encourage them to work toward buttressing or strengthening local attempts to exert pressure on governments to comply with constitutional limitations.

In Fiji, for example, when the Fijian Court of Appeal has heard challenges to the legality of various military coups, it has been comprised entirely of foreign judges (in 2000, of five judges from countries including the United Kingdom, New Zealand, Papua New Guinea, and Australia, and in 2009, a smaller number of judges, all from Australia). The presence of foreign judges may have played some role in the attention given to the litigation. The plaintiff in the 2000 case, Chandrika Prasad, explained in an affidavit that he brought the case to bring to the attention of the international community what he saw as human rights violations occurring as a result of the alleged coup.<sup>135</sup> Filing a case in a domestic court may be more effective in getting such international attention when the judges are themselves from outside the domestic circle. Indeed, Professor Williams, who represented Mr. Prasad, specifically noted in writing about the case that although it was a domestic court, the five judges who made up the Court of Appeal's bench were all from other countries.<sup>136</sup> Also present to observe the Court of Appeals hearing in *Prasad* was the President of the Bahamas Bar Association, on behalf of

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134. See *supra* notes 132–133.

135. Williams, *Republic of Fiji v Prasad*, *supra* note 58, at 146; see *Prasad v. Republic of Fiji* [2001] FJCA 2.

136. Williams, *Republic of Fiji v Prasad*, *supra* note 58, at 148. Cf. Michael Head, *A Victory for Democracy?: An Alternative Assessment of Republic of Fiji v. Prasad*, 2 MELB. J. INT'L L. 535, 536 (2002) (disagreeing in some respects with Williams and arguing that “the most significant new criterion suggested by the Court [in *Prasad*] was the acceptance of a new regime by the ‘international community’ which, in this case at least, refers to the stance taken by major Western nations, notably Australia, New Zealand, Britain and the United States”).

the International Bar Association Human Rights Institute,<sup>137</sup> also suggestive of the possible impact of outsider attention. Following the Court of Appeal's decision in *Prasad*—the first time domestic courts had held a coup and purported abrogation of the constitution to be unlawful—there was compliance with the decision.<sup>138</sup> In 2009, when three Australian lawyers sitting as judges on the Court of Appeal held that Bainimarama's actions were illegal in the *Qarase* case,<sup>139</sup> the Australian government called on the interim government to respect the Court's decision and “restore democracy through elections as early as possible.”<sup>140</sup>

Foreign attention of this kind will not be dispositive. In the *Prasad* case, the military and the interim government ultimately complied with the Court's ruling.<sup>141</sup> On the other hand, in the *Qarase* case, the results of the decision were not nearly as positive. The government reacted by quickly removing judges and abrogating the 1997 Constitution,<sup>142</sup> and it took until 2013–2014 for a new constitution to be drafted and fresh democratic elections called.<sup>143</sup>

Indeed, all these advantages may or may not be realized in any given context, and some advantages gained by having “outsiders” also have corollary disadvantages (such as lack of local

137. INT'L BAR ASS'N HUMAN RIGHTS INST., *supra* note 43, at 23.

138. See Williams, *Republic of Fiji v Prasad*, *supra* note 58, at 150; Twomey, *supra* note 58, at 322; Williams, *Case That Stopped a Coup?*, *supra* note 58, at 84, 92–93; Cox, *supra* note 58, at 10–12. *But. cf.* Head, *supra* note 136, at 536.

139. *Qarase v Bainimarama* [2009] FJCA 9. For discussion, see, e.g., Pepper, *supra* note 58.

140. See Kate McClymont, *Fiji Military Coup Was Illegal, Rules Court*, SYDNEY MORNING HERALD (Apr. 10, 2009), <http://www.smh.com.au/world/fiji-military-coup-was-illegal-rules-court-20090409-a26j.html> [<https://perma.cc/YZ4Y-6J2C>]; Linda Mottram & Sean Dorney, *Ruling Boosts Case for Fiji Elections: Crean*, ABC NEWS (Apr. 9, 2009), <http://www.abc.net.au/news/2009-04-09/ruling-boosts-case-for-fiji-elections-crean/1646870> [<https://perma.cc/3K5W-82MK>]. Australia is an important donor to Fiji and influence on regional foreign policy. *Fiji Country Brief*, AUSTRALIAN GOV'T DEP'T OF FOREIGN AFFAIRS & TRADE, <http://dfat.gov.au/geo/fiji/pages/fiji-country-brief.aspx> [<https://perma.cc/69YT-G3BS>].

141. See Williams, *Republic of Fiji v Prasad*, *supra* note 58, at 84; Cox, *supra* note 58, at 11; Twomey, *supra* note 58, at 322; Venkat Iyer, *Courts and Constitutional Usurpers, Some Lessons from Fiji*, 28 DALHOUSIE L.J. 27, 51–53 (2015); Nicholas Aroney & Jennifer Corrin, *Endemic Revolution: HLA Hart, Custom and the Constitution of the Fiji Islands*, 45 J. LEGAL PLURALISM & UNOFFICIAL L. 314, 324–25 (2013); Fraenkel, *supra* note 82, at 334.

142. Pepper, *supra* note 58, at 19–20.

143. See Dixon, *supra* note 77, at 805–07; Brij Lal, *Fiji Election: The Long Road to Democracy*, ABC NEWS (Sept. 16, 2014), <http://www.abc.net.au/news/2014-09-16/lal-fiji-election:-the-long-road-to-democracy/5746848> [<https://perma.cc/AJ8H-CC4E>].

knowledge), as discussed below. Before elaborating on the contextual factors that influence the likelihood of advantages being realized, we discuss the potential disadvantages of foreign judges in the next section.

### III. POTENTIAL DISADVANTAGES

As with forms of constitutional interpretation by “outsiders,”<sup>144</sup> there are potential disadvantages to reliance on foreign judges in domestic constitutional tribunals. In this section, we discuss three potential downsides to having foreign judges serve as national constitutional judges: first, they may lack sufficient local contextual knowledge to appropriately perform the constitutional function; second, they may be perceived as bringing (or indeed may bring) a distinctly foreign—a partial rather than impartial—perspective on national constitutional controversies, and relatedly, may lack local democratic legitimacy; and third, reliance on foreigners to sit on domestic courts may delay development of local constitutional culture and of the capacity or willingness of domestic lawyers to sit as judges on their own court.

#### A. Lack of Local Knowledge

Foreign judges will often have limited knowledge of local history, socio-political values and attitudes, and the kinds of national social, economic, and political conditions that can affect the implementation of a court decision.<sup>145</sup> They may also lack second-order knowledge about questions of this kind—i.e., knowledge about the kinds of local actors capable of supplying reliable answers to such questions. In an appellate context, judges may need knowledge of community understandings to inform certain forms of evaluative judgment (e.g., about what is “reasonable” behavior in tort law or about how to craft a remedial order in a complex case in ways that promote compliance and respect for the judgment).<sup>146</sup> The process of constitutional construction may also, according to some theories, al-

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144. Compare Dixon & Jackson, *supra* note 37.

145. See, e.g., Young, *supra* note 4, at 137; Mark Daly, *A Human Rights Lawyer’s Perspective*, in HONG KONG’S COURT OF FINAL APPEAL, *supra* note 21, 207, at 219–20; Dziedzic, *Right to Liberty*, *supra* note 33.

146. See, e.g., Sir Anthony Mason, *The Courts and Public Opinion*, NSW BAR ASS’N (2002), <http://www.austlii.edu.au/au/journals/NSWBarAssocNews/2002/11.pdf> [https://perma.cc/VZ88-3JPK].

low or require attention to contemporary values or to the potential consequences of a court decision.<sup>147</sup> The inability reliably to identify such values or consequences because of a lack of local knowledge may therefore diminish the legitimacy and effectiveness of a foreign judge's decisions.

The degree to which this is true will differ based on the judge involved; some judges may have long-standing familiarity with a country prior to appointment, whereas others may have little or no knowledge of the country concerned. Some judges may live in the relevant region, in ways that increase their familiarity with the history, culture, and politics of a country, where others may be appointed from more geographically distant jurisdictions.<sup>148</sup> Some judges may also choose actively to develop local contacts and understandings once appointed, whereas others may decide—or be constrained—to have quite limited contact with local civil society. All else being equal, however, foreign judges will lack the same degree of knowledge of local history, culture, attitudes, and conditions as their national counterparts, and this may limit their ability to engage in certain forms of context-sensitive decision-making.

One important limit on foreign judges' knowledge in this context is about broad community perceptions of the court and likely downstream social and political consequences to certain court decisions. National judges will generally gain information of this kind from a mix of formal and informal sources. Foreign judges can also benefit from formal media reporting of court decisions and their reception and consequences; the stronger the national or international media in a jurisdiction, the better the access foreign judges will have to information of this kind—provided it is available in a language that they can read or understand. Few foreign judges, however, will enjoy informal knowledge of the kind gained by living and working for an extended period in a jurisdiction. This may mean that they are at greater risk of making decisions or issuing remedial orders that are insensitive to broader socio-political conditions on the ground, or that threaten the basic sociological legitimacy of the court on which they sit.<sup>149</sup>

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147. Compare PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 7–8 (1982) (on modalities in constitutional theory); Keith E. Whittington, *The New Originalism*, 2 *GEO. J. L. & PUB. POL'Y* 599, 611–12 (2004) (distinguishing constitutional interpretation from construction).

148. This, for example, was often seen as one of the shortcomings of the Privy Council for the Caribbean. See Robinson & Bulkan, *supra* note 9, at 384.

149. See Schwartz, *supra* note 32, at 23–25. A stronger version of this criticism could be that foreign judges in fact suffer not only from a lack of information about local

### *B. Lack of Independence and of Democratic Legitimacy*

Foreign judges may lack actual or perceived independence; they may be regarded as partial to foreign interests rather than as impartial, and they may be viewed as lacking in democratic legitimacy.

#### 1. Lack of Independence and Impartiality

Foreign judges may lack both actual and perceived independence and impartiality. As Anna Dzedzic has noted, in the Pacific context, most foreign judges do not enjoy ordinary security of tenure or a life-time or long-term appointment to a foreign court.<sup>150</sup> Like any temporary or acting judge, non-permanent foreign judges face the prospect of non-renewal by the government if they deliver significant, or a significant number of, adverse decisions against the government.<sup>151</sup> This can also undermine the actual and perceived independence of a foreign judge in cases of concern to the government. The threats to actual independence may be diminished in situations where foreign judges enjoy secure financial benefits in their home jurisdiction and/or have the capacity to engage in a wide range of other interesting and meaningful work.<sup>152</sup>

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consequences, but also lack of interest in attending to those consequences. As individuals who do not live in the jurisdiction, they do not suffer the full consequences of those decisions, and thus may suffer from a form of heightened “moral hazard.” Cf. JACKSON, *supra* note 98, at 174–75 (arguing that coercive judgments issued by members of a domestic court against their own government have a particular gravitas that comes from judges themselves living in the country and being subject to the institutional reactions of other parts of the government and of the public).

150. See, e.g., Dzedzic, *supra* note 110, at 20. For discussion of the challenges for judicial impartiality posed by short-term contracts for foreign judges, see *id.* at 20–29.

151. See, e.g., Young, *supra* note 4, at 136 (noting the danger, but also quoting Lord Bingham, who suggested that it was highly unlikely that a foreign judge “would break his judicial oath and jeopardise his reputation in order to . . . secure a relatively brief extension of his contract”); Ruppel & Ambunda, *supra* note 53, at 43 (noting concerns of this kind about “acting and expatriate” judges appointed to the Namibian judiciary). On acting (non-permanent) judicial officers more generally, see Gabrielle Appleby et al., *Temporary Judicial Officers in Australia: A Report Commissioned by the Judicial Conference of Australia* (May 2017), 25–29, [http://www.jca.asn.au/wp-content/uploads/2013/11/P24\\_02\\_31-Temporary-Judicial-Officers-Report-May-2017.pdf](http://www.jca.asn.au/wp-content/uploads/2013/11/P24_02_31-Temporary-Judicial-Officers-Report-May-2017.pdf) [<https://perma.cc/8TKJ-6HUP>]; N.Z. Law Reform Comm’n, *Review of the Judicature Act 1908: Towards a Consolidated Courts Act 32* [3.65] (Issues Paper 29, Feb. 2012); Michael Taggart, *Acting Judges and the Supreme Court of New Zealand*, 14 CANTERBURY L. REV. 217, 220 (2008).

152. See, e.g., Young, *supra* note 4, at 136 (citing Lord Bingham on this question). In some countries, former judges may pursue second careers as international arbitrators. See Thomas J. Stipanowich & Zachary P. Ulrich, *Arbitration in Evolution: Current Practices*

Regardless of financial or reputational insecurity, moreover, no foreign judge (like no domestic judge) will be wholly neutral or impartial in perspective; they will inevitably bring to the judicial task ideas and approaches shaped by their own prior experiences, including their nationality.<sup>153</sup> But in terms of how they are perceived, the nationality of foreign judges may also carry with it distinctly negative associations. Colonial influences, memories, and relationships will often continue even after the severance of formal legal ties between countries.<sup>154</sup> Some countries may also have relationships that are quasi-colonial in nature; while never formally occupying a territory, one country may be an important provider of aid and technical assistance, or an important trade partner, to another.<sup>155</sup> They may also educate large numbers of a country's citizens and exert a powerful linguistic and cultural influence. If a foreign judge is a citizen of a former colonial (or newly quasi-colonial) power, their actions may reflect the interests of that power or be perceived by local citizens as subject to those influences.

Foreign countries, for example, may have contemporary strategic or geo-political interests in the constitutional governance of another country; the decisions of a foreign government may have an important impact on their immigration or national security policy,<sup>156</sup> or on their capacity to develop trade partnerships, or exploit natural resources in the region. If foreign judges are called to decide such questions, they may be perceived as distinctly "partial" rather than impartial, as influenced by foreign perspectives and strategic interests rather than the local public interest.<sup>157</sup>

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*and Perspectives of Experienced Commercial Arbitrators*, 25 AM. REV. INT'L ARB. 395, 404–05, 428 (2014).

153. See Dixon & Jackson, *supra* note 37, at 152.

154. This is the key basis for the critique of many hybrid courts by Elizabeth Bruch. See Bruch, *supra* note 41, at 3.

155. See AUSTRALIAN GOV'T DEP'T OF FOREIGN AFFAIRS & TRADE, *supra* note 140, on the flows of trade and aid between Australia and Fiji.

156. See, e.g., *Namah v. Pato* [2016] PGSC 13 (Papua N.G.) (holding that a Papua New Guinea program for detaining asylum seekers, set up jointly with Australia, violates the Papua New Guinea Constitution); Dziedzic, *Right to Liberty*, *supra* note 33; Ben Doherty, Helen Davidson & Paul Karp, *Papua New Guinea Court Rules Detention of Asylum Seekers on Manus Island Illegal*, GUARDIAN (Apr. 26, 2016), <https://www.theguardian.com/australia-news/2016/apr/26/papua-new-guinea-court-rules-detention-asylum-seekers-manus-unconstitutional> [<https://perma.cc/QT6V-4KWH>].

157. See Dixon & Jackson, *supra* note 37, at 170–74; Erik Voeten, *The Politics of International Judicial Appointments: Evidence from the European Court of Human Rights*, 61 INT'L ORG. 669 (2007) (analyzing the attitude of member States to the EU as a predictor of the voting patterns of judges on the European Court of Human Rights, and showing a

This danger may be heightened where foreign governments provide some, or all, of the funding for foreign judges. As Anna Dziedzic notes in her careful study of foreign judging in the Pacific, the salaries of many foreign judges in the region are ultimately paid for by a mix of foreign governments and international governmental and non-governmental organizations. This financial factor may affect both the actual and perceived independence of foreign judges, where issues of interest or concern to the funders are at stake.<sup>158</sup>

## 2. Lack of Perceived Democratic Legitimacy

Judges who decide constitutional challenges to the actions of other parts of the government not infrequently face challenges to their “democratic” legitimacy.<sup>159</sup> In the United States, where federal judges have life tenure and are nominated by the sole chief executive

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statistically significant effect of member State political attitudes in this context).

158. Dziedzic, *supra* note 4, at 69 (noting the existence of some foreign funding); Dziedzic, *supra* note 110, at 10, 25 (commenting also on the implications of foreign funding for judicial independence).

159. The terms “democratic legitimacy” and “local legitimacy” in this Article refer to a sociological form of legitimacy involving public domestic support for the presence of foreign judges; such support, in a democracy, would typically be manifested through decisions by popularly elected elements of the government, as well as other measures of popular support or acceptance. (On the idea of sociological legitimacy, see generally Fallon, *supra* note 96.) The three jurisdictions studied have all embraced elements of democracy, to greater or lesser degrees. All three rely on elections and representative legislatures. But Fiji has experienced military coups and some period of nondemocratic rule during recent decades; the degree of local democratic self-rule in Hong Kong is qualified, *inter alia*, by the method used to select the chief executive; and in BiH, the Office High Representative has on occasion exercised governmental authority when the elected parliament deadlocked. See, e.g., Bruce Hill, *How Free Is the Pacific? See Which Two Countries Fall Short of ‘Free,’* ABC NEWS (Feb. 2, 2018), <https://www.abc.net.au/news/2018-02-02/how-free-is-the-pacific/9388002> [<https://perma.cc/P23H-4LA8>] (on Fiji and recent limits on political freedoms); *Fiji Profile—Timeline*, BBC NEWS (Jan. 4, 2018), <https://www.bbc.com/news/world-asia-pacific-14919688> [<https://perma.cc/5YK3-TDYP>] (showing that Fiji was suspended from the Commonwealth in 2010 because of its military government’s refusal to hold elections); Joyce Lim, *What You Need to Know About the Hong Kong Chief Executive Election*, STRAITS TIMES (Mar. 24, 2017), <https://www.straitstimes.com/asia/east-asia/what-you-need-to-know-about-the-hong-kong-chief-executive-election> [<https://perma.cc/LED4-DY52>] (on the committee structure for election of the Hong Kong chief executive); Louise Arbour, *Bosnia’s Continuing Chaos*, FOREIGN POLICY (Nov. 18, 2009), <https://foreignpolicy.com/2009/11/18/bosnias-continuing-chaos/> [<https://perma.cc/V7LD-8KPE>] (noting ability of the Office of High Representative, established under the Dayton Accords, to impose decisions on the country); Tobias Kraft, Book Note, 49 N.Y.U. J. INT’L L. & POL. 1008, 1008–12 (2017) (reviewing CHRISTOPHER BENNETT, *BOSNIA’S PARALYZED PEACE* (2016)) (describing use of the deadlock-breaking powers of the High Representative over time); and *infra* note 266 (on the deadlocking of BiH’s domestic institutions).

officer, subject to confirmation by the upper house of the legislature, this concern has generated an enormous literature on the “counter-majoritarian” difficulty.<sup>160</sup> Any constitutional court empowered to invalidate laws enacted by a democratically constituted legislature may face similar challenges. But this challenge may be heightened where the holder of judicial office is a foreign judge.<sup>161</sup>

Thus, foreign judges may to an even greater extent than local judges be perceived to lack the necessary degree of democratic legitimacy to carry out their role effectively. Both the decision to have foreign judges sit and the selection (or selection methods) of those judges may implicate democratic legitimacy concerns; each component may affect the degree of democratic legitimacy foreign judges enjoy in any particular jurisdiction. To the extent that foreign judges are used as a result of a deal between former colonial powers and an emerging new country, it may be difficult without considerable historical work to identify the degree to which adoption of a hybrid model should be regarded as reflecting a democratic agreement of the polity. But regardless of whether the design impetus is from some “outsider” force, there may be differences in the democratic legitima-

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160. For the canonical work that is generally viewed as beginning this controversy in the contemporary period, see ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16 (1962). See also Alexander M. Bickel, *The Supreme Court 1960 Term*, 75 HARV. L. REV. 40, 50 (1961). See generally Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153 (2002). For a helpful collection, see KENNETH D. WARD, *THE JUDICIARY AND AMERICAN DEMOCRACY: ALEXANDER BICKEL, THE COUNTERMAJORITARIAN DIFFICULTY, AND CONTEMPORARY CONSTITUTIONAL THEORY* (2012). For an earlier canonical work that does not use the phrase but addresses the concern for judicial interference with democratic decision-making, see James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893). The 200th anniversary of *Marbury v. Madison* generated a number of relevant symposia. See, e.g., Symposium, *Judging Judicial Review: Marbury in the Modern Era*, 101 MICH. L. REV. 2557 (2003); Symposium, *Marbury and Its Legacy: A Symposium to Mark the 200th Anniversary of Marbury v. Madison*, 72 GEO. WASH. L. REV. 1 (2003); Symposium, *Marbury at 200: A Bicentennial Celebration of Marbury v. Madison as History*, 20 CONST. COMMENT. 205 (2003); Symposium, *Marbury v. Madison: A Bicentennial Symposium*, 89 VA. L. REV. 1105 (2003).

161. For a vivid dismissal of a colleague’s opinion, relying on foreign judicial judgments, as imposing “foreign moods [or] fads,” see *Foster v. Florida*, 537 U.S. 990, 990 (Thomas, J., concurring). Cf. *Medellin v. Texas*, 552 U.S. 491, 517–18 (2008) (noting concerns that would arise if International Court of Justice judgments were treated as binding domestic law that neither state nor federal courts could “look behind”); *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 353–54 (2006) (rejecting the argument that interpretation of a treaty by the ICJ is binding on federal courts). See also John F. Murphy, *Medellin v. Texas: Implications of the Supreme Court’s Decision for the United States and the Rule of Law in International Affairs*, 31 SUFFOLK TRANSNAT’L L. REV. 247, 275–76 (2008).

cy of foreign judges, depending on the mechanisms for their selection: mechanisms that include opportunities for members of the national polity to influence selection would ordinarily have more democratic legitimacy than mechanisms that do not allow for internal participation in the selection of foreign judges.

Even if there is democratic legitimacy through consensual processes regarding the design and selection of foreign judges to serve on national tribunals (or as much democratic legitimacy as exists for the design and selection of national judges who sit on the same tribunals), appearances of illegitimacy may arise. An analogy in this context is the role of foreign law in domestic constitutional interpretation, which is sometimes attacked as illegitimate. As each of us has argued, foreign law can be used to inform decision-making in a way that involves national actors engaging in broader and deeper debate about their own constitutional structures and doctrines, and in this way to enhance domestic decisional processes by ensuring that they are deliberative and consistent with commitments to reflection and public reason-giving.<sup>162</sup> But even if used in a normatively appropriate way, foreign law may trigger hostility—and so, too, might the role of foreign judges, however appropriately authorized or constituted. Indeed, adverse perceptions of foreign judges on one tribunal may be magnified by the presence of foreign judges on other national tribunals, as may have been the case in BiH.<sup>163</sup>

As noted above, all judges in constitutional democracies sit in a complex relationship with commitments to democratic self-government. Some constitutional scholars argue that judicial review of statutes is democratically suspect: Jeremy Waldron, for example, argues that there are a range of constitutional questions on which reasonable people may disagree, and therefore giving judges the final power to decide these questions is inconsistent with a commitment to democracy or equality among citizens in the process of self-government.<sup>164</sup> Waldron argues, further, that judicial review does not become democratic simply because it is endorsed by democratic majorities.<sup>165</sup>

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162. See generally JACKSON, *supra* note 98; Vicki C. Jackson, *Transnational Challenges to Constitutional Law: Convergence, Resistance, Engagement*, 35 *FED. L. REV.* 161 (2007); Dixon, *supra* note 122.

163. See *supra* notes 84–90 and accompanying text.

164. JEREMY WALDRON, *LAW AND DISAGREEMENT* (1999); Jeremy Waldron, *The Core of the Case against Judicial Review*, 115 *YALE L.J.* 1346 (2005).

165. See WALDRON, *LAW AND DISAGREEMENT*, *supra* note 164, at 255–57. Similarly, Waldron argues that the fact that democratic majorities may, at one point, choose to surrender power to non-democratic procedures does not make them democratic from the

There are, however, potentially important differences among different models of judicial review and selection processes for choosing judges: if judicial review is relatively “weak,” or judicial decisions can be easily overridden, democratic objections to judicial review will be less pressing.<sup>166</sup> Similarly, if judges are appointed by a process providing for some democratically authorized input, with terms fixed within some reasonable time limit and staggered to allow for new governments democratically elected over time to have some input into who sits, concerns about the democratic legitimacy of courts’ constitutional role may be reduced. That is, if democratic majorities have regular opportunities to renew their consent to judicial review and/or to influence its broad direction, this may well attenuate potential democratic objections. The same might also be said of judges who are reflective of—if not actually chosen by—current democratic majorities.<sup>167</sup>

The difficulty for foreign judges in this context, however, is that their outsider status means that they are less likely to be—or be viewed as—reflective of national majorities in this way.<sup>168</sup> For political constitutionalists, it may mean their decisions are subject to an even greater democratic deficit than those of national judges. And for many ordinary citizens, it may mean that they do not see the relevant judge or court as reflecting their interests or perspectives in any meaningful sense.

This danger seems especially great in constitutional cases, as where a hybrid court is also a constitutional court or an appellate court with final jurisdiction over constitutional issues, rather than an appellate court that only resolves disputes between private litigants developing or applying common law and ordinary statutes.<sup>169</sup> In an ordinary appellate context, foreign judges may be perceived as playing a role similar to that of an international arbitrator—i.e., that of an

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perspective of subsequent generations. *See id.*, at 270–75. Waldron is not alone in arguing for a more “political” understanding of constitutionalism, one in which courts would play a much smaller role than parliaments. *See infra* note 166.

166. *See* Rosalind Dixon & Adrienne Stone, *Constitutional Amendment and Political Constitutionalism: A Philosophical and Comparative Reflection*, in *PHILOSOPHICAL FOUNDATIONS OF CONSTITUTIONAL LAW* 95, 100–01 (David Dyzenhaus & Malcolm Thorburn eds., 2016); *see also* MARK TUSHNET, *WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW* (2009).

167. *Cf. e.g.*, Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 *J. PUB. L.* 279, 180–81 (1957); Barry Friedman, *The Politics of Judicial Review*, 84 *TEX. L. REV.* 257, 322–23 (2005).

168. *See* Dziedzic, *supra* note 4, at 73.

169. We are indebted to Adrienne Stone for pressing us on this point.

impartial expert, deciding issues primarily of concern to the parties in a commercial context. In constitutional cases, in contrast, they will often be deciding questions about the basic structure and functioning of government, the scope of individual rights, and the most basic norms of political justice in a society.

### *C. Fostering Dependency and Lack of Incentives to Develop Local Judging Capacity*

Although attracting foreign support for courts' work may seem an unmitigated good, questions have been raised about whether in the long-run foreign aid may do more to undermine rather than promote growth and good-government in countries in the Global South.<sup>170</sup> A specific potential disadvantage to the use of foreign judges is the possibility that their availability will delay the development and recruitment of indigenous judges, to the detriment of the country in which the court sits. It may cause governments to allocate scarce funds for human capital development to other areas. It might signal to young lawyers to pursue careers other than domestic judging and undermine opportunities for local judges to gain appellate experience. Reliance on foreign judges may promote an idea of independence that is too demanding, conveying the sense that no insider could possibly be independent enough. Use of foreign judges at an early stage in a new court's development, however, for a limited time, may have different effects than ongoing, indefinite reliance on such judges.<sup>171</sup>

## IV. FACTORS INFORMING THE TRADE-OFF: WHY FOREIGN JUDGES, WHO, BY WHAT MEANS, HOW, AND WHEN?

The trade-off between the advantages and disadvantages to foreign judging in a constitutional context, we suggest, will ultimately depend on a range of contextual factors—including *why* they are appointed to a court and the degree of domestic support for their ap-

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170. See, e.g., Ana Swanson, *Does Foreign Aid Always Help the Poor*, WORLD ECON. FORUM (Oct. 23, 2015) <https://www.weforum.org/agenda/2015/10/does-foreign-aid-always-help-the-poor/> [<https://perma.cc/VKH7-3QMM>] (summarizing arguments of Angus Deaton, Nobel Prize winner in economics); Angelle B. Kwemo, *Making Africa Great Again: Reducing Aid Dependency*, BROOKINGS (Apr. 20, 2017), <https://www.brookings.edu/blog/africa-in-focus/2017/04/20/making-africa-great-again-reducing-aid-dependency/> [<https://perma.cc/3BKB-MYMM>].

171. Cf. *supra* note 93 (noting aspects of history of legal education in Fiji).

pointment, *who* the foreign judges are, *by what means* they are appointed and their positions and assignments structured, *how* foreign judges approach their role, and *when* they exercise their role. Each of these is discussed below.

Many, though not all, of these factors are similar to those we identified as relevant to “outsider” forms of constitutional interpretation.<sup>172</sup> At the same time, the trade-offs may well differ in the context of domestic constitutional adjudication; constitutions are supposed to provide the supreme law of the land, and thus the ultimate source of legitimacy for all other legal and political acts in a country. There is thus additional reason for sensitivity to issues of local, as opposed to foreign or international, control over the appointment of any foreign judges and to the broader institutional context and timing of their involvement.

Ultimately, the value of foreign judges will largely depend on their capacity truly to serve as hybrids, blending national and transnational, in serving as national constitutional judges. How much they are able to do so will depend on a range of factors, including their capacity to create a bridge between different sources of legal knowledge and between insider and outsider perspectives. In some cases, the mere presence of a foreign judge on a court might create an awareness of a legally trained, nonpermanent, external eye on what is happening, a bridge to outside evaluation that may conduce to more impartial or professional decision-making by other members of the bench. Similarly, foreign judges’ presence may influence compliance with court decisions, by reminding local executive and legislative officials that there are both local and international audiences for court decisions. For the most part, however, the capacity of foreign judges to serve as a bridge of this kind will depend on *how* judges approach their constitutional task, and whether they seek to engage in genuinely two-way exchanges by sharing their knowledge of foreign legal systems with other members of the bench and by learning from other judges and lawyers about local understandings of social facts, law, and context.

#### *A. Why Foreign Judges: Necessity, Benefit & Domestic Support for Their Appointment*

Why foreign judges play a role on a hybrid court will affect their legitimacy and effectiveness. The more there is a felt need and a broad national constituency for foreign involvement, the greater le-

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172. Dixon & Jackson, *supra* note 37, at 151–52.

gitimacy it is likely to have, at least starting out, whereas the more imposed it is (or is viewed as), the larger the barriers to achieving legitimacy and, arguably, effectiveness. Perceptions of the reasons and need for foreign judges may be affected by many other factors, including the size, ethnic composition, geopolitical context, and recent history of conflict in a jurisdiction. But the legitimacy of foreign judging will likely be influenced by the degree to which there is an active domestic constituency calling for or supporting the appointment of foreign judges. Calls of this kind may be affected by local political dynamics and the interests of domestic business and civil society groups, reflecting local perceptions about the necessity and benefit of hybrid court models.

Necessity is clearly an important factor in this context; the more limited the pool of lawyers suitable for judicial appointment at the national level, for example, the more foreign judges are likely to be viewed as making a valuable contribution to the domestic legal system.<sup>173</sup> Foreign judges, in these circumstances, may in fact be seen as a welcome alternative to *purely* off-shore or foreign models of constitutional judging, and thus as helping to nationalize rather than internationalize local systems of justice.<sup>174</sup> Conversely, the more foreign judges are seen to replace local lawyers or judges willing and able to assume high judicial office, the greater the likely opposition to their presence on a national court.

Questions of perceived national benefit will be important in this context; there may be real and immediately perceptible benefits in some countries to foreign judges serving on a national tribunal. Foreign judges may help reassure the global investor community about the stability and predictability of national law, in ways that encourage valuable forms of international economic investment. They may also be seen as a valuable bulwark against certain forms of foreign or elite control or domination; they may help protect and promote the autonomy or standing of a national court, compared to regional or international counterparts, or bolster local efforts to resist various forms of inappropriate pressure. Transnational judicial involvement may in some contexts be seen by some as an important guarantee of peace and security. National political processes may have led in the recent past to civil war, or even genocide, and thus the continued oversight of those processes by the international communi-

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173. This may be true both in the absence of suitably trained and willing lawyers, or where those who are available are not seen as suitably impartial in light of local ethnic and other divisions.

174. *Cf.* INT'L JUSTICE RESEARCH CTR., *supra* note 9 (noting countries that switched from Privy Council review to a regional court staffed by regional judges).

ty may provide much-needed reassurance to minorities that their rights will be protected against majoritarian abuse.

But in other cases, there may be little sense of there being a current or ongoing justification of this kind. Or there may be significant disagreement about the need for or benefits of foreign judges (or indeed any form of foreign, outsider constitutional influence). Such disagreement may itself pose obstacles to the success of a hybrid constitutional court. Especially in post-conflict settings, the necessity of a hybrid court model may arise from high levels of distrust among certain ethnic groups; but this distrust may itself undermine the likelihood that foreign judges will be widely enough perceived as independent and impartial.

In Hong Kong, for example, support for foreign judges was initially bolstered by a local perception that, even though Hong Kong has both a strong local bar (comprised of Hong Kong and foreign-born lawyers) and a relatively high GDP per capita, there would not be enough suitably qualified lawyers willing to accept judicial appointment to the HKCFA at the time of handover.<sup>175</sup> Yash Ghai has also suggested that a major reason given for the appointment of foreign judges to the HKCFA was as a means of reassuring the international business community that there would be continuity in the general legal-commercial regime, following the handover of sovereignty over the territory.<sup>176</sup> By appointing respected foreign judges, many with commercial expertise, the Hong Kong authorities created important continuity with the period in which there was the potential for appeals in such matters to the Privy Council.<sup>177</sup> By appointing judges with a reputation for independent judgment, they likewise sent a valuable signal to investors about the commitment to independence in the interpretation and enforcement of commercial contracts.<sup>178</sup> This also had clear value to the large number of Hong Kong residents who depend on international trade, investment, and business for their day-to-day livelihood.<sup>179</sup> And over time, a wide variety of civil society groups have also actively supported and defended the role of foreign judges—as valuable to democracy and the rule of law, Hong

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175. See Young, *supra* note 4, at 134; see also GHAI, *supra* note 55, at 301–04, 332–33.

176. See GHAI, *supra* note 55, at 301–04, 332–33.

177. Young, *supra* note 4, at 134 (noting end of Privy Council role in 1997).

178. On signalling in constitutional law, see *supra* note 99.

179. On the importance of international trade to Hong Kong's economy, see *Economic and Trade Information on Hong Kong*, HKTDC RESEARCH (Feb. 28, 2019), <http://hong-kong-economy-research.hktdc.com/business-news/article/Market-Environment/Economic-and-Trade-Information-on-Hong-Kong/etihk/en/1/1X000000/1X09OVUL.htm> [https://perma.cc/ZH7J-QLKE].

Kong's autonomy, and its commercial reputation.

Foreign judges in Hong Kong have benefited from a perception that they help contribute to the autonomy of Hong Kong as a SAR within China.<sup>180</sup> Their distinctive training and perspective, their independence from Beijing, and broader global reputation can all contribute to maintaining the autonomy of the HKCFA—as an independent, common law court, rather than a Chinese-style civil law, governmental instrumentality.<sup>181</sup> And while, for some, this is an increasing source of resistance to the role of foreign-born judges, for others it is a source of ongoing support for the role of such judges.<sup>182</sup>

In Fiji, the small and ethnically divided nature of the society has supported a perception that there is a need for foreign judges to serve on the country's highest courts.<sup>183</sup> Even the most able and

180. See, e.g., *Hong Kong: China Interferes in Judiciary's Independence*, HUMAN RIGHTS WATCH (Nov. 4, 2016), <https://www.hrw.org/news/2016/11/04/hong-kong-china-interferes-judiciarys-independence> [<https://perma.cc/XN6E-PHH9>] (linking interference with judicial independence to interference in Hong Kong autonomy and independence).

181. For discussion, see, e.g., Todd Schneider, *David v. Goliath: The Hong Kong Courts and China's National People's Congress Standing Committee*, 20 BERKELEY J. INT'L L. 575 (2002); Young, *supra* note 4, at 93 (noting the positive impact of the HKCFA on basic principles of human rights, and the maintenance of Hong Kong's distinctive legal system); Lo, *supra* note 11 (suggesting that from the perspective of the practitioners of the Hong Kong separate and largely autonomous legal and judicial systems, the influence of the overseas NPJ is favored but that of the NPCSC's legis-prudence is not); P.Y. Lo, *An Internationalist, Consequentialist and Non-Progressive Court: Constitutional Adjudication in Hong Kong*, 2 CITY U. H.K. L. REV. 215 (2010) (arguing that the HKCFA has helped promote HKSAR's autonomy and its common law legal system). *But see* Anne R. Fokstuen, *The Right of Abode Cases: Hong Kong's Constitutional Crisis*, 26 HASTINGS INT'L & COMP. L. 265, 286–87 (2003) (arguing that decisions of this kind have in fact undermined judicial independence in Hong Kong).

182. For current controversy, see Cliff Buddle, *Why Criticising Hong Kong's Foreign Judges for Not Understanding the City is Ridiculous*, S. CHINA MORNING POST (Jan. 13, 2018), <https://www.scmp.com/week-asia/opinion/article/2128060/why-criticising-hong-kongs-foreign-judges-not-understanding-city> [<https://perma.cc/UGZ6-BQMG>]; Eddie Lee, *Beijing Throws the Book at Foreign Judges*, S. CHINA MORNING POST (Mar. 9, 2017), <https://www.scmp.com/news/hong-kong/law-crime/article/2077521/experts-line-throw-book-hong-kongs-foreign-judges> [<https://perma.cc/U9EQ-WSNU>]; Dennis Kwok, *Why Foreign Judges are Critical to Hong Kong's Judicial System*, H.K. FREE PRESS (Apr. 10, 2017), <https://www.hongkongfp.com/2017/04/10/foreign-judges-critical-hong-kongs-judicial-system/> [<https://perma.cc/H474-9JHG>]. For ongoing support, see, e.g., Alvin Lum, *Foreign Judges Key to Success of Hong Kong's Top Court, Chief Justice Says*, S. CHINA MORNING POST (Jun. 26, 2018), <https://www.scmp.com/news/hong-kong/hong-kong-law-and-crime/article/2152512/foreign-judges-key-success-hong-kongs-top> [<https://perma.cc/4P3Q-8BHC>].

183. See, e.g., Boyd, *supra* note 24, at 307 (noting that the “tension and mistrust” between the indigenous Fijians and the Indo-Fijian communities mean that “a judge from either community can be suspect by the other,” even absent any actual bias and that

qualified local lawyers often have close links to senior members of the political community.<sup>184</sup> Although the coup of 2006 and events around the 2009 *Qarase* decision have given rise to much concern about judicial independence and the rule of law in Fiji,<sup>185</sup> Fiji's government—notwithstanding the mass dismissal of judges after the *Qarase* decision (by a panel of three Australian judges)—has continued to appoint foreign judges to its courts, albeit from a different mix of jurisdictions and backgrounds.<sup>186</sup>

In BiH, in some contrast, there appear to be high levels of internal disagreement about the role of foreign judges. Serbian politi-

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“[a]ppointment of an expatriate judge avoids this complication,” allowing the court’s judgment to be “respected by the whole community”).

184. See Douglas Interview, *supra* note 108.

185. For relevant discussion, see, e.g., Dziedzic, *supra* note 4, at 83–84; Letter from J. Guy Joubert, Canadian Bar Ass’n, to Hon. Lawrence Cannon, Minister of Foreign Affairs of Canada (July 27, 2009), <https://www.cba.org/CMSPages/GetFile.aspx?guid=97274c41-fcf1-41c3-b282-d33072165e3d> [<https://perma.cc/TD9Y-LCYJ>] (concerning “deterioration of the rule of law in Fiji” and the government’s interference with efforts by Graham Leung, former President of the Fiji Law Society, to “detail the severe . . . repercussions for Fiji arising from the coup and suspension of the constitution” in a “country unable to prosper as a result of the decline of the rule of law”); THE LAW SOCIETY CHARITY, FIJI: THE RULE OF LAW LOST 10, 11 (2012) (stating that “[i]t was the reversal of the *Qarase* decision by the Court of Appeal which brought on the dismissal of the judges” and concluding that “the Rule of Law no longer operates in Fiji,” “there is no democracy,” and “the independence of the judiciary cannot be relied on”); *Fiji’s A-G ‘Threatening Lawyer’s Group,’* SYDNEY MORNING HERALD (Nov. 26 2008), <https://www.smh.com.au/world/fijis-ag-threatening-lawyers-group-20081126-6i24.html> [<https://perma.cc/6BEY-5XCM>] (noting “widespread accusations” that courts had lost their independence since the 2006 coup and referring to attacks in recent times on courts after controversial rulings, including a lower court “finding that the 2006 coup was legal”).

186. In 2009, following the Court of Appeal’s *Qarase* decision holding unlawful Bainimarama’s seizure of power (a decision that was not complied with), the entire judiciary, including the three Australian judges responsible for the *Qarase* decision, were dismissed and “[a] number of Australian lawyers who sat as Fiji judges were caught up in the storm and have since not sought to be reappointed.” Richard Ackland, *Devils’ Deal? Gates to Be the Judge of That*, SYDNEY MORNING HERALD (Nov. 6, 2009), <https://www.smh.com.au/politics/federal/devils-deal-gates-to-be-judge-of-that-20091105-i066.html> [<https://perma.cc/47R9-GDJW>]. Fiji, however, continues to rely on foreign judges, a number of them from Sri Lanka, and, at least as of 2012, many of these on short-term contracts. See, e.g., *Fiji Appoints Another Sri Lankan Judge*, RADIO N.Z. (May 6, 2015), <https://radionz.co.nz/international/pacific-news/272937/fiji-appoints-another-sri-lankan-judge> [<https://perma.cc/4BP7-JCLL>]; LAW SOCIETY CHARITY, *supra* note 185, at 3, 10; see also 2013 Fiji Const., art. 105(2), (3) (contemplating the appointment of judges from other countries); Dziedzic, *supra* note 4, at 83–84 (noting concerns in Fiji about the susceptibility of its foreign judges, whom Dziedzic describes as mostly from Sri Lanka, to influence by the executive that controls their appointment and tenure); *supra* note 112.

cal elites, in particular, have challenged the appropriateness and need for foreign judges on the Constitutional Court. Indeed, following a Constitutional Court decision invalidating a Serbian national holiday, Serbian politicians attacked the court and the role of the court's foreign judges, holding a referendum (ignoring the Court's effort to restrain it) on whether to add language to the Constitution of the Republic of Srpska to override the effect of the decision.<sup>187</sup> The referendum passed by an overwhelming majority, and the holiday was restored to the calendar with only minimal concessions to the non-discrimination principles emphasized by the court.<sup>188</sup> And the Republic of Srpska wrote the U.N. Security Council claiming, among other things, that the role of foreign judges on the court is incompatible with "BiH sovereignty and democracy."<sup>189</sup> How much of the Serbs' unhappiness was due to the content of various decisions<sup>190</sup> and how much to the involvement of foreign judges is uncertain, but the foreignness of the judges was explicitly invoked as a basis to resist the court and to terminate foreign judges' role.<sup>191</sup>

Some important degree of domestic support for foreign judges, and the court's role more generally, remains: in 2008, for example, attempts to amend the BiH Constitution to remove foreign judges

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187. See Matthew Brunwasser, *Bosnian Serbs Challenge Dayton Order in Referendum*, POLITICO (Sept. 25, 2016), <https://www.politico.eu/article/bosnian-serbs-challenge-dayton-order-in-referendum-milorad-dodik-the-president-of-republika-srpska/> [https://perma.cc/ZLU7-QB98]; Rodolfo Toe, *Bosnian Croats, Serbs United Against Foreign Judges*, BALKAN TRANSITIONAL JUSTICE (Dec. 2, 2015), <http://www.balkaninsight.com/en/article/croat-and-serb-parties-call-for-reform-of-the-constitutional-court-of-bosnia-and-herzegovina-12-01-2015> [https://perma.cc/6L53-VJXT]; Elameri Skrgic Mikulic, *Bosnian Serbs Indicted for 'Statehood Day' Referendum*, BALKAN TRANSITIONAL JUSTICE (July 13, 2017), <http://www.balkaninsight.com/en/article/bosnian-serbs-indicted-for-statehood-day-referendum-07-13-2017> [https://perma.cc/HB7Y-GA2K]; OHR, Special Report on a Referendum in Republic of Srpska Against Bosnia and Herzegovina State Constitutional Court Decisions (Oct. 21, 2016), <http://www.ohr.int/?p=96479> [https://perma.cc/FHC8-BZMC]; *Bosnian Serbs Mark Controversial "Statehood" Holiday*, RADIO FREE EUR. (Jan. 9, 2017), <https://www.rferl.org/a/bosnian-serbs-to-hold-divisive-statehood-day-holiday/28220835.html> [https://perma.cc/2RG8-RKB7].

188. Brunwasser, *supra* note 187; RADIO FREE EUR., *supra* note 187.

189. REPUBLIC OF SRPSKA'S 18TH REPORT TO THE U.N. SECURITY COUNCIL, at 1 (Oct. 2017), <http://www.predsjednikrs.net/wp-content/uploads/2017/10/18th-Report-to-UNSC-w-Cover-letter.pdf> [https://perma.cc/4VUQ-79HD]; *see also id.* at 4–9.

190. *See id.* at 4, 7 (complaining about the foreign judges aligning with Bosniak judges to "unlawfully alter" the constitutional arrangement, e.g., in a case invalidating Republika Srpska's RS Day holiday and in other cases claimed to undermine the power of a constituent people to block national legislation).

191. *See* Toe, *supra* note 187; REPUBLIC OF SRPSKA'S 18TH REPORT, *supra* note 189, at 2.

from the Constitutional Court were ultimately unsuccessful. This was arguably linked to a perception among Bosniak and certain Croat leaders of the need for some form of ongoing international monitoring of the terms of the Dayton Accord, and that foreign judges were perhaps one of the better ways of achieving such monitoring.<sup>192</sup> But there is also equally clear opposition to the role of foreign judges in BiH, especially among Serb elites, who argue that such a role is not only unnecessary but affirmatively detrimental to democratic self-government in BiH, perhaps viewing it as part of a web of outsider transnational control over national democratic processes. This arguably reflects deeper tensions about the role of the international community under the Dayton Accords.<sup>193</sup>

### *B. Who the Foreign Judges Are*

Who foreign judges are can also affect the perceived legitimacy of any foreign judicial role. If, for example, individual judges have a strong ingoing reputation (especially with extensive judicial experience), this is likely to enhance overall judicial legitimacy, whereas if judges are relatively unknown or inexperienced, this may weaken the knowledge-based, impartiality-promoting, and relational benefits of hybrid models of judging.

Foreign judges are ultimately a diverse class; they may, as we note above, have quite different levels of experience or familiarity with the jurisdiction in which they are appointed.<sup>194</sup> They may also

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192. Feldman Interview, *supra* note 115.

193. On opposition from Serb political leaders to the overall degree of international control in BiH, see e.g., *Referendum on Republika Sprska Day—First in a Series of Referendums*, SPRSKA TIMES (July 25, 2016), <http://thesrpskatimes.com/referendum-on-republika-srpska-day-first-in-a-series-of-referendums/> [<https://perma.cc/S8DS-DXVB>]. On opposition to the role of foreign constitutional judges specifically, see Danijel Kovacevic, *Bosnian Serbs Plan Challenge to Constitutional Court*, BALKAN INSIGHT (Nov. 30, 2015), <https://balkaninsight.com/2015/11/30/bosnian-serb-leaders-pledge-to-change-bosnia-s-constitutional-court-11-30-2015-1/> [<https://perma.cc/YSX8-H8EY>] (noting statements from Serb leaders that “the Constitutional Court decision was made with the intervention of international representatives and that there is a need to adopt a law on the Constitutional Court as soon as possible”, and criticizing a court decision as “unacceptable [because] it is a judgment of foreigners whose deadline expired ten years [earlier]”). *Cf. supra* note 190.

194. In Fiji, for example, judges such as Handley grew up there and spoke the local language (though he left when still a child), while other judges do not speak the local languages and just flew in and out for appeals. *See* Interview with Kenneth Handley, Former Judge of the NSW Court of Appeal, Vice President of Court of Appeal of Tonga, and Former Judge of the Courts of Appeal of Fiji, Tonga, and Kiribati (Nov. 21, 2017). Other judges lived in the region for a long period, again giving them direct experience of the

vary in professional experience and skill,<sup>195</sup> and in national origin, in ways that implicate perceptions of their independence and expertise, and of perceived neocolonial rule.<sup>196</sup>

Different kinds of foreign judges will bring with them quite different forms of knowledge and experience; foreign lawyers will generally bring with them knowledge of foreign case law and statutory developments, and will often have informal knowledge as to the practice and procedure governing trials and appeals. Academics will have similar formal knowledge of the law, though often in a narrower, more specialized area, and potentially broader knowledge of theoretical and comparative developments within their area of expertise. Foreign judges, in turn, will often have broad knowledge of formal legal precedents and of informal trial and appellate practice. In some cases, they may also have valuable informal knowledge about how courts interact with the legal profession, and political branches of government. Appellate judges in some legal systems (e.g., in Australia or the United Kingdom) are likely to deliver at least some opinions in their career that go against the interests of powerful private or public actors, thereby gaining experience in crafting opinions that help reduce potential backlash or opposition.

There can also be important differences even amongst former judges in their level of legal skill, experience navigating legal and political crises, and their public profile. Chief justices, for example, all else being equal, will generally have more experience dealing with issues of judicial administration and the court's relationship with the political branches; as foreign judges, former chief justices may thus have especially valuable informal knowledge about how best to approach cases in which government compliance with the decision is in doubt. Individual judges will also differ in the degree to which they have skills of this kind, as well as formal legal skills.

The same is true of the reputation of foreign judges: some

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local jurisdiction. Similarly, in BiH, most foreign judges had limited exposure to the country, but Judge Joseph Marko spoke the local language and had exposure to Croat-Slav culture through living near the Yugoslav border. Interview with Joseph Marko, Former Judge, Constitutional Court of Bosnia-Herzegovina (Nov. 24, 2017).

195. Some may be practicing lawyers or academics, while others may be retired judges or judges serving concurrently on another tribunal. In Hong Kong, for example, English judges have often served concurrently on both U.K. and Hong Kong courts, whereas Australian judges are all retired judges. See Spigelman Interview, *supra* note 125. For discussion of this distinction, and its importance in the Pacific, see also Dziedzic, *supra* note 4, at 26.

196. Harry Hobbs makes a similar point about foreign judges on international tribunals. See, e.g., Hobbs, *supra* note 34, at 517.

judges may have especially strong reputations, which bring important relational benefits, or the capacity to attract international attention to local constitutional developments, where others have lower public profiles. Some judges' special skills may also mean that they have a greater capacity to contribute to local legal knowledge; they may be more likely to deliver or contribute to decisions of international significance and be better placed to draw global attention to such developments.

In Hong Kong, for example, some foreign judges have played notable roles in the development of the HKCFA's jurisprudence.<sup>197</sup> Lords Millett and Hoffmann have made important contributions to the court's common law and commercial caseload.<sup>198</sup> Their reputation has also meant that these HKCFA decisions have attracted attention in other parts of the common law world.<sup>199</sup> On one view, the attention and respect this has garnered for the court may have spill-over benefits for its constitutional function: Respect for the court in the commercial world makes it a valuable asset both to Beijing and the Hong Kong executive.<sup>200</sup> It helps maintain Hong Kong as a leading center for commercial dispute resolution, with all the attendant economic benefits that can bring.<sup>201</sup> And this helps create additional insulation, or insurance, for the court against any pressure to under-

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197. Ghai, *supra* note 21, at 24–25; Fok, *supra* note 71, at 9–10.

198. Young & Da Roza, *supra* note 66, at 25 (noting that Mason and Lords Hoffman and Millett are “the most active NPs”). For illustrative cases, see, e.g., *Libertarian Inv. Ltd. v. Thomas Alexej Hall* [2014] 1 H.K.C. 368; *Nice Cheer Inv. Ltd. v. Comm’r of Inland Revenue* [2012] 28 H.K.C.F.A.R. 527; *Collector of Stamp Revenue v. Arrowtown Assets Ltd.* [2003] 6 H.K.C.F.A.R. 517; *Dir. of Lands v. Yin Shuen Enters. Ltd.* [2003] 6 H.K.C.F.A.R. 1.

199. A good example is the references to Millett’s judgment in *Libertarian*. See, e.g., *Agric. Land Mgmt. Ltd v. Jackson* [No 2] [2014] WASC 102 (Austl.); *AIB Group (U.K.) v. Redler* [2014] UKSC 58, ¶¶ 39, 57. See also discussion in James Lee, *Foreign Judges in Hong Kong and Singapore: Evaluating Reciprocity of Influence in Public Law* (unpublished manuscript, 2018) (on file with the *Columbia Journal of Transnational Law*).

200. On other circumstances in which one aspect of a court’s jurisdiction may contribute to its legitimacy in deciding other kinds of cases, consider Shapiro’s and Stone’s argument regarding the role of federalism cases in building the legitimacy of courts engaged in constitutional review. See Martin Shapiro & Alec Stone, *The New Constitutional Politics of Europe*, 26 COMP. POL. STUD. 397, 408–09 (1994); see also David Landau & Rosalind Dixon, *Constitutional Non-transformation? Socioeconomic Rights beyond the Poor*, in THE FUTURE OF ECONOMIC AND SOCIAL RIGHTS 124–31 (Katharine Young ed., forthcoming 2019). For discussions of other kinds of spillovers, involving “externalities” from domestic constitutional adjudication that affect other countries, see Dixon & Jackson, *supra* note 37, at 168–69.

201. See, e.g., Mason, *The Hong Kong Court of Final Appeal*, *supra* note 11, at 216 (noting that Hong Kong is a major center for international commercial arbitration).

mine its independence in interpreting the Basic Law.

Sir Anthony Mason, a highly respected former Chief Justice of Australia, has similarly had a significant influence on the HKCFA's constitutional jurisprudence.<sup>202</sup> Between 1999 and 2009, Mason sat on ninety-one appeals and authored twenty-five majority judgments for the Court.<sup>203</sup> Only Chief Justice Andrew Li issued more majority opinions during the same period interpreting rights under the Basic Law.<sup>204</sup> Mason was also a member of the panel for some of the most significant and controversial decisions of the HKCFA—including the first right of abode case, which gave a broad construction to the right to live in Hong Kong and which was overruled (in effect) by the Standing Committee of the National People's Congress ("NPCSC").<sup>205</sup> Mason also participated in subsequent right of abode cases that emphasized the ongoing importance of common law principles of interpretation and the domain of autonomous decision-making left to the HKCFA, even after the NPCSC decision.<sup>206</sup>

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202. Interview with Andrew Li, Former Chief Justice of Hong Kong (Dec. 11, 2017). See Fok, *supra* note 127, at 14 (noting Sir Anthony Mason's "preeminence in constitutional law," which "made him an obvious choice to hear cases in that field"); see also Young, *supra* note 4, at 134–35.

203. Young & Da Roza, *supra* note 66, at 4 (noting patterns of judicial decision-making on the court from 1999–2009). For Mason's entire tenure, that figure was 106 appeals, thirty-four majority opinions, and eight concurring opinions. See Fok, *supra* note 127, at 13–14.

204. He authored seventeen majority opinions, compared to Mason's twelve opinions in cases involving the Basic Law. Other permanent judges, such as Bokhary and Ribeiro PJJ, issued ten and eleven, respectively. See Young, *Constitutional Rights*, *supra* note 71, at 79. See generally Email from Andrew Li, Former Chief Justice of Hong Kong (Dec. 6, 2017) (on file with the *Columbia Journal of Transnational Law*); Li Interview, *supra* note 202.

205. Ng Ka Ling v. Dir. of Immigration [1999] 2 H.K.C.F.A.R. 4. For discussion, see also Daly, *supra* note 145, at 207; Schneider, *supra* note 181, at 581–86; Lo, *supra* note 11; Fokstuen, *supra* note 181, at 265.

206. See, e.g., Dir. of Immigration v. Chong Fung Yuen, [2001] 4 H.K.C.F.A.R. 11 (emphasizing that under the common law the scope of various "excluded provisions" under Art. 24 of the Basic Law was ultimately a question that depended on the text and context, and was not controlled by any specific aspect of the legislative history); Lau Kong Yung v Director of Immigration, [1999] 2 HKCFAR 300, 344–48 ¶¶ 157–68 (Mason, J. concurring) (discussing the "conjunction of a common law system under a national law within the larger framework of Chinese constitutional law," affirming the broad interpretive authority of the NPCSC but also indicating that a free-standing interpretation by the NPCSC cannot reopen "judgments previously given [which] are protected by the vesting of judicial power in the courts of the Region and the vesting of the power of final adjudication in the Court of Final Appeal"). In the first case, *Chong Fung Yuen*, Mason was simply one of five judges who joined in the unanimous decision of the Court authored by Andrew Li, but his general views on interpretation, and approach in related cases, have been expressly noted by Hong Kong scholars. See, e.g., Lo, *supra* note 181, at 222–26.

Mason also sat on a five-judge bench on the Congo sovereign immunity case, joining a majority of the divided court in holding that Congo was protected by China's absolute sovereign immunity rule.<sup>207</sup> The court, in an opinion by Justices Chan, Ribeiro, and Mason, pointed out similarities between the "absolute" and "restrictive" theories of State sovereign immunity, rather than focusing only on differences between the absolute theory of immunity found in the law of China, which the court found controlling, and the prior common law view of the restrictive theory of immunity. The court also drew analogies between the role of the legislative and executive branches in the United Kingdom and in China in calibrating the extent of sovereign immunity in the two countries, perhaps with a goal of mitigating perceptions that the HKCFA was not acting independently in determining the law in a way that differed from how its common law counterparts in other parts of the world would operate.<sup>208</sup>

While there is no doubt much room for debate about the results in these cases,<sup>209</sup> and Mason was only one of several judges who joined the majority opinion in each case, he clearly brought a well-honed juridical intelligence and considerable comparative knowledge to an already sophisticated bench.<sup>210</sup>

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207. *Dem. Rep. Congo v. FG Hemisphere Assoc.* [2011] 14 H.K.C.F.A.R. 95.

208. *See id.* ¶¶ 213 (noting that "[b]efore 1975, the traditional common law doctrine, applied in Hong Kong as in the United Kingdom, was that the immunity of foreign states was absolute"), 258 (noting that as a matter of statute, the executive branch in the United Kingdom has broad power "to calibrate the extent of state immunity granted to a foreign State on the basis of reciprocity and in accordance with the international rights and obligations of the United Kingdom"), and 296–98 (suggesting that declarations from the Hong Kong Chief Executive "are to be treated in much the same way as declarations of such facts of state by the executive have been treated at common law [and indeed in statutory State immunity regimes] in the United Kingdom and the United States" and that "[t]he common law jurisprudence on matters such as waiver of state immunity and the interplay between such rules and other branches of the law including the law of arbitration will continue to require judicial determination in particular cases. No doubt further legal issues will arise for judicial decision from time to time. . . . [And any] suggestion that acceptance by the courts of statements by the executive [should be seen as] . . . the courts abdicat[ing] . . . their proper judicial role" should be rejected.). *See also* Cora Chan, *Reconceptualising the Relationship Between the Mainland Chinese Legal System and the Hong Kong Legal System*, 6 AM. J. COMP. L. 1, 9–10 (2011).

209. On the right of abode, see Fokstuen, *supra* note 181, at 268–72, 275–78; Schneider, *supra* note 181, at 582–83. On the Congo case, see Simon N.M. Young, *Immunity in Hong Kong for Kleptocrats and Human Rights Violators*, 41 H.K. L.J. 421, 429 (2011) (not making any direct criticism of the decision itself, but noting the decision's regrettable consequences for human rights and international accountability).

210. *See, e.g.*, Interview with Murray Gleeson, Former Chief Justice of Australia, Non-Permanent Judge of the Hong Kong Court of Final Appeal (Mar. 23, 2017); Spigelman

*C. By What Means: How a Court Is Appointed and Constituted & the Broader Transnational Context*

By what means, and in what institutional matrix and transnational context, judges are appointed may likewise affect the perceived legitimacy of a foreign judge's role. As suggested earlier, in general the legitimacy of foreign judges may be enhanced where they are appointed by or in consultation with national authorities. The particular institutional structures in which the judges operate may also have legitimacy effects; it might be that a panel decision that includes a foreign judge who joins with national judges will be viewed with less suspicion than will a panel decision made up only of foreign judges. Finally, the transnational context and goals of a system for including foreign judges may influence, in different directions, their perceived legitimacy and independence. We elaborate these points below.

1. Mode of Appointment

The mechanisms by which foreign judges are appointed may affect their perceived legitimacy.<sup>211</sup> The more foreign control there is over the appointment process for foreign judges, the greater the potential for democratic objections to their role. Whether and to what extent local control of various sorts will enhance legitimacy is uncertain, but foreign control has an obvious propensity to attract critique.<sup>212</sup> To the extent that the foreign judges are viewed as part of a foreign or transnational set of "outside" interests, their legitimacy domestically may be undermined or put in question. In general (though there may be exceptions), the more that foreign judges are viewed as part of a systematic pattern of transnational influence or

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Interview, *supra* note 125.

211. Cf. BRIT. INST. OF INT'L AND COMPARATIVE LAW, CAPE TOWN PRINCIPLES 2 (2016) (noting that the process of selecting judges should aim to promote public confidence in the judiciary). For an argument against foreign law in constitutional adjudication based on the absence of domestically democratic methods of selecting foreign judges, see Roger P. Alford, *In Search of a Theory of Constitutional Comparativism*, 52 UCLA L. REV. 639, 709–10 (2006) (“[W]hile all domestic judicial decisions have a certain degree of democratic legitimacy, foreign judges have no democratic legitimacy. Immune to the democratically corrective forces of judicial election or executive nomination, there is no democratic check that the United States can impose upon the rulemaking power of foreign courts.”).

212. “Control” in this context may also comprise a range of dimensions—i.e., control or autonomy in the funding of judicial salaries, control over the nomination and appointment of judges, and in the allocation of judges to specific courts or matters. On funding, as well as other dimensions to judicial appointment processes, see, e.g., Dziedzic, *supra* note 110, at 10.

control, the more likely they are to be resented as undermining commitments to national self-government.

The three courts on which we focus provide contrasts on this point during the periods under study. In Hong Kong, foreign judges are appointed by the Chief Executive of Hong Kong on the recommendation of an independent commission composed of local judges, lawyers, and community leaders. The Chief Justice, who cannot be a foreign judge, is the Chairman *ex officio*, and the Secretary of Justice (equivalent to an attorney general) is a member *ex officio*. For HKCFA judges, including non-permanent foreign judges, the Chief Executive must, in addition, seek endorsement from the Legislative Council and report it to the NPCSC.<sup>213</sup> In Fiji, under the 1997 Constitution, foreign judges were appointed by the President on the recommendation of the Judicial Services Commission following consultation with the Minister and sector standing committee of the House of Representatives responsible for matters relating to the administration of justice.<sup>214</sup> In BiH, by contrast, the role of foreign actors in appointing the foreign members of the bench is much greater; the President of the European Court of Human Rights appoints the three foreign judges “after consultation with the presidency of B-H.”<sup>215</sup> Such differences in the breadth and nature of local participation in appointing foreign members of the courts may be related to differences in the degree of domestic support for the role of foreign judg-

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213. THE BASIC LAW OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION OF THE PEOPLE'S REPUBLIC OF CHINA, CH. 4 ART. 90 (H.K.); Judicial Officers Recommendation Commission Ordinance (Cap. 92) (H.K.). *See also* Fok, *supra* note 71, at 5.

214. *See* 1997 Const. Fiji, § 132(2) (providing the process for the appointment of judges of the Supreme Court, the Justices of Appeal [including the President of the Court of Appeal], and the puisne Judges of the High Court, with no distinction made between foreign and non-foreign judges in respect of appointment, as long as they met the qualifications for appointment set out in § 130). The Judicial Service Commission comprised the Chief Justice, the chairperson of the Public Service Commission, and the President of the Fiji Law Society (§ 131(1)). Note that the appointment of the Chief Justice followed a different process: they were “appointed by the President on the advice of the Prime Minister following consultation by him or her with the Leader of the Opposition” (§ 132(1)). Appointments for acting judges could be made by the President on the recommendation of the Judicial Services Commission (§ 132(3)); but for the application of this section in relation to the appointment of an Acting Chief Justice in 2008–09, *see, e.g.,* INT'L BAR ASS'N HUMAN RIGHTS INST., *supra* note 43, at 44–47. Under the 2013 Constitution, foreign judges are appointed by the President on the recommendation of the Judicial Services Commission following consultation by it with the Attorney-General. *See* 2013 Fiji Const., § 106(1)–(4). *Cf.* 1970 Fiji Const., §§ 90, 94.

215. Bosn. & Herz. Const. art VI.1. *See* Grewe & Riegner, *supra* note 33, at 41; Joseph Marko, “United in Diversity”?: Problems of State- and Nation-Building in Post-Conflict Situations: The Case of Bosnia-Herzegovina, 30 VT. L. REV. 503, 517 (2006).

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## 2. Composition of a Court

The composition of a court, or of a panel deciding a case, as between foreign and local judges, may also bear on the court's perceived legitimacy. A court dominated by foreign judges might invite, to a greater degree, objections to its decisions—either by virtue of the foreignness of the judges or the specific historical, or perceived ongoing, geo-political interests of the countries from which foreign judges are drawn. How panels are assigned (perhaps especially if assignment is believed to be non-random) and who actually delivers the dispositive judgment might also matter in specific cases.<sup>217</sup>

As a possible example, one might point to the suspension of the constitution and removal of the entire Court of Appeal in Fiji in 2009, after a decision holding unconstitutional under the 1997 Constitution a military take-over that had occurred in 2006; the panel that issued the decision was made up entirely of Australian lawyers.<sup>218</sup> Whether the reliance on an all-foreign—indeed, all-Australian—bench made it easier for the government to reject the decision is uncertain.<sup>219</sup> Australia is also sometimes perceived by its neighbors as

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216. See Part IV.A, *supra*.

217. Even in well-established and entirely domestically-staffed courts, like the U.S. Supreme Court, sensitivity to regional interests has sometimes influenced the justice to whom an opinion is assigned. See, e.g., Alpheus T. Mason, *The Chief Justice of the United States: Primus Inter Pares*, 17 J. PUB. L. 20, 26–27 (1968) (recounting how, after the opinion in the all-white primary case was initially assigned to Justice Frankfurter to be written, Justice Robert Jackson wrote to the Chief Justice to say that, given the “ugly factors in our national life,” and the sensitivity of “deny[ing] the entire South the right to a white primary, which is one of its most cherished rights,” the strength of the Court’s decision would “be greatly weakened if the voice that utters it is one that may grate on Southern sensibilities”). Justice Jackson explained that Justice Frankfurter’s writing for the Court would have this adverse effect, because, inter alia, he was Jewish and from New England, the home of the movement to abolish slavery. The case was reassigned to Justice Reed, who was from Kentucky. For another example of how court rules or practices may recognize the importance of which of its judges hear particular matters, see Convention for the Protection of Human Rights, as amended by Protocol 14, art. 26(4), May 13, 2004, C.E.T.S. No. 194 (providing that a judge from the accused member State shall sit ex officio as a member of the Chamber or Grand Chamber deciding a case).

218. See Anita Jowitt, *The Qarase v. Bainimarama Appeal Case*, 13 J. S. PACIFIC L. 24, 29 (2009) (describing the Court of Appeal’s panel that decided *Qarase* as consisting of “three Australian judges, Powell JA, Lloyd JA and Douglas JA”); see also Corrin, *supra* note 78, at 195 (noting the President’s announcement, the day after the 2009 *Qarase* decision, that all judicial appointments were revoked).

219. The *Qarase* decision of 2009, referred to in text above, was made in the Spring of

exercising too much influence in the Pacific, or as having its own strategic priorities that are not necessarily the same as those of other governments in the region.<sup>220</sup>

Of course, having a mix of foreign and domestic judges is no guarantee against legitimacy concerns arising with respect to the democratic bona fides of the foreign judges, as illustrated by the frequent attacks on the foreign judges of the BiH Constitutional Court.<sup>221</sup> But some jurisdictions, like Hong Kong, limit the foreign judge to being only one member of a typically five-member bench. In Fiji, by contrast, it has not been uncommon to have all-foreign panels in important cases heard by the Court of Appeal,<sup>222</sup> whereas in

2009. In the Fall of 2009, the recently appointed Chief Justice (Anthony Gates) publicly pointed to Australia's policy of travel bans on senior government officials as evidence of its "hostility" towards Fiji. See Chris Merritt, *Fiji's Chief Justice Anthony Gates Triggers Expulsions*, AUSTRALIAN (Nov. 5, 2009), <http://www.theaustralian.com.au/business/legal-affairs/fijis-chief-justice-anthony-gates-triggers-expulsions/news-story/38c8f402c7a2f81a9078e85658ec78c8> [https://perma.cc/AA8Q-DQET]; *Fiji's Chief Justice Condemns Australian, NZ 'Interference' and 'Hostility,'* PACIFIC SCOOP (Nov. 3, 2009), <http://pacific.scoop.co.nz/2009/11/fijis-chief-justice-condemns-australian-nz-interference-and-hostility/> [https://perma.cc/7ZVS-GASQ]; see also *Fiji Welcomes Lifting of Travel Bans by Australia*, NZ, ABC NEWS (Mar. 30, 2014), <https://www.abc.net.au/news/2014-03-31/an-fiji-sanctions/5355728> [https://perma.cc/ARF6-LHPH]; Ackland, *supra* note 186 (noting that Gates began as a prosecutor in Fiji in 1977, left in 1987 for a few years, and returned in 1993 to work as a lawyer and then as a judge).

220. See, e.g., Jane Kelsey, *Australia and NZ's Power Politics Breed Resentment in Pacific*, N.Z. HERALD (Aug. 5, 2009) [https://www.nzherald.co.nz/nz/news/article.cfm?c\\_id=1&objectid=10588873](https://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10588873) [https://perma.cc/E2NB-AV9S]. This might also be one reason that a more diverse foreign bench, comprised of judges from Australia, New Zealand, the United Kingdom, and Papua New Guinea may have been seen as more legitimate in *Prasad*. The judges were respectively from New Zealand (Casey and Barker), Papua New Guinea (Kapi), the United Kingdom (Gordon War), and Australia (Kenneth Handley). See *Fiji Appoints New Judges as Expats Leave*, SYDNEY MORNING HERALD (Sept. 5, 2007) <https://www.smh.com.au/world/fiji-appoints-new-judges-as-expats-leave-20070905-xfg.html> [https://perma.cc/JXH6-UVQ4]. See also *supra* note 138 and accompanying text (noting compliance with the *Prasad* decision of 2000).

221. See *supra* notes 187–193 and accompanying text.

222. Since independence in 1970, Fiji has had a number of different constitutions—the Constitutions of 1987, 1990, 1997 and 2013—each creating a somewhat different set of provisions governing the composition and appointment of the judiciary. Foreign judges, however, have consistently played a prominent role under each of these constitutions—both in the ordinary administration of justice and in the resolution of key constitutional controversies. See, e.g., Dziedzic, *supra* note 4, at 67–68; STEPHANIE LAWSON, *THE FAILURE OF DEMOCRATIC POLITICS IN FIJI* 298 (1991); Yash Ghai & Jill Cottrell, *A Tale of Three Constitutions: Ethnicity and Politics in Fiji*, 5 INT'L J. CONST. L. 639, 663 (2007); Ratuva, *supra* note 82, at 113–14; Brij V. Lal, *Fiji's Constitutional Conundrum*, 372 ROUND TABLE 671, 672 (2003).

BiH, foreign judges comprise three out of the nine total members of the Constitutional Court. All other things being equal, a mix of local and foreign judges is likely to face lower legitimacy concern than an all-foreign bench.

The composition and institutional infrastructure of a court may also affect the capacity of foreign judges to contribute to its deliberations. If foreign and national judges share a common language, for example, this will make it much easier to work together in a cooperative way.<sup>223</sup> Where they speak different languages, their capacity to cooperate will largely depend on the effectiveness of translation services within a court, which will not always be broadly available.<sup>224</sup> Access to translation services of this kind can also affect the relationship between a court and the broader public: if the decisions of a hybrid court are not translated into local languages, this can substantially undermine a court's capacity to build national support and legitimacy.<sup>225</sup>

Foreign judges' capacity to work together, and with local judges, may also be influenced by whether they share a similar legal background; common law and civil law-trained lawyers may find it more difficult to work collectively, for example, than judges from the same legal tradition.<sup>226</sup> Other differences may also be significant,

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223. Compare Hobbs, *supra* note 34, at 517 (making similar arguments for international hybrid tribunals).

224. On language as an issue on the Constitutional Court of BiH, see, e.g., Feldman Interview, *supra* note 115; Marko, *supra* note 33, at 642; Interview with Constance Grewe, Former Judge, Constitutional Court of Bosnia-Herzegovina (Nov. 27, 2017). Early in the life of the court, there was in fact no official translation or budget for translation, and Marko often served as an informal translator. Marko Interview, *supra* note 194. But equally, informal interactions may sometimes occur even without the need for translation of this kind. Interview with David Feldman, Former Judge, Constitutional Court of Bosnia-Herzegovina (Nov. 27, 2017) (noting such interactions as important to the working of the court during his period on it).

225. See Joseph Marko, *Five Years of Constitutional Jurisprudence in Bosnia and Herzegovina: A First Balance*, 7 EUROPEAN DIVERSITY & AUTONOMY PAPERS 1, 11 (2004), [http://webfolder.eurac.edu/EURAC/Publications/edap/2004\\_edap07.pdf](http://webfolder.eurac.edu/EURAC/Publications/edap/2004_edap07.pdf) [https://perma.cc/BN8G-FZEA] ("From the standpoint of the rule of law it should however be critically noted that not only the Constitution, but also the constitutional law suffer from a lack of publicity. Even today, the Dayton Agreement including the Constitution has not yet been published in the Official Journal of Bosnia and Herzegovina.").

226. For example, a shared common law tradition among the judges has been noted as helpful to the effective operation of a hybrid constitutional court by some participants and observers. See, e.g., Mason, *The Hong Kong Court of Final Appeal*, *supra* note 11, at 217–18; Mason Interview, *supra* note 125; Gleeson Interview, *supra* note 210. See also Hobbs, *supra* note 34, at 514 (making similar arguments for international hybrid tribunals); Tochilovsky, *supra* note 40, at 321–23 (noting the challenges of combining common law

depending on the domestic constitutional system of the hybrid court's country; it may matter whether the foreign judges come from a monist or dualist background, for example, or from a constitutional system based on parliamentary supremacy or one based on notions of formal constitutional entrenchment.<sup>227</sup>

### 3. Broader Transnational Context

The actual and perceived benefits to foreign judges' presence on a court may be influenced by the broader transnational context: In some countries, there may be a diverse, internationalized bar operating alongside a hybrid constitutional or appellate court. A relationship of this kind may also pre- or post-date the appointment of foreign judges; in some cases, the presence of foreign lawyers may mean that there is an ingoing openness to the appointment of foreign judges. But in other countries, the role and prestige of foreign judges may help internationalize the local bar; there may be a sense that certain arguments are more likely to succeed in front of a foreign judge if they are made by leading foreign counsel.<sup>228</sup> Or foreign counsel may be more willing to accept briefs in a country if it means appearing before a respected or well-known national judge.<sup>229</sup> In either event, foreign lawyers and judges can play a mutually-reinforcing

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and civil law traditions in the operation of the ICTY); Patricia J. Wald, *The International Criminal Tribunal for the Former Yugoslavia: Some Observations on Day-to-Day Dilemmas of an International Court*, 5 J. L. & PUB POL'Y 87, 89–91 (2001) (noting the "sometimes uneasy and frequently awkward blend" of the different approaches of judges from civil as compared to common law jurisdictions). In BiH, however, judges such as Joseph Marko stressed that there were as many differences among civil law judges as between civil and common law-trained judges. Marko, *supra* note 33, at 663.

227. Some foreign judges suggested that such differences arguably mattered in BiH, for example. See, e.g., David Feldman, *The Nature and Effects of Constitutional Rights in Post-Conflict Bosnia and Herzegovina*, in RIGHTS IN DIVIDED SOCIETIES 151, 160 (Colin Harvey and Alex Schwartz eds., 2012); Marko, *supra* note 33, at 649, 659, 663; Marko Interview, *supra* note 194.

228. See Mason, *Sharing Expertise*, *supra* note 11, at 8.

229. In Fiji, for example, the quality of counsel that have appeared in key constitutional cases in the Court of Appeal and Supreme Court over the last fifteen years or so is striking. In *Prasad*, argument was led by Nicholas Blake QC and Geoffrey Robertson, QC. Lal, *supra* note 222, at 678. Counsel also included leading constitutional experts from the region. See Williams, *Republic of Fiji v Prasad*, *supra* note 58, at 146; Boyd, *supra* note 24, at 305. In the *Qarase* case, counsel included leading London Barrister Richard Gordon QC and Sydney Barrister Bret Walker SC. McClymont, *supra* note 140. Sir Anthony Mason notes, in contrast, that there were few foreign counsel appearing in the Court at the time of his appointment to the Fiji Supreme Court, though that changed within a few years. See Mason, *Sharing Expertise*, *supra* note 11, at 2.

role in helping promote broader and deeper forms of comparative engagement. Foreign lawyers may invite foreign and national judges to consider comparative legal precedents or developments, and foreign judges may then help guide and refine the scope and direction of such engagement.<sup>230</sup>

As noted earlier, foreign judges may be connected to a broader set of foreign actors in ways that mean they are viewed as *less* legitimate by local actors.<sup>231</sup> Where foreign control is negatively regarded, the more foreign involvement there is in day-to-day control of the government, the greater is the likelihood that foreign judges will be viewed as promoting foreign rather than national interests.

#### *D. How Judges Approach the Task: Deference, Use of Foreign or International Law, and Capacity-Building*

How foreign judges approach their task may likewise matter. If they do so with wisdom and sensitivity to local facts and circumstances (including the socio-political context), they may have a better chance to increase the effectiveness and perceived impartiality of judicial decisions, whereas if they are insensitive to this broader context, or conversely too consistently deferential to local judges' factual and legal judgments, they may undermine the knowledge and legitimacy benefits of having foreign judges. Striking an appropriate balance between bringing knowledge of foreign law to bear and at the same time understanding one's role as a local constitutional court judge may positively affect how foreign judges are viewed. Similarly, how judges approach the broader judicial role—beyond the courtroom—may affect the benefits of foreign judging. If foreign judges engage in even quite micro-level efforts at capacity-building, this can help improve local judges' knowledge base through informal exchanges, in contrast to situations in which foreign judges simply “parachute” in and out of a jurisdiction.<sup>232</sup>

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230. See, e.g., Gleeson Interview, *supra* note 210 (emphasizing the importance of foreign-trained counsel in Hong Kong to the operation of the HKCFA).

231. The degree of transnational involvement in the day-to-day governance of a country is likely to affect local perceptions of the legitimacy of foreign judicial involvement. See *supra* notes 187–191, 193 and accompanying text (discussing effects of pervasiveness of foreign judges' involvement in BiH and hostility to foreign judges).

232. On the notion of a parachute judge, see, e.g., Daly, *supra* note 145, at 219–20; Lo, *supra* note 11; Boyd, *supra* note 24, at 308.

## 1. Deference in Making Factual and Legal Judgments

Judges will vary in how they approach their role as a foreign judge. Some foreign judges may be quite conscious of their limited knowledge of local socio-political circumstances, while others may be less conscious of such limits on their knowledge. Judges may also react quite differently to perceived limits of this kind; some may invest additional effort in understanding local socio-political conditions, while others may treat those limits as irrelevant, or adopt deferential approaches to the local knowledge of national judges, whether on a range of evaluative questions or on a narrower set of factual questions.

The more foreign judges actively seek to learn about the local jurisdiction and/or to defer to local judges on questions of local attitudes or facts, the less danger there will be of decisions by foreign judges that are insensitive to the relevant sociopolitical context. Yet each path poses other potential obstacles to the perceived independence and impartiality of the tribunal. As noted above, too much deference on legal or factual questions may undermine the court's perceived independence and impartiality.<sup>233</sup> And too much "independent" judicial inquiry into social facts by foreign judges risks a different kind of impairment of their perceived impartiality, at least in adversary systems.<sup>234</sup>

There are notable differences among foreign judges in their approach to these questions: in our interviews with several foreign judges, some judges indicated that when they sat as national judges in their own countries, they generally saw no need to take active measures to understand community attitudes.<sup>235</sup> Their membership in the legal and political community, and knowledge of broader current affairs and attitudes in their own countries, meant that they were already well-equipped to gauge community values in the process of constitutional construction or common law judging.<sup>236</sup> But at least

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233. Compare Baird, *supra* note 75, at 81 (noting that while "a certain amount of deference to local decision makers will sometimes be necessary, a rigorous and independent approach is also expected" from judges).

234. On the risks of untested appellate factfinding, see Allison Orr Larsen, *Confronting Supreme Court Factfinding*, 98 VA. L. REV. 1255, 1291–1305 (2012); *see also infra* note 278.

235. *See, e.g.*, Gleeson Interview, *supra* note 210; Mason Interview, *supra* note 125.

236. Sir Anthony Mason *Reflects on Judging in Australia and Hong Kong, Precedent and Judgment Writing*, UNIV. OF MELB. LAW SCH. HIGH COURT BLOG (July 28, 2014), <https://blogs.unimelb.edu.au/opinionsonhigh/2014/07/28/barnett-mason/> [https://perma.cc/6LK7-MBZY].

one judge indicated that when he sat as a foreign judge, he was aware of the need to talk to local judges, lawyers, and business people in order to understand the broader socio-political context for decisions.<sup>237</sup> Other foreign judges, in contrast, tended to engage in more limited “social fact-finding” of this kind, perhaps due to limited time or opportunity<sup>238</sup> but also differences in judicial sensibility. Some judges are simply less committed to a socio-legal approach of this kind in general and in the specific context of their role as foreign judge.<sup>239</sup>

Some judges indicated a preference for a more deferential approach to socio-legal questions. Murray Gleeson, for example, suggested that as a judge of the HKCFA, he thought it appropriate to defer to the judgments of local judges only in the context of knowledge of social facts relevant to constitutional or appellate adjudication, not about questions of law.<sup>240</sup> In other contexts, he adopted the ordinary common law appellate standard for reviewing the decisions of a lower court on questions of law and fact. Justice Handley indicated a similar approach to his role as an appellate judge in Fiji, Tonga, and Kiribati, involving deference to local judges’ knowledge of local facts but not on legal issues,<sup>241</sup> and suggested it had important paral-

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237. See Mason Interview, *supra* note 125. In the Hong Kong context, former Chief Justice Andrew Li also suggested he took active measures to encourage and support engagement of this kind on the part of foreign NPs. Li Interview, *supra* note 202. Constance Grewe also noted her attempts to read and gain informal knowledge of BiH prior to assuming her role as a foreign judge. Grewe Interview, *supra* note 224.

238. This will be especially true, for example, when a case is heard urgently, and the general background is one of non-democratic rule.

239. This may also reflect a theory of constitutional interpretation that emphasizes formal legal sources over socio-political contextual factors.

240. Gleeson Interview, *supra* note 210. It might be questioned why there should be more deference on facts than on law, since law too—especially constitutional law—is rooted in particular domestic contexts. For explication of “idiosyncrasy” and “odd details” in domestic constitutions, see GÜNTER FRANKENBERG, *COMPARATIVE CONSTITUTIONAL STUDIES: BETWEEN MAGIC AND DECEIT* 138–51 (2018) (discussing how national constitutions may express very particular national commitments, identities, or histories). And, as has been explored in both law and philosophy, there is a degree of porosity in proposed dividing lines between “fact,” on the one hand, and “law” or “values” on the other. See, e.g., Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 232–33 (1985); E.J. Lowe, *Fact*, in *THE OXFORD COMPANION TO PHILOSOPHY* 287 (Ted Honderich ed., 2d ed. 2005); Philippa Foot, *Fact-Value Distinction*, in *THE OXFORD COMPANION TO PHILOSOPHY*, *supra* note 240, at 287. But there is also arguably a considerable amount of “generic” constitutional law. David S. Law, *Generic Constitutional Law*, 89 MINN. L. REV. 652, 772 (2004).

241. See Handley Interview, *supra* note 50. Other foreign judges have also explicitly rejected the idea of across-the-board deference. In addition to Gleeson, Sir Anthony Mason

lels with the earlier approach of the Privy Council in this area. The Privy Council, in *Devi v Roy*,<sup>242</sup> endorsed a “double concurrence” principle giving strong deference to concurrent findings of facts by two lower (local) courts. A principle of this kind could not directly apply to an intermediate appellate court, such as the Court of Appeal of Fiji, but might offer some guidance on how much deference foreign judges ought give to factual findings by lower court judges, or possibly even fellow appellate judges with greater local socio-political knowledge.

There were also differences among judges in their approach to addressing these questions as part of their reasoning: Lord Millett, for example, suggested in his memoir that he was inclined to defer to local judges on questions relating to local conditions and to make that clear in his reasons as a non-permanent HKCFA judge.<sup>243</sup> The then-Chief Justice Andrew Li, however, suggested Millett remove this reasoning—he emphasized that it was “important for the public to perceive that the overseas judge when sitting in the HKCFA [was] functioning only as a Hong Kong judge,” and thus a legitimate part of the *local* system of constitutional justice.<sup>244</sup> Millett agreed and chose to delete the reference.<sup>245</sup>

## 2. Approach to Transnational Sources of Law

Foreign judges will also vary in how they approach questions of foreign law, its relevance, and citation. Some judges may choose to draw primarily on their own prior knowledge and thus tend to cite the caselaw of their home legal system.<sup>246</sup> Others may have broader ingoing comparative knowledge and/or a conscious commitment to broad comparative and international engagement, and thus introduce a broader range of materials.

The value of comparative and international citation may vary

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and James Spigelman, for example, suggested they thought that generally applying deference on all issues of fact and law would undermine their role as judges of Hong Kong, duly appointed under domestic law, and the commitment of the Hong Kong Basic Law to judicial independence and impartiality. See Mason Interview, *supra* note 125; Spigelman Interview, *supra* note 125.

242. [1946] AC 508.

243. PETER MILLETT, AS IN MEMORY LONG 192 (2015); see Fok, *supra* note 127, at 7–8.

244. Li Email, *supra* note 204. See also discussion in MILLETT, *supra* note 243, at 192; Fok, *supra* note 127, at 7–8.

245. See MILLETT, *supra* note 243, at 248.

246. See Smith, *supra* note 13, at 340–41.

significantly based on the context; in some settings, transnational sources may help bolster claims to local judicial independence in the face of domestic political challenges, whereas in others invoking foreign or international law may be seen as an illegitimate form of transnational influence. Judges who consistently cite decisions from their home legal systems may be perceived as undermining the sovereignty and distinctiveness of the host legal system or, alternatively, may be viewed as appropriately speaking from their expertise.<sup>247</sup> Those who cite broadly from comparative and international materials may be seen to enrich the host system or, alternatively, to be “cherry pickers” roaming too freely among sources in the world.

A number of foreign judges on hybrid courts seem attuned to these possibilities and have sought to use their comparative and international knowledge in a way that promotes, rather than undermines, a sense of local legal autonomy.<sup>248</sup> In Hong Kong, for example, Sir Anthony Mason suggested that as a judge of the HKCFA he was reluctant to cite Australian precedents when English precedents were available. English case law is the basis of the common law system in Hong Kong, and therefore reference to English law helps affirm the common law traditions underpinning the “one country, two systems” principle.<sup>249</sup> In cases where the court did cite Australian precedents, and where Sir Anthony was sitting, it is also notable that

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247. Compare, e.g., Farran, *supra* note 24, at 181–83 (criticizing foreign judges for unduly citing their own countries’ caselaw and thereby furthering patterns of legal imperialism or colonialism in this context). For a useful empirical analysis of the extent to which this is true for different courts in the Pacific, see also Smith, *supra* note 13.

248. See, e.g., Smith, *supra* note 13, at 336 (noting that Australian judges on Pacific courts tend to cite English law more than Australian law). *But see* Farran, *supra* note 24, at 190 (criticizing courts in the region on these grounds).

249. In Hong Kong, for example, Sir Anthony Mason suggested that as a judge of the HKCFA he was not inclined to cite Australian precedents, where strong English precedents were available. English case law, in Hong Kong, is the basis of the common law system, and therefore reference to English law helps affirm the common law traditions underpinning the “one country, two systems” principle. Where he did cite Australian law for a proposition, Mason further suggested that he would, when he could, counter-balance it with broader comparative references to other common law systems, such as Canada or New Zealand. See Mason Interview, *supra* note 125; Email from Sir Anthony Mason, Former Judge, Hong Kong Court of Final Appeal (Feb. 12, 2017) (on file with the *Columbia Journal of Transnational Law*). See also, e.g., *Chan Kam Nga v Director of Immigration*, 2 HKCFAR 82, 91–92 (1999) (Sir Anthony Mason NPJ, concurring and citing Australian and English precedent). Cf. David S Law, *Judicial Comparativism and Judicial Diplomacy*, 163 U. PA. L. REV. 927, 986–90 (2015) (reporting that the HKCFA relies extensively on foreign precedents, and that it “relies most frequently” on U.K. caselaw, with 48% of citations being to U.K. law, 11% to the HKCFA’s own decisions, and 7% to Australia and New Zealand caselaw).

it was sometimes other members of the court—local judges—who cited those precedents in the course of their judgment.<sup>250</sup> Sir Anthony himself has cited international legal materials as relevant to the force of the human rights norms incorporated by the Basic Law. But extensive reliance on Australian precedents by the Australian non-permanent judges on the HKCFA has tended to be “the exception rather than the rule.”<sup>251</sup>

In BiH, foreign judges on the court have included some of Europe’s leading public lawyers, from a range of jurisdictions, as well as former judges of the European Court of Human Rights and sitting members of the European Commission of Human Rights.<sup>252</sup> Foreign judges have thus been able to contribute knowledge of comparative, international, and European law.<sup>253</sup> The Court has cited a range of comparative cases and international sources—including Canadian cases on the status of the preamble to a constitution, international human rights law, the European Convention on Human Rights, and the Vienna Convention on the Law of Treaties, as a guide to interpreting the Constitution as an annex to an international treaty.<sup>254</sup> References of this kind have had an ambivalent reception in BiH: while many national judges have embraced comparative and international sources, others have rejected the relevance of particular transnational law sources.<sup>255</sup> Serb political elites in particular have tended

250. See, e.g., *Swire Properties Ltd v The Secretary of Justice* [2003] H.K.E.C. 840, ¶ 45 (Bokhary PJ, citing Australian law), ¶ 74 (Sir Anthony Mason NPJ, concurring).

251. Fok, *supra* note 127, at 21–22.

252. Marija Tausan, *Bosnia Calls Time on Foreign Judges*, BALKAN TRANSITIONAL JUSTICE (Mar. 26, 2012), <https://balkaninsight.com/2012/03/26/bosnia-calls-time-on-foreign-judges/> [<https://perma.cc/MQF4-SE8S>] (noting that some foreign judges had served on the European Court of Human Rights and had a variety of experiences). David Feldman, one of the foreign judges interviewed for this Article, is himself a leading public law scholar, from the Cambridge University faculty, and editor or author of leading works. See *Professor David Feldman*, FACULTY OF LAW, UNIV. OF CAMBRIDGE, <https://www.law.cam.ac.uk/people/dj-feldman/723> [<https://perma.cc/3TPN-YYTX>].

253. See Marko Interview, *supra* note 194; Marko, *supra* note 33, at 643.

254. See, e.g., Decision U-5/98, Const. Ct. of Bosn. & Herz. (July 1, 2000) (invalidating aspects of the constitutions of the Republic of Srpska and the Federation of Bosnia and Herzegovina as inconsistent with principles of collective equality found in the Constitution of BiH), and specifically ¶¶ 19 (on the Vienna Convention), 23–25, 54–55 (referring to Canadian precedents), 57 (referring to international human rights norms), 68 (referring to the European Charter for Regional or Minority Languages), 96 (referring to the European Convention on Human Rights); see also Email from Joseph Marko, Former Judge, Constitutional Court of Bosnia-Herzegovina (Dec. 3, 2017) (on file with the *Journal of Transnational Law*).

255. See Marko Email, *supra* note 254; see also Decision U-5/98, Const. Ct. of Bosn. & Herz., ¶ 47 (separate opinion of Judge Zvonko Mlijko) (arguing that the issue is one of

to characterize the influence of international law as part of a broader system of oppressive and illegitimate international control over BiH.<sup>256</sup>

In Fiji, there may at times have been cases in which the *non*-reliance on international legal sources reflected a deliberate decision by the judges to avoid a basis for public questioning of a decision's legitimacy. In the *Prasad* case, for example, Justice Ken Handley suggested he was careful *not* to rely on international human rights law as the primary basis for a decision to declare the Speight coup unconstitutional.<sup>257</sup> Instead, he encouraged the court to rely as much as possible on the 1997 Fijian Constitution and the degree of public approval it enjoyed during the period of consultation prior to its adoption.<sup>258</sup>

### 3. Support for Local Lawyers, Judges, and Law Students

Another important difference among foreign judges is in their approach to local capacity-building.<sup>259</sup> Some foreign judges may simply fly in and out of a jurisdiction for a hearing and have no broader engagement with the relevant legal system;<sup>260</sup> such judges

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federalism and not individual rights, and that “reference to the provisions of the International Convention on the Elimination of All Forms of Racial Discrimination, the European Charter for Regional Languages . . . and the Framework Convention for the protection of National Minorities are totally beside the point” and disagreeing with examples of Canada, Switzerland, and Belgium as used in the opinion). For some sense of the split on the court on this issue, see *id.* ¶ 82 (dissenting opinion of Judge Popovic) (“We cannot disregard the fact that this Decision was adopted in a manner that the Judges from amongst the Bosniacs and foreign judges voted for the Decision and that the Judges from amongst the Serbs and Croats voted against it.”; also objecting to Judge Marko’s participation in the decision because of his prior work for the Venice Commission, *id.* ¶¶ 82–83).

256. Joseph Marko suggested that, in the *Constituent Peoples Case* (U-5/98, discussed *supra* notes 254–255), comparative law (e.g., references to Canada, rather than to European regional international law) might have been helpful in generating a perception of greater neutrality or legitimacy. See Marko Interview, *supra* note 194.

257. Handley Interview, *supra* note 50.

258. *Id.* For broader analysis of the role of Fijian law and norms in this context, see also Aroney & Corrin, *supra* note 141, at 323–24; Theodor Schilling, *The Court of Justice’s Revolution, Its Effects and the Conditions for its Consummation: What Europe Can Learn from Fiji*, EUR. L. REV. 445, 451 (2002).

259. See Stuart Ford, *A Social Psychology Model of the Perceived Legitimacy of International Criminal Courts: Implications for the Success of Transitional Justice Mechanisms*, 45 VAND. J. TRANSNAT’L L. 405, 405 (2011) (noting the relevance of this in an international context).

260. For discussion of such “parachute” judging, noting arguments for more interaction

are sometimes referred to as “parachute” judges.<sup>261</sup> Genuine institutional constraints may leave no time or resources to support engagement of this kind, and interacting with local lawyers may give rise to a potential conflict of interest. But “parachute” judging may also reflect different role conceptions. Some foreign judges may see their role as simply involving the hearing and decision of relevant cases; other foreign judges, in contrast, may be more interested in local capacity-building, and thus invest time and effort in interacting with the national legal profession.<sup>262</sup>

Interactions of this kind may in theory contribute to long-term local capacity-building in several ways. If distinguished foreign judges interact with the local bench, bar, and law schools, they may be able to contribute to local legal knowledge, judicial independence, and the prestige of the legal system more generally in a country. If foreign judges hire local lawyers as associates (law clerks), or interact with local law schools, they may help contribute to building greater long-term local legal capacity. Engagement of this kind can also affect the perceived legitimacy of foreign judges; local lawyers and civil society entities are more likely to support the ongoing role of foreign judges if they know those judges personally and feel like they contribute to the prestige, independence, or knowledge of their own professional organizations. On the other hand, foreign judges’ engagement with the bench, bar, and law schools may fan concerns, in some contexts, about the role of legal elites vis-à-vis the broader public and, it could be argued, may detract from the kind of independence that arises from not having well-developed local connections.

#### *E. When: The Timing and Time-Frame for Foreign Judicial Involvement*

Timing—meaning *when* foreign judges play a role in the evo-

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between visiting judges and the local judiciary, see Boyd, *supra* note 24, at 308.

261. See Daly, *supra* note 145, at 230; Lo, *supra* note 11.

262. See, e.g., speeches given by various non-permanent foreign judges on the HKCFA, *Speeches and Articles*, H.K. BAR ASS’N, <http://www.hkba.org/events-publication/speeches-articles> [https://perma.cc/U9AW-ZH7W]; *List of Speeches/Articles*, H.K. COURT OF FINAL APPEAL, [https://www.hkcfa.hk/en/documents/publications/speeches\\_articles/index.html](https://www.hkcfa.hk/en/documents/publications/speeches_articles/index.html) [https://perma.cc/4PBU-PQLV]. See also interactions between foreign judges and the Fiji Law Society, as is evidenced for example by the welcome speeches by the law society to the new foreign judges appointed in 2003. Handley, for example, suggested that he actively encouraged interactions of this kind, and gave several papers. Handley Interview, *supra* note 194.

lution of a constitutional system—may well be another potentially important dimension to the value and legitimacy of foreign judicial involvement on national courts. It might be that the earlier and shorter the time-frame for foreign judicial involvement, the more likely it is to be perceived as legitimate, whereas the longer-term and more permanent it is perceived to be, the less likely it is to be viewed as making a positive contribution to national self-government.

There are exceptions to this general hypothesis, however. If a polity's identity is constituted in ways reflected in the participation of foreign judges, as may be the case in Hong Kong, this timing effect may not occur.<sup>263</sup> And if a country starts out under a new constitution or constitutional court, for instance, with few lawyers capable of serving on a national court, there will be obvious arguments of necessity for allowing foreign judges to serve for some period of time.<sup>264</sup> Over time, however, these arguments may progressively lose force; there will be greater opportunities to train local lawyers to serve in the judiciary, and thus reasonable questions about why a country has not been able to do so.<sup>265</sup>

In some cases, there may be good answers to this question of why foreign judges continue to play a significant role: in “power sharing” contexts, the argument for foreign judges may be that they are a necessary mechanism for ensuring the independent interpretation and enforcement of the constitution as a whole.<sup>266</sup> In BiH, there

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263. Whether the general hypothesis would apply in very small polities is also unclear, as resource constraints may be so severe that an ongoing system of outside support, including foreign judges, might appeal to inhabitants. Cf. *Tokelau Stays as New Zealand's Last Colony*, TVNZ Onenews (Oct. 25, 2007), <https://web.archive.org/web/20140513015114/http://tvnz.co.nz/view/page/1318360/1415741> [<https://perma.cc/S69P-CM9L>] (reporting that in the tiny dependency of Tokelau, two referenda in the prior fifteen years had failed to pass by the required supermajority for “free association” with New Zealand, rather than its present status as a dependent territory).

264. See, e.g., Fok, *supra* note 71, at 9 (emphasizing that in terms of knowledge the benefits of foreign judges were especially valuable in the early years of the HKCFA's operation).

265. In BiH, for example, foreign judges played only a short-term role in the Human Rights Chamber; their initial mandate of five years was renewed for a further three years in 2002, but thereafter came to an end. Marko, *supra* note 225, at 15. The role of foreign judges in criminal law matters in BiH has also progressively contracted. Re, *supra* note 87, at 34.

266. See, e.g., Marko, *supra* note 33, at 642. It is worth noting that other parts of the government in BiH, which depend on a model of three-way national power-sharing, have been almost completely deadlocked and ineffective. See Grewe & Riegner, *supra* note 33, at 17; Feldman, *supra* note 227, at 162 (noting that it has often been “impossible for the Parliamentary Assembly to function as an effective legislature”).

has been debate over the role of foreign judges—in 2002, as the five-year term of the initial court was expiring,<sup>267</sup> and again in 2008, as part of broader debates over a constitutional amendment.<sup>268</sup> As noted earlier, many Serb political leaders have argued for replacing foreign judges with national judges.<sup>269</sup> Most observers, however, regard the whole-scale replacement of foreign judges by national judges in BiH as unrealistic in the short-term, given long-standing ethnic divisions and the need to recover from mass genocide. Yet on the BiH Constitutional Court, there have been changes to the internal rules of the court, which mean that foreign judges now play a role in only a subset of cases where national judges are unable to reach consensus on the outcome of a case.<sup>270</sup>

In very small societies, the question may be one of actual or perceived impartiality, rather than or in addition to basic legal and judicial capacity. There may also be economic obstacles to training a sufficiently large number of lawyers to serve on the country's highest courts. But as already noted, foreign countries and judges may themselves have at least some capacity to overcome resource-obstacles of this kind by contributing to various forms of practical legal training. The legitimacy of foreign judges, therefore, may also in some contexts depend on there being a gradual shift in the relative composition of a hybrid court, away from foreign and toward more indigenous models of judging.<sup>271</sup>

Constance Grewe, a foreign judge on the Constitutional Court of BiH, and her coauthor suggest that a key virtue of hybrid courts is that they can “incrementally develop [to create] more organic forms of cooperation between local and international actors.”<sup>272</sup> Robert

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267. This was expressly provided for in the terms of the Constitution. Bosn. & Herz. Const. art. VI.1.c–d. See Graziadei, *supra* note 84, at 66; Marko, *supra* note 225, at 15.

268. See Feldman Interview, *supra* note 115.

269. See, e.g., *supra* notes 187–191; REPUBLIC OF SRPSKA'S 18TH REPORT, *supra* note 189, at 1, 4–11.

270. See Grewe & Riegner, *supra* note 33, at 41–42; see also Feldman Interview, *supra* note 115.

271. In Hong Kong, for example, in 1997, there was some concern that a single foreign non-permanent judge was perhaps insufficient to guarantee judicial independence, but two decades later, the literature reflects a sense that this represented something like the maximum degree of appropriate foreign judicial influence. See, e.g., Michael Thomas, *A Practitioner's Perspective*, in HONG KONG'S COURT OF FINAL APPEAL, *supra* note 21, 197, at 201–02; Simon N.M. Young, Antonio Da Roza & Yash Ghai, *Genesis of Hong Kong's Court of Final Appeal*, in HONG KONG'S COURT OF FINAL APPEAL, *supra* note 21, 121, at 142–43. *But cf.* *supra* note 182.

272. Grewe & Riegner, *supra* note 33, at 53.

French, a former Chief Justice of Australia and foreign judge in Fiji, has likewise argued that in many settings the preferred model of foreign judging will be one based on the idea of a temporary judicial exchange.<sup>273</sup> Relationships of this kind clearly have important virtues in terms of norms of reciprocity<sup>274</sup> and may also have the benefit of being time-limited in nature.

Questions of timing likewise may be important to the value of foreign judges as contributors to processes of peace-building or democratic-consolidation in divided societies. Levels of trust among different groups may be so low in the immediate aftermath of a civil war or genocide that, if one wants to create an effective constitutional court or system of criminal justice, there may be little alternative but to appoint foreign judges for some indefinite period. But over time, democratic stability and consolidation requires parties to learn to trust each other again and work effectively in a process of national self-government. One of the dangers of long-term foreign involvement in this context, as Tom Ginsburg and others have noted, is that it may undermine the incentives for parties to rebuild this form of trust: If they can rely on foreign actors to protect their interests, they have less reason to invest in attempts at cooperation and true power-sharing.<sup>275</sup> The longer the time-gap between a violent ethnic conflict and the appointment of a foreign judge, therefore, the greater the potential objections to such an appointment on capacity-building grounds. Whether the design and structure of a hybrid court are sensitive to these various temporal concerns, therefore, may affect its overall legitimacy and effectiveness.

## CONCLUSION

To a U.S. audience, the idea of a foreign judge on a constitutional tribunal is just that—quite foreign. It raises immediate questions about the potential downsides of this practice. As described above, these include foreign judges having insufficient local

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273. See, e.g., Justice Robert French, *Judicial Exchange—Debalkanising the Courts*, *FED. J. SCHOL.* 13, 18–19 (2005).

274. See, e.g., Alvin Gouldner, *The Norm of Reciprocity: A Preliminary Statement*, 25 *AM. SOC. REV.* 161, 177–78 (1960). For discussion of how this might be operationalized in practice in the Pacific, such as via forms of judicial exchange, see Dziedzic, *supra* note 4, at 29.

275. Tom Ginsburg, *In Defence of Imperialism? The Rule of Law and the State-Building Project*, in *NOMOS: GETTING TO THE RULE OF LAW* 224, 228–30 (James E. Fleming ed., 2011); see also Schwartz, *supra* note 32, at 37.

knowledge effectively to discharge their constitutional function; concerns about whether they have sufficient local democratic legitimacy, or will be influenced or perceived to be influenced by foreign governments; and concerns about disincentivizing the development of a local bench.

Yet, as the Article shows, the practice of foreign lawyers and judges sitting as judges on national constitutional tribunals is not uncommon, especially in many “micro States.” Foreign judges can bring valuable formal and informal knowledge and experience from outside the jurisdiction, including via the creation of a channel for comparative constitutional “engagement”; they may contribute to actual or perceived impartiality. And their presence may create channels for increased outsider attention (by foreign governments, public international organizations, and NGOs), both to unconstitutional practices and to positive developments.

The tradeoff between the advantages and disadvantages of this practice will depend on a range of context-specific factors. We have identified a number of these factors—including *why* foreign judges are appointed to a court; *what* “model” of hybrid court it is, and the degree of domestic support for their appointment; *who* foreign judges are, and their specific expertise and reputation; *by what means* foreign judges are appointed and how their positions and assignments are structured; *how* foreign judges approach their role; and *when* they exercise their role. We suggest throughout that the success of having foreign judges serve on national constitutional courts will depend on those judges’ capacities to bridge rather than operate on one side of the outsider-insider divide, occupying a truly hybrid position between constitutional “outsider” and “insider.” In so doing, foreign judges may also be able to mediate tensions between the potential benefits (e.g., increased independence) and costs (e.g., to local legitimacy) of having foreign judges on domestic constitutional courts.

The Article does not attempt to take a definitive view of the success or failure of various hybrid constitutional courts, or of the relative contribution of various foreign judges to the degree of success (or failure) enjoyed by the court on which they have sat. In some instances, courts comprised partially or solely of foreign judges have delivered decisions that are either considered “successful” or “unsuccessful” in gaining compliance—e.g., decisions of the Fijian Court of Appeal that did, versus those that did not, lead to an immediate restoration in civilian rule. But for the most part, we avoid judgments about the overall track-record of hybrid constitutional courts or of particular foreign judges who have sat on such courts.

To some degree, this reflects limits on our own knowledge

and confidence as constitutional “outsiders” about forming such views.<sup>276</sup> It also reflects the fact that three case studies of quite different versions of hybrid courts are insufficient to permit strong causal inferences to be drawn. While a larger study might be possible,<sup>277</sup> the total number of hybrid courts, though larger than many would realize, is still quite finite, and it is not possible without a large-scale effort to collect and code data on judicial decision-making by courts worldwide.

But this Article’s self-limitation to analyzing potential advantages and disadvantages and what factors may influence the tradeoffs, without making strong evaluative or predictive claims, also reflects a deeper paradox. It may well be that the more successful a foreign judge is in contributing to a constitutional jurisprudence that is accepted and respected by domestic actors, the harder it will be to perceive that individual influence. Judges who contribute to a jurisprudence of this kind will often choose to join collegial decisions, or the decisions of other local judges, rather than write separately. They may likewise tend to avoid repeated reference to constitutional precedents or authorities from their own jurisprudence, and instead rely on more indirect suggestions of the relevance of such norms or authorities to local lawyers and judges, or references to broader transnational precedents and norms. Approaches of this kind reduce the risk that foreign judges will be perceived by local actors as being *unduly* influential in domestic processes of decision-making, or as imposing the views and perspectives of foreign constitutional systems or powers. Yet they also make it harder to trace the precise influence of such judges on domestic constitutional jurisprudence.

Just because we cannot reliably detect the influence of such actors, however, does not mean that they lack influence. On the contrary, there seems good reason to think that foreign judges are in fact a significant influence on the constitutional jurisprudence and position of the courts in which they served. Their contributions may be positive or negative, depending on the vantage point of evaluation.

Understanding the advantages, disadvantages, and possible effects of foreign judges on constitutional courts is thus, potentially, a step toward better understanding larger questions about how constitutional courts in democracies can work to mediate tensions between important values. Fairness to all parties as a value (and as an aspect of impartiality) may come into tension with judicially self-directed

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276. For related discussion, see Dixon & Jackson, *supra* note 37, at 188–91, 209.

277. See RAN HIRSCHL, *COMPARATIVE MATTERS: THE RENAISSANCE OF COMPARATIVE CONSTITUTIONAL LAW* 244–45 (2014).

study of concrete social or economic circumstances;<sup>278</sup> judicial independence may seem in tension with democratic legitimacy;<sup>279</sup> and the “inside the juridical system” view of the meaning of a constitutional provision may be in tension with “outsider” views of that same provision.<sup>280</sup> The little-known practice of having foreign judges sit on “hybrid” domestic constitutional courts, then, may provide a lens on a much larger set of issues.

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278. Cf. Frederic Schauer, *The Decline of “The Record”*: A Comment on Posner, 51 DUQ. L. REV. 51, 65–66 (2013) (raising questions about Judge Posner’s arguments for expanded judicial notice and judicial fact research at appellate stage).

279. Cf. Jackson, *supra* note 100, at 24, 85–86 (suggesting that judicial independence is related to legitimacy and accountability in complex ways).

280. See generally Dixon & Jackson, *supra* note 37.