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THE USE OF FOREIGN JUDGES ON COURTS OF CONSTITUTIONAL JURISDICTION IN PACIFIC ISLAND STATES

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ABSTRACT

The global norm is that, by law or by practice, the judges on courts of constitutional jurisdiction will be citizens of the state they serve. However, in the nine independent states of Fiji, Kiribati, Nauru, Papua New Guinea, Samoa, Solomon Islands, Tonga, Tuvalu and Vanuatu, as in other parts of the world, foreign judges regularly sit on the highest domestic courts. This thesis examines the implications of the use of foreign judges for constitutional adjudication, judicial independence, and the role of judges and judiciaries in Pacific constitutional systems.

The thesis presents the findings of an original empirical study of the numbers of foreign judges serving in the Pacific, their nationality and professional background, the processes by which they are recruited, and the terms and conditions of their service. It reveals a transnational movement of judges from common law jurisdictions to Pacific states, to engage in judicial service that is affected by the legal frameworks and practices of the Pacific states that use foreign judges and the policies of the external states and organisations that provide foreign judges.

The thesis assesses the implications of the use of foreign judges for the way in which courts approach constitutional adjudication, judicial independence, and the representative qualities of judges and judiciaries in Pacific constitutional systems. First, I argue that foreign judges bring two dimensions of knowledge to the task of constitutional adjudication: knowledge *reach* that extends beyond the local; and a knowledge *gap* in relation to local context. I show that predominant features of constitutional adjudication across Pacific jurisdictions are, at least in part, explicable in light of the kinds of knowledge that foreign judges bring. Secondly, I explain how the presumption of distance implied by foreignness feeds into a perception that foreign judges are more impartial than local judges. I argue that this perception is overstated, while the risks to judicial independence resulting from the insecure tenure of foreign judges are not properly addressed. Thirdly, attention to the nationality of judges highlights the significance placed on judges' allegiance to the state, responsibility to the people, and the expressive functions of the judiciary. I argue that the circumstances of foreign judging limit the extent to which foreign judges are understood to be authorised by, accountable to, speak for, or reflect the people or the state. Instead, greater emphasis is placed on the idea of foreign judges as members of a profession, with expertise, impartiality and a transnational commitment to law.

This analysis of the practice of foreign judging and its implications provides the basis to assess the rationales for the use of foreign judges, to identify challenges that the practice poses to the legitimacy of Pacific judiciaries, and to propose good practice initiatives that might inform the laws and policies that regulate the use of foreign judges.

DECLARATION

This is to certify that:

(i) the thesis comprises only my original work towards the degree of Doctor of Philosophy;

(ii) due acknowledgement has been made in the text to all other material used; and

(iii) the thesis is fewer than 100,000 words in length, exclusive of tables, maps, bibliographies and appendices.

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Part of my motivation in undertaking this thesis was to learn more about the legal systems of the Pacific. It is a privilege to become part of a community of scholars and practitioners working on Pacific constitutions. Many people across the Pacific generously assisted me in my research and generously shared their knowledge and experiences. Particular thanks are due to Eselealofa Apinelu, Bal Kama, Malaea Aloese Feterika, Lalotoa Mulitalo and Hai-Yuean Tualima for their encouragement, inspiration and friendship.

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Elements of this thesis were presented at academic and public forums over the course of my candidature, including the Pacific Constitutions Research Network Conference (University of the South Pacific, 23-25 November 2016); the Masterclass on Indigenous Peoples and the Law (Melbourne Law School, 6 April 2017); the Trinations Public Law Symposium (Auckland University, 5-6 December 2017); the Comparative Constitutional Law Roundtable (University of New South Wales, 7-8 December 2017); the ICON-S International Society for Public Law Conference (Hong Kong, 25-27 June 2018); the Public Law Conference (Melbourne Law School, 11-13 July 2018); and the Judges in Conversation series (Federal Court of Australia, 11 October 2018). I thank the organisations that provided financial support for my participation at these conferences, including the Pacific Constitutions Network, the Centre for Comparative Constitutional Studies at Melbourne Law School, and the Law Faculties at Auckland University and the University of New South Wales. At the Public Law Conference in July 2018 I was honoured to receive the Richard Hart Prize for the best paper by an early career scholar, for a paper that formed the basis of Chapter 5 of this thesis. At all forums, I greatly benefitted from feedback and insights from my fellow participants, especially John Borrows, Claire Chalmers, Ros Dixon, Kirsty Gover, Harry Hobbs, Lee-Anne Sackett and Simon Young.

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CHAPTER 1
INTRODUCTION

Foreign judges sit on the highest national courts of Pacific island states and regularly determine constitutional matters. The use of foreign judges is a longstanding practice in the Pacific, informed by the exigencies of smallness, the legacies of colonialism and a particular conception of the role of the judge. Every constitution in the region anticipates, and to varying degrees regulates, the appointment of foreign judges. The practice is likely to continue for some time.

This thesis provides the first in-depth exploration of the use of foreign judges in the Pacific region and its effects on Pacific judiciaries. The research question it addresses is: what are the implications of the use of foreign judges for constitutional adjudication, judicial independence, and the role of judges and judiciaries in Pacific constitutional systems?

The focus of this thesis is on nine independent island states in the Pacific region – Fiji, Kiribati, Nauru, Papua New Guinea, Samoa, Solomon Islands, Tonga, Tuvalu and Vanuatu. The thesis describes the people who serve as foreign judges on Pacific courts, how they are recruited, the nature of their work on Pacific courts, and the terms and conditions of their service. It shows how the constitutional and legal frameworks of Pacific states, and the practices of the external states and organisations that provide foreign judges, accommodate the distinctive issues raised by the use of foreign judges.

On the basis of this comprehensive understanding of the contemporary practice of foreign judging across the nine Pacific states, the thesis examines the implications of the use of foreign judges for the way in which Pacific courts approach constitutional adjudication, the independence of Pacific judiciaries, and the representative qualities of judges and judiciaries. I argue that foreign judges bring different dimensions of knowledge to bear on adjudication than local judges do. They face distinctive burdens on their independence, deriving from their status as non-citizens and from legal provisions and practices that distinguish between foreign and local judges for the purposes of appointment, remuneration and tenure. Foreign judges are not readily understood as representatives of the people or the state, but rather as representatives of a profession, with transferable legal skills and expertise, with implications for the way in which Pacific communities and judges themselves understand their role in the wider constitutional system.

Pacific states appoint foreign judges for a range of reasons. This thesis argues that the most compelling rationale for the use of foreign judges is as a transitional measure until Pacific states

are in a position to constitute courts wholly comprised of citizen judges. The practice can, however, affect the legitimacy and effectiveness of Pacific judiciaries. It poses challenges that deserve careful assessment and redress, not only by institutions in the Pacific states that use foreign judges, but also by the international organisations and foreign states that provide foreign judges.

The use of foreign judges, while not unique to the Pacific, is a significant point of difference between the judiciaries of Pacific states and those of most other countries. It runs counter to the general assumption, which pertains in the majority of states, that the judges on the highest courts of constitutional jurisdiction will be citizens of the state they serve. The use of foreign judges on Pacific courts therefore raises a range of questions that have not yet been fully explored in constitutional studies: Does the nationality of the judges who determine constitutional issues matter? Is there a difference between foreign and local judges? If so, where do those differences lie, and with what implications for the role and function of the judiciary in the wider constitutional system? By exploring the use of foreign judges on Pacific courts, this thesis sheds light on widespread but often unarticulated presumptions about the significance of nationality to the functions and qualities of constitutional judges. In this way, this thesis takes advantage of the capacity of comparative constitutional studies to challenge assumptions about the constitutional arrangements of one's own state as well as others.[1]

I. Foreign judges and courts of constitutional jurisdiction

Foreign judges – that is, judges who are not citizens of the state on whose courts they serve[2] – sit on a range of different courts and are involved in national judiciaries in various capacities. This thesis focuses on foreign judges who are appointed to national courts charged with interpreting the constitution and resolving constitutional disputes. This first Part of this Chapter explains the scope of this study. It justifies my focus on courts exercising *constitutional* jurisdiction and distinguishes the use of foreign judges on national courts from other ways in which foreign judges might be involved in a national judiciary.

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[1] Vicki C Jackson, 'Methodological Challenges in Comparative Constitutional Law' (2010) 28 *Penn State International Law Review* 319, 320; Ugo Mattei, 'Three Patterns of Law: Taxonomy and Change in the World's Legal Systems' (1997) 45(1) *The American Journal of Comparative Law* 5, 13.

[2] An explanation of this definition of foreign judge is set out in Chapter 2, Part II. I use the term 'foreign judge' in preference to 'expatriate' or 'international' judge. Expatriates live outside their home country, and in this sense expatriate judges are foreign judges who reside in the state they serve rather than visit temporarily. I use the term 'foreign judge' throughout and distinguish where relevant between resident and non-resident foreign judges. I do not use the term 'international judge' to avoid confusing foreign judges who serve on national courts with judges appointed to international courts.

Distinctive features of constitutional adjudication

Constitutional law is a distinctive branch of law, with features that give the involvement of foreign judges in the determination of constitutional disputes special significance.

Constitutions are closely linked to their states, nations or polities.[3] Sometimes described as the 'birth certificate of a nation', every state has a constitution which provides for independent self-government, organises state power, and creates its institutions. Constitutions might also have a symbolic or expressive function, representing the values of the state and its people.[4]

Constitutions regulate the powers of the institutions of government, and the relationships between government and the people. Written constitutions tend to be framed in general, abstract language to embody overarching principles, national aspirations and human rights protections.[5] Written constitutions are supplemented by principles and values that may not be formally expressed in the written document but rather emerge from the culture, legal interpretations and practices of a particular constitutional system.[6] The written and unwritten aspects of constitutions therefore require interpretation.

Courts are called upon to provide such interpretations in the course of resolving constitutional disputes. In many states, including the Pacific states studied here, courts have powers of strong judicial review, which means they can overrule legislation and executive actions that are inconsistent with the constitution. The power of strong judicial review distinguishes constitutional adjudication from other kinds of disputes. It means that judges may override the decisions of democratically elected representatives on politically significant issues[7] or contested social values[8] in ways that may be difficult to reverse. On the highest apex courts, the decisions of judges are final and not subject to further judicial review. In common law jurisdictions, they create precedents that lower courts are bound to follow. In many constitutional systems, judicial interpretations may only be countered by formal constitutional amendment.

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[3] Cheryl Saunders, 'Towards a Global Constitutional Gene Pool' (2009) 4(3) *National Taiwan University Law Review* 1, 9.

[4] Mark Tushnet, 'The Possibilities of Comparative Constitutional Law' (1999) 108 *Yale Law Journal* 1225, 1270.

[5] Vicki C Jackson, 'Paradigms of Public Law: Transnational Constitutional Values and Democratic Challenges' (2010) 8 *International Journal of Constitutional Law* 517, 537.

[6] Martin Loughlin, *Foundations of Public Law* (Oxford University Press, 2010) ch 10; Ernest Young, 'The Constitution Outside the Constitution' (2006) 117 *Yale Law Journal* 408.

[7] Mauro Cappelletti, *The Judicial Process in Comparative Perspective* (Clarendon Press, 1989) ch 1; Ran Hirschl, 'The Judicialization of Politics' in Robert E Goodin (ed), *The Oxford Handbook of Political Science* (Oxford University Press, 2011) 253.

[8] Owen M Fiss, 'The Social and Political Foundations of Adjudication' (1982) 6(2) *Law and Human Behavior* 121; Jeremy Waldron, *Law and Disagreement* (Clarendon Press, 1999) 181.

The combination of the status and subject matter of constitutions means that constitutional adjudication raises distinctive questions about the role, function and legitimacy of courts. Focusing on the use of foreign judges on constitutional courts therefore isolates key issues that press on the limits of the judicial function and the place of judiciaries within national constitutional systems.

Other instantiations of foreign judging

The use of foreign judges on national courts of constitutional jurisdiction must be distinguished from three other ways in which foreign judges might be involved in a state's judiciary.

First, foreign judges might be involved because a state permits appeals from decisions of domestic courts to a supranational appellate court. An example is the jurisdiction of the Judicial Committee of the Privy Council to hear final appeals from some former British colonies. While many states have abolished appeals to the Privy Council, several Pacific and Caribbean states have retained the process. Other examples include the Caribbean Court of Justice[9] and the Eastern Caribbean Supreme Court.[10] Supranational appellate courts determine appeals by applying the domestic law of the state in which the matter arose. In some cases, the supranational appellate court is composed almost entirely of judges from outside the state jurisdiction. For example, while senior judges from Commonwealth countries may be appointed to the Judicial Committee of the Privy Council, in practice the twelve judges of the United Kingdom Supreme Court comprise more than 95% of the judges sitting on appeal cases from the diverse jurisdictions it serves.[11] In contrast, the majority of judges on the Caribbean Court of Justice and Eastern Caribbean Supreme Court are drawn from the Caribbean region, although both also include judges from outside the region.

The use of foreign judges to decide domestic legal matters means that supranational appellate courts share some similarities with the use of foreign judges on domestic courts. However, there are important differences between the two practices. Supranational appellate courts are more distant from domestic governments and peoples than national courts. A supranational court

[9] The Caribbean Court of Justice was established in 2005 in part as a court of final appeal for states in the region. At 2015, Barbados, Belize and Guyana had opted into the court's jurisdiction: Tracy S Robinson, Arif Bulkan and Adrian Saunders, *Fundamentals of Caribbean Constitutional Law* (Sweet & Maxwell, 2015) 343.

[10] The Eastern Caribbean Supreme Court is the appellate court for six states and three territories of the Commonwealth Caribbean region.

[11] David Neuberger, 'The Judicial Committee of the Privy Council in the 21st Century' (2014) 3(1) *Cambridge Journal of International and Comparative Law* 30, 31.

may physically sit in another state or even outside the region.[12] National governments have less influence on the appointment and removal of judges and the funding and administration of the court, which may be placed in the hands of a foreign state[13] or a regional body.[14] Indeed, the processes for the appointment of judges and the administration of the two Caribbean courts were deliberately framed in order to insulate those courts from political interference by domestic governments.[15] This stands in contrast to the appointment of judges to national courts which is formally in the hands of domestic institutions.

Secondly, and more unusually, a state might designate a foreign court as part of its own judicial structure. For example, between 1976 and 2018, the High Court of Australia served as the final court of appeal for Nauru.[16] In the years immediately following independence, Tuvalu continued to use the Fiji Court of Appeal pending the establishment of its own Court of Appeal.[17] While they share some features, these arrangements must also be distinguished from the appointment of foreign judges to national courts. Of most significance, the judges of the foreign court of appeal do not take a separate commission or make an oath to the designating state, but rather continue to be, first and foremost, judges in their own constitutional system.[18]

Thirdly, the use of foreign judges on national courts can be distinguished from their use on specialised courts, such as transitional post-conflict tribunals and transnational commercial courts. 'Hybrid' tribunals composed of local and foreign judges have been established in post-conflict contexts in Kosovo, East Timor, Sierra Leone, Cambodia, Lebanon and Bosnia

[12] The Judicial Committee of the Privy Council usually sits in London. It occasionally travels to other states, with three visits to the Bahamas and two to Mauritius since 2006. The Caribbean Court of Justice is an itinerate court which can sit in any contracting party. The judges of the High Court division of the Eastern Caribbean Supreme Court rotate regularly between member states while the single Court of Appeal sits in St Lucia but travels to hear appeals in other states.
[13] The judges of the Judicial Committee of the Privy Council are appointed by the British Monarch on the advice of the British government.
[14] *Agreement Establishing the Caribbean Court of Justice,* 14 February 2001, art V(1).
[15] Derek O'Brien, *The Constitutional Systems of the Commonwealth Caribbean: A Contextual Analysis* (Hart Publishing, 2014) 211, 215; Dennis Byron and Maria Dakolias, 'The Regional Court Systems in the Organization of the Eastern Caribbean States and the Caribbean' in Edgardo M Favaro (ed), *Small States, Smart Solutions* (World Bank Publications, 2008) 91, 95.
[16] *Agreement between the Government of Australia and the Government of the Republic of Nauru relating to Appeals to the High Court of Australia from the Supreme Court of Nauru*, 6 September 1976. Nauru withdrew from this treaty in 2018.
[17] *Constitution of Tuvalu 1978* s 104(1); Beith Atkinson, 'Regional Co-Operation in the Courts: A Tuvalu View' in Guy Powles and Mere Pulea (eds), *Pacific Courts and Legal Systems* (University of the South Pacific and Monash University, 1988) 241.
[18] Gregory Dale, 'Appealing to Whom? Australia's "Appellate Jurisdiction" Over Nauru' (2007) 56(3) *International and Comparative Law Quarterly* 641, 665.

Herzegovina.[19] The jurisdiction of hybrid tribunals is usually limited to particular crimes or a period of conflict. In a development of a different kind, the globalisation of commerce and investment has led several states to establish commercial and arbitration courts staffed by local and foreign judges.[20] These courts hear international commercial matters, which often engage the laws of foreign states. The involvement of foreign judges in these kinds of courts and tribunals is distinguished from their presence on domestic courts on two grounds. First, these courts exist outside the ordinary national court system, as specialist tribunals with limited jurisdiction. Secondly, because they apply international or foreign law, there is a particular justification for the involvement of foreign judges that does not apply to the use of foreign judges on national courts, who decide cases solely according to domestic law.

Foreign judges on national courts have the equivalent powers and functions, and exercise the same constitutional jurisdiction, as the local judges with whom they sometimes sit. They interpret and apply national law. At least formally, their appointment is wholly in the hands of local national appointing bodies. Therefore, while supranational and foreign appellate courts and specialised hybrid tribunals share some features with foreign judging, the use of foreign judges on national courts of constitutional jurisdiction is a distinctive practice deserving of its own study.

II. An underexplored global phenomenon

Constitutional offices in the legislative, executive and judicial branches of government in an independent state are generally held by citizens of that state. Accordingly, in the majority of countries, by law or by practice, judges are citizens of the state on whose courts they serve.

However, foreign judges sit on courts of constitutional jurisdiction in 28 states across the globe, in the Pacific as well as the Caribbean, Africa, Europe and Asia.[21] In some states, foreign judges

[19] Laura A Dickinson, 'The Promise of Hybrid Courts' (2003) 97 *American Journal of International Law* 295, 295.

[20] In Singapore, Qatar and Dubai: Andrew Godwin, Ian Ramsay and Miranda Webster, 'International Commercial Courts: The Singapore Experience' (2017) 18 *Melbourne Journal of International Law* 219.

[21] In the years between 2010-15, foreign judges sat on courts of constitutional jurisdiction in Andorra, Bahamas, Belize, Bosnia Herzegovina, Botswana, East Timor, Federated States of Micronesia, Fiji, The Gambia, Kiribati, Kosovo, Lesotho, Liechtenstein, Marshall Islands, Monaco, Namibia, Nauru, Palau, Papua New Guinea, San Marino, Samoa, Seychelles, Solomon Islands, Swaziland, Tonga, Tuvalu and Vanuatu. Foreign judges sit on the Court of Final Appeal of Hong Kong, an autonomous region of China. They also sit on the highest courts of Brunei Darussalam, but these courts do not have constitutional jurisdiction.

sit alongside local (citizen) judges. In others however, the courts are composed entirely of foreign judges.

The practice of foreign judging, and the reasons for it, differ across states. Many states use foreign judges because it is not possible to appoint sufficient numbers of local judges given the small size of the legal profession. The availability of qualified citizen lawyers may be limited because of the small population of the state itself,[22] because the legal profession was depleted during conflict or authoritarian rule,[23] or because of the non-representative composition of the legal profession due to historic discrimination.[24] In these states, the use of foreign judges is permitted by the constitution to enable states to maintain functioning judiciaries. In contrast, in other states, it is mandatory for a proportion of the judges on the constitutional court to be foreign judges, with the aim of neutralising ethnic or other entrenched divisions within the state. Bosnia Herzegovina serves as the primary example, but this model was picked up in Kosovo[25] and also featured in the short-lived independence constitution of Cyprus and the Annan plan for a reunified Cyprus.[26] In these contexts, foreign judges are used to bring impartiality to counter-balance a presumption that the local judges will be influenced by their own ethnic or national backgrounds. Finally, in Hong Kong (an administrative region of China with a degree of autonomy) one foreign judge sits on the bench of the Court of Final Appeal at the discretion of the Chief Justice. Here, the inclusion of a foreign judge is intended to enhance the reputation and expertise of the Court and to signify a distinction between the legal systems of Hong Kong and China.[27]

Despite the number and range of states in which foreign judges serve, the use of foreign judges is an under-explored phenomenon. Studies of the effects of globalisation on courts have focused on the transnational movement of constitutional law via 'constitutional borrowing' and the

[22] Eg European microstates and the small island states of the Caribbean and Pacific.
[23] Eg East Timor: Hansjoerg Strohmeyer, 'Policing the Peace: Post-Conflict Judicial System Reconstruction in East Timor' (2001) 24 *University of New South Wales Law Journal* 171.
[24] Eg Namibia: Sufian Hemed Bukurura, 'A Judiciary in Transition: Reflections on the Selection of Judges in Namibia' in Peter H Russell and Kate Malleson (eds), *Appointing Judges in an Age of Judicial Power: Critical Perspectives from around the World* (University of Toronto Press, 2006) 313, 316.
[25] Constance Grewe and Michael Riegner, 'Internationalized Constitutionalism in Ethnically Divided Societies: Bosnia-Herzegovina and Kosovo Compared' (2011) 15 *Max Planck Yearbook of United Nations Law* 1.
[26] *Constitution of the Republic of Cyprus 1960* arts 133, 153; *The Comprehensive Settlement of the Cyprus Problem* ('Annan plan'), art 6. See Hubert Faustmann and Andrekos Varnava (eds), *Reunifying Cyprus: The Annan Plan and Beyond* (IB Tauris, 2009) 33, 77, 102.
[27] Simon NM Young and Antonio Da Roza, 'The Judges' in Simon NM Young and Yash Ghai (eds), *Hong Kong's Court of Final Appeal* (Cambridge University Press, 2013) 253, 263–5.

citation of foreign judgments by courts of constitutional jurisdiction.[28] The movement of judges themselves across national borders has been largely overlooked. Slaughter's seminal study of a 'global community of judges', arising from judges' engagement in transnational legal disputes and networking at judicial conferences, makes no mention of foreign judges on domestic courts, although it is clearly a manifestation of 'judicial globalisation'.[29]

The use of foreign judges has only recently begun to receive the attention of constitutional scholars.[30] Most literature on the question is found in studies of the judiciaries of particular states or regions. These country or regional studies might consider the rationales for the use of foreign judges; the advantages and disadvantages of the practice in terms of the capabilities, independence and legitimacy of the judiciary; and the effect foreign judges might have on the decisions of the court.[31] A sub-category of this literature consists of reflections by foreign judges themselves on their experiences.[32] Although international organisations, such as the United Nations Development Programme and the Commonwealth, recruit and fund foreign judges to serve in countries across the world,[33] studies of the practice are incomplete and evaluations

[28] Vicki C Jackson, *Constitutional Engagement in a Transnational Era* (Oxford University Press, 2010); Vlad Perju, 'Constitutional Transplants, Borrowing and Migrations' in Michel Rosenfeld and András Sajó (eds), *Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, 2012) 1304.
[29] Anne-Marie Slaughter, 'A Global Community of Courts' (2003) 44(1) *Harvard International Law Journal* 191.
[30] Rosalind Dixon and Vicki C Jackson, 'Constitutions Inside Out: Outsider Interventions in Domestic Constitutional Contests' (2013) 48(1) *Wake Forest Law Review* 149; Yash Ghai, 'Themes and Arguments' in Yash Ghai and Simon NM Young (eds), *Hong Kong's Court of Final Appeal* (Cambridge University Press, 2013) 1, 25–7. The 20th Commonwealth Law Conference, Melbourne, 20-24 March 2017 and the International Society of Public Law Conference, Hong Kong, 25-27 June 2018 featured panels on foreign judges.
[31] Eg Hong Kong: Lin Feng, 'The Expatriate Judges and Rule of Law in Hong Kong: Its Past, Present and Future' in Shimon Shetreet and Wayne McCormack (eds), *The Culture of Judicial Independence in a Globalised World* (Brill Nijhoff, 2016) 279. Bosnia Herzegovina: David Feldman, 'The Independence of International Judges in National Courts: Lessons from Bosnia Herzegovina' in CF Forsyth and Shimon Shetreet (eds), *The Culture of Judicial Independence: Conceptual Foundations and Practical Challenges* (Martinus Nijhoff Publishers, 2011) 215; Alex Schwartz, 'International Judges on Constitutional Courts: Cautionary Evidence from Post-Conflict Bosnia' [2017] *Law and Social Inquiry* advance online version. Lesotho: Rachel Ellett, *Politics of Judicial Independence in Lesotho* (Freedom House Southern Africa, 2012) 94–8. Pacific: Natalie Baird, 'Judges as Cultural Outsiders: Exploring the Expatriate Model of Judging in the Pacific' (2013) 19 *Canterbury Law Review* 80.
[32] Maurice Casey, 'New Zealand Judges in Overseas Courts' in Ian Barker and Graham Wear (eds), *Law Stories: Essays on the New Zealand Legal Profession 1969-2003* (LexisNexis NZ, 2003) 89; John Logan, 'A Year in the Life of an Australian Member of the PNG Judiciary' (SSGM Discussion Paper 2015/16, State, Society and Governance in Melanesia Program, Australian National University, 2015); Anthony Mason, 'Reflections of an Itinerant Judge in the Asia-Pacific Region' (2000) 28 *International Journal of Legal Information* 311.
[33] The UNDP engaged foreign judges to serve in East Timor during the post conflict transitional arrangements after 1999. The Commonwealth Fund for Technical Cooperation provides funding for foreign judges to serve across the Commonwealth: see 'Report of the Commonwealth Secretary-General 2011-2013' (Commonwealth Secretariat, 2013) 11.

limited.[34] Even though a high number of Commonwealth member states use foreign judges, a best practice compendium on the appointment, remuneration and tenure of judges across the Commonwealth excluded the issues raised by the use of foreign judges from its study.[35]

By analysing the practice of foreign judging in the Pacific, this thesis contributes comparative knowledge to an understudied global phenomenon. The thesis' conclusions about the significance of nationality to the role and function of constitutional judges, and the points at which pressures on the legitimacy and effectiveness of the use of foreign judges are likely to arise may, with care for relevant differences, be applied to assess the practice of foreign judging in other contexts.

III. An overlooked region

The Pacific region is often overlooked in global studies of constitutional law, partly because of the focus on the constitutional systems of Europe and North America,[36] and perhaps also because of the smallness and less-than-statehood status of some polities in the region.[37] Pacific states are rarely represented in collections examining particular issues of constitutional law across different countries.[38] The marginalisation of constitutional experiences from the Pacific region, and those of other small states, is perhaps one reason why the use of foreign judges is an underexamined topic in constitutional law scholarship.

This Part identifies the shared characteristics, as well as points of diversity, of the countries of the Pacific region. It does so in order to provide relevant context and to explain why the Pacific is a suitable case study for examining the practice of foreign judging and its implications.

The Pacific encompasses the island states and territories situated in the South Pacific Ocean. The region contains independent sovereign states, self-governing territories and dependencies.

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[34] United Nations Development Programme, Bangkok SURF, 'Global Experiences Using Expatriate Judges' (Substantive Research Piece East Timor, UNDP, August 2002); Aleida Ferreyra, Ramzi Mabsout and United Nations Office of the High Representative for the Least Developed Countries, Landlocked Developing Countries and Small Island Developing States, *Best Practices in the Implementation of the Brussels Programme of Action for the Least Developed Countries for the Decade 2001-2010* (United Nations, 2008) 39; Commonwealth Secretariat, 'Evaluation of the Commonwealth Fund for Technical Cooperation (CFTC)' (2008).

[35] Jan van Zyl Smit, *The Appointment, Tenure and Removal of Judges under Commonwealth Principles: A Compendium and Analysis of Best Practice* (Commonwealth Secretariat, 2015).

[36] Saunders, above n 3, 3.

[37] Wouter Veenendaal, *Politics and Democracy in Microstates* (Routledge, 2015) 2–3.

[38] For example, only one edited collection on the issue of judicial independence includes states from the Pacific: HP Lee and Marilyn Pittard (eds), *Asia-Pacific Judiciaries: Independence, Impartiality and Integrity* (Cambridge University Press, 2017).

This thesis focuses on nine independent states. It does not cover islands that are territories of an overseas power[39] or states which have entered into arrangements of 'free association' with a foreign state.[40] Free association arrangements produce a particular kind of constitutional relationship between two states. They generally entail a larger foreign power providing special concessions, financial assistance and in some cases citizenship to people of the island state, while retaining responsibility for foreign affairs and defence.[41] While the judiciaries in these states and territories share many of the features of judiciaries in independent states, including the use of foreign judges, states in free association and territories have been excluded from this study on the basis that the use of foreign judges in states that are formally and constitutionally independent raises distinctive issues, particularly in relation to conceptions of national sovereignty.

The states of the Pacific region are diverse and distinctive. They do however share some characteristics which affect their constitutional systems and the use of foreign judges. All nine states studied here are classified as small island developing states.[42] They have small populations, in some cases dispersed across islands in large ocean territories. Papua New Guinea is by far the most populous state in the region with just over seven and a half million people, but the other states have far smaller populations.[43] Small populations, geographic isolation and limited resources constrain economic development in small island states.[44] These features also influence the structure and capacity of the institutions of law and government, including judiciaries.[45]

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[39] American Samoa, Guam and the Commonwealth of the Northern Mariana Islands (territories of the United States); French Polynesia, New Caledonia, and Wallis and Futuna Islands (territories of France); Pitcairn Islands (territory of the United Kingdom); Tokelau (territory of New Zealand).

[40] Cook Islands and Niue (in free association with New Zealand); and Federated States of Micronesia, Marshall Islands and Palau (in free association with the United States).

[41] Stewart Firth, 'Sovereignty and Independence in the Contemporary Pacific' (1989) 1(1/2) *The Contemporary Pacific* 75; Barrie Macdonald, 'Decolonization and Beyond: The Framework for Post-colonial Relationships in Oceania' (1986) 21(3) *The Journal of Pacific History* 115, 120.

[42] *About the Small Island Developing States* (2015) United Nations Office of the High Representative for the Least Developed Countries, Landlocked Developing Countries and Small Island Developing States <http://unohrlls.org/about-sids/>.

[43] Tuvalu and Nauru have populations of approximately 10,000; Tonga 106,000; Kiribati 112,00; Samoa 193,000; Vanuatu 265,000; Solomon Islands 584,000; Fiji 892,000, Papua New Guinea 7,619,000: United Nations, Department of Economic and Social Affairs, Population Division, *World Population Prospects: The 2015 Revision* (United Nations, 2015) <http://esa.un.org/unpd/wpp/>.

[44] Francis X Hezel, 'Pacific Island Nations: How Viable Are Their Economies?' (Pacific Islands Policy No 7, East-West Center, 2012) 3.

[45] Lino Briguglio, 'Small Island Developing States and Their Economic Vulnerabilities' (1995) 23(9) *World Development* 1615, 1615–18; Veenendaal, above n 37, 22–3.

All nine Pacific states are current members of the Commonwealth of Nations, reflecting their former status as colonies, protectorates or trust territories of Australia, New Zealand or the United Kingdom.[46] With the exception of Tonga, all states became independent during a period of decolonisation from the 1960s to 1980s. Upon independence, these states adopted written constitutions[47] which generally continued the common law legal system and Westminster form of government introduced by the colonial administrations. The written constitutions made at independence have continued, with some amendment, in all states except Fiji and Tuvalu.[48] Tonga was never formally colonised, but as a protectorate from 1900 to 1970, the British government assumed responsibility for defence, foreign affairs and some judicial proceedings.[49] Tonga's *Constitution*, made in 1875, drew upon constitutional structures of the United Kingdom and the United States to create a constitutional monarchy adapted to the context of Tonga.[50]

The use of foreign judges in Pacific states reflects, in part, the influence of their colonial histories. Colonial administrators established British-style courts which applied statutory and common laws imported from Australia, Britain or New Zealand to deal with issues deemed to affect the interests of the colonisers. Separate 'native' or 'island' courts were established to resolve disputes between Indigenous peoples.[51] The transplanted systems of law and governance were initially administered by foreign experts, including foreign judges, sourced from Australia, New Zealand, the United Kingdom and Europe.[52] Even in Tonga, where Tongans had served for over thirty years as judges on the courts established by the *Constitution* of 1875, the practice of appointing British judges became entrenched during the 20th century protectorate period.[53] Settlers were generally hostile to the idea of submitting to courts presided over by Indigenous

[46] The exception is Vanuatu, which was an Anglo-French condominium from 1906 until independence in 1980.
[47] *Constitution of Fiji 1970* (schedule to *Fiji Independence Order 1970* (Imp)); *Constitution of Kiribati 1979* (schedule to *Kiribati Independence Order 1979* (Imp)); *Constitution of Nauru 1968; Constitution of the Independent State of Papua New Guinea 1975; Constitution of the Independent State of Samoa 1960; Constitution of Solomon Islands 1978* (schedule to *Solomon Islands Independence Order 1978* (Imp)); *Constitution of Tuvalu 1978* (schedule to *Tuvalu Independence Order 1978* (Imp)); *Constitution of the Republic of Vanuatu 1980*.
[48] New constitutions were made for Fiji in 1990, 1997 and 2013, and Tuvalu in 1986.
[49] Sione Lātūkefu, *The Tongan Constitution: A Brief History to Celebrate Its Centenary* (Tonga Traditions Committee, 1975) 70–2.
[50] Sione Lātūkefu, 'The Impact of the British on the Tongan Traditional Concept of Justice and Law' in Hermann Hiery and John M MacKenzie (eds), *European Impact and Pacific Influence* (IB Tauris, 1997) 177.
[51] Jennifer Corrin Care and Don Paterson, *Introduction to South Pacific Law* (Routledge-Cavendish, 2nd ed, 2008) 3–4.
[52] Sally Engle Merry, *Colonizing Hawai'i: The Cultural Power of Law* (Princeton University Press, 2000) 89.
[53] Guy Powles, 'The Common Law as a Source of Law in the South Pacific: Experiences in Western Polynesia' (1988) 10 *University of Hawaii Law Review* 105, 119–20.

judges.[54] In contrast, courts determining customary matters were sometimes staffed by a mix of European and Indigenous peoples appointed by the colonial administration.[55]

After independence, states chose to continue with the judicial system established during the colonial period. Many also decided to retain colonial legislation and apply Australian, English or New Zealand statutes, at least as a transitional measure.[56] National authorities continued to appoint foreign judges and former colonial powers continued to provide judges as part of their foreign development assistance programs. Features of the contemporary practice of foreign judging, including the movement of foreign judges across different states and the appointment of judges on short contracts, resonate with colonial practices.[57]

In the Pacific, as elsewhere, the courts have the primary responsibility to interpret and apply the constitution.[58] Pacific courts have powers of strong judicial review and may declare invalid legislation and executive actions which contravene the constitution. In addition, courts in several Pacific states have an advisory jurisdiction in constitutional matters, which permits them to provide opinions on questions referred by the Cabinet, parliament or head of the executive.[59] Pacific states do not have specialised constitutional courts. Constitutional jurisdiction is instead generally vested in the superior trial court, with a right to appeal to the highest appellate court. In many states, courts have been called upon to decide constitutional disputes of great political and social significance. These include challenges to the limits of the authority of national and local customary decision-making bodies,[60] human rights violations,[61] constitutional proceedings which directly affect the composition of the parliament and the appointment of constitutional officials,[62] and determinations of the legality of extra-constitutional actions taken during states

[54] Eg in Fiji: Tracey Banivanua-Mar, 'Frontier Space and the Reification of the Rule of Law: Colonial Negotiations in the Western Pacific, 1870-74' (2009) 30 *Australian Feminist Law Journal* 23, 30–32.
[55] Eg in Samoa: Malama Meleisea, *The Making of Modern Samoa: Traditional Authority and Colonial Administration in the History of Western Samoa* (Institute of Pacific Studies, University of the South Pacific, 1995) 188.
[56] Corrin Care and Paterson, above n 51, 18–21.
[57] Antony Allott, 'The Independence of the Judiciary in Commonwealth Countries: Problems and Provisions' (1994) 20(4) *Commonwealth Law Bulletin* 1428, 1431.
[58] On constitutional procedure see Julian R Moti, '"The Law Giveth ... And My Lord Taketh Away": Constitutional Redress in the Pacific Islands' in Mads Tønnesson Andenæs and Duncan Fairgrieve (eds), *Judicial Review in International Perspective* (Kluwer Law International, 2000) 121.
[59] *Constitution of Fiji 2013* s 91(5); *Constitution of Fiji 1997* s 123; *Constitution of Kiribati 1979* s 66(5); *Constitution of Nauru 1968* s 55; *Constitution of Papua New Guinea 1975* s 19; *Constitution of Samoa 1960* s 73(3); *Constitution of Vanuatu 1980*, s 39(3).
[60] Eg *Teonea v Kaupule* [2005] TVHC 5; *Teonea v Pule o Kaupule of Nanumaga* [2009] TVCA 2.
[61] Susan Farran, *Human Rights in the South Pacific: Challenges and Changes* (Routledge-Cavendish, 2009) ch 2.
[62] Eg the validity and effect of no-confidence motions: Anna Dziedzic, 'No Confidence Votes' in *Max Planck Encyclopedia of Comparative Constitutional Law* (Oxford University Press, 2017) [36-42].

of exception and coups.[63] The engagement by Pacific courts in matters of high political and social importance makes the Pacific a good case study for understanding the significance of the use of foreign judges on courts that have, and exercise, constitutional jurisdiction.

Prior to colonisation, the peoples of the Pacific were governed according to custom.[64] The region contains a great diversity of custom, reflected in different legal systems, laws and languages. Cultural identities do not necessarily map neatly onto state borders. Some states, of which Papua New Guinea, Solomon Islands and Vanuatu are examples, contain within them many different peoples with their own distinctive customs. The historical and contemporary movement of peoples across the Pacific created cultural diversity as well as cultural connections across what are now state borders.[65] In all states, custom continues to operate, both as an alternative to the formal legal system for the resolution of disputes and as an influence upon the content of formal legal rules and procedures, including the constitutional structures of government.[66] Many constitutions in the region recognise custom as part of the law or as a source of law.[67] The resulting legal pluralism provides a distinctive legal context for the work of judges and courts.

IV. Research methods

It would be possible to analyse the use of foreign judges from various disciplinary perspectives, including Pacific history, domestic and international politics, law and development, or colonial and postcolonial studies. This thesis however, considers the phenomenon from the perspective

[63] Most notably, Fijian Courts have determined the legality of actions taken during and after coups: Anne Twomey, 'The Fijian Coup Cases: The Constitution, Reserve Powers and the Doctrine of Necessity' (2009) 83 *Australian Law Journal* 319.

[64] This thesis uses the term 'custom' to refer to the codes of behaviour and values that constituted the legal systems of Indigenous peoples of the Pacific islands prior to colonisation, and which continue today. As Zorn explains, writers on Pacific legal systems distinguish between 'custom' and 'customary law', but do so for different reasons: Jean Zorn, 'Custom Then and Now: The Changing Melanesian Family' in Anita Jowitt and Tess Newton Cain (eds), *Passage of Change: Law, Society and Governance in the Pacific* (Pandanus Books, 2003) 95, fn 3. The preference for the term 'custom' in this thesis is intended to reflect the sense that custom includes not only codes of behaviour but also constitutive values of Indigenous peoples.

[65] Matt K Matsuda, *Pacific Worlds: A History of Seas, Peoples, and Cultures* (Cambridge University Press, 2012) 2–5.

[66] Jennifer Corrin, 'Getting Down to Business: Developing the Underlying Law in Papua New Guinea' (2014) 46(2) *The Journal of Legal Pluralism and Unofficial Law* 155; Miranda Forsyth, *A Bird That Flies with Two Wings: The Kastom and State Justice Systems in Vanuatu* (ANU E Press, 2009); Asiata Va'ai, 'The Idea of Law: A Pacific Perspective' (1997) 21 *Journal of Pacific Studies* 225.

[67] Corrin Care and Paterson, above n 51, ch 3; 'Converging Currents: Custom and Human Rights in the Pacific' (Study Paper SP17, New Zealand Law Commission, 2006) 35–6, appendix 4.

of constitutional law, reflecting the constitutional character of the issues of adjudication, independence and the role of judges and judiciaries raised by the research question.

The research methods of constitutional law involve the analysis of legal texts (such as constitutions, legislation and case law) and the principles that inform those texts. They also involve the examination of how the operation of these laws and principles affect the practices of government institutions and the relationships between government and the people. The methods of constitutional law therefore extend beyond legal doctrine to encompass an assessment of the operation of constitutional law in practice.

Like the foreign judges studied in this thesis, I come to the legal systems of Pacific island states as an outsider. In so far as I am studying (what are to me) foreign legal systems from a perspective inevitably informed by my own Anglo-Australian legal training and experience, this thesis also draws upon the methods of comparative legal research.[68] In order to identify and explain relevant similarities and differences between legal systems, comparative legal scholars need to understand the institutional and socio-cultural contexts in which law operates. In one's own legal system, this kind of knowledge is tacitly assumed. Comparative legal scholarship, however, seeks 'to make explicit the broader social and cultural context and assumptions of a foreign legal system or legal concepts, as they are understood by the people working from within the system.'[69] Analysing and explaining the approach of a foreign legal system to a particular legal phenomenon – in this thesis, the nationality of the judges on courts of constitutional jurisdiction – therefore requires more than a description of relevant legal rules, but a deeper understanding of the operation of those rules in practice and the assumptions and principles that inform them.[70] For the purposes of this thesis, this requires explaining the ways in which the distinctive social and legal contexts of each of the nine Pacific states affect the practice of foreign judging, and its implications for constitutional adjudication, judicial independence and the role of judges and judiciaries in the region.

For these reasons, this thesis draws on a combination of empirical, legal analytical, and theoretical research methods. Empirical research methods were used to understand the actual practice of foreign judging in the Pacific. A quantitative study of the foreign judges serving in the

[68] On this understanding of comparative law, see Maurice Adams, 'Doing What Doesn't Come Naturally: On the Distinctiveness of Comparative Law' in Mark Van Hoecke (ed), *Methodologies of Legal Research* (Hart Publishing, 2011) 229, 233–4; Gunter Frankenberg, 'Critical Comparisons: Re-Thinking Comparative Law' (1985) 26 *Harvard International Law Journal* 411.
[69] Adams, above n 68, 235.
[70] Kim Lane Scheppele, 'Constitutional Ethnography: An Introduction' (2004) 38 *Law and Society Review* 389.

nine Pacific states was enabled by the creation of an original dataset of all judges serving on courts of constitutional jurisdiction from 2000-2015.[71] I also undertook qualitative research by conducting interviews with foreign judges and officials involved in the recruitment and appointment of foreign judges to Pacific courts. A detailed description of the methodology used to collect and analyse this empirical data is set out in Chapter 2, Part II. This empirical research provides evidence of the practice of foreign judging necessary to assess the operation of the laws that regulate the use of foreign judges, and the implications of the use of foreign judges for core aspects of the judicial role.

Legal analytical research methods – that is, the reading and interpretation of legal texts such as constitutions, legislation and cases – were used to ascertain the relevant law. The thesis includes a detailed, comparative analysis of constitutional and statutory provisions relating to the appointment, tenure and removal of judges in each of the nine Pacific jurisdictions. The case law of Pacific jurisdictions is also used to understand common law requirements on legal issues such as judicial impartiality and the validity of judicial appointments and removals. Moving beyond description, the thesis also includes a critical analysis of the constitutional jurisprudence of Pacific courts. In order to understand the influence, if any, that foreign judges have on the way in which courts approach constitutional interpretation, I read over 60 constitutional cases from across the region, identifying the predominant methods of constitutional interpretation in Pacific courts and the assumptions on which those methods are based.

Finally, this thesis engages with constitutional theory in order to better understand the requirements of the three core aspects of the judicial role that may be affected by the use of foreign judges. The processes of constitutional adjudication, judicial impartiality and independence, and the representative qualities of judges and judiciaries, all contribute to the legitimacy and effectiveness of the judiciary. These qualities, and the concept of legitimacy itself, are all subject to theoretical debate. This thesis does not deal with these qualities in the abstract to make normative claims about the propriety of the use of foreign judges. Rather, it seeks to adapt and apply relevant theoretical insights to the use of foreign judging and the circumstances of Pacific states, in order to come to a view on the implications of the practice in the particular context of the Pacific.

[71] Set out at Appendix A.

V. Thesis outline

The thesis first presents a comprehensive empirical picture of the contemporary use of foreign judges in the Pacific and the laws and procedures that regulate the practice. Chapter 2 presents a descriptive overview of the foreign judges serving in the Pacific, detailing the number of foreign judges in the region; the nature of foreign judges' service; their nationality and professional background; the proportion of foreign to local judges; and trends towards localisation (that is, the replacement of foreign judges with local judges). Chapter 3 examines the laws and procedures relating to the selection, appointment and removal of foreign judges in the Pacific region, and the terms and conditions of their service. It analyses the constitutional and statutory requirements governing judicial service in each Pacific state as well as the contractual relationships between judges, governments, courts and funding organisations. It examines how these legal frameworks are applied in practice, drawing on data collected in interviews as well as case law and academic scholarship. Together, the information presented in Chapters 2 and 3 provides a detailed understanding of the practice of foreign judging as it arises in the Pacific.

An assessment of the implications of the practice of foreign judging for Pacific judiciaries requires understanding whether and how foreign judges are different from local judges. Chapter 4 explains the ways in which a judge's nationality is significant to the role and functions of a judge. It does so by identifying attributes that are understood to accompany nationality – such as knowledge, membership and identity – and assessing their significance to the role and function of the judges who sit on courts of constitutional jurisdiction. The resulting analysis covers three aspects of judging: first, the relevance of knowledge of the national law and the community in which it operates to the task of constitutional adjudication; secondly, the relevance of national membership to judicial responsibility, accountability and independence; and thirdly, the significance of the identity of judges to the representative function of a judiciary, in particular as a symbol of sovereignty.

The following chapters take up each of these three aspects of judging and examine how the use of foreign judges affects constitutional adjudication, judicial independence, and the representative role of judges and judiciaries in the Pacific states.

Chapter 5 considers how the use of foreign judges influences the way in which Pacific courts approach constitutional adjudication. It does so by focusing on two dimensions of knowledge that foreign judges bring to the task of constitutional adjudication. The first is knowledge *reach*, in that foreign judges will have knowledge that extends beyond local circumstances to

encompass direct knowledge and experience in their home jurisdiction. The second is a knowledge *gap*, in that foreign judges generally will not have the same depth of knowledge about the national legal, social and political context of the Pacific state as local judges. From a reading of over 60 constitutional cases determined by Pacific courts, I identify three general features of constitutional adjudication in the region: the influence of common law, the limited integration of custom and constitutional law, and a predominantly textualist approach to constitutional interpretation. I explain how these features are, at least in part, explicable in light of the kinds of knowledge that foreign judges are assumed to bring to the task of adjudication. I suggest that the predominant approach to constitutional adjudication supports a conception of foreign judges as technical legal experts with transferable knowledge and skills.

Chapter 6 assesses the effect that the use of foreign judges has on the impartiality and independence of Pacific judiciaries. A common justification for the use of foreign judges is that they bring, or are seen to bring, a greater degree of impartiality than local judges, who, particularly in small Pacific communities, might feel the pressures of family, church, political and community ties and influence. I argue, contrary to this claim, that foreign judges should not be considered more impartial than local judges by virtue of their distance from the local community. A greater threat to judicial independence and impartiality arises from the insecurity of foreign judges' tenure, resulting from the widespread appointment of foreign judges on short renewable contracts and their vulnerability to arbitrary removal from office. I suggest that claims about the impartiality of foreign judges have been overstated, while the risks to judicial independence posed by the insecure tenure of foreign judges have not been properly addressed, contributing to the conception of foreign judges as *impartial* technical experts.

Finally, attention to the nationality of judges highlights the significance placed on judges' allegiance to the state and responsibility to the people, and the expressive functions of judicial office. Chapter 7 uses the lens of representation to examine the different ways in which the individuals who hold judicial office are connected to that office, the state and its people. The significance of allegiance to the state is examined through the formalities of representation, that is, the procedures by which a person is given authority to act as a judge and held accountable in that position. The idea that judges speak for or represent certain values or constituencies in the course of constitutional adjudication provides a way to examine whether foreign judges, through adjudication, might come to represent particular values or concepts. The expressive function of the judiciary is examined by considering the value placed on a judiciary that represents – in the sense of reflecting or resembling – the society it serves. In each case, the

circumstances of foreign judging limit the extent to which foreign judges are understood to be authorised by, accountable to, speaking for, or reflective of the people or the state. Instead, greater emphasis is placed on the sense that foreign judges are members of a profession, with the technical skills and expertise to adjudicate legal disputes, and shared transnational values of impartiality and a commitment to the law.

It is only in light of the empirical findings and the analysis of the implications of the use of foreign judges in the Pacific that I am in a position, in concluding Chapter 8, to make some observations about the rationale for the use of foreign judges and the legitimacy and effectiveness of the practice. As will be seen, the rationales for, and legitimacy of, the use of foreign judges in the Pacific depend on conceptions of what it is that judges do. Chapter 8 examines a range of rationales for the use of foreign judges and suggests that greater clarity about the rationales for using foreign judges would provide a more secure foundation for some of the distinctive features of the legal frameworks and practices that facilitate foreign judging. The Chapter then considers the challenges posed by the use of foreign judges to the legitimacy of Pacific courts of constitutional jurisdiction. I suggest that whether or not foreign judges pose any distinctive challenge to legitimacy depends on what it is that judges do, and are expected to do, when adjudicating constitutional cases. I show that the legitimacy of foreign judges is secure when foreign judges are understood as expert and impartial professionals who apply a pre-existing law to resolve constitutional disputes, but that challenges arise when foreign judges are understood to make law, reflect customary and community values, or represent the people. I suggest that this concern underlies the predominant vision of the foreign judge in the Pacific as an impartial, expert professional with transferable skills in adjudication. Based on the empirical and analytical findings of the thesis, this Chapter suggests some good practice initiatives to support the legitimate and effective use of foreign judges in the Pacific.

The thesis concludes by outlining the significance of this research for understanding the evolving role of judges and judiciaries in contemporary conditions of globalisation.

CHAPTER 2
THE FOREIGN JUDGES ON PACIFIC COURTS

I. Introduction

Although the use of foreign judges is a long-standing practice across the Pacific, there has been no systematic study of the number, proportion and attributes of foreign judges serving in the region.[1] This Chapter presents the results of an original empirical study of the composition of the courts of constitutional jurisdiction in the nine Pacific states from 2000 to 2015. It explains the findings of this quantitative study by considering them in light of the nature of the foreign judges' service on Pacific courts and the contexts in which Pacific courts operate. Part III outlines the number and proportion of foreign judges serving on the relevant Pacific courts. Part IV describes the different kinds of judicial service – ranging from ad hoc, part-time or full-time service, on a residential or visiting basis – that foreign judges provide to Pacific courts and explains how this affects the numbers of foreign judges serving in the region. Part V provides an overview of the personal attributes of the cohort of foreign judges, drawing on data on their nationality and professional background. It identifies some trends regionally and in particular states, and offers some explanations for why some states might tend to recruit foreign judges from particular donor states, or with particular professional backgrounds. Finally, in Part VI, I compare the extent to which the judiciaries of Pacific states have localised over time. 'Localisation' refers to the replacement over time of foreign judges with local, citizen judges. I explain the different patterns of localisation in Pacific states on the basis of smallness, constitutional culture, and the different needs of trial and appellate courts in the region.

The picture that emerges from this analysis shows that while there is a large number of foreign judges in the Pacific – 187 in total, comprising just over three quarters of all judges in the region – many of these judges serve for brief periods, and often on a part-time basis. It also shows that the nationalities and professional backgrounds of foreign judges, and the emphasis on localisation, differ across Pacific states, and across different courts within states, and are informed by a range of historical and contextual factors.

The quantitative analysis presented in this Chapter is complemented by Chapter 3 which describes the laws and practices for recruiting and appointing foreign judges and the terms and

[1] Smith lists some of the foreign judges sitting on Pacific courts from 2003-2012, however, this study covered only foreign judges from Australia, New Zealand and the United Kingdom and did not include Papua New Guinea: Stephen Eliot Smith, 'The Way We Do Things Back Home: Do Expatriate Judges Preferentially Cite the Jurisprudence of Their Home Countries?' (2013) 13(2) *Oxford University Commonwealth Law Journal* 331.

conditions of their service. Together, these chapters provide the evidence required to assess the implications of the use of foreign judges for constitutional adjudication, judicial independence and the representative qualities of Pacific judiciaries[2] and to draw conclusions about the rationales for the continued use of foreign judges in Pacific states.[3]

II. Methodology

This Part sets out the methodology used to collect and analyse empirical data in order to capture the contemporary practice of foreign judging in the Pacific that is described in this and the following chapter. It explains the definition of 'foreign judge' adopted here, and the steps taken to identify the relevant courts of constitutional jurisdiction and the judges who served on those courts. It also outlines the qualitative interviews used to gather information about the practice of foreign judging.

Foreign judges

In general terms, a foreign judge is a judge from a country other than one's own. The word 'foreign' is based on the Latin word *foras* meaning 'outside'. The meaning of foreignness is therefore relative, defined against whatever is considered to be 'inside' or domestic.[4] Legal texts rarely define foreignness. Instead, the law uses concepts such as citizenship, residence or nationality to categorise what is foreign and what is not.

The typical example of a foreign judge is a person who serves as a judge in a state in which they do not hold citizenship or usually reside. However, examples arise that strain the equation of foreignness with non-citizenship and non-residence. For example, there is a large Pacific diaspora in New Zealand. Many New Zealand citizens identify as Pacific islanders and maintain strong links to their home country. Justice Ida Malosi was born to Samoan parents in New Zealand. In 2002 she was appointed a judge of the New Zealand Family Court, becoming the 'first Pacific Island woman judge' in New Zealand.[5] From 2013 to 2014, Justice Malosi served as a judge on the Samoan Supreme Court. Does this mean that Justice Malosi is a foreign judge when she sits in Samoa?

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[2] Chapters 5, 6 and 7.

[3] Chapter 8.

[4] Rebecca Saunders, *The Concept of the Foreign: An Interdisciplinary Dialogue* (Lexington Books, 2003) 3, 6. For theoretical discussion of the concept of foreignness, see Chapter 4, Part II.

[5] Michele Hewitson, 'First Female Pacific Island Judge Ready to Be Tough but Caring' *New Zealand Herald* (Auckland), 13 September 2002 <http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=2847011>.

An alternative way to understand foreignness is as belonging to a different national community, and, in the specific case of judges, belonging to a different *legal* community.[6] In this sense, foreign judges are judges who, prior to their appointment, were members of a national legal community outside that which they now serve as judges. One problem with this definition is that it would categorise as foreign judges citizens from Pacific states who gain their legal education and professional experience overseas, a fairly common career path for lawyers in the region.[7] This definition would, however, apply to most foreign judges serving in the Pacific, who have legal qualifications and experience gained predominantly in their home state, not the Pacific state in which they serve as judges. There are, however, some exceptions. For example, Justice David Cannings is an Australian citizen who has lived and worked in Papua New Guinea since 1984. He was appointed a judge of the Papua New Guinea National and Supreme Courts in 2004. Despite his long professional experience in Papua New Guinea, Justice Cannings is a non-citizen judge under Papua New Guinean law.[8]

For the purposes of this study, I define a foreign judge as a judge who is not a citizen of the state on whose courts they serve. On this basis, both Justice Malosi and Justice Cannings are counted as foreign judges. Although defaulting to a definition based on citizenship risks glossing over some of the complexities of national identity and the global movement of peoples, it is justified here on the basis that citizenship is the criterion that the laws of Pacific states use to distinguish between local and foreign judges.

Courts of constitutional jurisdiction

For the reasons explained in Chapter 1, this study focuses on courts of constitutional jurisdiction. Seventeen courts across the nine Pacific states exercise constitutional jurisdiction. In Kiribati, Samoa, Solomon Islands, Tonga, Tuvalu and Vanuatu, the superior court (designated the High Court or Supreme Court[9]) has original jurisdiction in constitutional matters, while the Court of

[6] Some authors writing about Hong Kong have taken this approach, defining a foreign judge as a judge qualified for appointment otherwise than by reason of local legal qualifications, thus avoiding a definition based on judges' ethnicity: Joseph Fok, 'The Use of Non-Local Judges in Overseas Jurisdictions' (2017) 23(1) *Journal of the Commonwealth Magistrates' and Judges' Association* 28, 28; Lin Feng, 'The Expatriate Judges and Rule of Law in Hong Kong: Its Past, Present and Future' in Shimon Shetreet and Wayne McCormack (eds), *The Culture of Judicial Independence in a Globalised World* (Brill Nijhoff, 2016) 279, 279.

[7] Nilesh N Bilimoria, 'Choices for the South Pacific Region's Bar Associations and Law Societies?' in Petra Butler and Caroline Morris (eds), *Small States in a Legal World* (Springer International Publishing, 2017) 245, 247.

[8] As explained in Chapter 3, Part IV.A, the *Organic Law on the Terms and Conditions of Employment of Judges* (PNG) s 2 distinguishes between citizen and non-citizen judges for the purposes of tenure.

[9] In Kiribati, Solomon Islands and Tuvalu, this court is designated the High Court; in Samoa, Tonga and Vanuatu it is the Supreme Court.

Appeal has appellate jurisdiction in constitutional and other matters.[10] In Fiji, three courts exercise constitutional jurisdiction. The High Court has original jurisdiction in constitutional matters, which must be commenced in that court.[11] Appeals on constitutional matters may be taken as of right to the Court of Appeal, and from there by leave to the Supreme Court.[12] In Papua New Guinea, constitutional jurisdiction is shared across the National Court and the Supreme Court. The Supreme Court, as the final court of appeal, has original and exclusive jurisdiction to hear any question relating to the interpretation or application of the Constitution.[13] However, both the National Court and the Supreme Court are charged with enforcing constitutional rights and freedoms, upon an application by an interested person or upon the Court's own initiative.[14] Judges are appointed to sit concurrently on the National and Supreme Courts and the bench of the Supreme Court is comprised of National Court judges. As such, the National and Supreme Courts of Papua New Guinea are taken to be one court for the purposes of this study. In Nauru, the Supreme Court has sole jurisdiction over constitutional matters.[15] During the period covered by this study, the High Court of Australia served as Nauru's court of final appeal. However, because appeals that involve the interpretation or effect of the Constitution are excluded from the High Court by agreement between Nauru and Australia,[16] the Supreme Court of Nauru is the only court of constitutional jurisdiction in that state.

Kiribati and Tuvalu retain appeals to the Judicial Committee of the Privy Council. Appeals from Kiribati may only be taken in matters affecting the people of Banaba Island, who hold special rights under the *Constitution of Kiribati*.[17] Appeals from Tuvalu to the Privy Council may be taken by leave from the Tuvalu Court of Appeal.[18] To date, no appeals have been taken to the Privy Council from either country. Because the Judicial Committee of the Privy Council is not a national court it is not included in this study.[19] Tonga has its own Privy Council, which advises the Monarch in the exercise of his or her executive and judicial functions. For much of Tonga's

[10] *Constitution of Kiribati 1979* s 88; *Constitution of Samoa 1960* ss 73(2), 80; *Constitution of Solomon Islands 1978* s 83; *Constitution of Tonga 1875* s 90; *Constitution of Tuvalu 1978* ss 130, 131, 135; *Constitution of Vanuatu 1980* s 53.
[11] *Constitution of Fiji 2013* s 100(4); *Constitution of Fiji 1997* s 120(2).
[12] *Constitution of Fiji 2013* ss 98(1)-(2), 99; *Constitution of Fiji 1997* ss 121, 122.
[13] *Constitution of Papua New Guinea 1975* ss 18(1), 162.
[14] *Constitution of Papua New Guinea 1975* s 57.
[15] *Constitution of Nauru 1968* s 54(1).
[16] *Agreement between the Government of Australia and the Government of the Republic of Nauru relating to Appeals to the High Court of Australia from the Supreme Court of Nauru*, 6 September 1976, art 2; *Appeals (Amendment) Act 1974* (Nauru) s 45.
[17] *Constitution of Kiribati 1979* s 123.
[18] *Constitution of Tuvalu 1986* s 136; *Superior Courts Act 1987* c 7.68 (Tuvalu) s 13.
[19] For the reasons explained in Chapter 1, Part I.

history, the Privy Council served as the court of final appeal, but its judicial function is now limited to hearing matters relating to hereditary estates and titles[20] and it too is excluded from this study.

Time period

This study covers the composition of the relevant courts from 2000 to 2015. This 16-year period was chosen in order to understand the use of foreign judges at a time when the courts and other institutions of Pacific states were well established. The nine Pacific states became independent over the period from 1962 to 1980. Not all states were in a position to establish their judiciaries at the date of independence. Until the mid-1980s, Kiribati, Solomon Islands and Tuvalu extended the arrangements made during colonial times, when Fijian courts and judges served the Western Pacific region.[21] Domestic courts of final appeal for Fiji and Tonga were established in 1990, when both states discontinued appeals to the Judicial Committee of the Privy Council and the Tongan Privy Council respectively. Therefore, by 1990, the court structures described above were in place. 2000 to 2015 represents a period when the Pacific courts were, collectively, well settled. Because this study seeks to examine contemporary practices, the time period was selected to cover current, rather than historical, practices.

Identifying judges

There is no publicly available, comprehensive list of foreign judges who have served in the Pacific. While some Pacific judiciaries produce Law Reports and Annual Reports that sometimes set out the composition of the court for that year, such reports are not consistently produced in each of the nine states. For the purposes of this study, I created an original dataset with the names, dates of service, nationalities and professional background of all foreign judges who served on the relevant courts during the case study period from 2000 to 2015.

The dataset was compiled using three sources. In order to identify the names of judges and dates of their service, I conducted an audit of all judgments of the relevant courts published by the Pacific Legal Information Institute ('Paclii'), an open-access online database of legal materials from fourteen Pacific jurisdictions.[22] Not every decision of every court is provided to Paclii for publication and as a result the database is not exhaustive. It is however sufficiently comprehensive to indicate the names of the judges – local and foreign – who produced written judgments in each year over the case study period. In order to verify judges' terms of

[20] *Constitution of Tonga 1875* ss 50(2), 90.
[21] Mere Pulea, 'A Regional Court of Appeal for the Pacific' (1980) 9(2) *Pacific Perspective* 1, 4–6.
[22] *Pacific Islands Legal Information Institute* <www.paclii.org>.

appointment I looked to notices of judicial appointment. Only three states – Nauru, Solomon Islands and Vanuatu – publish judicial appointments in an official government gazette, and even then not all judicial appointments are gazetted. Some judges provided me with copies of their warrants of appointment. In Fiji, Papua New Guinea and Tonga, new judicial appointments are announced by government media releases, so media reports were used to supply details of new judicial appointments. Finally, having identified the names of the judges serving on the relevant courts, I used publicly available biographical data[23] and media sources to ascertain the nationality, professional experience and dates of service of each judge to the extent possible. Each of these sources has limitations in terms of comprehensiveness, accessibility and accuracy. However, drawing on all three sources provided a reasonably complete list of foreign judges, which is set out at Appendix A.

Interviews

In order to gather information about the practices of foreign judging, I conducted 26 interviews.[24] Twenty-two interviews were with people who, between them, had served as judges in all nine Pacific states and on 15 of the 17 courts of constitutional jurisdiction in the region. The judges interviewed were from three donor countries: Australia, New Zealand and the United Kingdom. No foreign judges from Sri Lanka, all of whom served in Fiji, were interviewed. The Chief Justice of Fiji refused to permit the researcher to approach judges currently serving on the Fijian courts[25] and Sri Lankan judges who had formerly served in Fiji declined or did not respond to invitations to participate. Four interviews were conducted with representatives of organisations involved in the recruitment and appointment of foreign judges in the Pacific region, including authorities in Pacific and donor states and international organisations.

The interviews occurred between July 2016 and May 2017. Most interviews were conducted in person, with some phone interviews where a face-to-face interview was not possible. Each semi-structured interview[26] covered the pathways to becoming a judge in the Pacific; the procedures for recruitment and appointment, the judge's tenure and remuneration; and the kinds of work

[23] Sources include online directories of judges and lawyers; professional biographies on the websites of courts, chambers and academic institutions; and *Who's Who in Australia and New Zealand* (Crown Content, 2003).

[24] Participants were identified and approached using the range of strategies discussed in Esther Nir, 'Approaching the Bench: Accessing Elites on the Judiciary for Qualitative Interviews' (2018) 21(1) *International Journal of Social Research Methodology* 77.

[25] Letter from AHCT Gates, Chief Justice of Fiji, to Anna Dziedzic, 6 October 2016.

[26] Jennifer Mason, 'Semistructured Interview' in Michael Lewis-Beck, Alan Bryman and Tim Futing Liao (eds), *The SAGE Encyclopedia of Social Science Research Methods* (Sage Publications, 2004) 1021.

that judges performed while serving on the Pacific court. The primary purpose of the interviews was to gather information about procedural matters relating to the appointment and service of foreign judges not available from other sources, although participants sometimes also shared their views about aspects of the practice of foreign judging based on their own experiences. Interviews were not recorded or transcribed, but a file note was created after each discussion.

Participants could choose to remain anonymous or to be referred to by their position or name. While some participants consented to have comments attributed to them with prior agreement, many participants chose to remain anonymous. For this reason, and because of the small number of participants overall, it was subsequently decided that all interviewees would be anonymous to ensure confidentiality. Where information gathered from interviews is used in this thesis, it is framed in general terms without identifying individuals. Interviews are cited by reference to the file notes of each interview (eg F1, F2). The information provided in the interviews was supplemented by information published in memoirs, articles and presentations.

III. Number and proportion of foreign judges

In total, 187 foreign judges sat on the courts of constitutional jurisdiction in the nine Pacific states during the period 2000 to 2015. Of these, 26 judges sat in more than one Pacific state over the case study period. The ratio of foreign to local judges varies. In Nauru and Tuvalu all of the judges on the relevant courts between 2000 and 2015 were foreign. Between 71% and 95% of the judges serving in Fiji, Kiribati, Samoa, Solomon Islands, Tonga and Vanuatu were foreign judges. Papua New Guinea had the lowest proportion of foreign judges with just 21%. Combining the figures for each jurisdiction separately, and thereby counting some foreign judges more than once, 228 of the 299 (or 76%) of the judges serving in the region over the case study period were foreign judges.

Table 2.1 Ratio of foreign to local judges in nine Pacific states 2000-2015

State	Number of judges	Number of local judges	Number of foreign judges	% foreign judges
Tuvalu	7	0	7	100%
Nauru	8	0	8	100%
Tonga	22	1	21	95%
Kiribati	16	1	15	94%
Samoa	32	4	28	88%
Vanuatu	27	4	23	85%
Fiji	121	21	100	83%
Solomon Islands	28	8	20	71%
PNG	42	33	9	21%

While it is clear that the number and proportion of foreign judges serving in the Pacific region is high, the numbers do not tell the whole story. The remainder of this Chapter situates these figures in their context, by reference to the nature of foreign judges' service and the political and historical contexts in which Pacific courts operate.

IV. The nature of foreign judges' service

This Part outlines the different ways in which foreign judges serve on Pacific courts. It identifies three categories of service – full-time resident foreign judges, part-time visiting foreign judges, and ad hoc visiting judges. It is important to understand these differences because they affect the high number of foreign judges serving in the region and the implications of the use of foreign judges for Pacific judiciaries.

Full-time resident foreign judges

Some foreign judges reside in the Pacific state and serve on the Pacific court full time for the duration of their appointments. This is the case for most foreign judges serving on the superior trial courts in Fiji, Kiribati, Papua New Guinea, Samoa, Solomon Islands, Tonga and Vanuatu. Some resident foreign judges provide many years of continuous, full-time service. Others serve for a period of years or months before returning to their home countries or taking up other positions.

Part-time visiting foreign judges

In Nauru and Tuvalu, the two smallest jurisdictions, the superior trial courts sit part time. As a result, judges do not reside in Nauru or Tuvalu, but rather visit periodically as required for sittings of the court, generally two to three times a year.[27] Several Chief Justices of Nauru and Tuvalu have held their positions concurrently with other judicial appointments in the Pacific.[28]

All courts of appeal in the region are part time. They are convened for sittings as required in very small jurisdictions such as Tuvalu, and periodically one to three times a year in other jurisdictions. As a result, the foreign judges on courts of appeal are also part-time visiting judges. In Fiji, Kiribati, Samoa, Solomon Islands, Tonga and Tuvalu, a pool of foreign judges hold

[27] Nauru Constitutional Review Committee, *Naoero Ituga: Report* (2007) 115; Office of the Attorney General, 'Country Report of the Office of the Attorney General Tuvalu' (Report to the 34th Pacific Islands Law Officers' Network Meeting, October 2015) 7.

[28] Sir Gaven Donne served concurrently as Chief Justice of Nauru and Tuvalu until 2001; Robin Millhouse served concurrently as Chief Justice of Nauru and Kiribati from 2006-2010; Sir Gordon Ward served as Chief Justice of Tuvalu concurrently with service as the Chief Justice of Tonga and President of the Fiji Court of Appeal.

commissions to sit on the court of appeal and are invited to constitute the court for a particular sitting. Some judges of appeal return to sit in the Pacific jurisdiction annually or more frequently; others may sit only once or twice. In many cases, a bench of the court of appeal will consist of three visiting foreign judges. Generally, judges appointed to the superior trial court are ex officio judges of the court of appeal[29] and might sit with visiting judges of appeal. In Papua New Guinea and Vanuatu, visiting judges on appeal panels often sit with judges (both local and foreign) from the court below.

Ad hoc visiting foreign judges

Foreign judges are occasionally recruited to hear specific matters.[30] For example, the Working Committee responsible for drafting the *Constitution of Samoa* recommended that, for constitutional matters, efforts should be made to appoint an experienced constitutional lawyer or academic to sit on the Court of Appeal.[31] In 1982 Sir Kenneth Keith, who at that time was a barrister and legal academic in New Zealand and had previously been involved in the processes for making Samoa's independence, was appointed to sit on the Samoan Court of Appeal to hear its first constitutional case.[32] In an example of a different kind, also from Samoa, in 2006 the Chief Justice sought foreign judges to hear election petitions, in order to avoid perceptions of conflict of interest arising from family or social connections between Samoan judges and candidates for election.[33] Two Australian judges were appointed to the Supreme Court of Samoa to hear the election petitions, sitting for approximately three months.[34]

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[29] *Constitution of Fiji 2013* s 98(2); *Constitution of Fiji 1997* s 128; *Constitution of Kiribati 1979* s 91(1)(a); *Constitution of Papua New Guinea 1975* s 161(1); *Constitution of Samoa 1960* s 75(2)(a); *Constitution of Solomon Islands 1978* s 85(2); *Superior Courts Act 1987* (Tuvalu) s 7(1); *Constitution of Vanuatu 1980* s 50; *Judicial Services and Courts Act 2003* c 270 (Vanuatu) s 45.

[30] As expressly permitted by *Constitution of Kiribati 1979* s 93(1); *Constitution of Samoa 1960* s 75(5); *Constitution of Tuvalu 1978* s 123. As discussed in Chapter 3, Part IV.A all constitutions in the region permit the appointment of foreign judges on short terms.

[31] Lauofo Meti, *Samoa: The Making of the Constitution* (National University of Samoa, 2002) 165–6, 175–6.

[32] Kenneth Keith, 'Reflections on Some Pacific Constitutions' (2012) 18 *New Zealand Association for Comparative Law Yearbook* 133, 133. The case was *In re the Constitution, Attorney-General v Olomalu* [1982] WSCA 1.

[33] Supreme Court of Tasmania, 'Report of the Chief Justice of the Supreme Court of Tasmania: Annual Report 2005-2006' (2006) 11.

[34] 'Two Australian Judges Take up Temporary Positions in Samoa' *Radio New Zealand*, 18 May 2006 <http://www.radionz.co.nz/international/pacific-news/162130/two-australian-judges-take-up-temporary-positions-in-samoa>.

The significance of the nature of foreign judges' service

While there are exceptional cases in which a foreign judge permanently resides in the Pacific state and effectively serves their entire judicial career in one Pacific judiciary,[35] the general practice is that foreign judges serve on a short-term temporary basis. This is one reason for the high number of foreign judges, as positions on Pacific courts tend to be filled by a succession of foreign judges on short terms, rather than by a single permanent judge.

A significant point of difference arises between part-time visiting judges who serve primarily on the court of appeal and foreign judges who are resident in the Pacific state and serve full time for a period of years. For example, there is likely to be greater stability in the membership of courts composed of foreign judges serving on a full-time basis, than in courts constituted by visiting ad hoc or part-time judges. It is also likely that resident foreign judges will have greater opportunities to gain knowledge and experience of the Pacific jurisdiction in which they serve, which is relevant to the kinds of knowledge that foreign judges bring to the task of constitutional adjudication.[36]

V. Who serves as a foreign judge in the Pacific?

This Part describes the nationality of foreign judges serving in the Pacific and their professional background.[37] These attributes are relevant to understanding patterns in the recruitment of foreign judges. As will be seen in later Chapters, these attributes also affect the kinds of knowledge that foreign judges bring to their role, claims made about judicial independence, and the expressive qualities of Pacific judiciaries.

The data shows that the most common profile of a foreign judge in the Pacific is an Australian or New Zealand citizen with judicial experience. This modal profile should not, however, be presumed to account for all foreign judges in the region. The recruitment of foreign judges from Commonwealth jurisdictions in Asia and Africa, and from within the Pacific itself, represents a shift away from the traditional donor countries of Australia and New Zealand, at least in some Pacific states. Further, while judges in the region are predominantly drawn from foreign judiciaries, a significant proportion have no prior judicial experience and are instead recruited from legal or government practice. The data also shows some differences in the preferences of individual Pacific states and courts within states. A comparative analysis suggests some reasons

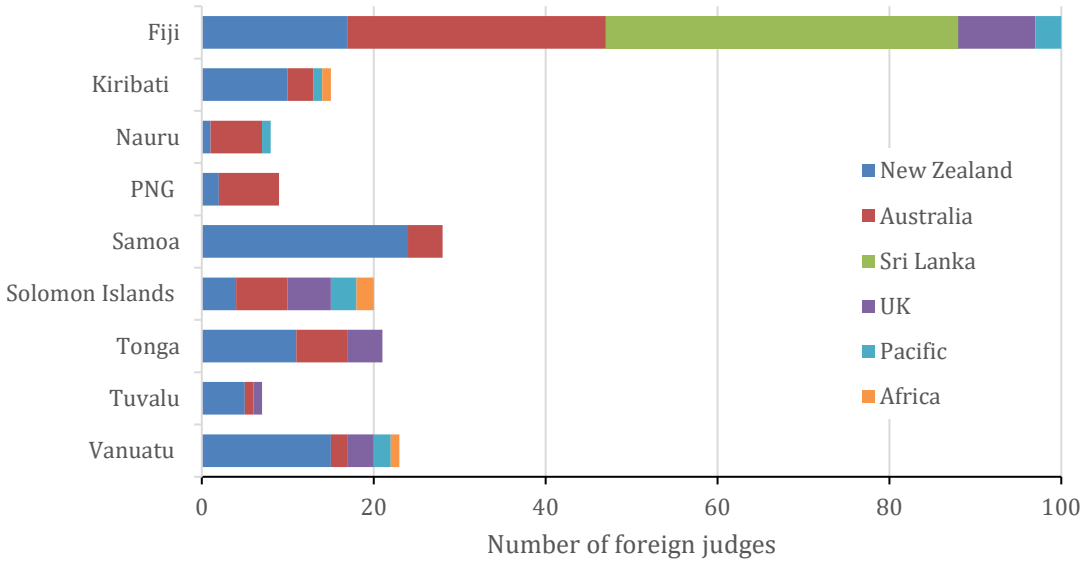
[35] Examples include Anthony Gates, who served as a judge and then Chief Justice in Fiji on a full-time basis throughout the case study period and David Cannings, described above Part II.
[36] See Chapter 5.
[37] These attributes, where known, are listed for each foreign judge in Appendix A.

for these differences, relating to the availability and expertise of foreign candidates for judicial appointment, and the historical links and political relationships between Pacific states and the states and organisations from which foreign judges are sourced.

A. Nationality

All foreign judges serving in the Pacific are from Commonwealth countries with common law legal systems. Of the 187 foreign judges serving across the Pacific, 32% were from New Zealand, 30% from Australia, 22% from Sri Lanka and 8% from the United Kingdom. The remaining 8% comprise ten judges recruited from other states within the Pacific region and four from African states. There is, however, considerable variation between Pacific states in relation to the nationality of the foreign judges. As illustrated in Figure 2.1, some states heavily favour judges from one foreign state above others, while others appoint judges of more diverse nationalities.

Figure 2.1 Nationality of foreign judges on Pacific courts 2000-2015



Pacific constitutions provide that in order to be appointed a judge, a person must have held judicial office or practiced law in the state itself or another country. Such 'other countries' may be any country,[38] any Commonwealth country,[39] countries with a similar legal system,[40] and/or countries prescribed by law.[41] The legal frameworks therefore permit the appointment of judges

[38] *Constitution of Kiribati 1979* ss 81(3), 91(1)(b).
[39] *Constitution of Tonga 1875* s 85(b)(i); *Constitution of Solomon Islands 1978* s 78(3)(a); *Constitution of Vanuatu 1980* s 49(2) with *Legal Practitioners (Qualifications) Regulations Act 1996* (Vanuatu) s 2.
[40] *Constitution of Samoa 1960* s 65(5); *Constitution of Tuvalu* s 124(a); *National Court Act 1975* (PNG) s 2(a)(ii).
[41] *Constitution of Fiji 2013* s 105; *Constitution of Fiji 1997* s 130; Judicial Tribunals (Prescribed Countries) Promulgation No 32 of 2007; *Constitution of Solomon Islands* s 78(3); *Constitution of Nauru* s 49(3) with *Legal Practitioners Act 1973* (Nauru) s 5.

from a much wider range of Commonwealth countries than is reflected in practice. A range of historical, political and pragmatic factors thus influences the nationalities of the foreign judges on particular Pacific courts.

Historical links

The use of Australian, New Zealand and British judges reflects continuing historical, political and legal connections between these countries and Pacific states. Prior to independence, these three countries were the colonial administrators: Fiji, Kiribati, Solomon Islands, Tonga and Tuvalu were British territories; Nauru and Papua New Guinea were administered by Australia; and Samoa was administered by New Zealand. Prior to its independence, Vanuatu was a condominium jointly administered by Britain and France. These historical links continue to influence the nationality of foreign judges in some states. For example, the fact that most of the foreign judges serving in Samoa are from New Zealand can be seen as a legacy of New Zealand's position as colonial administrator and the continuing close relationship between the two countries.[42]

Several judges interviewed noted the similarities between their home legal system and Pacific legal systems as a factor that facilitated judicial service in the Pacific.[43] Upon independence, several Pacific constitutions imported and applied the common law of England as it stood at a particular date.[44] Many adopted statutes based largely on precedents in Australia, New Zealand and the United Kingdom. These historical legal influences also help to explain the high numbers of Australian and New Zealand judges, and the continuing use of British judges.

Market forces and regional connections

The movement of foreign judges tends to follow established development aid channels. The majority of judges move from donor states like Australia and New Zealand to developing Pacific states. This reflects 'market forces' of supply and demand. Australia, New Zealand and the United Kingdom all have established judicial systems and large numbers of qualified judges and lawyers prepared to serve overseas. These jurisdictions also produce judges who have reached the statutory age for retirement in their own countries but who wish to continue to work as judges overseas. On the demand side, Pacific states are small, developing states, with limited

[42] New Zealand administered Samoa as League of Nations Mandate and later a United Nations Trust Territory from 1914 until its independence in 1962. Upon Samoa's independence, the two countries entered into a Treaty of Friendship.
[43] Interviews F1, F4, F5, F8, F10, F12, F22.
[44] Jennifer Corrin Care, 'Cultures in Conflict: The Role of the Common Law in the South Pacific' (2002) 6(2) *Journal of South Pacific Law*.

financial and human resources. Some are highly dependent on overseas aid to meet the costs of government.[45] Australia and New Zealand have a strong presence in Pacific states as aid and development donors, particularly in the law and justice sector.[46] Australian and New Zealand judges regularly participate in regional judicial conferences and training, where they meet Pacific judges.[47] Several have, or form, personal connections to the Pacific states they serve. These links, along with geographical proximity, account in part for the higher use of foreign judges from Australia and New Zealand over the case study period.

Intra-regional exchanges

Only 10 of the 187 foreign judges serving in the Pacific over the case study period were from other Pacific states. Some of these intra-Pacific exchanges entailed senior judges from Fiji, Papua New Guinea, Samoa, and Vanuatu sitting with other foreign judges on courts of appeal in Fiji, Solomon Islands and Vanuatu. In other cases, people from Pacific jurisdictions have been appointed as full-time resident judges in other Pacific states. Two former Fijian judges who were unable to serve in Fiji sat instead on the Supreme Courts of Nauru and Vanuatu.[48] Sir John Muria, the former Chief Justice of Solomon Islands, was appointed Chief Justice of Kiribati in 2011. Although the numbers are small, there is a long history of intra-regional exchanges. Papua New Guinea, as a larger state with a high proportion of local judges has provided judges to other Pacific states since the early 1990s.[49] Some Pacific authorities have expressed an interest in the greater use of foreign judges from within the region, given commonalities between the legal systems and similarities in the social and cultural contexts in which the law operates. However, the small number of Pacific Islander judges and lawyers limit the capacity of Pacific courts to provide judges to other states in the region.[50]

[45] The costs of government in small states are particularly high when assessed per capita: Lino Briguglio, 'Small Island Developing States and Their Economic Vulnerabilities' (1995) 23(9) *World Development* 1615, 1617.

[46] Eg the Pacific Judicial Development Programme, funded by the Government of New Zealand and managed by the Federal Court of Australia: Pacific Judicial Development Programme, '2010-2015 Completion Report' (Federal Court of Australia, June 2015).

[47] Jon M Van Dyke, 'The Pacific Judicial Conference: Strengthening the Independent Judiciary and the Rule of Law in the Pacific' (2011) 22(1–2) *Western Legal History* 127.

[48] Ratu Joni Madraiwiwi served as Chief Justice of Nauru, and Daniel Fatiaki as a judge of the Supreme Court of Vanuatu.

[49] Graham Hassall and Cheryl Saunders, *Asia-Pacific Constitutional Systems* (Cambridge University Press, 2002) 187. This practice is continuing, with the Papua New Guinea Supreme Court entering into arrangements with courts in Solomon Islands in 2017 and Nauru in 2018.

[50] Lorraine Kershaw, 'Presentation to Pacific Constitutions and the Rule of Law Conference' (Auckland, 7 December 2011).

Procedures for recruitment

The nationality of foreign judges is also influenced by the procedures used to recruit them. These are described more fully in Chapter 3. They range from informal approaches from the Chief Justice, to arrangements between particular courts and states, to processes managed by external funding agencies.

Where judges are selected through informal or personal connections, it is to be expected that judges will recommend other judges from their own jurisdictions whom they know best. This perhaps explains why the Courts of Appeal of Kiribati and Tuvalu predominantly comprise retired judges from superior courts of New Zealand, with a high degree of overlap in personnel.

Where courts have established formal programs for the provision of judges, it is likely a greater proportion of foreign judges will be of that nationality. For example, the Supreme Court of Vanuatu and the District Court of New Zealand have a rolling secondment program, whereby a District Court judge from New Zealand serves on the Supreme Court of Vanuatu for two years and is replaced at the end of that term by another District Court judge.[51] This program accounts, in part, for the higher number of New Zealand judges serving on the courts of Vanuatu.

In contrast, where external aid providers recruit judges, there is likely to be more diversity in the nationality of foreign judges. For example, three African judges who served on Pacific courts during the case study period were recruited through the Commonwealth Fund for Technical Cooperation.[52] Under this program, the Commonwealth recruits and funds judges and other experts to serve in Commonwealth countries, prioritising south-south exchanges.[53] To take a different example, the Regional Assistance Mission to the Solomon Islands (RAMSI), established to restore law and order in Solomon Islands after a period of civil conflict from 1998 to 2003,[54] provided a range of legal personnel, including judges, in order to clear the backlog of criminal cases arising from the conflict.[55] RAMSI recruited judges from Australia, Fiji, New Zealand and the United Kingdom. The diversity of nationalities on the Solomon Islands High Court may have

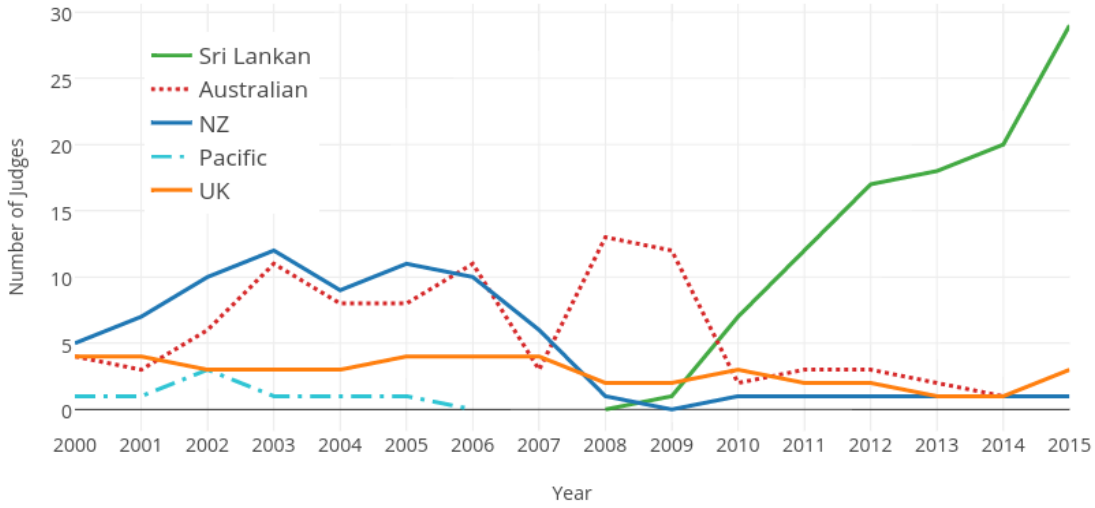
[51] Ministry of Justice, *The District Courts of New Zealand* (2008) 11.
[52] Vincent Zehurikize from Uganda served on the High Court of Kiribati; Nkemdilim Amelia Izuako from Nigeria served on the High Court of Solomon Islands; and Mary Sey from The Gambia served on the Supreme Court of Vanuatu.
[53] 'Report of the Commonwealth Secretary-General 2011-2013' (Commonwealth Secretariat, 2013) 21.
[54] Albert Palmer, 'The Ethnic Conflict in the Solomon Islands' in Ustinia Dolgopol and Judith Gail Gardam (eds), *The Challenge of Conflict: International Law Responds* (Martinus Nijhoff Publishers, 2006) 49.
[55] Jon Fraenkel, Joni Madraiwiwi and Henry Okole, 'The RAMSI Decade: A Review of the Regional Assistance Mission to Solomon Islands, 2003-2013' (2014) 54.

been fostered by RAMSI's hiring practices, in which judicial positions were advertised through international development consulting firms.

National and international politics

Finally, domestic and international politics influence the nationality of foreign judges. This is seen most clearly in Fiji, where there has been a marked change in the nationality of foreign judges. As shown in Figure 2.2, prior to 2009, foreign judges of the High Court, Court of Appeal and Supreme Court were predominantly recruited from Australia, New Zealand and the United Kingdom. After April 2009, Fiji began to recruit high numbers of judges from Sri Lanka, with some Australian, New Zealand and British citizens recruited from legal practice in Fiji, Hong Kong and Malaysia. Forty-one Sri Lankans were appointed to the Fijian courts between 2009 and 2015, outnumbering both local judges and judges of other nationalities.

Figure 2.2 Nationality of foreign judges serving in Fiji 2000-2015



The dramatic change in the composition of the Fijian courts followed a military coup. On 5 December 2006, Commodore Voreqe Bainimarama led a coup that ousted the elected Prime Minister and dissolved the parliament. Bainimarama then led an interim government that ruled Fiji for nearly seven years. The actions of Bainimarama and other officials involved in establishing the interim government were challenged in court. On 9 April 2009, the Court of Appeal ruled that those actions were contrary to the Constitution and that the interim government had unlawfully assumed executive authority.[56] The following day, the President abrogated the

[56] *Qarase v Bainimarama* [2009] FJCA 67.

constitution, revoked all judicial appointments, and installed Bainimarama as interim Prime Minister to rule until democratic elections were restored in 2014.[57]

This coup and its aftermath resulted in a great deal of instability for the Fijian courts. It exposed deep polarisations and personal animosities within the Fijian judiciary.[58] Early in 2007, Chief Justice Fatiaki, a Fijian, was suspended and replaced by Anthony Gates, a British/Australian citizen with a long record of judicial service in Fiji.[59] Gates' appointment as Acting Chief Justice and other judicial appointments made under the interim regime were criticised as unconstitutional on the grounds that the Judicial Services Commission was improperly constituted.[60] Over the course of 2007, several foreign judges resigned citing concerns about judicial independence and the manner in which Acting Chief Justice Gates administered the court.[61] Some foreign judges stayed for the duration of their existing commissions but did not seek reappointment under the interim regime.[62] The remaining foreign judges were dismissed on 10 April 2009, by presidential order revoking all judicial appointments.

Fiji needed judges but was unable to recruit them from the traditional donor countries of Australia, New Zealand and the United Kingdom. Following the abrogation of the Constitution in April 2009, Fiji was suspended from the Commonwealth and the Pacific Islands Forum. Australia and New Zealand placed bans on Fijian officials, including judges, travelling into Australia and New Zealand.[63] Professional lawyers' associations in Australia and New Zealand advised their members against accepting judicial appointments in Fiji.[64] In this context, Fiji turned to Sri Lanka to provide a new cohort of foreign judges. Fijian officials visited Sri Lanka to

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[57] President Ratu Josefa Iloilovatu Uluivuda, Address to the Nation, 10 April 2009; *Revocation of Judicial Appointments Decree* No 4 of 2009 (Fiji).

[58] Venkat Iyer, 'The Judiciary in Fiji: A Broken Reed?' in HP Lee and Marilyn Pittard (eds), *Asia-Pacific Judiciaries: Independence, Impartiality and Integrity* (Cambridge University Press, 2017) 109, 124–6.

[59] Graham Leung, 'The Impact of the Coup on Fiji's Judiciary' in Jon Fraenkel, Stewart Firth and Brij V Lal (eds), *The 2006 Military Takeover in Fiji: A Coup to End All Coups?* (ANU Press, 2009) 291, 293–4.

[60] *Constitution of Fiji 1997* s 131 required that the Judicial Services Commission comprise the Chief Justice, the Chair of the Public Service Commission and the President of the Fiji Law Society but the two former members had been removed from office: International Bar Association, 'Dire Straits: A Report on the Rule of Law in Fiji' (2009) 48–9.

[61] Graham Leung, 'The Erosion of Judicial Independence' in Jon Fraenkel, Stewart Firth and Brij V Lal (eds), *The 2006 Military Takeover in Fiji: A Coup to End All Coups?* (ANU Press, 2009) 301, 303; International Bar Association, above n 60, 49–50.

[62] The significance of the acceptance of judicial appointment by foreign judges is discussed in Chapter 7, Part III.B.

[63] Pacific Media Centre News Desk, 'Fiji's Chief Justice Condemns Australian, NZ "Interference" and "Hostility"' *Pacific Scoop*, 3 November 2009 <http://pacific.scoop.co.nz/2009/11/fijis-chief-justice-condemns-australian-nz-interference-and-hostility/>.

[64] Chris Merritt, 'When Backlogs Lead to Payback' *The Australian* (Canberra), 1 May 2009 27; 'NZ Lawyers Should Not Work for Fiji Regime, Law Society Says' *NZ Herald* (Auckland), 21 April 2009 <http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10567736>.

recruit judges and build connections between the courts.[65] Although Sri Lanka is a member of the Commonwealth, a mixed common law jurisdiction, and boasts a large number of legally qualified people, Fiji is the only Pacific state in which Sri Lankans serve as judges.

Fiji's experience demonstrates how political relationships between Pacific states and the states from which judges are sourced can affect the extent to which certain nationalities are represented on Pacific courts. The issue is not confined to Fiji. It is notable that New Zealand, not Australia, is the primary source of foreign judges to Vanuatu's Supreme Court, in circumstances in which neither country has particularly close colonial ties to Vanuatu. One reason for this is that national ties between judges and Australian aid donors in particular have been said to 'have a negative impact on the community's and politician's ideas about the independence of the judiciary.'[66] It is reported that this concern, combined with past allegations of spying by Australian police and law officials in Vanuatu and the fact that many cases before Vanuatu courts involve Australian interests, has led Vanuatu to take a cautious approach to sourcing foreign judges from Australia, although Australia provides assistance in other ways to Vanuatu's law and justice sector.[67]

B. Professional background

The professional background of the foreign judges serving in the Pacific is recorded in Appendix A. Roughly 40% of the 187 foreign judges were sitting as judges in their home jurisdiction at the time of their appointment to a Pacific court. These judges either serve concurrently in the Pacific state and their home jurisdiction or resign or take leave from their home court to serve in the Pacific. About 25% were retired judges. Another 25% were lawyers or barristers prior to taking judicial appointment in the Pacific. The remainder were public servants or tribunal members at home or abroad.

The data on which these figures are based is fairly abstract. It records only the judge's position in his or her home country at the time of appointment to the Pacific court, and therefore does not account for changes in their profession during the period of their service in the Pacific (for example, retirement from a judicial position at home[68]) nor does it capture the entirety of the

[65] Bandula Sirimanna, 'Fiji Courts Want 6 of Our Judges' *Sunday Times* (Colombo), 16 August 2009 <http://www.sundaytimes.lk/090816/News/nws_07.html>.
[66] Miranda Forsyth, 'Understanding Judicial Independence in Vanuatu' (SSGM Discussion Paper 2015/9, State, Society and Governance in Melanesia, 2015) 9.
[67] Ibid.
[68] Where a judge was appointed to a Pacific court while serving as a judge in his or her home country, his or her professional background is coded as a 'sitting judge', even where the judge continued to serve on the Pacific court following retirement at home.

judge's professional career. While foreign judges were predominantly recruited from legal or judicial service in their home jurisdiction, a small number also had international legal or judicial experience within and beyond the Pacific.

It is nonetheless possible to trace some general trends. Appointees to the courts of appeal in the region tend to be either sitting or retired judges in their home states. This preference can be attributed to the prestige, knowledge and authority that experienced judges bring to courts of appeal. It may also reflect some sensitivities about a foreign judge with no prior judicial experience being in a position to overrule judges in the courts below.[69] There is greater variation at the level of the superior trial courts. In Kiribati, Samoa, Tuvalu and Vanuatu, the foreign judges appointed to the superior trial courts were generally sitting, retired or former judges in their home jurisdictions. In other cases, such as the High Courts of Fiji and Solomon Islands and the Supreme Courts of Nauru, Papua New Guinea and Tonga, the professional backgrounds of foreign judges are more diverse, with judges drawn from foreign judiciaries and legal practice.

The choice between appointing a retired foreign judge and judge currently sitting in his or her home jurisdiction seems largely to depend on the attitude of the head of the relevant court in the donor state. Some Chief Justices prefer that judges on their courts do not concurrently serve on courts overseas.[70] Some permit it on the basis that judges serve overseas during periods of leave from their home courts, and as such, do not affect the workload of the judge or the court as a whole.[71] Others are in favour of concurrent service as a way of connecting courts and expanding judge's experiences.[72] As noted above, some courts in Australia and New Zealand have established ongoing relationships with particular Pacific courts, whereby sitting judges are seconded to the Pacific court. From the perspective of the recipient Pacific jurisdiction, the decision to appoint a sitting foreign judge or a retired foreign judge will obviously take account of the nature of the judicial position. A judge who continues to sit in his or her home jurisdiction will have limited capacity to serve as a full-time resident judge, but may be able to serve as an ad hoc or part-time judge.

The choice between the appointment of foreigners with judicial experience or directly from legal practice arises principally when recruiting full-time, resident judges to serve on the superior trial court, including, in some cases, the position of the Chief Justice. As with nationality, the nature of the recruitment process might have an effect. Filling a judicial vacancy using a formal

[69] Interview F7.
[70] Interviews F7, F14, F17.
[71] Interviews F2, F4, F11, F12.
[72] Interviews F2, F3, F5, F12.

advertising and recruitment process might result in a greater diversity of applicants. For example, many of the foreign judges serving on Tonga's Supreme Court during the case study period were recruited and paid with the support of donor agencies. While only five of the twelve Supreme Court judges who served during the case study period had judicial experience in their home country, some did have international judicial experience in the Pacific and elsewhere in the Commonwealth. Three, including two Chief Justices, were recruited from legal practice in New Zealand.[73]

Several of the foreign judges serving in Papua New Guinea were also appointed from legal practice. Unusually, however, they were recruited from the local Papua New Guinean legal profession.[74] As noted above in Part II, such judges sit at the edges of the definition of a 'foreign judge'. They do however, make up a very small proportion of the foreign judges counted in this study.[75] For present purposes, it is a point of distinction between the Papua New Guinean judiciary and others in the region that several of its foreign judges are drawn from within the local legal community – a familiar path to judicial office in many common law jurisdictions – rather than from external courts or legal communities.[76]

Finally, the experience of Fiji's intermediary Court of Appeal illustrates a different context in which foreign lawyers, rather than judges, are preferred. The 2006 coup and its aftermath marked a change in the professional background, as well as nationalities, of the Justices of Appeal. Until 2007, the majority (17) of the foreign Justices of Appeal were retired or sitting judges from Australia and New Zealand. Two judges were British citizens with long judicial experience in the Pacific, and two more were judges serving in other Pacific jurisdictions. For the reasons described above, many of these judges resigned or allowed their commissions to lapse over the course of 2007. Because judges were not willing to accept appointments from the interim government, new Justices of Appeal were recruited from a different pool, with three senior barristers recruited from the Sydney bar in 2008 and 2009.[77] After the revocation of all judicial appointments in April 2009, six judges and eight lawyers, predominantly in government service, were recruited from Sri Lanka along with barristers working in Hong Kong and Australia.

[73] See Appendix A.
[74] Including David Cannings, Graham Ellis and Goodwin Poole. See Graham Ellis, 'Life on the Bench in PNG' [2010] *Bar News: The Journal of the New South Wales Bar Association* 96, 97.
[75] In addition to the Papua New Guinean judges noted above, Chief Justice Connell of Nauru was an Australian who held a senior position in the Nauruan government prior to his appointment to judicial office.
[76] Sitting and retired Australian judges also served in Papua New Guinea during the case study period. These appointments are discussed in part VI below.
[77] Ian Lloyd, Randall Powell and Francis Douglas.

This shift from a court comprised predominantly of sitting and retired judges, to one comprising a majority of judges appointed from foreign legal practice seems to be driven by the exigencies of Fiji's political situation after the coup.

C. The significance of nationality and professional background

The nationalities and professional backgrounds of the foreign judges serving on courts are significant to assessing the implications of the practice of foreign judging for constitutional adjudication, judicial independence and the role of judges and judiciaries in Pacific states. For example, the discussion in Chapter 5 seeks to show that nationality affects how judges approach the task of constitutional adjudication, as foreign judges bring the orthodoxies and assumptions of their own legal traditions to bear when determining constitutional matters in an overseas jurisdiction. Similarly, the discussion in Chapter 6 identifies ways in which the professional backgrounds of foreign judges informs claims about their independence and impartiality. Finally, the profile of the judges who sit on a nation's courts of constitutional jurisdiction has implications for the expressive, or representative, qualities of Pacific courts which are explored in Chapter 7.

VI. Localisation

It was assumed that Pacific courts would localise over time as more citizens became qualified for judicial appointment.[78] It is generally acknowledged, however, that the pace of localisation across the Pacific has, with the exception of Papua New Guinea, been slow.[79] The figures produced in this study, set out in Table 2.1 above, bear this out. They show that many years after independence and the consolidation of national courts, Pacific states continue to rely on foreign judges. Since independence, no local judges have ever served on the courts of constitutional jurisdiction in Nauru and Tuvalu, while Kiribati and Tonga have appointed just the one local judge each. During the case study period, in Fiji, Samoa, and Vanuatu, local judges comprised between 13% and 17% of all judges serving on the relevant courts, while in Solomon Islands 29% of all judges were local. Papua New Guinea has the greatest degree of localisation, with local judges comprising 79% of all judges serving during the case study period. This Part examines the various processes of localisation and the forces that facilitate or inhibit it. It does

[78] Michael A Ntumy (ed), *South Pacific Islands Legal Systems* (University of Hawaii Press, 1993) xx.
[79] Michael Scott, 'Fiji's Judicial Department: A Review' in Michael A Ntumy (ed), *South Pacific Islands Legal Systems* (University of Hawaii Press, 1993) 222. One judge predicts that it will be another 60 years before Solomon Islands' judiciary is entirely localised: John A Keniapisia, 'Judges from Other Commonwealth Jurisdictions Serving in the High Court and Court of Appeal of Solomon Islands' (Paper presented at the 20th Commonwealth Law Conference, Melbourne, 22 March 2017).

so in order to explain the factors that contribute to the continuing use of foreign judges in the Pacific, which include the small populations of Pacific states, the part-time nature of some Pacific courts, and political attitudes towards foreign judges and understandings of their role.

The small size of the population is one important factor in localisation. In small states, the local legal community is also small, with the result that there is both limited supply of, and demand for, local judges. This is not simply a function of population size but flows also from the isolation and limited resources of small island developing states.[80] In terms of supply, the local legal community from which judges may be drawn is generally small. Many Pacific lawyers obtain their qualifications overseas and some choose to stay overseas, where there may be greater demand for specialist skills and higher remuneration. Judicial salaries are often significantly lower than what lawyers may earn in practice at home or overseas, which presents a further barrier to local candidates taking up judicial appointments.[81] Smallness also limits the demand for permanent, full-time local judges. As noted above, all courts of final appeal in the region are part time and in the smallest states of Nauru and Tuvalu the superior court also sits part time. Part-time, ad hoc judicial appointments may be cost effective where there is insufficient demand for a full-time court, but they are generally unattractive to local candidates seeking full-time employment.

Table 2.2 shows that localisation generally tracks on to population size, such that the states with the smallest populations have the lowest number of local judges.

Table 2.2 Population size and localisation

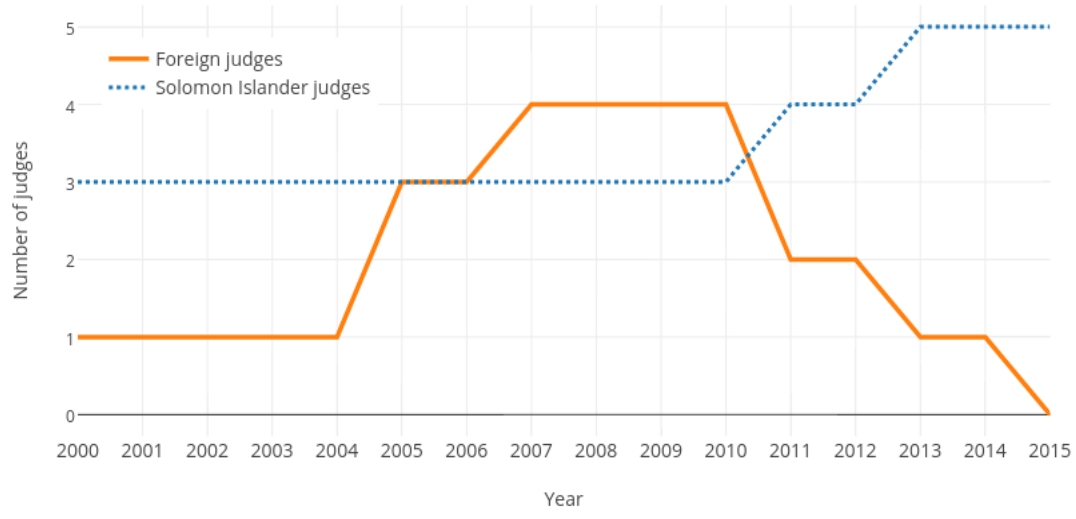
State	Population[82]	Number local judges	% local judges
Tuvalu	10,000	0	0%
Nauru	10,000	0	0%
Tonga	106,000	1	5%
Kiribati	112,000	1	6%
Samoa	193,000	4	13%
Vanuatu	265,000	4	15%
Solomon Islands	584,000	8	29%
Fiji	892,000	20	17%
PNG	7,619,000	33	79%

[80] Briguglio, above n 45, 1615–18; Wouter Veenendaal, *Politics and Democracy in Microstates* (Routledge, 2015) 22–3.
[81] Jennifer Kusapa, 'Expatriate Judges, Not an Answer: Chief Justice' *Island Sun* (Honiara), 21 January 2015 <http://www.islandsun.com.sb/index.php/latest-news/national/7391-expatriate-judges-not-an-answer-chief-justice>.
[82] United Nations, Department of Economic and Social Affairs Population Division, *World Population Prospects* (United Nations 2015) <http://esa.um.org/unpd/wpp>.

Care should be taken when interpreting these figures. Simply counting and comparing the number of judicial officers does not take account of the different nature of judicial service by local and foreign judges. A head count of judges does not necessarily capture the number of cases heard or days worked by each category of judge. Foreign judges serving on courts of appeal sit part time, while foreign judges serving on superior trial courts tend to serve for short terms. In contrast, local judges are generally appointed until retirement, meaning that one local judge may serve alongside a succession of several different foreign judges.

The figures produced in this study also combine the judges sitting on the superior trial courts and courts of appeal. In three states in the mid-range population size – Samoa, Solomon Islands and Vanuatu – localisation is much greater in the lower tiers of the court system. To take one example, Figure 2.3 isolates the number of foreign and local judges serving on the Solomon Islands High Court. It shows that eight local and eight foreign judges served on the High Court over the case study period. However, the number and proportion of foreign judges increased markedly over 2005-2010 in order to deal with the large number of prosecutions arising from the civil conflict. However, since that time, the proportion of local judges has returned to pre-RAMSI levels, and in 2015, the High Court comprised only local judges.

Figure 2.3 Number of foreign and local judges on the Solomon Islands High Court



In both Samoa and Vanuatu, for the majority of the case study period there was a core group of three to four local judges serving on their respective Supreme Courts. They were supported by successive foreign judges appointed on an ad hoc or short-term basis, with the result that at most points of time, the majority of judges sitting on the Supreme Courts in each state were local. The reason for the greater degree of localisation at this level of the court system again

reflects smallness: local judges are likely to prefer appointments to a full-time court in a permanent capacity.

Although the degree of localisation varies across courts, there is nevertheless a general correlation between population size and localisation. It is clearest in the four smallest states of Nauru, Kiribati, Tonga and Tuvalu, in which the degree of localisation is minimal. The correlation is not, however, perfectly sustained as the size of the population increases. For example, Fiji has a larger population, but a lower proportion of local judges than the Solomon Islands. Papua New Guinea's population is significantly higher than all other Pacific island states and consequently has a greater proportion of local judges, but it nevertheless continues to use foreign judges. Exploring the process and degree of localisation in the two most populous Pacific states of Fiji and Papua New Guinea illuminates the significance of reasons other than size in explaining the continued reliance on foreign judges in the Pacific.

A. Localisation in Papua New Guinea

Of the nine case study countries, Papua New Guinea has the lowest proportion of foreign judges. Of a total of 42 judges sitting on the National and Supreme Courts over the case study period, only nine were foreign. One compelling reason is its significantly larger population: with over 7.6 million people, Papua New Guinea is by far the largest Pacific state and can support local tertiary-level legal education and a larger local legal profession. Another reason, however, is the early political emphasis on the localisation of the judiciary.

In 1972, the Constitutional Planning Committee was established to draft Papua New Guinea's independence constitution. Its recommendations were largely adopted, and the Committee's Report is often used by the Supreme Court when interpreting the Constitution.[83] The Committee's Report was based on the desire for an autochthonous Constitution tailored to the specific context and needs of an independent Papua New Guinea. The recommendations for the new state's judiciary reflect this, and emphasise national sovereignty, localisation and the development of an indigenous jurisprudence. The Committee expressed reservations about the use of foreign judges, stating that it was 'obviously not … consistent with the principle of our national sovereignty'.[84] The Committee considered that 'our own judges' are the best people to judge the cultures and customs of Papua New Guinea, to develop its common law, and to ensure

[83] *Constitution of Papua New Guinea 1975* s 24.
[84] Constitutional Planning Committee Papua New Guinea, 'Constitutional Planning Committee Report' (1974) ch 8, [34].

that courts were responsive to the needs and values of Papua New Guinean society.[85] It did, however, recognise that Papua New Guinea would need to rely on foreign judges in the short term, while sufficient numbers of local lawyers gained qualifications and legal experience.

Following independence, some Australian judges who had served in Papua New Guinea prior to its independence continued their appointments and additional judges were recruited from other Commonwealth countries. Localisation of Papua New Guinea's judiciary was accelerated by the 'Rooney affair' in 1979, a conflict between the executive and judiciary which saw the Minister for Justice sentenced to imprisonment for contempt of court but released by the Prime Minister.[86] By the end of the Rooney affair, five foreign judges, including the Chief Justice, had resigned, leaving the Court significantly understaffed. The Prime Minister looked to Australia for new judges, but also approached the local legal profession.[87] The first Papua New Guinean judge, Sir Mari Kapi, was sworn in in late December, followed by the first local Chief Justice, Sir Buri Kidu, in 1980. By 1992, nine of the 14 (64%) judges on the National and Supreme Court were local judges,[88] and by 2015 this had increased to 23 local judges out of 29 (79%).

Despite the early and sustained emphasis on localisation accelerated by the Rooney affair, Papua New Guinea continues to use foreign judges some 30 years later. As noted in Part V above, Papua New Guinea is distinctive because several of its foreign judges are residents recruited from the local legal profession. However, 2011 saw a change in the profile of the foreign judges in Papua New Guinea. That year, two sitting judges from the Federal Court of Australia were appointed to concurrently serve on Papua New Guinea's Supreme Court, pursuant to arrangements agreed by the Chief Justices of Papua New Guinea and the Federal Court of Australia and supported by each country's Attorney-General.[89] Under arrangements formalised by an exchange of letters between the Chief Justices, each Federal Court judge visits Papua New Guinea three times a year, sitting one week at a time on the Supreme Court.[90] In addition, in

[85] Ibid ch 8, [37]-[38]. See also Bernard Narokobi, 'The System of Selecting Judges of the National and Supreme Courts: A Proposal' (Occasional Paper No 7, Law Reform Commission of Papua New Guinea, 1978).
[86] *Public Prosecutor v Rooney (No 2)* [1979] PNGLR 448. The Rooney affair is discussed in greater detail in Chapter 7, Part V.A.
[87] Bernard Narokobi, 'How Independent Are the Courts in Papua New Guinea? The Somare/Rooney Affair' (1980) 9(2) *Pacific Perspective* 12, 20.
[88] John Nonggorr, 'The Maintenance of Judicial Independence and Integrity in Papua New Guinea: Some Recent Developments' (1992) 18(3) *Commonwealth Law Bulletin* 1181, 1182.
[89] John Logan, 'A Year in the Life of an Australian Member of the PNG Judiciary' (SSGM Discussion Paper 2015/16, State, Society and Governance in Melanesia Program, Australian National University, 2015) 2.
[90] Ibid.

2015 Terrence Higgins, a retired Australian judge, was appointed to sit as a visiting judge on Papua New Guinea's Supreme Court.

The appointment of sitting and retired Australian judges as visiting judges of the Papua New Guinean Supreme Court represents a departure from previous practice, which emphasised localisation and recruited resident foreign judges with experience in the Papua New Guinea legal profession. It also stands in contrast to the policies implemented by the Papua New Guinean government in 2015 to reduce its reliance on non-citizen technical advisers.[91] While the new regulations relate only to non-citizen technical advisers in the public service and not the judiciary, some of the animating concerns about national sovereignty, costs and effectiveness might nonetheless also apply to the courts. Several reasons have been provided for the renewed use of visiting foreign judges. The growth in the number and complexity of commercial cases before the court requires specific judicial expertise and experience in large commercial litigation and foreign judges were one way to provide this.[92] Another reason to draw on foreign judges might be the difficulty in attracting local lawyers to judicial office, where the pay and conditions of service are not as attractive as private legal practice. Finally, the arrangements with the Federal Court were instigated by Sir Salamo Injia, who has been described as an outward-looking, modernising Chief Justice keen to expand relationships with other courts in the region.[93] The renewed use of visiting foreign judges on the Supreme Court suggests that the availability of adequate numbers of local judges is not the only rationale for the use of foreign judges. Instead, the appointment of foreign judges is regarded as one way in which to develop the knowledge and capacities of the Papua New Guinean courts.

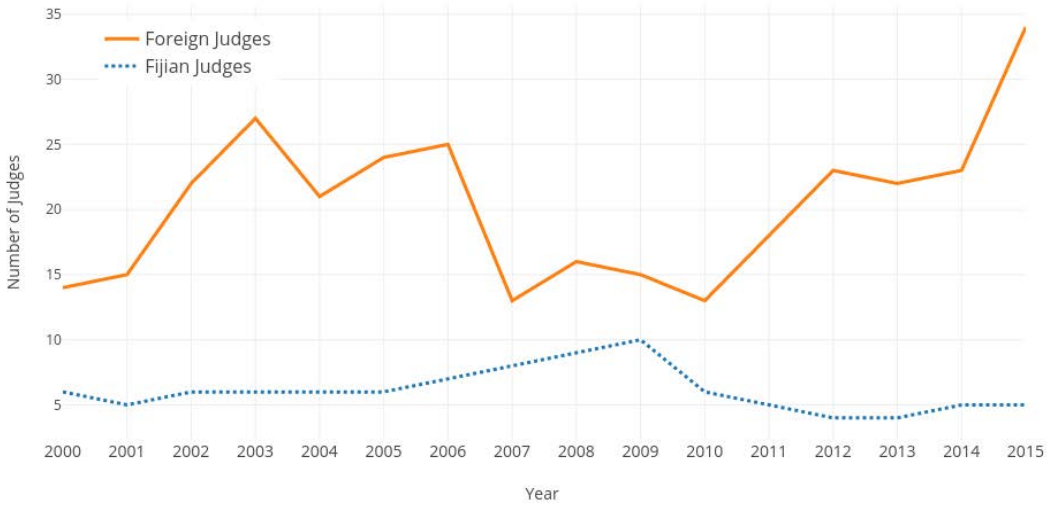
B. Localisation in Fiji

Fiji has the second highest population of the nine Pacific states. It also has a long judicial history. It was the location of the colonial Court of the Western High Pacific, and its Court of Appeal was later used by several newly independent Pacific states. Fiji has a substantial local legal profession, and several Fijians have served as judges in other Pacific jurisdictions. Despite this, there has not been the same emphasis or progress on localisation as in Papua New Guinea, or indeed as Samoa or Solomon Islands. As Figure 2.4 shows, while the number of local judges

[91] Michael Anderson, Joachim Luma and Carmen Voigt-Graf, 'Recent Developments Regarding Non-Citizen Technical Advisers in Papua New Guinea' (Issues Paper 24, National Research Institute, March 2017).
[92] John Logan, 'Law and Justice in Papua New Guinea' (Paper presented at the Australian Institute of International Affairs, Brisbane, 23 June 2015) 42.
[93] Interview F24.

serving on the relevant Fijian courts increased during the case study period, by 2015 there were fewer local judges than in 2000.

Figure 2.4 Number of foreign and local judges in Fiji 2000-2015



There are several explanations for the limited localisation of the Fijian judiciary. One reason relates to sensitivities arising from the tensions between the Indigenous and Indian Fijian communities. Fiji has a significant population of people of Indian heritage, descended from indentured labourers brought to Fiji during British rule. Prior to independence, more Indian Fijians obtained legal qualifications and served in the Fijian legal profession, and were thus more likely to qualify for judicial appointment.[94] The 1990 *Constitution of Fiji*, which sought to entrench the political paramountcy of Indigenous Fijians, introduced a requirement that some judicial positions be distributed among ethnic groups, with the majority going to Indigenous Fijians.[95] These requirements were removed in 1997. Iyer notes that while race does 'creep in' to discussions of the administration of justice in Fiji, the use of foreign judges has helped the Fijian judiciary to steer clear of racial politics.[96]

Fiji's political instability has affected the judiciary and legal profession. Many Indian Fijians emigrated from Fiji in the wake of the 1987 coups,[97] depleting the local legal profession. Several

[94] Brij V Lal, *A Time Bomb Lies Buried: Fiji's Road to Independence, 1960-1970* (ANU E Press, 2008) 17.
[95] *Constitution of Fiji 1990* s 124(3), (4); Paul Reeves, Tomasi Rayalu Vakatora and Brij V Lal, 'The Fiji Islands: Towards a United Future Report of the Fiji Constitution Review Commission 1996' (Parliamentary Paper No 34 of 1996, Parliament of Fiji, 1996) [13.100].
[96] Iyer, above n 58, 128.
[97] Ralph R Premdas, 'The Dynamics of Ethnic Minority Domination in Fiji' in Eric P Kaufmann (ed), *Rethinking Ethnicity: Majority Groups and Dominant Minorities* (Routledge, 2004) 195, 206–7.

local judges, along with a number of foreign judges, resigned following another coup in 2000.[98] After the 2006 coup – Fiji's fourth – Chief Justice Fatiaki was suspended from office and replaced by a foreign judge. Only some Fijian judges serving prior to the 2006 coup were reappointed after all judicial appointments were revoked in 2009. Concerns about the erosion of judicial independence under the interim government[99] might also have dissuaded local lawyers from accepting judicial appointment since 2006.

The rationale for the use of foreign judges in Fiji, as expressed by government actors and constitution makers, differs markedly from the discourse in Papua New Guinea. There is less emphasis on localisation and greater emphasis on the quality and merit of judges. The Reeves Commission's review of the Constitution, undertaken in 1995, stated that localisation was 'an important policy objective' and that the court should reflect the composition of the population as a whole, but left the practice of appointing foreign judges largely unquestioned.[100] In 2016, the Attorney-General was asked in Parliament to justify the large number of foreign judges in Fiji, despite the high number of Fijian lawyers and magistrates. He responded that all judges – foreign and local – must meet the standards of experience, expertise and integrity set out in the *Constitution*,[101] suggesting that merit, not localisation, was the overriding consideration in the appointment of judges.

C. Contributing factors

The extent of localisation of Pacific judiciaries varies across different courts and different jurisdictions. No Pacific state has a fully localised judiciary, although Papua New Guinea is close to achieving it. The reasons for the continued use of foreign judges relate mainly to a shortage of local judges as a result of the various challenges associated with smallness, isolation and limited resources. The examples of Solomon Islands and Fiji demonstrate that other factors, such as increased and unexpected demands on the courts, political instability and discrimination between groups within the population, can also contribute to a shortage of local judges. However, as the study of localisation in the most populous state of Papua New Guinea illustrates, the continued use of foreign judges may also relate to other factors, such as the desire for specialist expertise and to build judicial networks with other courts. The rationales for the continued use of foreign judges in the Pacific are discussed more fully in Chapter 8, in light

[98] Tupou Draunidalo, 'The Rule of Law and Judicial Independence amidst the Coups and Attempted Coups in Fiji since 1987' in Jon Fraenkel, Stewart Firth and Brij V Lal (eds), *The 2006 Military Takeover in Fiji: A Coup to End all Coups* (ANU E Press, 2009) 311, 312.
[99] Draunidalo, above n 98; International Bar Association, above n 60; Leung, above n 61.
[100] Reeves, Vakatora and Lal, above n 95, [13.98].
[101] Fiji, *Parliamentary Debates,* 10 February 2016, 1063-5 (Aiyaz Sayed-Khaiyum, Attorney General).

of the analysis of the laws and practices governing the use of foreign judges and the implications of their use. For present purposes, however, it is clear that localisation is not achieved simply by increasing the number of local people eligible for judicial appointment, and that foreign judges are used for a range of reasons including, but not limited to, the need to fill the gaps caused by a shortage of suitably qualified local judges.

VII. Conclusion

This empirical study shows that the use of foreign judges is a widespread, prevalent and entrenched practice in Pacific states. Foreign judges serve in large numbers, constituting approximately three quarters of all judges serving on courts of constitutional jurisdiction in the region. The high number not only reflects the demand for judges, but the part-time ad hoc nature of the practice, in which a succession of foreign judges fill a limited number of judicial positions, with consequences for stability and continuity in the composition of Pacific courts.

Pacific courts are not necessarily 'hybrid' courts, in the sense that foreign judges always sit with local judges. In two states – Nauru and Tuvalu – there are no local judges on the relevant courts. Progress in localisation in Samoa, Solomon Islands and Vanuatu means that foreign judges increasingly sit with local judges in those states. In contrast, in Papua New Guinea, which has the highest proportion of local judges, only one foreign judge might sit on a panel of the Supreme Court, and often not at all. One consequence of this is that the benefits arising from the interaction and exchange of knowledge between local and foreign judges on some Pacific courts are not generalisable across all. Similarly, differences in the nature of service (as between resident full-time judges and visiting part-time or ad hoc judges) and the professional backgrounds of foreign judges should also caution against making generalisations about the qualities of foreign judges, their motivations and characteristics when considering the implications of the use of foreign judges.

Given historical, legal and development assistance ties between Pacific states and their former colonial administrators, it is not surprising that most foreign judges serving in the Pacific are recruited from the former colonial administrators of Australia, New Zealand and the United Kingdom. The data collected here shows, however, a greater diversity of donor states, and an emerging trend to the appointment of foreign judges from Commonwealth states of the global south, namely Sri Lanka, African states, and intra-regional exchanges within the Pacific itself.

To properly assess the implications of the use of foreign judges for constitutional adjudication, judicial independence and the role of judges and judiciaries in Pacific states, it is necessary to

proceed from an accurate understanding of the actual practice and the factors that influence the profiles of particular courts. The empirical data and contextual analysis presented in this Chapter permits the examination of the implications of the use of foreign judges based on a comprehensive understanding of the practice, on its own terms and in the particular context of the Pacific.

CHAPTER 3
LEGAL FRAMEWORKS AND PROCEDURES FOR THE USE OF FOREIGN JUDGES

I. Introduction

The terms and conditions of judicial service, and the procedures by which judges are selected, appointed and removed, affect the ways in which judiciaries function, and qualities such as expertise and independence. In the Pacific, these processes apply differently to foreign and local judges, sometimes because the law expressly differentiates on the basis of the citizenship of judges, other times because the use of foreign judges raises distinctive issues, resulting in different practices.

This Chapter examines the selection, appointment and removal of foreign judges and the terms and conditions of their service. The analysis is not limited to formal legal requirements, but necessarily encompasses several layers of legal regulation and practice. Constitutional and legislative provisions in each of the nine Pacific states provide a broad legal framework that is given effect by the decisions of officials and supplemented by contractual relationships between governments, courts, funding organisations and foreign judges themselves. The use of foreign judges multiplies the sites and sources of relevant regulation and practice, as the terms and conditions of foreign judges' service are affected not only by the laws and practices of the state in which the judge serves, but also by laws and practices in the judge's home country and funding states and institutions.

This Chapter is organised around four aspects of judicial service. Part II examines the laws and procedures relating to the selection and appointment of foreign judges. Part III outlines the remuneration and other benefits received by foreign judges serving in the Pacific. Part IV considers the tenure of foreign judges and their susceptibility to removal by extra-constitutional processes. Finally, the legal frameworks and the development over time of the practice of foreign judging also have implications for the language, time and place in which Pacific courts conduct hearings, which are addressed in Part V. In relation to each aspect of judicial service, each Part sets out the applicable law, relevant practices in Pacific states and outside them, and an analysis of some of the consequences of the law and practice. In order to capture the practices behind the constitutional text, and intersecting forms of local, foreign and international regulation, this Chapter draws on data collected in interviews with foreign judges and persons from institutions involved in recruiting or appointing foreign judges. The methodology for collecting and presenting this data is explained in Chapter 2.

This Chapter, together with the picture of the practice of foreign judging in the Pacific presented in Chapter 2, provides the evidence base for the informed and contextual analysis of the implications of the use of foreign judges for constitutional adjudication, judicial independence and the representative qualities of judges and judiciaries in the Pacific in the chapters that follow.

II. Selection and appointment

The formal processes for judicial appointment generally apply to local and foreign judges alike. However, behind the formal legal framework, the practices for recruiting foreign judges necessarily differ from those for local judges. The distance between foreign candidates and the Pacific state, and the involvement of external actors from foreign judges' home states and donor organisations, can present challenges in the recruitment of foreign judges.

A. Formal appointment process

In the nine Pacific states, the formal power to appoint judges is variously vested in the Head of State acting on the advice of government, or the Head of State acting on the advice of a specialist judicial services commission, or in such a commission alone. In Nauru and Tuvalu there is no judicial services commission and all judges are appointed by the Head of State acting on the advice of the government of the day.[1] In Fiji, Kiribati, Papua New Guinea, Samoa and Vanuatu, a similar process is used for the Chief Justice, who is appointed by the Head of State on the advice of the Prime Minister[2] or the Cabinet,[3] while the power to appoint all other judges is vested in the Head of State acting on the advice of a judicial services commission.[4] In Solomon Islands and Tonga, all judicial appointments are made by the Head of State with advice from the judicial services commission.[5] In Papua New Guinea, all judges

[1] *Constitution of Nauru 1968* s 49(2); *Constitution of Tuvalu 1986* s 123. In Tuvalu, the Cabinet consults the Chief Justice before appointing judges.
[2] *Constitution of Fiji 2013* s 106(1); *Constitution of Samoa 1960* s 65(2); *Constitution of Vanuatu 1980* s 49(3).
[3] *Constitution of Kiribati 1979* s 81(1); *Constitution of Papua New Guinea 1975* s 169(2); *Constitution of Tuvalu 1986* s 122(2).
[4] *Constitution of Fiji 2013* s 106(2); *Constitution of Samoa 1962* ss 72(3), 75(2)(b); *Constitution of Vanuatu 1980* s 47(2). In Kiribati, judicial appointments are recommended by the Chief Justice sitting with the Public Service Commission, an arrangement akin to a judicial services commission: *Constitution of Kiribati 1979* ss 81(2), 91(1)(b).
[5] *Constitution of Solomon Islands 1978* s 78(1), (2), 86(1), (2); *Constitution of Tonga 1875* ss 85, 86. In Tonga, the King in Privy Council makes judicial appointments after 'receiving advice' from the Judicial Appointments and Discipline Panel.

other than the Chief Justice are appointed directly by the Judicial and Legal Services Commission.[6]

The membership of judicial services commissions varies across the states. The Chief Justice is a member of all commissions in the region. Many commissions also include the Minister of Justice or Attorney General. Other members might include representatives of the public service commission, the legal profession, chiefly or tribal leaders, or the general community.[7] Judicial services commissions featured in the independence constitutions of many former British colonies, representing a departure from the system then existing in England, in which the power to appoint judges lay solely in the hands of the executive government of the day.[8] This shift was explained by reference to the expansive power that new Commonwealth constitutions conferred on judges to determine the constitutionality of legislation, which was thought to increase the risk of conflict between the judiciary and the political branches of government.[9] The use of judicial services commissions sought to distance, but not remove, the executive from judicial appointments and limit the risk of undue interference in judicial decision making. It remains a prevalent model across the Commonwealth.[10]

The formal processes for appointment generally apply to foreign and local judges alike. There are two historical examples in which the appointment of a non-citizen to judicial office was subject to a special process. The 1990 *Constitution of Fiji* required the appointing authority to act in accordance with the Prime Minister's advice when appointing a non-citizen. The application of this provision to judges was removed in 1997 to address concerns that it was an avenue by which the executive could improperly influence judicial appointments.[11] The second example arose in Papua New Guinea, where the Constitutional Planning Committee recommended that the *Constitution* include a target date for the localisation of the judiciary after which non-citizens should not be appointed judges except with the approval of the

[6] *Constitution of Papua New Guinea 1975* s 170(2).
[7] *Constitution of Fiji 2013* s 104(1); *Constitution of Papua New Guinea 1975* s 183; *Constitution of Samoa 1960* s 72; *Constitution of Solomon Islands 1978* s 117; *Constitution of Tonga 1875* s 83C; *Constitution of Vanuatu* 1980 s 48.
[8] The *Constitutional Reform Act 2005* (UK) introduced a new process in which an independent Judicial Appointments Commission is responsible for selecting judges. In Australia and New Zealand, the executive has sole responsibility for appointing judges.
[9] Stanley A De Smith, *The New Commonwealth and Its Constitutions* (Stevens & Sons, 1964) 137.
[10] Jan van Zyl Smit, *The Appointment, Tenure and Removal of Judges under Commonwealth Principles: A Compendium and Analysis of Best Practice* (Commonwealth Secretariat, 2015) [1.6.1].
[11] Paul Reeves, Tomasi Rayalu Vakatora and Brij V Lal, 'The Fiji Islands: Towards a United Future Report of the Fiji Constitution Review Commission 1996' (Parliamentary Paper No 34 of 1996, Parliament of Fiji, 1996) [13.99].

National Executive Council.[12] In the end, however, no such provision was included in the Constitution. While special appointment procedures for foreign judges have been contemplated, Pacific states have, by and large, considered it unnecessary to subject foreign judges to different formal processes than those that apply to the appointment of local judges.

Foreign judges, like local judges, receive a written commission or warrant of appointment signed by the Head of State. They are ceremonially sworn in and take the judicial oath.[13] In five states, judges also make an oath of allegiance, in which the judge swears to 'bear true allegiance' to the state or sovereign.[14] The *Constitution of Tonga* sets out a separate oath of office for judges who are not Tongan subjects which excludes the pledge of loyalty to the King of Tonga.[15] Papua New Guinea and Tuvalu exempt non-citizens from swearing loyalty or allegiance where doing so might adversely affect the nationality or citizenship status of the person concerned. The significance of the judicial oath and oath of allegiance in connecting foreign judges to a state to which they otherwise lack ties of citizenship is considered in Chapter 7.[16]

While the formal appointment procedures make limited distinctions between local and foreign judges, in practice the process for selecting and appointing a foreign judge is different in at least three respects. First, the local appointing authority is less likely to have direct knowledge about a foreign candidate; secondly, foreign judges might be expected to bring certain qualifications or skills; and thirdly, the recruitment process may involve the foreign judge's home state or a donor organisation in some way.

B. Recruitment

Particular challenges arise in the recruitment of foreign judges. In many common law countries, judges are recruited predominantly from the legal profession in that jurisdiction.[17]

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[12] Constitutional Planning Committee Papua New Guinea, 'Constitutional Planning Committee Report' (1974) ch 8, [63].

[13] *Constitution of Fiji 2013* s 109, sch; *Constitution of Fiji 1997* s 135, sch; *Constitution of Kiribati 1979* ss 82, 92, sch 1; *Constitution of Nauru 1968* s 52, sch 4; *Constitution of Papua New Guinea 1975* s 249, sch 4; *Constitution of Samoa 1960* s 67, sch 3; *Official Oaths Act 1978* c 24 (Solomon Islands) s 3; *Constitution of Tonga 1875* s 95; *Oaths and Statutory Declarations Act* c 7.48 (Tuvalu) s 3, sch 1; *Oaths Act* c 37 (Vanuatu) s 6(2).

[14] *Constitution of Fiji 2013* s 109, sch; *Official Oaths Act 1978* (Solomon Islands) c 24, s 3; *Oaths and Statutory Declarations Act* c 7.48 (Tuvalu) s 3; *Oaths Act* c 37 (Vanuatu) s 6(2). Judges in Papua New Guinea take a 'Declaration of Loyalty' to the state and its people: *Constitution of Papua New Guinea 1975* ss 6, 249.

[15] *Constitution of Tonga 1875* s 95.

[16] Chapter 7, Part III.B.

[17] Peter H Russell, 'Judicial Recruitment, Training and Careers' in Peter Cane and Herbert Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press, 2010) 523, 528.

In the Pacific, local judges tend to be recruited from the public service and the private bar. In these cases, members of the appointing authority are likely to have direct knowledge of the candidate and will certainly have access to judges, members of the legal profession, employees and the wider community who can provide advice on the candidate's qualifications, character and suitability for judicial office. In relation to foreign judges, however, the appointing authority is at a greater distance from potential candidates and so must use other methods to identify and assess the suitability of candidates for judicial appointment. This section outlines the different ways in which foreign judges are recruited to Pacific judiciaries.

Informal connections and name tapping

Some foreign judges are recruited to Pacific courts through informal networks between judges, officials and associations. Sometimes, the Chief Justice or the Attorney General in the Pacific jurisdiction will write to his or her counterparts in donor countries[18] or to professional lawyers' associations[19] to seek candidates for judicial appointment. Other times the Chief Justice of a Pacific court will approach other foreign judges to recommend candidates.[20] Contacts are often made through the foreign judges currently sitting on the Pacific court or at regional judicial conferences.[21] Sometimes, a Chief Justice or other official might contact potential candidates to seek expressions of interest in judicial appointment. For example, in 2010 the Parliamentary Counsel of Nauru wrote letters to several retired judges to gauge their interest in a position as Chief Justice of Nauru.[22] Sometimes, recruitment drives are targeted to a specific jurisdiction, rather than individuals. For example, Fijian officials visited Sri Lanka in 2009 to recruit judges and build connections between the two jurisdictions.[23]

[18] Interviews F3, F5.

[19] Eg the Nauruan government approached the Australian Bar Association to recommend a retired Australian judge: 'Nauru Bringing in Australian Judge for "Riot" Trial' *Radio New Zealand*, 1 August 2017 <http://www.radionz.co.nz/international/pacific-news/336293/nauru-bringing-in-australian-judge-for-riot-trial>.

[20] Interviews F2, F5, F7, F10, email F27.

[21] Interviews F9, F10, F11.

[22] Ramona Koval, 'Geoffrey Eames, Former Nauru Chief Justice' *The Saturday Paper*, 21 March 2015 <https://www.thesaturdaypaper.com.au/world/asia-pacific/2015/03/21/geoffrey-eames-former-nauru-chief-justice/14268564001645>.

[23] Bandula Sirimanna, 'Fiji Courts Want 6 of Our Judges' *Sunday Times* (Colombo), 16 August 2009 <http://www.sundaytimes.lk/090816/News/nws_07.html>.

Informal methods of recruitment of this kind are most often used to identify candidates for appointment as visiting judges on courts of appeal. There are, however, some examples of resident judges serving on superior trial courts who have also been recruited in this way.[24]

Lists of judges

Several sources referred to lists of foreign judges willing to serve in the Pacific maintained by organisations in Pacific and donor states.[25] For example, beginning in 1988, the Pacific Islands Forum Secretariat maintained a Register of Appellate Judges which it would update and circulate to Pacific governments. It seems, however, that authorities in Pacific states seeking to recruit foreign judges rarely used this list and the Register is no longer maintained.[26] There is therefore no clear account of the utility of such lists in the recruitment of foreign judges.

Arrangements between courts

Some Pacific courts have established standing arrangements with courts in Australia and New Zealand, whereby sitting judges are seconded to the Pacific court. For example, the Supreme Court of Vanuatu and the District Court of New Zealand have a program in which a judge from the District Court of New Zealand is appointed to the Vanuatu Supreme Court every two years. This arrangement has been formalised by an exchange of letters between the Chief Justice of Vanuatu and the Chief Judge of the District Court of New Zealand and, within New Zealand, by a Memorandum of Understanding between the Court and the Ministries of Justice and Foreign Affairs.[27] Similarly, two judges of the Federal Court of Australia have been appointed to the Papua New Guinea judiciary and visit three times a year to sit on the Supreme Court, pursuant to a formal arrangement between the two courts.[28] In these cases, the Chief Justice of the donor court calls for expressions of interest from the judges on the court and proposes candidates for appointment to the Pacific court. The Chief Justice or other representatives of the Pacific court may interview candidates, but sometimes the Pacific jurisdiction might rely on the recommendations of the donor court.[29]

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[24] Eg Gerard Winter, 'Judicial Guidelines: The Five Way Test' (2006) 1(2) *International Judicial Monitor*; Helen Kempton, 'A Busy and Varied Career in Law' *The Mercury* (Hobart), 8 June 2015 <http://at.themercury.com.au/link/efc1fdeefb395b81fce7d96f465a897e?domain=themercury.com.au> in which both judges report receiving phone calls from Chief Justices.

[25] Anthony Mason, 'Sharing Expertise with the Developing World' (2001) 26 *Alternative Law Journal* 7, 7. Interviews F4, F5, F19.

[26] Email communication from Lorraine Kershaw, International Legal Advisor, Pacific Island Forum Secretariat, 7 November 2018.

[27] Ministry of Justice, *The District Courts of New Zealand* (2008) 11. Interviews F16, F19.

[28] John Logan, 'A Year in the Life of an Australian Member of the PNG Judiciary' (SSGM Discussion Paper 2015/16, State, Society and Governance in Melanesia Program, Australian National University, 2015) 2.

[29] Interviews F16, F19, F22, F24.

Advertised positions

Judicial positions in Pacific states are most commonly advertised where a full-time resident judge is funded by an aid agency or international organisation. Examples include judicial appointments in Tonga funded by New Zealand and Australian aid agencies; appointments in Solomon Islands under the auspices of the Regional Assistance Mission to Solomon Islands; and judicial appointments made as part of the Commonwealth Fund for Technical Cooperation (CFTC). Candidates responding to advertised positions are generally interviewed by a panel of judges and officials from the Pacific state concerned. In the case of the CFTC, the Commonwealth Secretariat shortlists candidates for consideration by the head of jurisdiction in the Pacific state, who settles the final appointment in accordance with local procedures.[30]

Some Pacific states advertise judicial positions. In Tonga, the Judicial Administration and Discipline Panel established in 2010 advertises vacancies on the Supreme Court, assesses applicants and makes recommendations to the King in Privy Council.[31] Since 2013, the government of Nauru has advertised positions for new Supreme Court Judges.[32] The website of the Judicial Department of Fiji has a form entitled 'Expression of Interest in a position as a Judicial Officer on Fiji's Courts or Tribunals' which applicants can submit to the Chief Registrar at any time.[33]

Analysis

Information gathered in interviews suggests that Pacific Chief Justices have a primary role in identifying and approaching candidates for appointment and in establishing formal arrangements with donor courts.[34] This role is consistent with the position of the Chief Justice as head of jurisdiction and as a member of the judicial services commission, where one exists. The executive may also exert some influence on judicial recruitment by virtue of membership on judicial services commissions or as the appointing authority. This is especially the case in Nauru, where judicial appointments appear to be handled largely by the executive government, and in Tonga, where the King has a wide discretion and the final say in the appointment of judges. External courts and organisations that provide or fund foreign judges

[30] Interview F26.
[31] Interview F18.
[32] Eg Government of Nauru, *Expression of Interest Sought for Appointment as Judge to the Supreme Court of Nauru* (October 2013) <http://www.naurugov.nr/media/33015/new_judges_-_eoi___oct_updated___2013.pdf.>; Seek, *Justice of the Supreme Court* (4 August 2017) <https://www.seek.com.au/job/34079553>.
[33] *Expression of Interest in a Position as a Judicial Officer on Fiji's Courts or Tribunals* (20 April 2015) <http://www.judiciary.gov.fj>.
[34] Interviews F3, F4, F7, F9, F10, F11, F14, F17.

also have a role, ranging from informal influence through shared connections to more formal involvement in recruitment and selection.

Many foreign judges are recruited by informal means, predominantly through personal connections between Pacific and foreign judges. The increasing use of advertisements and formal recruitment processes is partly driven by the recruitment policies of the external states and organisations that recruit and fund foreign judges on behalf of Pacific states. The use of such processes to fill judicial vacancies that are wholly managed by Pacific states is part of a wider global trend to transparent, merit-based procedures for judicial appointment.[35] As noted in Chapter 2, the method of recruitment does affect the diversity of nationalities of foreign judges serving on Pacific courts. It is not surprising that foreign judges who are informally approached to recommend other judges for possible appointment to Pacific courts will turn first to judges from their home jurisdictions and their own courts, whom they know best. In contrast, the foreign judges recruited by donor organisations using open advertisements are of more diverse nationalities.[36]

Several participants commented in interviews that while the calibre of foreign judges appointed to Pacific courts was generally high, there were instances in which persons were appointed who did not have the experience or personal qualities necessary for judicial work in the Pacific.[37] This was said to arise from the challenge of conducting due diligence investigations into candidates whom the recruiting organisations or the appointing authorities in the Pacific state do not directly know, and, on occasion, from patronage or self-interest on the part of the executive. In the particular context of foreign judging, advertisements and open competition may not necessarily assist Pacific states in identifying the best candidates for appointment. Where a candidate is a judge or retired judge in his or her home jurisdiction, recruiters and appointing authorities can more easily ascertain their qualifications and merit, in a sense riding on the legitimacy of the process for judicial appointment in the judge's home state. Where a candidate has no judicial experience, appointing bodies must find other ways to assess their suitability, for example by consulting referees, or judges' or lawyer's associations, in the candidate's home state, a process that may be impeded by lack of access. Recruiting foreign judges through lists presents similar difficulties, especially if the list is compiled using a

[35] Peter H Russell and Kate Malleson (eds), *Appointing Judges in an Age of Judicial Power: Critical Perspectives from around the World* (University of Toronto Press, 2006) 3; Derek Schofield, 'Maintaining Judicial Independence in a Small Jurisdiction' in John Hatchard and Peter Slinn (eds), *Parliamentary Supremacy and Judicial Independence: A Commonwealth Approach* (Cavendish Publishing Limited, 1999) 73, 74; van Zyl Smit, above n 10, [1.7.5].
[36] Chapter 2, Part V.A.
[37] Interviews F4, F23, F25.

process in which candidates self-nominate. These difficulties associated with recruitment affect other aspects of foreign judging. For example, one reason given for the appointment of foreign judges on short terms is to provide an opportunity for appointing authorities to assess the judge's suitability.[38]

C. Selection criteria

The eligibility requirements for appointment to judicial office seek to ensure that judges meet minimum professional qualifications and experience. Appointing authorities might consider additional selection criteria such as legal expertise, integrity, administration skills, communication skills, and fairness.[39] The candidate's background may also be relevant in so far as diversity of gender, ethnicity or nationality amongst judges of the court is regarded as desirable.[40] This section outlines the selection criteria applied to foreign judges recruited to Pacific courts.

Qualifications for judicial office

In Pacific states, the criteria for the selection of judges – both local and foreign – are principally contained in the constitutional requirements regarding eligibility to hold judicial office. The prescribed qualifications generally relate to the candidates' judicial or legal experience. The appointment of foreign judges is facilitated by recognising overseas legal or judicial experience. Several constitutions provide that in order to qualify for judicial appointment, a person must have held judicial office or have practiced as a legal practitioner for a minimum period of time in the state itself or another country. In Fiji and Samoa, such 'other countries' may be prescribed by law, although in Samoa the country must have a legal system similar to that existing in Samoa.[41] In the Solomon Islands, other countries include any country in the Commonwealth or as prescribed by law.[42] Tonga requires judicial experience in any country or 10 years practice as an advocate in part of the Commonwealth.[43] In Tuvalu, the other country

[38] Carl B Ingram, 'The Length of Terms of Judges in the Pacific and Its Impact on Judicial Independence' in *Land Law and Judicial Governance in the South Pacific: Comparative Studies* (New Zealand Association for Comparative Law, 2011) 375, 376; Reeves, Vakatora and Lal, above n 11, 13.108; Jon M Van Dyke, 'The Pacific Judicial Conference: Strengthening the Independent Judiciary and the Rule of Law in the Pacific' (2011) 22(1–2) *Western Legal History* 127, 160–1.
[39] Russell and Malleson, above n 35, 8–9.
[40] Kate Malleson, 'Diversity in the Judiciary: The Case for Positive Action' (2009) 36(3) *Journal of Law and Society* 376.
[41] *Constitution of Fiji 2013* s 105, *Constitution of Fiji 1997* s 130, Judicial Tribunals (Prescribed Countries) Promulgation No 32 of 2007 (Fiji); *Constitution of Samoa 1960* s 65(5).
[42] *Constitution of Solomon Islands 1978* ss 78(3), 86(3).
[43] *Constitution of Tonga 1875* ss 85(1), 86(1).

must have a 'similar legal system',[44] while Kiribati accepts legal experience in any country.[45] Nauru and Vanuatu tie eligibility for judicial appointment to the qualifications for admission to legal practice.[46] In effect, this permits the appointment as judges of persons with legal qualifications and experience in specified other countries. In Nauru, this includes those admitted to legal practice in England, Northern Ireland, the Republic of Ireland, Scotland, Australia, New Zealand or any other country as notified by the Minister after consultation with the Chief Justice.[47] In Vanuatu it includes persons admitted in a Commonwealth jurisdiction.[48] In this way, the laws in each state facilitate the appointment of foreign judges as well as citizens who have studied and practiced law overseas.

There are some relevant differences between jurisdictions. One pertains to whether the appointing body has the authority to decide whether the other country has a 'similar' legal system, or whether this is determined by legislative instrument. Another point of difference is whether the source countries for foreign judges are limited to Commonwealth countries or are more expansive. The choice does not appear to have had much impact on the cohort of foreign judges serving in the Pacific: as demonstrated by the data presented in Chapter 2, all foreign judges serving in the nine Pacific states between 2000 and 2015 were from Commonwealth countries.

In contrast to the other states, in Papua New Guinea the qualifications for appointment are set out in legislation rather than the constitution. The Constitution Planning Committee chose this approach so that the requirements for judicial office could be altered to accommodate the anticipated increase in the legal qualifications and experience of local candidates over time.[49] Papua New Guinea is also distinctive in that the prescribed qualifications for appointment are different for citizens and non-citizens. Citizens must have recognised university qualifications and at least four years' experience in practice as a lawyer or magistrate, while non-citizens qualify if they were a judge, or lawyer with at least five years' experience, in a country with a legal system substantially similar to that of Papua New Guinea.[50] The purpose of the distinction, according to the Constitutional Planning Committee, was to provide greater scope

[44] *Constitution of Tuvalu 1978* s 124; *Superior Courts Act* c 7.68 (Tuvalu) s 8(1).
[45] *Constitution of Kiribati 1979* ss 81(3); 91(1)(b).
[46] *Constitution of Nauru 1968* s 49(3); *Constitution of Vanuatu 1980* s 49(4).
[47] *Legal Practitioners Act 1973* (Nauru) s 5. Other prescribed countries include India and Papua New Guinea: Nauru, *Government Gazette* No 52, 30 September 1981, 1; Nauru, *Government Gazette* No 60, 29 September 1999, 1.
[48] *Legal Practitioners (Qualifications) Regulations Act 1996* (Vanuatu) s 2.
[49] Constitutional Planning Committee Papua New Guinea, above n 12, ch 8, [31].
[50] *National Court Act 1975* c 38 (PNG) ss 1, 2.

to appoint Papua New Guineans, who, at the time of independence, had only recently begun to gain professional legal qualifications.[51]

Legislative or policy guidance on judicial appointments

In most Pacific states, the constitutional or statutory qualifications for judicial office, which specify only prior judicial or legal experience, are the only explicit criteria to guide the selection of judges. Fiji and Vanuatu, however, have prescribed further considerations that the appointing authority must take into account when recommending judicial appointments. In Fiji, the 2013 *Constitution* provides that 'the making of appointments to a judicial office is governed by the principle that judicial officers should be of the highest competence and integrity'.[52] The 1997 *Constitution* included as a second principle that the composition of the judiciary should, as far as possible, reflect the ethnic and gender balance of the community.[53] This principle seems to have been understood as primarily directed to ensuring the appointment of local judges from both the Indigenous Fijian and Indian Fijian communities,[54] and does not appear to have restricted the appointment of foreign judges in any significant way. In any event, this second principle was not carried into the 2013 *Constitution*. Vanuatu is unique in adopting additional selection criteria to accommodate foreign judges. Legislation requires the Judicial Service Commission to consider candidates' experience and abilities; character and standing in the community in which the candidate usually resides; and in the case of candidates from outside Vanuatu, their judicial experience.[55]

Specific selection criteria for foreign judges

Advertised judicial positions may specify a range of additional selection criteria. This is most often the case when foreign judges are recruited (and paid) by a donor state or organisation. These positions are therefore partly judicial appointments and partly development assistance, and this duality may be reflected in the selection criteria agreed between the Pacific court or appointing authority and the donor organisation. For example, the advertisement for the position of puisne judge of the High Court of Solomon Islands, funded by Australian aid, sought candidates with at least 15 years' experience as a judge or legal practitioner (10 years more

[51] Constitutional Planning Committee Papua New Guinea, above n 12, ch 8, [34]; John Logan, 'Law and Justice in Papua New Guinea' (Paper presented at the Australian Institute of International Affairs, Brisbane, 23 June 2015) 25.
[52] *Constitution of Fiji 2013* s 105(1).
[53] *Constitution of Fiji 1997* s 134.
[54] The Reeves Commission recommended this provision to replace a requirement in the *Constitution of Fiji 1990* for the distribution of judicial positions between ethnic groups: Reeves, Vakatora and Lal, above n 11, [13.100-2].
[55] *Judicial Services and Courts Act 2003* c 270 (Vanuatu) s 33(3).

than the minimum experience required by the *Constitution of the Solomon Islands*), with 'proven success in individual and organisational capacity development and sustainability of efforts, ability to share knowledge, and transfer skills'.[56] The position description noted that 'the Judge's efforts should be treated as an opportunity to improve systems and transfer knowledge and skills to National Judiciary and other [Solomon Islands Government] staff, and also to improve the practice of practitioners'. The candidate was further 'expected to demonstrate a good understanding, appreciation and empathy of the local cultures and mores of the society and be able to encourage and assist legal practitioners and other judicial and support staff in improving their work performance, practices and aptitudes.'[57] The advertisement for a judicial position in Kiribati funded by the CFTC sought a judge to conduct judicial work, but also to review and implement court operations and administration and to mentor and train judicial officers.[58] In contrast, advertisements for judges placed by the government of Nauru simply refer to the constitutional requirements for eligibility, or specify expertise in particular areas of law.[59]

The degree to which foreign judging should encompass capacity building is a contested issue. This contest discloses different views about the rationale for the use of foreign judges, which are discussed in Chapter 8 in light of the analysis of laws, practices and implications of the use of foreign judges across the whole thesis. For present purposes, it is important to note that although the appointing authority in the Pacific state is ultimately responsible for selecting the judge, donor organisations may be involved in defining the role of foreign judges and recruiting candidates according to specific criteria for foreign judges, which do not necessarily pertain to local judges serving in their home jurisdictions.

Analysis

The qualifications and selection criteria for judges in Pacific states facilitate the appointment of foreign judges by recognising legal or judicial experience gained overseas. With the exception of Papua New Guinea, selection criteria are not explicitly formulated to distinguish between local and foreign judges, or with an eye to localisation. Indeed, in Tuvalu, the constitutional provision is framed in such a way as to *require* candidates for judicial appointment to have qualifications and experience in an overseas jurisdiction, precluding local lawyers who have

[56] *Puisne Judge of the High Court of Solomon Islands (Civil Cases)* (6 November 2015) Devex <https://www.devex.com/jobs/puisne-judge-of-the-high-court-of-solomon-islands-civil-cases-411841>.
[57] Ibid.
[58] *Commonwealth Secretariat Vacancy: Judge of the High Court, Tarawa, Kiribati* (June 2013) UNjobs <https://unjobs.org/vacancies/1368393604897>. See also *Puisne Judge of the High Court* (28 November 2007) Devex <https://www.devex.com/jobs/puisne-judge-of-the-high-court-79395>.
[59] See advertisements posted by Government of Nauru, above n 32; Seek, above n 32.

practiced solely in Tuvalu.[60] In no state is it expressly stated that appointing authorities ought to give preference to qualified local candidates over foreign candidates. However, in some Pacific states, the pattern of judicial appointments suggests that, while there is no express policy, there is in practice a preference to fill full-time judicial positions with local candidates and look overseas only where the pool of suitably qualified local candidates willing to accept judicial appointment falls short.[61]

D. Formalities and restrictions in the donor jurisdiction

The preceding sections focused on the laws and practices of Pacific states. A judge's home state may also impose procedural requirements on judges serving overseas. Processes of this kind generally arise when a foreign judge is a sitting judge in their home jurisdiction and serves concurrently in a Pacific state and their home state, although some also apply to retired judges.

Generally, a serving judge will seek the agreement of the head of jurisdiction or the judicial services commission in his or her home state before accepting appointment to a Pacific court.[62] In New Zealand, legislation prohibits a judge from holding any other office, whether paid or unpaid, unless the head of court is satisfied that it is consistent with judicial office.[63] In Sri Lanka, the Judicial Services Commission permitted Sri Lankan judges leave of absence so that they could serve in Fiji.[64]

Several judges described this process as a 'formality', especially where the overseas judicial work is undertaken while the judge is on leave from his or her home court and as such does not affect the capacity of the home court to meet its caseload. Some heads of jurisdiction are more favourable than others to judges of their courts serving overseas, which affects the take up of overseas appointments. Some heads of jurisdiction seek to limit the overseas service of judges to ensure that the court has sufficient capacity to hear its own matters. For example, the Supreme Court of Queensland adopted a general practice that only one judge may sit

[60] *Constitution of Tuvalu 1978* s 124.
[61] Chapter 2, Part VI discussing Papua New Guinea, Samoa, Solomon Islands and Vanuatu.
[62] Interviews F2, F3, F4, F11.
[63] *Senior Courts Act 2016* (NZ) s 142, formerly *Judicature Act 1908* (NZ) s 4(2A); *District Courts Act 1947* (NZ) s 5(4).
[64] Pacific Media Centre News Desk, 'Fiji's Chief Justice Condemns Australian, NZ "Interference" and "Hostility"' *Pacific Scoop*, 3 November 2009 <http://pacific.scoop.co.nz/2009/11/fijis-chief-justice-condemns-australian-nz-interference-and-hostility/>.

overseas at a time, restricting the opportunity for members of the same donor court to sit together on a Pacific Court.[65]

The extent of the involvement of the executive branch in acknowledging or approving the appointment of sitting judges to foreign courts varies. Some judges reported that the Chief Justice will notify the Attorney General of the proposed appointment.[66] In Queensland, consultation between the Attorney General, Chief Justice and head of the executive is required by legislation.[67] Where there are formal arrangements between courts, in which the judge's home jurisdiction provides both the judges and financial support for their service, representatives of the government agencies responsible for the administration of justice and foreign affairs may be involved. Again, such processes largely appear to be formalities and most executive agencies do not seek to intervene in the procedures of either the donor or recipient court.

Retired judges who engage in judicial service overseas may also have to address some procedural issues.[68] Generally these relate to the judge's entitlement to access his or her pension. For example, the *Constitution* of the Australian state of Victoria provides that a judge's right to a pension ceases upon accepting appointment to any judicial office in or outside Victoria.[69] A retired judge of a Victorian Court who wishes to accept appointment as a judge overseas while retaining his or her right to a pension must write to the Victorian Attorney General and seek an order from the Governor in Council in their particular case.

These restrictions on judges holding other public office or outside employment relate not only to the management of resources but seek to ensure that these additional positions are compatible with judicial office. There is no clear rule on whether service on a foreign court is incompatible with holding judicial office in the judge's home country. The legal issues will differ depending on the specific constitutional and legal frameworks in each donor country.[70] The common law rule of incompatible office provides that offices are incompatible

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[65] Glen Williams, 'McPherson JA in the Solomon Islands' in Aladin Rahemtula (ed), *Justice According to Law: A Festschrift for the Honourable Mr Justice BH McPherson CBE* (Supreme Court of Queensland Library, 2006) 632, 633.

[66] Interviews F10, F11.

[67] *Supreme Court Act 1991* (Qld) s 22 requires a judge who accepts 'another public office' to notify the Attorney General and resign the office if the Governor in Council decides, after consultation between the Attorney General and Chief Justice, that the office is 'inconsistent with the proper discharge of the office of a judge'.

[68] Interviews F1, F21.

[69] *Constitution Act 1975* (Vic) s 83(4)(i).

[70] In particular, the ability of judges serving on federal courts in Australia is affected by the constitutional doctrine of incompatible office arising from the nature of the separation of judicial power required by

> when, from the nature or extent of the different duties and businesses attached to them, they cannot be properly and effectually executed by the same person; or when they are subordinate to, or interfere with each other, which creates a legal presumption that they will not be executed with impartiality and honesty.[71]

Under the common law rule, when an official accepts an incompatible office, he or she impliedly relinquishes the original office.[72] Concerns about the possibility that appointment as a judge in a foreign jurisdiction might be incompatible with judicial office in the judge's home jurisdiction led the New South Wales parliament to legislate in 1979 to make it clear that a judge who accepted a part-time appointment to the Supreme Court of Papua New Guinea did not relinquish judicial office in New South Wales as a result of the rule of incompatible office.[73] Similarly, a model clause developed to facilitate concurrent service by Australian judges across state and territory jurisdictions and New Zealand expressly provides that the rule of incompatible office does not operate to prevent the holder of judicial office from being appointed to another judicial office.[74] In Queensland, legislation confers power on the executive branch to determine if an office is incompatible,[75] while in New Zealand legislation confers this power on the relevant head of court.[76] Where there is no legislation to govern the issue, the matter is left to be determined by protocol between judges, the head of jurisdiction and the executive.

Guidelines and protocols on judicial ethics do not deal expressly with concurrent judicial service overseas.[77] The practice, at least in Australia and New Zealand, suggests that service on a foreign court is not considered to be incompatible with judicial office, unless there are specific circumstances that might give rise to concerns that the judge cannot execute both offices effectively and impartially. Advice from the Solicitor General of New South Wales stated that there was no suggestion that the appointment of a judge of the New South Wales Supreme Court to a court of a Pacific state was incompatible with the proper exercise of the judge's judicial functions, particularly because the judge was to serve in the Pacific only while

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Chapter III of the *Australian Constitution*: Sarah Murray, 'Dual Federal and State Judicial Appointments: An Australian Impossibility?' (2014) 25 *Public Law Review* 284.

[71] Joseph Chitty, *A Treatise on the Law of the Prerogatives of the Crown* (J Butterworth, 1820) 87.

[72] Ibid.

[73] *Judicial Office (Papua New Guinea) Act 1979* (NSW); New South Wales, *Parliamentary Debates,* Legislative Assembly, 3 November 1979, 4134 (Mr Walker, Attorney General and Minister for Justice). A similar provision appears in the now repealed *Conciliation and Arbitration Act 1904* (Cth) s 103A.

[74] *Judicial Officers Act 1986* (NSW) s 43I; New South Wales, *Parliamentary Debates,* Legislative Council, 2 December 2009, 20395-7 (Tony Kelly).

[75] *Supreme Court Act 1991* (Qld) s 22.

[76] *Senior Courts Act 2016* (NZ) s 142(2).

[77] Australasian Institute of Judicial Administration, *Guide to Judicial Conduct* (2nd ed, 2007); Chief Justice New Zealand, *Protocol Containing Guidance on Extra-Judicial Employment and Offices (Senior Courts)* (2017); Judiciary of England and Wales, *Guide to Judicial Conduct* (2013).

on leave from his or her position on the New South Wales Court.[78] The New South Wales legislation to accommodate judicial service in Papua New Guinea provided that a judge could be granted leave in order to serve as a judge in Papua New Guinea, but while on leave the judge was 'not entitled to exercise or perform any jurisdiction, powers, authorities, duties or functions' as the holder of judicial office in New South Wales.[79] However, the more recent practice of judicial secondments, in which judicial service overseas is supported financially or in kind by the judge's home court, suggests that a judge is not always required to take leave in order to sit as a judge overseas.[80]

Analysis

The use of foreign judges is distinctive because it engages processes in both the Pacific state appointing the foreign judge and the judge's home state. Rules and procedures, and the attitudes of heads of jurisdictions and executives to foreign judging, affect the cohort of foreign judges serving in the Pacific and the nature of their service. It is more likely that Pacific states will appoint sitting judges from jurisdictions where the head of the court supports overseas service and retired judges from jurisdictions where judicial service overseas does not affect eligibility for a judicial pension. This overview suggests that different practices and assumptions have developed in different jurisdictions over time, such that most issues are left to be resolved on a case by case basis rather than by a consistent generally applicable policy.

The discussion in this Part has shown that the processes for the appointment of foreign judges, while formally in the hands of each individual Pacific state, are informed in various ways by attitudes, procedures and personal relationships within a judge's home state and/or donor organisations. This raises two issues that are picked up in the discussion of the implications of the use of foreign judges later in this thesis. The first, discussed in Chapter 6, is that various parties are imported into the appointment process, multiplying the potential sources of influence over foreign judges, and with it the risks to judicial independence.[81] The second, discussed in Chapter 7, is that the appointment of foreign judges distances the Pacific state from the judges that serve on its courts, attenuating the sense in which judges represent the Pacific state and its people.[82]

[78] Interview F3.
[79] *Judicial Office (Papua New Guinea) Act 1979* (NSW) ss 3, 4.
[80] Interview F24.
[81] Chapter 6, Part II.C.
[82] Chapter 7, Part III.

III. Remuneration

Different remuneration arrangements apply to foreign judges who serve as visiting court of appeal judges and foreign judges who serve as full-time resident judges.[83]

Visiting court of appeal judges generally receive a daily sitting fee, ranging from $300 to $1000 Australian or New Zealand dollars a day, depending on the jurisdiction and dates of service. In some jurisdictions, the sitting fees are set out in legislation or regulations.[84] In others they are set by agreement between the government and judge. The travel, accommodation and living expenses of visiting court of appeal judges are also covered, and in some cases, those of the judge's partner. In most cases, the government of the Pacific state provides the funds to pay these foreign judges.

In contrast, foreign judges who serve as resident full-time judges are paid an annual salary. Under some agreements of service, judges in this category also receive benefits such as travel, accommodation and medical care. Practice varies as to who pays this salary and how much it is. In some cases, the Pacific government pays entirely for the foreign judge's service.[85] In other circumstances, a donor government or agency might 'top up' the local salaries of foreign judges so that it is commensurate with what the person would earn as a judge in his or her home state.[86] The foreign donor might also pay an overseas living allowance and provide for tax exemptions in the judge's home state.[87] Some formal schemes entail a degree of cost sharing: for example, the donor agency might pay the judge's salary, while the Pacific state provides the judge's accommodation and transport.[88]

Some foreign judges are wholly funded by an external agency or organisation. In these cases, the rates of pay are set by the donor according to its own remuneration schedules.[89] The terms and conditions under these funding agreements vary. For example, some donor agencies prohibit the judge from receiving additional payments or benefits from the Pacific court (such as an additional sitting fee for serving on the Court of Appeal) while in other cases judges are allowed to receive additional payments of this kind.[90] Formal arrangements

[83] On the distinction between the two see Chapter 2, Part IV.
[84] *Constitutional Offices (Terms and Conditions of Service) Act* c 84 (SI); *Judicial Services and Courts Act* c 270 (Vanuatu) sch pt 1.
[85] Interviews F1, F8.
[86] Interviews F4, F5, F16, F20.
[87] Interviews F13, F16, F23.
[88] Interviews F24, F26.
[89] Interview F26. Eg advertisement for *Puisne Judge of the High Court of Solomon Islands (Civil Cases)*, above n 56.
[90] Interviews F19, F26.

between courts for the provision of judges generally include terms as to remuneration and expenses. Under some such agreements, the donor court effectively subsidises the foreign judge's salary by recognising the judge's service overseas as part of his or her service in the home court.[91]

Analysis

The remuneration of foreign judges raises two issues. The first is the potential disparity of pay between foreign and local judges, and between foreign judges paid pursuant to different funding arrangements. Some interviewees expressed a concern that disparity in pay could damage relationships between local and foreign judges.[92] One foreign judge interviewed declined the offer of a salary 'top up' from an overseas aid agency, preferring to work on the same terms and conditions as local judges.[93] Some foreign judges use daily sitting fees to cover their expenses only, and return or donate the balance.[94] On the other hand, several interviewees noted that in order to attract good candidates, Pacific states and donors needed to provide salaries on par with what the judge would earn in his or her home state[95] and to this end, some jurisdictions offer judicial salaries comparable to those in Australia and New Zealand. Different issues may arise where the Pacific state offers a significantly higher salary to what a judge would earn in his or her home state, as is reportedly the case in Fiji with respect to some Sri Lankan judges. The concern is that this, combined with appointment on short renewable contracts, risks creating a perception that judges will decide cases in a manner favourable to the government in order to secure reappointment.[96]

The second issue relates to the sustainability of the continued reliance on foreign judges. As developing states, all nine Pacific jurisdictions have limited funds. Some are reliant on overseas aid to support the institutions of government, including the judiciary. High judicial salaries can put pressure on the judicial and national budgets.[97] Without foreign assistance, most states cannot afford to pay judicial salaries at the same level as foreign judges' home states. In his opening address to the Court in 2015, the Chief Justice of the Solomon Islands, Sir Albert Rocky Palmer, commented that using foreign judges to fill the gaps on the High Court is too expensive and takes funds that could be utilised for other needs across the legal sector. He

[91] Interviews F21, F23, F24.
[92] Interviews F6, F17, F23. In Papua New Guinea see 'Pay Disparity a Thorny Issue' *The National*, 6 December 2011 <https://www.thenational.com.pg/pay-disparity-a-thorny-issue/>.
[93] Interview F6.
[94] Interviews F10, F11, F17.
[95] Interview F23.
[96] Discussed in Chapter 6, Part IV.A.
[97] Interview F18.

suggested a better approach would be to improve the salaries and conditions of local judges so that a career on the bench is more attractive to local lawyers.[98] Chief Justice Lunabek of Vanuatu has similarly called for improvements in the salaries, terms and conditions for local judges in order to make judicial service more attractive to local lawyers.[99]

IV. Tenure and removal

A. Fixed term appointments

A significant feature of the practice of foreign judging is that, by and large, foreign judges are appointed to serve for fixed terms of weeks, months or years. This stands in contrast to the position of judges in many other countries, where judges, especially on higher courts, are appointed for life or until the judge reaches a specified age of retirement. Tenure is also a point of distinction between foreign and local judges in the Pacific, in that citizen judges are commonly appointed until a specified retirement age or for longer terms, in contrast to the shorter, fixed term appointments of many foreign judges. This section identifies the range of different approaches to the duration and regulation of the terms of appointment for foreign judges in the region and some of the issues that arise.

Duration of appointments

It is difficult to collect comprehensive data on the terms of appointment of foreign judges in the Pacific. The term of a judge's appointment may be stated in the formal instrument of appointment, although sometimes there is no specified term. Contractual arrangements between the foreign judge and Pacific state, and occasionally with external funding organisations, may specify a period of employment which effectively functions as the term of appointment. Instruments of appointment are not always published, and official and private records are not often readily accessible. Appendix A includes the specified term of appointment for each foreign judge serving in the Pacific during the case study period, where it is known.

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[98] Jennifer Kusapa, 'Expatriate Judges, Not an Answer: Chief Justice' *Island Sun* (Honiara), 21 January 2015 <http://www.islandsun.com.sb/index.php/latest-news/national/7391-expatriate-judges-not-an-answer-chief-justice>; 'Chief Magistrate Says Foreigners No Solution to Solomons Shortage' *ABC News*, 21 October 2013 <http://www.abc.net.au/news/2013-10-21/an-chief-magistrate-says-foreigners-not-the-answer-to-magistrat/5035402>.

[99] Chief Justice Lunabek, 'Speech on the Official Opening of the Courts of Vanuatu' (Port Vila, 27 January 2012) <https://mjcs.gov.vu/images/research_database/Chief_Justice_2012_SPEECH2-_Opening_of_Court.pdf.>.

It is possible to trace some general trends in each jurisdiction based on the available data. In Fiji, Kiribati, Nauru, Solomon Islands, Tonga and Tuvalu, foreign judges on the relevant courts tend to be appointed for a fixed term ranging from one to five years. In Papua New Guinea, foreign judges are appointed on three-year terms, except when that would take the appointment over the mandatory retirement age, in which case the term is reduced. In Samoa, no term of appointment is specified for foreign judges appointed to the Court of Appeal, but foreign judges appointed to the Supreme Court may be appointed for a term of months or years. In Vanuatu, the instruments of appointment for some judges of the Court of Appeal do not specify a term of appointment, but most Judges of Appeal are appointed for the particular sittings of the Court of Appeal, that is, a period of two weeks. Foreign judges appointed to the Supreme Court of Vanuatu, on the other hand, are generally appointed for a term of months or years.

Constitutional and statutory provisions

The constitutional and legislative provisions for judicial tenure vary across the nine Pacific states, and sometimes also across different courts within the same state. Some constitutions permit, while others require, that judges serve on short term contracts. In three cases, the law provides different tenure for foreign and citizen judges. In all jurisdictions, there are no legal restrictions on reappointment or the renewal of fixed term appointments.

In three states, the constitution permits any judge to be appointed for a fixed term. In Tuvalu, a judge can be appointed for life or for a period specified in the instrument of appointment.[100] In Tonga, judges may be appointed for limited periods or for particular sittings on terms determined by the King.[101] In Kiribati, judges hold office until the expiration of the term of their appointment.[102] As a result of these provisions, the appointing authorities in these countries have flexibility to determine the term of judges' appointments.

In three other states, the law expressly distinguishes between citizens and non-citizens for the purposes of tenure. In Papua New Guinea, non-citizen judges may be appointed for a term not exceeding three years, while citizen judges are appointed for ten-year terms.[103] The constitutions of Fiji and Samoa expressly exempt non-citizen judges from the constitutional guarantee of tenure until retirement age that applies to other judges. The *Constitution of Fiji 2013* provides that judges are appointed until a specified retirement age except for non-

[100] *Constitution of Tuvalu* 1986, ss 123, 126.
[101] *Constitution of Tonga 1875* s 85-87.
[102] *Constitution of Kiribati 1979* ss 83, 91(2), 93.
[103] *Organic Law on the Terms and Conditions of Employment of Judges* (PNG) s 2.

citizens, who *must* be appointed for terms of up to three years.[104] The *Constitution of Samoa* is less directive in that it provides that Supreme Court judges must be appointed until retirement, but that non-citizens *may* be appointed to the Supreme Court for a term of years[105] while any Court of Appeal judge (whether citizen or non-citizen) *may* be appointed for a period of time or for hearing particular matters, as set out in the instrument of appointment.[106]

Prior to amendments in 2009, the *Constitution of Solomon Islands* also distinguished between citizen and foreign judges for the purposes of tenure. It provided that while all judges are appointed until retirement age of 60, a non-citizen over that age could be appointed for a term of years.[107] The effect of this provision was that a foreign judge could be appointed for a term of years, while a citizen judge was appointed until retirement. Constitutional amendments in 2009 increased the retirement age to 70 and removed the reference to non-citizen judges.[108] The parliamentary debates indicate that the purpose of the amendment was to remove the discriminatory provision that prevented citizens over 60 from serving as judges.[109] However, the effect of the amendments is wider, because the *Constitution* now requires that all judges, including foreign judges, hold office until 70 years of age. While not all appointments are gazetted, those that are indicate that most foreign judges appointed before and after the amendments in 2009 were appointed for fixed periods, of generally two or five years. The text of the *Constitution* would appear to require, however, that only judges over the age of 70 and acting judges may be appointed on fixed terms.[110]

The constitutions of Nauru and Vanuatu fix the tenure of judges until a specified retirement age.[111] However, both constitutions permit the appointment of acting judges on limited

[104] *Constitution of Fiji 2013* s 110. The *Constitution of Fiji 1997* permitted the appointment of judges of the Supreme Court and Court of Appeal for a term of years or for sessions of the court; and judges of the High Court for a term of at least four, and no more than seven, years: s 137(2), (4). No express distinction was made between citizens and non-citizens.
[105] *Constitution of Samoa 1960* s 68.
[106] *Constitution of Samoa 1960* s 75(5).
[107] *Constitution of Solomon Islands 1978* s 80(1), (2); 87(1), (2).
[108] *Constitution (Amendment) Act 2009* (SI).
[109] Solomon Islands, *Parliamentary Debates,* 6 April 2009 (Hon Sikua, Prime Minister); Solomon Islands, *Parliamentary Debates,* 7 April 2009 (Hon Tausinga, Mr Zama, Hon Lilo). Similar concerns about discrimination against local judges were raised during discussions of the independence *Constitution of Nauru*: Territory of Nauru, 'Record of the Proceedings of the Constitutional Convention' (15 January 1968) 59-61.
[110] *Constitution of Solomon Islands 1978* s 79(3).
[111] *Constitution of Nauru 1968* s 53; *Constitution of Vanuatu 1980* s 47(3), *Judicial Service Commission Act 2003* c 270 (Vanuatu) art 36(1).

terms.[112] In Nauru, several foreign judges were appointed as acting judges because they were older than the specified retirement age of 65.[113] The retirement age was increased to 75 in 2009, but foreign judges are still appointed for fixed terms.[114] In Vanuatu, the gazette notices for some foreign judges expressly proclaim their appointment as 'acting judges' for specified terms.[115] However, some gazettes provide that foreign judges are appointed as 'judges' for terms of between three months and two years.[116] The inconsistency raises questions about whether judges appointed for fixed terms are properly commissioned or if they are in effect acting judges.

In Solomon Islands and Vanuatu, where the law does not distinguish between local and foreign judges for the purposes of tenure, local judges tend to be appointed for longer terms or until retirement age as a matter of practice.

Relationship between contractual terms and formal appointment

A contract or service agreement might set out the term of a foreign judge's employment instead of, or in addition to, the term specified in the formal instrument of judicial appointment. Generally, the contract is between the foreign judge and the government of the Pacific state and covers such matters as the period of the appointment, remuneration and entitlements. Sometimes, these matters are set out in correspondence between the judge and the government prior to or during the judge's appointment.[117]

Disputes have arisen where the terms of the contract and the formal appointment are inconsistent. In the early 1990s, Justice Faqir Muhammad was appointed a judge of the High Court of Kiribati. He was later appointed Chief Justice for a three-year term. This appointment was formally renewed for a further two years, to expire on 6 February 1995. The British government had initially funded the judge's position but ceased to do so in 1994. In March 1994, the government of Kiribati secured funding from New Zealand to cover the remainder of the judge's term. The judge and the government of Kiribati then entered into a service

[112] *Constitution of Nauru 1968* s 53; *Constitution of Vanuatu 1980* s 47(5), *Judicial Service Commission Act 2003* c 270 (Vanuatu) s 35.
[113] Nauru Constitutional Review Committee, *Naoero Ituga: Report* (2007) 113.
[114] *Constitution of Nauru (Parliamentary Amendments) Act 2009* (Nauru) s 33.
[115] See instruments of appointment for Justice Coventry in Gazette 7/2000; Justice Treston in Gazettes 24/2003 and 25/2005; Justice Tuohy in Gazette 24/2006; Justices Goldsbrough and Young in Gazette 25/2007; Justice O'Regan in Gazette 26/2008; Justice MacDonald in Gazette 19/2010; Justice Heath in Gazette 29/2012; and Justice Mansfield in Gazettes 9/2007, 35/2010 and 60/2015.
[116] See instruments of appointment for Justice Dawson in Gazettes 28/2008 and 19/2010; Justice Butler in Gazette 14/2009; Justices Fatiaki and Clapham in Gazette 29/2009; Justice Sey in Gazettes 33/2012 and 63/2014; Justice Harrop in Gazette 7/2014.
[117] Interviews F1, F20.

agreement providing that the judge would serve as resident judge for one year, in effect until 2 May 1995. The dispute about when the judge's commission would end made its way to the High Court of Kiribati. The Court held that the effect of the contract was that the government of Kiribati had agreed to appoint Muhammad as Chief Justice for a term ending 2 May 1995, but that the contract was no substitute for the formal appointment made by the President under the *Constitution*. While there was no way to compel the President to make the judicial appointment consistent with the contract, if Muhammad was not formally appointed to this position, he would be entitled to damages under contract.[118]

A similar case arose in Nauru in 2010, when the Supreme Court was called upon to determine a dispute between Chief Justice Millhouse and the Nauruan government over the renewal of his contract. Before the end of his term, Chief Justice Millhouse and the responsible Minister had discussed an extension of the Chief Justice's appointment. A draft contract was prepared but no formal appointment was made. Chief Justice Millhouse in fact sat past his term of appointment and was paid at a higher rate consistent with the draft contract. However, once the Cabinet became aware that the Chief Justice's term had expired, it resolved not to renew his contract. The Supreme Court held that Millhouse was not entitled to an extension of his appointment as Chief Justice on the basis that the President's discretionary power to appoint a judge could not be curtailed by contract.[119]

A final example arose in Tonga, where, prior to 2010, the *Constitution* provided that judges were to be appointed by the King with the consent of the Privy Council and hold office during good behaviour.[120] Legislation stated that the terms of judicial appointments were to be governed by employment contract, provided that the contract was not inconsistent with the *Constitution*.[121] While the formal instruments of appointment did not specify a term of appointment, the employment contracts of foreign judges would specify a term of service, for example of 12 months or two years. Inconsistencies between the terms specified in the instrument of appointment and the employment contract gave rise to uncertainty about whether a judge's appointment lapsed at the expiry of the term specified in contract for service or, on the contrary, continued regardless of the terms of the employment contract.[122]

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[118] *Muhammad v Attorney-General* [1995] KIHC 1.

[119] *Re President of the Republic of Nauru and in the matter of Article 53 and 55 of the Constitution of Nauru* [2010] NRSC 14; *Re President of the Republic of Nauru and in the matter of Article 53 and 55 of the Constitution of Nauru (No 2)* [2010] NRSC 15.

[120] *Constitution of Tonga 1875* ss 85, 86.

[121] *Supreme Court Act* c 10 (Tonga) s 4A(1), (2).

[122] Interviews F12, F20.

In 2010, the *Constitution* was amended to provide that '[t]he King in Privy Council, after receiving advice from the Judicial Appointments and Discipline Panel, shall determine the terms of appointment'.[123]

These examples illustrate the practical difficulties that may arise in the appointment of foreign judges on short term contracts. Uncertainty about the term of the appointment, and inconsistencies between the formal appointment and the contract of service, have led to disputes between judges and governments on several occasions. Such disputes have the potential to destabilise the judiciary, especially in small jurisdictions where there may only be the one resident judge. The judicial decisions discussed here demonstrate that the legal position is that the terms specified in the formal instrument of appointment will prevail over contract, but this does not provide much security if the contract for employment expires leaving the judge without remuneration.

Determination of term of appointment

Regardless of whether the term of appointment is stated in the contract or in the instrument of appointment, questions arise as to who determines the term of appointment and what that term is. In some states, the term of appointment is governed by legislation. Laws in Fiji and Papua New Guinea impose maximum three-year terms on non-citizen judges, although shorter terms are also possible.[124] In other states, the appointing authority has discretion to decide the term of the appointment. There is a great deal of variation between the duration of fixed term appointments, even within the same state, the same court and in relation to the same judge. The decision may be influenced by a number of factors. Pacific states have limited budgets and governments may be wary of over committing limited financial resources to a single resident foreign judge.[125] Legal frameworks may indirectly lead to the appointment of judges on short terms: for example, the *Constitution of Vanuatu* limits the number of judges on the Supreme Court to three,[126] meaning that additional judges tend to be appointed as acting judges on fixed terms.

The preferences of donor states and organisations also affect the duration of the judge's term of appointment. Where a donor government or agency provides judicial salaries, it is common practice to limit that funding contribution to a fixed term, generally two to three years. As a

[123] *Act of Constitution of Tonga (Amendment) (No 3) Act 2010* (Tonga).
[124] *Constitution of Fiji 2013* s 110(1); *Organic Law on the Terms and Conditions of Employment of Judges* (PNG) s 2.
[125] Interview F18.
[126] *Constitution of Vanuatu 1980* s 49(2).

result, the term of the judicial appointment is also limited.[127] Secondment programs are negotiated to suit both the donor court (from which the judge takes leave) and the recipient Pacific court. The secondment arrangements between the District Court of New Zealand and the Supreme Court of Vanuatu contemplate appointments of two years, which may be extended.

There are a few instances in which foreign judges themselves nominate the term of their appointment[128] or negotiate clauses in the contract of service to protect tenure, for example to require the government to give notice of reappointment or to provide for renewal at the option of the judge.[129] The evidence gathered in this study suggests that short-term judicial appointments reflect the preferences of Pacific states and external donor organisations, rather than judges themselves.

Analysis

Foreign judges on Pacific courts tend to serve on short, fixed term appointments. There are some exceptions, most notably in relation to judges on some courts of appeal, whose appointments might not specify a term. The appointment of judges on fixed terms raises concerns about judicial independence, which are discussed in detail in Chapter 6, where the empirical evidence set out here is used to explain and justify the circumstances in which such appointments are appropriate.

The use of short-term appointments for foreign judges, almost by default, introduces a degree of uncertainty into judicial appointments, affecting the stability of the judiciary. Inconsistencies between instruments of appointment and contracts of employment create uncertainties and at times lead to disputes. This analysis has highlighted a lack of clarity in the laws and practices in Nauru, Solomon Islands and Vanuatu, such that the appointments of some foreign judges may not comply with the letter of the law, or should properly be described as acting appointments. Finally, except in states where the law prescribes a maximum term of appointment for foreign judges, there does not appear to be a consistent policy about the duration of foreign judges' appointments to at least guide the decisions of the appointing authorities in Pacific states as well as the organisations that provide and fund foreign judges.

[127] Interviews F13, F20, F23, F26.
[128] Interviews F1, F8, F12.
[129] Interviews F6, F20.

B. Removal of judges

All Pacific constitutions set out a formal process for removing judges. In five of the nine states, the constitution prescribes a process for removal whereby an authority such as the judicial services commission, the executive or parliament, can refer the question of removal to an independent tribunal, which conducts an investigation and makes a recommendation to the relevant authority.[130] In Nauru and Samoa, judges may only be removed on address of the parliament approved by two thirds of the total number of members.[131] In Vanuatu and Tonga, the judicial services commission may recommend the removal of a judge to the President or King respectively.[132] Judges may only be removed from office for misbehaviour or inability to perform the functions of their office,[133] although in Tonga the King retains a unilateral power to dismiss judges without cause.[134]

It is, however, rare for Pacific states to use these formal procedures to remove foreign judges.[135] Instead, states have used means outside the formal process to remove foreign judges. Such extra-constitutional removal is made possible by the appointment of foreign judges on short term contracts, and the fact that as non-citizens, foreign judges are susceptible to forms of regulation that citizen judges are not.

Non-renewal of contract

When a judge is appointed for a fixed term, the simplest way a government can remove the judge is to let the term lapse and decline to renew it. It was suggested in interviews that in at least four Pacific states, judges who have made decisions unfavourable to the government have not had their contracts renewed.[136] Such cases speak to wider concerns that the appointment of judges on short renewable terms makes judges susceptible to executive interference, as judges might be perceived to decide cases to please the authorities responsible for their reappointment.[137] Sometimes, however, foreign judges resist such

[130] *Constitution of Fiji 2013* s 111, 112; *Constitution of Kiribati 1979* s 83, 93; *Constitution of Papua New Guinea 1975* ss 179-181; *Constitution of Solomon Islands 1978* ss 80, 87; *Constitution of Tuvalu 1978* s 127(2).
[131] *Constitution of Nauru 1968* s 51(1); *Constitution of Samoa 1960* s 68(5).
[132] *Constitution of Tonga 1875* s 83C(2)(c).
[133] *Constitution of Fiji 2013* ss 111(1), 112(1); *Constitution of Kiribati 1979* ss 83(2), 93(2); *Constitution of Nauru 1968* s 51(1); *Constitution of Papua New Guinea 1975* s 178; *Constitution of Samoa 1960* s 68(5); *Constitution of Solomon Islands 1978* ss 80(4), 87(4); *Constitution of Tonga 1875* s 83C(2)(c); *Constitution of Tuvalu 1978* s 127(1); *Constitution of Vanuatu 1980* s 47(3).
[134] *Constitution of Tonga 1875* ss 85(2) and 86(2).
[135] In Vanuatu in 1996 formal procedures were commenced to remove Chief Justice D'Imecourt, but the process was later held by the Supreme Court to be invalid: *D'Imecourt v Manatawai* [1998] VUSC 59.
[136] Interviews F1, F8, F20, F25.
[137] See Chapter 6, Part IV.A.

attempts at removal. In Kiribati, Justice Millhouse sat beyond the expiry of his contract in order to continue to hear a politically controversial case, utilising s 86 of the *Constitution* which permits a judge whose commission has expired to 'sit as a judge of the Court for the purpose of giving judgment or otherwise'.[138]

The contractual basis for the service of foreign judges also gives external agencies who fund judicial positions a means to effectively remove a foreign judge by refusing to renew funding arrangements with the Pacific state, leaving them in the position of having to fund the judicial position themselves or seek alternative funding. While there are no reports of funding agencies targeting particular judges, there are cases in which donor agencies have refused to renew fixed term funding agreements, leading in effect to the abolition of a judicial position.[139]

Invitations to sit on Court of Appeal cease

Courts of appeal in the region function on a part-time basis. Foreign judges visit the state when sittings are convened a few times a year or as required. The general practice is that the Chief Justice or President of the Court of Appeal in each jurisdiction will invite judges from a pool of foreign judges to constitute the Court of Appeal for a particular sitting. This arrangement has practical advantages in that it accommodates part-time foreign judges who may not be available to sit on every sitting of the Court of Appeal.[140] However, judges have been effectively removed from office when the Chief Justice ceases to invite the judge to sit on the Court.[141]

Visa cancellation

As non-citizens, foreign judges enter and work in Pacific countries according to the immigration laws of the state. This makes foreign judges vulnerable to removal through the cancellation of their visa by the government. There are several examples where foreign judges have been removed in this way.

In Vanuatu in 1996, relationships between the British Chief Justice D'Imecourt, the Vanuatu government and other judges of the Supreme Court, became strained. In response to allegations of misconduct and criticism of the Chief Justice's performance, the Judicial Service Commission sought to terminate the Chief Justice's appointment. At the same time, the

[138] *Mwemwenikarawa v Timeon* [2011] KIHC 8.
[139] Interview F20. This occurred, for example in Kiribati in relation to Muhammad CJ: *Muhammad v Attorney-General* [1995] KIHC 1 and in Vanuatu in relation to D'Imecourt CJ: *D'Imecourt v Manatawai* [1998] VUSC 59.
[140] Reeves, Vakatora and Lal, above n 11, 13.62.
[141] Interviews F9, F12, F17.

Minister for Foreign Affairs declared the Chief Justice an undesirable immigrant and prohibited him from entering Vanuatu for an indefinite period. D'Imecourt left Vanuatu, but challenged the actions of the Minister for Foreign Affairs and the Judicial Service Commission. The Supreme Court quashed the Minister's declaration on the grounds that there had been a denial of natural justice. D'Imecourt had also argued that the Minister's declaration that he was an undesirable immigrant was tantamount to the termination of his judicial appointment outside the constitutional process for removal. The Court, however, did not accept that this made the Minister's declaration unlawful, stating that 'if any person, Chief Justice or otherwise' falls within the prohibited classes under the *Immigration Act*, 'he will become a prohibited immigrant, even if the consequence means that the person is unable to carry out … the office of Chief Justice'.[142]

In Nauru in 2014, Chief Justice Eames, an Australian citizen, was effectively removed from office when the Nauruan Minister revoked his visa. The Chief Justice had issued an injunction from Melbourne to prevent the deportation of the Resident Magistrate, also an Australian citizen, after the Magistrate had himself issued an interim injunction in an immigration matter against the wishes of the Minister.[143] Unable to enter Nauru to sit on the Court, Chief Justice Eames resigned two months later, citing the impossibility for him to perform his role remotely, his lack of confidence in the rule of law and judicial independence in Nauru, and the likelihood that his criticism of the government's conduct would require his recusal from future cases involving the government.[144] The Nauruan government defended its actions, saying it had acted to 'clean up cronyism and corruption' by 'high profile people [appointed from overseas] who have put their own interests above the interests of the nation', claims strongly refuted by Chief Justice Eames.[145]

In 2016, it was reported that some members of the Vanuatu government had discussed deporting Justice Mary Sey, a citizen of The Gambia, after she convicted sixteen members of

[142] *D'Imecourt v Manatawai* [1998] VUSC 59. The Court also quashed the decision of the Judicial Services Commission to terminate the Chief Justice's appointment.
[143] Geoffrey Eames, 'The Rule of Law in Nauru: An Evolving Concept?' (Paper presented at Law Society of South Australia Criminal Law Conference, McLaren Vale, 24 October 2014).
[144] Judges Chambers Supreme Court of Nauru, 'Geoffrey Eames Resigns as Chief Justice of Nauru' (Media Release, No 5, 13 March 2014) 2–3.
[145] Ibid 9–11.

Vanuatu's parliament of bribery offences. However, this action was not pursued, and the Judge later sentenced most of the convicted parliamentarians to terms of imprisonment.[146]

These examples show that foreign judges are vulnerable to extra-constitutional removal as a result of their non-citizenship. The fact that foreign judges depend on visa arrangements to serve in Pacific states also provides a means by which third party countries can affect the service of foreign judges. In 2013, Chief Justice Ward (a citizen of the United Kingdom) was unable to sit in Tuvalu because the Fiji government refused to provide him with a visa to transit in Fiji, which is the only flight route to Tuvalu.[147] Sir Gordon Ward had been President of the Court of Appeal of Fiji and had let his appointment lapse after the 2006 coup. Chief Justice Ward heard some urgent matters on the papers, while Robin Millhouse was appointed Acting Chief Justice to preside over High Court sittings in Tuvalu.[148] This situation continued until 2016, when Chief Justice Ward resigned and a new Chief Justice was appointed.

Following the 2006 Fiji coup and the abrogation of the *Constitution* in 2009, Australia and New Zealand imposed travel bans on government officials, including judges, travelling into Australia and New Zealand. The Chief Justice of Fiji criticised Australia for refusing to permit Sri Lankan judges appointed to the Fijian courts to transit in Australia, stating that 'as Head of the Judiciary in Fiji I must stand up against such interference. Fiji must have a judiciary. And it is not for Australia and New Zealand to tell us we cannot have one, or to tell us who we are to appoint.'[149] The interim military government expelled the Australian and New Zealand High Commissioners and recalled its own envoys over the issue.[150] Australian officials denied that it had refused to issue transit visas, stating that the travel restrictions applied only once judges had taken their oath.[151]

Analysis

Foreign judges are vulnerable to removal from office in ways that local judges are not. Insecure tenure, citizenship status, and their need to travel to and from Pacific states expose foreign

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[146] Miranda Forsyth, 'The Vanuatu Judiciary: A Critical Check on Executive Power' in HP Lee and Marilyn Pittard (eds), *Asia-Pacific Judiciaries: Independence, Impartiality and Integrity* (Cambridge University Press, 2017) 354, 363.
[147] 'Tuvalu Judge Unable to Transit via Fiji' *Cook Islands News* (Rarotonga, Cook Islands), 24 January 2014 4.
[148] Office of the Attorney General, 'Country Report of the Office of the Attorney General Tuvalu' (Report to the 34th Pacific Islands Law Officers' Network Meeting, October 2015) 7–8.
[149] Pacific Media Centre News Desk, above n 64.
[150] 'Fiji Expels Envoys over Interference Claims' *ABC Radio*, 4 November 2009 <http://www.abc.net.au/news/2009-11-04/fiji-expels-envoys-over-interference-claims/1128378>.
[151] Chris Merritt, 'Flawed Memo behind Fiji's Decision to Expel Top Australian Diplomats' *The Australian* (Canberra), 9 November 2009 1.

judges to extra-constitutional removal at the hands of governments of Pacific states, and at times as a result of the actions of other states. The issue highlights points at which domestic constitutional norms interact with, and are sometimes superseded by, private contract law on the one hand, and the rights of sovereign states recognised at international law on the other. As the judgment in Chief Justice D'Imecourt's case demonstrates, constitutional protections for judicial independence have not been able to protect foreign judges from removal in these novel ways.

V. Conduct of hearings

The longstanding use of foreign judges has had an effect on the way in which Pacific courts conduct hearings. This Part explores three key features of court proceedings: the language of the court; delay and speed in judicial decision making; and the place in which the court sits.

A. Language

Each of the nine Pacific states included in this study is multilingual. Although English is the official language of Fiji, Kiribati, Solomon Islands and Tuvalu, several different indigenous and other languages are widely spoken. In Nauru, Samoa and Tonga, the indigenous language stands alongside English as an official language. In Papua New Guinea, where there are over 800 indigenous languages, English and Tok Pisin are official languages. Vanuatu has three official languages: English, French and Bislama.[152]

In all countries, the language of law is, or includes, English. Legislation is drafted or translated in English. Written judgments of the higher courts are published in English. Court proceedings, particularly at the superior trial court and court of appeal, are conducted in English. One reason for this is the reliance on foreign judges. The effect is seen most clearly in Vanuatu, where despite colonial ties to Britain and France and constitutional recognition of English and French as official languages,[153] the post-independence judiciary of Vanuatu has been largely anglicised as a result of the use of Australian, British and New Zealand judges and the provision of law and justice assistance from those countries.[154] The anglicisation of courts across the Pacific is also a consequence of the importation of common law and statutory law from

[152] Tok Pisin and Bislama are creole languages.
[153] *Constitution of Vanuatu 1980* s 3.
[154] William FS Miles, *Bridging Mental Boundaries in a Postcolonial Microcosm: Identity and Development in Vanuatu* (University of Hawai'i Press, 1998) 166.

Australia, New Zealand or the United Kingdom.[155] In local and customary courts, where lay magistrates preside and apply customary laws and procedures, proceedings are more likely to be conducted in indigenous languages.

As a matter of practice, the use of foreign judges brings with it the need for court interpreters, extending both the time and costs of litigation. Legal provisions in several Pacific states expressly provide that a person accused of a criminal offence must be tried in a language he or she understands, and if that is not possible, to have access to an interpreter.[156] In Fiji, this right extends to parties to civil proceedings.[157] In some trial courts, litigants may choose to have the proceedings conducted in English or the local language. Many local judges are bilingual and some foreign judges who sit in trial courts will learn the local language.[158] One judge interviewed reported that a local judge sitting with foreign judges on the bench of a court of appeal would speak with witnesses in the indigenous language and translate for the benefit of the foreign judges.[159] The conduct of proceedings in English not only has consequences for the litigants involved in a particular proceeding, but because court decisions are generally only available in English, access to law by the general public is also limited.[160]

B. Time

The use of foreign judges, particularly non-resident judges, affects the timing and duration of court sittings. In smaller jurisdictions where there is only a part-time foreign judge, there may be difficulties hearing urgent matters.[161] Court backlogs and delays can arise when foreign judges are unable to travel into the jurisdiction[162] or where there are gaps between departing foreign judges and their replacements.[163]

Another effect of part-time courts can be observed in the operation of courts of appeal. All courts of appeal in the region are part-time, convened periodically one to four times a year

[155] Jennifer Corrin, 'A Question of Identity: Complexities of State Law Pluralism in the South Pacific' (2010) 61 *Journal of Legal Pluralism and Unofficial Law* 145, 147–8.
[156] Susan Farran, *Human Rights in the South Pacific: Challenges and Changes* (Routledge-Cavendish, 2009) 244.
[157] *Constitution of Fiji 2013* s 15(6)-(8).
[158] Interview F11.
[159] Interview F3.
[160] Teleiai Lalotoa Mulitalo Ropinisone Silipa Seumanutafa, *Law Reform in Plural Societies* (Springer, 2018) 132.
[161] Nauru Constitutional Review Committee, above n 113, 116.
[162] Government of Tuvalu, 'Te Kakeega III: National Strategy for Sustainable Development 2016 to 2020' (March 2016) 12; Office of the Attorney General, above n 148, 7–8; 'Tuvalu Judge Unable to Transit via Fiji', above n 147.
[163] 'The Political Scene: More Supreme Court Judges Resign' *The Economist Intelligence Unit*, 1 October 2010 <http://country.eiu.com/article.aspx?articleid=1927474177>.

depending on the needs of the jurisdiction. Foreign judges will visit for the duration of the sittings (usually one to two weeks). One striking consequence of this arrangement is that most judgements of Pacific courts of appeal are handed down in the same sittings in which the case is heard, generally on the final day. It is rare for courts of appeal comprising foreign judges to reserve judgements beyond the sittings period[164] although they will do so in complex cases or where judges have different opinions on the outcome.[165] The practice of foreign judging is a key reason why judgments of the courts of appeal are handed down so quickly. Part-time foreign judges seek to contain their work in the sittings period. This is especially important for foreign judges who sit on a court in their home jurisdiction, who take care to ensure that their service in the Pacific does not interfere with their work on their home court.[166] The practice also has historical roots, deriving from a time when communications between judges in different countries was more difficult.[167] Even now, judges tend to prefer discussing and finalising judgements when together in person, rather than coordinating conferences across different countries and time zones.[168] The practice has the advantage of improving the efficiency of the courts and access to justice. In circumstances where the Court of Appeal sits only once or twice a year, there is often a delay between the time that the case is lodged and heard, and judges are keen not to further delay the resolution of the case more than necessary.[169]

The general practice of courts of appeal is that each judge will be allocated cases to prepare the first draft. Draft judgments are circulated to the panel of judges and discussed and amended, before being handed down as judgments of the court. Judges sitting on courts of appeal in the Pacific therefore take on a high workload in sitting weeks. Many also undertake significant preparatory work before the sittings, partly in order to be able to deliver judgements in such short timeframes, but also to take advantage of the better library resources and research services available in their home jurisdictions.[170] The time pressures

[164] The Supreme Court of Papua New Guinea is an exception, in that the Court is often composed of only local judges and separate concurring opinions are relatively common.
[165] Interviews F5, F14, F24.
[166] Interviews F3, F24.
[167] Anthony Mason, 'Reflections of an Itinerant Judge in the Asia-Pacific Region' (2000) 28 *International Journal of Legal Information* 311, 318.
[168] Interviews F3, F24.
[169] Interview F12.
[170] Interviews F2, F12.

mean that it is rare for judges to issue separate concurring judgements, although this is more likely where judgement is reserved. Dissents are rare.[171]

C. Place

Where a court consists of foreign judges, there may be times when it sits outside its physical jurisdiction. In the smaller jurisdictions, where the foreign Chief Justice is, at times, the only judge, that judge might be called upon to issue orders remotely or sit in a court outside the state in order to take evidence.[172] Such arrangements are generally authorised as part of the inherent powers of the court. Tuvalu is the only jurisdiction of the Pacific states studied here that makes express legislative provision for its courts to sit outside the state. The High Court can sit at any place outside Tuvalu appointed by the Chief Justice, while the Court of Appeal can sit at any place outside Tuvalu when authorised by the Ministry and with the agreement of the Chief Justice.[173] The Court of Appeal, which comprises foreign judges from New Zealand, has sat in Auckland on occasion.[174] Such arrangements may be necessary to ensure that a properly constituted court can sit in a timely way. They do, however, raise questions about the ease with which the parties, the public and local media can access the court, as well as deeper questions about sovereignty.[175] For these reasons, most courts sit in the country of jurisdiction, even when they are entirely composed of foreign judges.

VI. Conclusion

This Chapter shows that distinctive issues arise in relation to the appointment, remuneration, tenure and removal of foreign judges in the Pacific. It also shows how legal frameworks and the practices of courts, government authorities and donor organisations have been adapted, and in some cases circumscribed and bypassed, to meet the challenges presented by the use of foreign judges.

The overview in this Chapter suggests that while these processes are largely effective in securing the services of foreign judges, there is a degree of irregularity and uncertainty which affects the appointment of foreign judges and the terms of their service and, as a consequence, Pacific courts. The recruitment of foreign judges is largely by informal means.

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[171] Lord Cooke of Thorndon, 'Final Appeal Courts: Some Comparisons' (Occasional Paper No 7, New Zealand Centre for Public Law, 2001) 10. Papua New Guinea is an exception for the reasons outlined above n 164.

[172] In Nauru and Tuvalu: see Eames, above n 143, 2; Office of the Attorney General, above n 148, 8.

[173] *Superior Courts Act 1987* c 7.68 (Tuvalu) ss 6(3)(b); 12(2)(b).

[174] Eg *Ielemia v Crown* (Unreported, Court of Appeal of Tuvalu, 18 September 2017).

[175] Vaughan Black and Stephen GA Pitel, 'Out of Bounds: Can a Court Sit Outside Its Home Jurisdiction?' (2013) 41 *Advocates' Quarterly* 503.

Even where more formal recruitment measures, such as advertisements, are used, appointing authorities face the challenge of assessing candidates for judicial appointment from a distance. The tenure of foreign judges' service is insecure, affected by short term appointments and their vulnerability to removal by extra-constitutional means. The use of foreign judges, in combination with other factors, has meant that the language, timing and place of judicial proceedings are not fully tailored to the needs of litigants and the people, an issue which foreign judges themselves have sought to address in the conduct of hearings. Meanwhile judges' home courts and donor organisations add a layer of their own, largely ad hoc, procedures and requirements, affecting in some cases the availability of foreign judges and the selection criteria, remuneration and tenure of foreign judges. The legal frameworks do not cover the range of issues that arise, leaving Pacific judiciaries, donor courts and organisations, and foreign judges themselves to negotiate appropriate practices, often on an ad hoc basis.

In Chapter 8, this thesis draws on the comparative insights gained from the different experiences across the Pacific – and the analysis of the implications of the use of foreign judges for core aspects of the judicial role in the following Chapters – to suggest a range of good practice initiatives which Pacific courts and governments, donor organisations, and foreign judges might adapt to address these issues.

CHAPTER 4
THE SIGNIFICANCE OF NATIONALITY

I. Introduction

The global norm is that, by law or practice, the judges of a state's highest court will be citizens of that state. In over one hundred states, constitutional or statutory provisions require judges of the constitutional or highest court to be citizens or nationals of the state.[1] Even where there is no express legal requirement of citizenship, in some states the dictates of politics or convention make the appointment of a non-citizen to the highest court inconceivable.

This norm is reflected in international standards for domestic judicial systems. Since the 1980s, international organisations have developed minimum standards of judicial independence and judicial conduct capable of operating within the different constitutional and legal frameworks across the world. No international standards require citizenship for eligibility for judicial appointment. However, several expressly exempt nationality from the prohibited grounds of discrimination in judicial appointments. For example, the *Basic Principles on the Independence of the Judiciary* provides that a requirement that a candidate for judicial office must be a national of the country is not to be considered discriminatory in the same sense as discrimination on the prohibited grounds of 'race, colour, sex, religion, political or other opinion, national or social origin, property, birth or status'.[2]

In many states, citizenship is a primary and non-negotiable requirement for judicial appointment. Where the law requires judges to be citizens, nationality trumps merit in the sense that a non-national with expertise and experience in the state's legal system could not expect to be appointed to judicial office. A requirement of nationality is also uncontroversial. It does not constitute unfair discrimination in judicial selection. Nor has it generated much in the way of legal theoretical scholarship, either to justify the requirement of nationality or to challenge the exceptional use of foreign judges. While there is a great deal of literature devoted to

[1] Audit of national laws relating to the qualifications for judicial appointment to the constitutional or highest national courts in all countries as at 1 July 2017.

[2] *Basic Principles on the Independence of the Judiciary* adopted by the Seventh UN Congress on the Prevention of Crime and the Treatment of Offenders, Milan, 26 August-6 September 1985, endorsed by the UN General Assembly resolutions 40/32 and 40/146 of 1985, art 10. See also International Project of Judicial Independence of the International Association of Judicial Independence and World Peace, *Mt Scopus International Standards on Judicial Independence*, 19 March 2008, art 21.15.1; *Beijing Statement of Principles of the Independence of the Judiciary in the Law Asia Region* adopted by the Sixth Conference of the Chief Justices of Asia and the Pacific, Beijing, August 1997, art 13.

examining the function of judiciaries and the role and qualities of judges in domestic constitutional systems, limited attention is paid to the relevance of nationality to judging.

This Chapter seeks to address this gap by setting out the ways in which nationality might be significant to the task of adjudicating constitutional matters and the role of the judges who sit on courts of constitutional jurisdiction. It does so by identifying qualities that are understood to accompany nationality, such as identity, membership and knowledge, and assessing their significance to judging in courts of constitutional jurisdiction. The resulting analysis covers three aspects of judging. The first, considered in Part III, relates to the task of adjudication. For this, nationality might indicate knowledge of the national law necessary to the judge's core duty to resolve disputes according to law. Nationality implies direct knowledge of the national community, which assumes significance when judges come to engage in constitutional interpretation and law-making. The second aspect of judging relates to the qualities of judicial office, in particular judicial responsibility, accountability and independence. Part IV considers how a judge's membership of a national community provides avenues for judicial responsibility to the state and its people; and conversely, how a foreign judge's distance from the national community might provide a kind of judicial independence. The third and final aspect is the role of the judge and the court in the wider constitutional system and the state. In Part V, I suggest that judges and courts, as part of the government and the state, can give expression to the relationship between the people, the state and law. In this sense, the nationality of judges is primarily an expression of sovereignty.

Nationality and foreignness are abstract concepts, capable of different manifestations and interpretations. There are also different understandings of the nature of judging and the qualities deemed desirable in judges. As a result, some aspects of nationality might have more or less salience depending on the conceptions of the role and function of a judge in a particular context. Because national legal systems differ in their understandings of both nationality and the role and qualities of the judge, the extent to which the nationality of judges is significant will also differ across legal systems. The purpose of this analysis, therefore, is not to make a case for or against the use of foreign judges on courts of constitutional jurisdiction. Rather, this Chapter identifies the ways in which the nationality of judges might be significant in order to develop a framework for examining the implications of the use of foreign judges for constitutional adjudication, judicial independence, and the role of judges and judiciaries in the particular context of the Pacific.

II. Nationality and foreignness

A. Nationality

Nationality is a person's status deriving from his or her membership of a nation. The concept captures the complex relationships between individuals, the culturally and socially 'imagined' community of the nation, and the legal and political conception of the state. Part of this complexity arises from the relationships between the nation and nationality on the one hand, and the state and citizenship on the other. A nation is a community of people bound by beliefs about and connections to people, place and history. The state is a self-governing political entity, comprising a population, territory, government, and capacity to enter relations with other states.[3] Nationality, characterised by the qualities of identity, membership and shared knowledge, is distinct to citizenship, which is a formal legal and political status conferred on an individual by the state. Nationality is a thicker concept than citizenship, and nationality may not necessarily align to citizenship, although they can overlap.[4]

Although they are conceptually distinct, the nation is commonly seen as coterminous with the state, defined by territorial boundaries and the limits of political authority; while 'citizenship' is often used interchangeably with 'nationality'. The diversity of peoples within states on the one hand, and conditions of globalisation on the other, challenge the equation of nation and nationality with the state and citizenship. State borders are arbitrary: it is possible for there to be several nations within the one state, or one nation across several states.[5] The global movement of peoples has 'scrambled' national identities, such that a person's nationality may not match his or her state of residence or citizenship and a person may hold more than one nationality.[6] Nevertheless, a state-centred notion of nationality has salience, especially in the areas of politics and law in which judges function.[7] Law begins and ends within the boundaries of the state and is made pursuant to the constitutional systems specific to each state. The idea of sovereignty, in which a defined polity (sometimes described as the nation) is understood to make and legitimise state law, serves to further connect the nation and the state.[8] Even in

[3] *Convention on the Rights and Duties of States* (*Montevideo Convention*) opened for signature 26 December 1933 (entered into force 26 December 1934).
[4] Chaim Gans, 'Citizenship and Nationhood' in Ayelet Shachar et al (eds), *The Oxford Handbook of Citizenship* (Oxford University Press, 2017) 107; David McCrone and Richard Kiely, 'Nationalism and Citizenship' (2000) 34(1) *Sociology* 19.
[5] Stephen Tierney, *Constitutional Law and National Pluralism* (Oxford University Press, 2004).
[6] Seyla Benhabib, *The Rights of Others: Aliens, Residents, and Citizens* (Cambridge University Press, 2004) 174.
[7] Gans, above n 4, 109–10; Will Kymlicka, 'Citizenship in an Era of Globalization' in Ian Shapiro and Casiano Hacker-Cordón (eds), *Democracy's Edges* (Cambridge University Press) 112, 114–15.
[8] David Miller, *On Nationality* (Oxford University Press, 1997) 30.

conditions of legal pluralism characterised by the coexistence of state and non-state legal systems, state law occupies an important, even central, place.[9] For these reasons, for the purposes of the discussion of the significance of nationality to judging in this Chapter, nationality is presumed to primarily relate to a nation-state and, as it does in many other contexts, citizenship stands as the proxy for the thicker notion of nationality.

While the relationships between individuals, communities, nations and states will vary, it is possible to identify qualities of nationality at an abstract level.[10] First, nationality is an aspect of personal identity.[11] A person's identity may be framed around multiple categories, such as gender, race, religion and language, as well as nationality. The extent to which nationality is core to one's identity varies, and, like all identity characteristics, might assume more or less importance for some individuals and in specific circumstances. Along with other identity characteristics, nationality influences the way in which a person experiences the world. This is not to ascribe to stereotyped national traits, or to say that the peoples of a nation are homogenous. The point is rather that the peoples of a nation share in a national identity informed by common history, place, customs and languages which affect how they see the world.

Secondly, nationality implies membership. The qualities of membership can include affective ties of belonging, a sense of solidarity with fellow nationals, shared values and interests, and a sense of mutual obligation.[12] These qualities of membership give content to the concept of 'effective nationality' in international law, which understands nationality not simply as the status of citizenship conferred on an individual by the laws of a state, but as a matter of 'social fact', evidenced by a 'genuine connection' between individual and nation, demonstrated by 'interests and sentiments' and reciprocal rights and duties.[13] The concept of allegiance captures a further and distinctive dimension of membership, implying both strong personal attachment and formal obligations of loyalty to the nation and its people.[14]

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[9] William L Twining, *General Jurisprudence: Understanding Law from a Global Perspective* (Cambridge University Press, 2009) 364.
[10] Miller, above n 8, 13.
[11] Lynn Jamieson, 'Theorising Identity, Nationality and Citizenship: Implications for European Citizenship Identity' (2002) 34(6) *Sociologia* 507.
[12] Roger Cotterrell, *Law, Culture and Society: Legal Ideas in the Mirror of Social Theory* (Ashgate, 2006) 76.
[13] *Nottebohm Case* (Liechtenstein v Guatemala) (second phase) [1955] ICJ Rep 4, 26.
[14] Elise Arcioni, 'Identity at the Edge of the Constitutional Community' in Fiona Jenkins, Mark Nolan and Kim Rubenstein (eds), *Allegiance and Identity in a Globalised World* (Cambridge University Press, 2014) 31, 36–7.

As a consequence of both membership and identity, nationality might also imply knowledge of a nation and national community. The shared experience of membership and identity can create an 'insider view' of national sensibilities, cultures and beliefs. Miller calls this 'a common public culture' which might include shared political principles, cultural ideals, religion and language.[15] This culture is inscribed and communicated in the media of the national 'imagined' community, through education, national discourse, history, values, and so on.[16] Members of the nation are assumed to know their common public culture, even if they might resist it, seek to change it or define themselves in opposition to it.[17] Such knowledge can be acquired through study and experience, but is presumably more readily accessible to those who are a part of the national community.

The qualities of identity, membership and knowledge are not unique to nationality. They arise within many kinds of communities.[18] The nation is just one of several, overlapping, communities to which people belong. However, nationality carries distinctive features arising from the nation as an 'imagined community'. Unlike other kinds of community, members of a national community will never personally know all other members; nor are they bound to them by ties of kinship or formal membership rituals.[19] Nations are instead 'constituted by belief', bound together by members' mutual belief in a shared identity, common culture, historical continuity, and collective action.[20] As such, a nation can be conceived in many different ways. On one view, a nation might be defined by the distinctive ethnicity or culture of its peoples. On another view, a nation might be understood in a more cosmopolitan sense and defined by civic engagement in shared political institutions.[21] It is not necessary here to decide between these different imaginings, but only to note that they will affect how nationality is understood and practiced in particular contexts. The qualities of identity, membership and knowledge might also attach differently to nationality and to citizenship.[22] For the purposes of this discussion, I take the general case to be one where the citizenship of judges stands as a proxy for their nationality,

[15] Miller, above n 8, 26–7.
[16] Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (Verso, Rev ed, 2006).
[17] Miller, above n 8, 42.
[18] Cotterrell, above n 12, ch 4.
[19] Anderson, above n 16, 6.
[20] Miller, above n 8, 22–6.
[21] Gans, above n 4, 110–11.
[22] Rainer Bauböck, 'Political Membership and Democratic Boundaries' in Ayelet Shachar et al (eds), *The Oxford Handbook of Citizenship* (Oxford University Press, 2017) 60, 65.

putting to one side any cases where this equation fails to properly capture differences or conflicts between them.

B. Foreignness

Foreignness is commonly defined against nationality: a foreigner is a person from another country. Foreignness is, however, a relative concept, and as such, unstable and variable. No entity is inherently foreign: a foreigner in one place is at home in another. Defining foreignness against nationality, which itself is capable of many meanings, does not make the concept much more concrete.[23]

Foreignness can be put to many functions. One is the process of othering, by which the boundaries of the nation are established and maintained by defining what is foreign, that is, what the nation is not. In classical political thought, foreignness was seen as a threat to national identity and the stability of the national community.[24] The fear that diversity might undermine or corrupt the ties of membership and belonging between the peoples of a nation persists in some theoretical work and in nationalist discourses.[25] Alternatively, foreignness might be understood to serve more positive values, which Honig explores in her work on the function of the foreigner in stories of democratic founding, in which foreigners are shown to symbolise the novelty, externality and impartiality crucial to the imagined project of nation and state building.[26]

In summary, nationality and foreignness, when considered in the abstract, speak to ways of seeing the world that are shaped at least in part by a national identity informed by history and culture, and qualities of membership and non-membership of the national community. The abstract concepts of nationality and foreignness can be filled with various kinds of significance and meaning, with both positive and negative connotations. The concepts are given content in the 'imaginings' – as expressed in various media including the laws and legal systems – of particular national communities. A national practice, enshrined in law, that judges must be citizens, or may be foreign, might speak to some or all of the qualities of knowledge, membership and identity outlined here. The purpose of this Chapter is to identify these qualities and examine their significance to the role of the constitutional judge.

[23] Rebecca Saunders, *The Concept of the Foreign: An Interdisciplinary Dialogue* (Lexington Books, 2003) ch 1.
[24] Bonnie Honig, *Democracy and the Foreigner* (Princeton University Press, 2001) 1–3.
[25] Ibid; Saunders, above n 23, ch 3.
[26] Honig, above n 24.

III. Knowledge

Nationality is assumed to carry with it a particular knowledge and way of seeing the world that is distinctive to that national community. This Part considers the extent to which national knowledge of this kind is significant to judging.

A. Knowledge of national law

Judges require knowledge of the law. In most legal systems, candidates for appointment to judicial office must meet prerequisites regarding legal education and professional experience. By and large, judges will have legal qualifications and professional experience in their own countries and thus have direct knowledge the national law and legal system. Even in the United Kingdom, where judges may be drawn from Ireland or any Commonwealth country, candidates for judicial office must still have a minimum number of years of professional practice in the United Kingdom.[27] Nationality, therefore, might function in addition to such requirements as an indicator of knowledge of the national legal system. Foreign judges are less likely to have the same level of knowledge of the national law and legal system than a person who has trained and practiced in that legal system.

The extent to which knowledge of the national law and legal system matters differs among legal traditions. A broad point of distinction may be drawn between civil law and common law systems. In the civil law tradition, the primary form of law is the comprehensive written codes made by legislation. Law is a 'national' matter[28] and judges are part of the bureaucracy of the state. As 'expert clerks' within a career judiciary, judges are specialists within the broader legal profession, expert in identifying and applying the correct legislative provisions to resolve the dispute.[29] In contrast, the common law tradition casts judges as more creative. The common law was created and developed by judges, reasoning by analogy from case to case to build a body of law, which has been supplemented by legislation. The common law was transplanted from Britain to countries across the world as part of the process of colonisation. The Judicial Committee of the Privy Council, a court which sat in London and was composed mainly of British judges, functioned as the court of final appeal, applying and adapting the common law to suit what they understood (from a distance) to be the circumstances of each colony.[30] Into

[27] *Constitutional Reform Act 2005* (UK) s 25.
[28] Tania Groppi and Marie-Claire Ponthoreau (eds), *The Use of Foreign Precedents by Constitutional Judges* (Hart, 2013) 414.
[29] John Henry Merryman and Rogelio Ṕerez-Perdomo, *The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin America* (Stanford University Press, 3rd ed, 2007) 36.
[30] Paul Mitchell, 'The Privy Council and the Difficulty of Distance' (2016) 36(1) *Oxford Journal of Legal Studies* 26.

independence, national judges continued to look to British common law to build a national common law which shared much in the way of underlying principles and content with other common law nations. Some states continued to use the Judicial Committee of the Privy Council as their court of final appeal. The result of this imperial history and common law practice is that the common law, as well as the judges and advocates trained in it, are understood to be mobile across national boundaries within the common law world.[31]

This broad contrast between civil law and common law systems is based on generalisations that do not hold true across all legal systems and in all areas of law. Both legal traditions consist of legislation and judge-made law, such that the claimed differences between them lie more in ideal models or 'folklore' rather than practice.[32] The differences break down particularly at the point of constitutional adjudication. The introduction of written constitutions, and the power of judges to declare legislation invalid, disrupts the civil law conception of the bureaucratic judge who applies a detailed legislative code.[33] It also represents a departure from British common law, which developed in the absence of a written supreme constitution, making common law connections less apparent in constitutional adjudication.

Legal tradition, nevertheless, remains relevant to general conceptions of judging. The differences between the civil law and common law traditions have been shown to contribute to variations in approaches to constitutional reasoning[34] and the use of foreign precedents by constitutional judges.[35] It seems that common law and civil law traditions also differ in their attitude to the nationality of judges. The majority of countries which regularly use foreign judges are members of the Commonwealth with common law legal systems.[36] A study of options available to Commonwealth countries seeking to abolish appeals to the Privy Council recommended sharing judges across national appeal courts with no sense that this might be controversial.[37] The countries in which there is no positive requirement that judges must be

[31] Lord Cooke of Thorndon, 'The Dream of an International Common Law' in Cheryl Saunders (ed), *Courts of Final Jurisdiction: The Mason Court in Australia* (Federation Press, 1996) 138, 142–5.
[32] Merryman and Ṕerez-Perdomo, above n 29, 47.
[33] Ibid 158.
[34] András Jakab, Arthur Dyevre and Giulo Itzcovich, *Comparative Constitutional Reasoning* (Cambridge University Press, 2017).
[35] Groppi and Ponthoreau, above n 28, 412–14.
[36] Of the 28 states which use foreign judges listed in Chapter 1, fn 21, 18 are members of the Commonwealth.
[37] Cheryl Thompson-Barrow, *Bringing Justice Home: The Road to Final Appellate and Regional Court Establishment* (Commonwealth Secretariat, 2008) 51.

citizens are predominantly members of the Commonwealth with common law legal systems.[38] For example, Australia, New Zealand and the United Kingdom have no formal citizenship requirement for judges, and in these countries non-citizens, albeit with experience as practitioners in the national legal system, have been appointed to superior courts. A tentative hypothesis is that the comparative receptiveness of common law legal traditions to foreign judges relates to the kind of expertise expected of judges in each tradition, with the civil law tradition emphasising the value of specific knowledge of the content and systems of national law; and the common law tradition placing greater emphasis on the skills of legal analysis and reasoning by which law is identified, applied and developed. This is of course only one contributing factor. The common law is part of the British legal tradition, which itself has a distinctive understanding of the state further complicated by the history of empire, which has resulted in a somewhat looser notion of citizenship.[39]

B. Knowledge of the nation and the national community

The formal criteria for judicial appointment will generally require citizenship *in addition to* legal qualifications and experience in the national legal system. This suggests that nationality might be relevant for reasons other than that it implies knowledge of the nation's laws and legal system. One such reason might be the value placed on the judge having knowledge of the nation and the national community.

The text of constitutions, like other written laws, is indeterminate. Constitutional provisions may be vague, ambiguous or inadequate to address developments unforeseen at the time the constitution was made. In such cases, judges must exercise their discretion to interpret, and at times extend, the law.[40] Nationality – and in particular the knowledge of the national legal system and wider community that it implies – assumes significance at this point of judicial interpretation and law-making. One view of judicial decision-making denies any scope for law-making or interpretation, characterising it as a mechanical task in which a judge identifies the legal rules and applies them to the case before the court. On this view of judging, the nationality

[38] Of the 68 countries that do not require by law that judges must be citizens, 47 are Commonwealth countries. The exceptional Commonwealth countries that require judges to be citizens are Bangladesh, India, Malaysia, Mozambique, Pakistan, South Africa and Swaziland.

[39] See, for example, the complexities of the British citizenship regime, which extends some rights of British citizenship to citizens of Commonwealth member states: Martin Loughlin, *The British Constitution: A Very Short Introduction* (Oxford University Press, 2013) 83–5.

[40] Mauro Cappelletti, *The Judicial Process in Comparative Perspective* (Clarendon Press, 1989) 5; Jeffrey Goldsworthy, 'Constitutional Interpretation' in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, 2012) 689, 689; Dieter Grimm, *Constitutionalism* (Oxford University Press, 2016) 205.

– as well as other identity characteristics, such as the gender or race – of the individual judge should not matter, because the technical application of rules to facts should lead to the same outcomes regardless of the identity of the judge.[41] This view of judicial decision-making is no longer regarded as an accurate description of the judge's task, if it ever was.[42] It serves to obscure, rather than remove, the discretionary choices that judges must inevitably make.[43]

Assuming then, that judges on constitutional courts must engage, at least in some cases, in reasoning to ascertain the meaning of the constitution, questions arise about the practice (that is, *how* judges reason) and its legitimacy (that is, whether and to what extent that practice is permitted within the confines of the judicial role). Comparative constitutional practice and constitutional theory provide a range of possible answers. One typology, developed by Goldsworthy, organises different approaches to constitutional reasoning across two spectrums.[44] The first spectrum ranges between strict textualism, in which the constitution comprises the written text; through legalism, in which the constitutional text is supplemented by other legal sources; to what Goldsworthy terms 'normativism', in which the constitution is understood to encompass or express deeper abstract principles. The second spectrum ranges between originalism and non-originalism, indicating the degree to which the constitutional text is to be interpreted by reference to the intentions of the founders or to the values of contemporary society.[45] The choice between various combinations of options is informed by the judge's personal philosophies about the judicial role, legal and political culture, and the institutional structure of the court.[46] It might also be guided by the text of the constitution, for example in provisions which direct judges to interpret constitutional provisions by reference to values or principles.[47]

The nationality of constitutional judges might have more or less salience depending on the approach taken to constitutional interpretation. Strict textualism involves judges interpreting the constitution by reference to the words of the constitution. Legalism requires judges to look

[41] Erika Rackley, *Women, Judging and the Judiciary: From Difference to Diversity* (Routledge, 2013) 130–4.
[42] MH McHugh, 'The Judicial Method' (1999) 73 *Australian Law Journal* 37, 38–9; Lord Reid, 'The Judge as Lawmaker' (1972) 12 *Journal of the Society of Public Teachers of Law* 22.
[43] Cappelletti, above n 40, 10.
[44] Goldsworthy, above n 40. Other typologies relate to interpretation in particular constitutional systems, but cover comparable ground: eg Philip Bobbitt, *Constitutional Fate: A Theory of the Constitution* (Oxford University Press, 1982).
[45] Goldsworthy, above n 40, 691–2.
[46] Ibid 707–16.
[47] Gary Jeffrey Jacobsohn, 'Constitutional Values and Principles' in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, 2012) 777, 779–80.

to both the text of the constitution and other legal sources such as precedent.[48] On these approaches to constitutional interpretation, the nationality of the judge might matter less, provided that the judge had knowledge of the language of the constitution and other legal sources sufficient to interpret its meaning. Similarly, originalism, in which constitutional interpretation is to be guided by the intentions of the constitutional founders, requires historical knowledge of the founders and their generation, rather than knowledge of the contemporary society of the kind that nationals are assumed to gain through their own experience.

Upon moving towards the other ends of each spectrum, however, the nationality of judges assumes greater importance. One variation of non-originalism is the idea that the constitution should be capable of 'growth, development, and adjustment to changing societal needs'.[49] If judges are to interpret the constitution in light of how its provisions will operate in their social context, they must have knowledge of the social reality.[50] The adaptation of law to society through constitutional interpretation requires knowledge of the contemporary society of a kind that nationals who have lived experience in that society are assumed to have. A related claim, made in political science literature, is that a constitutional court seeking to engage credibly in reforming the law must behave strategically, for fear that a court which develops the law in a way that is out of step with the elected branches of government or the community will overstep its role and suffer backlash, or alternatively will underperform in its role and become irrelevant.[51] Strategic judicial behaviour requires that judges have knowledge of the wider political environment, and the interests of other actors and their likely reactions. Foreign judges unfamiliar with local politics and legal culture might therefore be poorly situated strategic actors, although much also depends on context.[52]

Where the constitution is understood to encompass or express deeper abstract principles, the significance of a judge's nationality will depend on the nature of those principles. Jacobsohn posits a distinction between constitutional *values*, which derive from the culture, history and traditions of the nation-state, and constitutional *principles*, which give expression to the

[48] Adrienne Stone, 'Judicial Reasoning' in Cheryl Saunders and Adrienne Stone (eds), *Oxford Handbook of the Australian Constitution* (Oxford University Press, 2018) 472, 475–6.
[49] *Re British Columbia Motor Vehicle Act* [1985] 2 SCR 486, 509 (Lamer CJ) cited in Goldsworthy, above n 40, 699.
[50] Grimm, above n 40, 209.
[51] Georg Vanberg, 'Constitutional Courts in Comparative Perspective: A Theoretical Assessment' (2015) 18 *Annual Review of Political Science* 167, 179–81; Lee Epstein, Jack Knight and Olga Shvetsova, 'The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government' (2001) 35(1) *Law and Society Review* 117.
[52] Alex Schwartz, 'International Judges on Constitutional Courts: Cautionary Evidence from Post-Conflict Bosnia' [2017] *Law and Social Inquiry* advance online version, 5, 19, 25.

constitutional order and political morality of the state. Values then have a culturally determined meaning that is best (and perhaps only) understood by a judge who is a member of that national culture. Principles, on the other hand, might be more universal or at least transnational, because they draw on conceptions of democracy, equality and justice, or the precepts of a religion.[53]

Where the constitution is understood to be expressive of national identity and national values,[54] or where constitutional, political and social norms are understood to define each other in an interdependent way,[55] the judges who interpret and apply the constitution must have a plausible claim to be in touch with national self-understandings and values. Nationality is presumed to provide the judge with the knowledge and experience necessary to undertake this kind of constitutional interpretation. Aharon Barak, the former President of the Supreme Court of Israel, who ascribes to a philosophy of constitutional interpretation as necessarily driven by the basic values of the legal system,[56] makes this connection between interpretation and nationality explicit:

> The judge learns about basic values from the fundamental documents, such as the constitution itself. … The judge learns about basic values from statutes and precedents. Above all – he learns about them from the national experience, from the nature of the political system as a democracy, and from his understanding of the basic conceptions of the nation.[57]

In exceptional cases when law runs out, judges are left to decide cases by reference to their subjective beliefs, as shaped by their life experience and their own judicial philosophy.[58] But even here, that subjectivity is tied to nationality:

> Every judge is part of his people. At times he lives in an ivory tower, but my tower is on the hills of Jerusalem, not on Mt Olympus. As a judge, I am conscious of what is taking place in my nation, I am a part of it.[59]

It is much more difficult for foreign judges to reflect the fundamental values of the national community when interpreting the constitution, in part because they lack this kind of intimate knowledge and connection with the nation's history, culture and political system.[60] It has been suggested, for example, that British judges when sitting on the Judicial Committee of the Privy

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[53] Jacobsohn, above n 47.
[54] Mark Tushnet, 'The Possibilities of Comparative Constitutional Law' (1999) 108 *Yale Law Journal* 1225.
[55] Goldsworthy, above n 40, 702; Grimm, above n 40, 209.
[56] Aharon Barak, 'The Role of the Supreme Court in a Democracy' in Mads Tønnesson Andenæs, Lord Slynn of Hadley and Duncan Fairgrieve (eds), *Judicial Review in International Perspective* (Kluwer Law International, 2000) 121, 122.
[57] Ibid 122–3.
[58] Ibid 128.
[59] Ibid 129.
[60] Ronald Dworkin, 'Discussion: International Criminal Justice' in Robert Badinter and Stephen Breyer (eds), *Judges in Contemporary Democracy: An International Conversation* (New York University Press, 2004) 189, 252–3.

Council display more caution when interpreting a foreign constitution in an expressive manner than those same judges do when determining matters arising in their British jurisdictions.[61]

While some constitutions might be understood to express or derive from peculiarly national values, others might be understood as expressing shared common, or even universal, principles. Judging then becomes less tied to nationality. The idea that there are common constitutional principles shared across national borders has led to a sense of transnational jurisprudence, in which judges reasonably might look to the decisions of foreign courts when interpreting their own constitutions, not as binding precedent, but as a source of comparative deliberation. A transnational perspective might be particularly valuable where the domestic court interprets and applies laws which have a foundation in international law, such as human rights, or where the court draws upon shared global values such as constitutionalism or democracy.[62] The idea of common legal principles can also justify the use of judges not expert in the local legal system and with little direct knowledge of the local community. Lord Haldane, a member of the Judicial Committee of the Privy Council in the early part of the 20th century wrote that the judges of the Privy Council

> try to look for the common principle underlying systems of jurisprudence of differing kinds. … We are constantly finding that, where great broad principles of justice are concerned you find — veiled, but still there, and only distinguished by technicalities — the same substance as belongs to other systems. The human mind is much the same all the world over.[63]

In a world where constitutional and legal principles converge, legal expertise including judicial expertise, is transferable between jurisdictions.[64] There are however, two caveats to any claim that common constitutional principles might loosen the ties between judges and nationality. First, the convergence of constitutional ideas should not be overstated: differences between national constitutions persist, including differences that might be obscured by apparently similar legal language.[65] Secondly, universal principles must be adapted to the circumstances of the nation, which requires an understanding of the national context and legal culture,[66] returning once again to the significance of the knowledge presumed to accompany nationality.

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[61] Tracy Robinson and Arif Bulkan, 'Constitutional Comparisons by a Supranational Court in Flux: The Privy Council and Caribbean Bills of Rights' (2017) 80 *Modern Law Review* 379, 410.
[62] Vicki C Jackson, *Constitutional Engagement in a Transnational Era* (Oxford University Press, 2010) ch 3.
[63] Mitchell, above n 30, 48 quoting Lord Haldane, 'The Work for the Empire of the Judicial Committee of the Privy Council' (1923) 1 *Cambridge Law Journal* 143, 154.
[64] Rosalind Dixon and Vicki C Jackson, 'Constitutions Inside Out: Outsider Interventions in Domestic Constitutional Contests' (2013) 48(1) *Wake Forest Law Review* 149, 166.
[65] Cheryl Saunders, 'Towards a Global Constitutional Gene Pool' (2009) 4(3) *National Taiwan University Law Review* 1, 22.
[66] Jacobsohn, above n 47, 786.

In summary, nationality is presumed to provide judges with knowledge of the distinctive national culture and values, which inform how they interpret the constitution and develop the law. Such knowledge does not necessarily follow from nationality – some national judges might be out of touch with the values and aspirations of the national community, while some foreign judges might gain knowledge and local insights through lived experience and study. On the whole, however, nationality is presumed to provide judges with insight into distinctive national community values and how they inform the national legal culture. The relevance of knowledge of this kind to the task of adjudication depends on theories of constitutional interpretation and understandings of law. I suggest that nationality assumes more importance where the constitution is understood to express distinctive national values or customs which might not be made explicit in the constitutional text, but which judges are expected to reflect in interpreting it. The knowledge deemed to accompany nationality assumes less importance, however, where constitutional interpretation is understood as primarily based on reading the text of the constitution. Knowledge of a peculiarly national kind also assumes less significance where constitutions are understood to give expression to universal constitutional principles. In this case, not only might nationality matter less, but the comparative or transnational knowledge of foreign judges might be particularly valuable.

The importance placed on a judge's knowledge of the state's laws and the national community might therefore be one reason to require that judges must be citizens. However, in states in which citizenship is a legal requirement for judicial office, citizenship is a separate and additional requirement to legal qualifications and experience. Indeed, in these states, citizenship status will trump knowledge, in the sense that a citizen will qualify for judicial office but a non-citizen with greater legal expertise and experience will not. The requirement of citizenship therefore speaks to other qualities of membership and identity.

IV. Membership

Membership entails different kinds of interactions and emotional attachments.[67] It might capture the cultural relationships between people that arise from living together with a common language and history, of the kind that informs a judge's insights into underlying principles and social values that were discussed in the previous section. Membership also implies a sense of belonging, and with it reciprocal commitments between individuals and others in the community to which they belong. This Part considers how three expressions of membership of

[67] Cotterrell, above n 12, 69–75.

a national community – allegiance, responsibility and accountability – might inform the role of judges on courts of constitutional jurisdiction.

A. Allegiance

Membership of a nation is formally expressed in the concept of allegiance. Allegiance was historically understood as a pledge of obedience in exchange for the sovereign's protection, but now refers to both a personal attachment and an obligation of loyalty to the nation.[68]

The feelings of attachment and loyalty denoted by the idea of allegiance are sometimes understood to affect the impartiality of judges. This issue is taken seriously in international courts and tribunals. Dannenbaum argues that the rules and procedures of international courts exhibit a 'deep anxiety about the capacity of international judges to be impartial to and independent from their state of nationality'.[69] As a result, international courts might allow only one judge of each nationality on the court,[70] or permit state parties to appoint an ad hoc judge of their own nationality,[71] or require judges to recuse themselves from cases involving their state of nationality.[72] Parties to international commercial arbitration will often seek an arbitrator of a different nationality to the parties.[73] These practices are motivated by the assumption that a judge or arbitrator will, consciously or unconsciously, be influenced in favour of their country of nationality, in part because of their sense of allegiance.

In contrast to the position of judges on international courts, judges on national courts are expected to have allegiance to the state and to publicly express a commitment to serve the interests of the state. In some legal systems, judges – citizen and non-citizen – formally swear an oath of allegiance, which is both personal promise and public commitment to the state and to judicial office.[74] For citizen judges, however, the professional commitment to uphold the

[68] Arcioni, above n 14, 37.
[69] Tom Dannenbaum, 'Nationality and the International Judge: The Nationalist Presumption Governing the International Judiciary and Why It Must Be Reversed' (2012) 45(1) *Cornell International Law Journal* 77, 112.
[70] Eg *Statute of the International Court of Justice* art 3; *Statute of the Inter-American Court of Human Rights* art 4; *Rome Statute of the International Criminal Court* art 35(7).
[71] Eg *Statute of the International Court of Justice* art 31(2); *Statute of the Inter-American Court of Human Rights* art 10.
[72] Eg *Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights* art 22. See also Milan Markovic, 'International Criminal Trials and the Disqualification of Judges on the Basis of Nationality' (2014) 13 *Washington University Global Studies Law Review*.
[73] Ilhyung Lee, 'Practice and Predicament: The Nationality of the International Arbitrator (With Survey Results)' (2008) 31 *Fordham International Law Journal* 603.
[74] Mark R Rutgers, 'The Oath of Office as Public Value Guardian' (2010) 40(4) *American Review of Public Administration* 428, 430.

state's laws as stated in the oath might align with more personal feelings of loyalty and allegiance.[75]

B. Responsibility

In his theoretical exploration of the relevance of nationality to the role of the judge, Kahn identifies the idea of responsibility as a key reason why states reject staffing their courts with international judges.[76] For Kahn, a judge's responsibility to the state and its people is particularly significant in constitutional adjudication. Through the process of adjudication, a judge does not simply resolve a private dispute or grievance between two parties but does so according to the public standards and values expressed in the law. In constitutional litigation, a private citizen assumes a public role, becoming an 'agent' of the public order, presenting a vision of the constitution that might, through judicial decision, become law. Judicial decisions are not simply the application of law to facts but are rather a narrative of the legal order, in which the court 'speaks for' the whole society when it decides which vision of the constitution prevails.[77] For Kahn, only a national judge can produce this kind of public narrative because a national judge – as a citizen and as part of the political power structure – shares in the people's responsibility for the law as it is and as it may become.[78] A foreign judge, on the other hand, can take a judicial decision, but does not necessarily take responsibility for the laws of the past or the future. To take an analogy employed by Miller in his discussion of nationality, the 'people of a nation are not in a lifeboat, randomly thrown together'. Rather they are bound by ties of custom and practice that stem from *historic* identity, binding them in ways that the people in a life boat, who share a common immediate purpose but not a common past, are not.[79]

The concept of responsibility presented by Kahn focuses on the task of adjudication. A similar sense of responsibility is also relevant to how judges understand their role in the constitutional order. Philip Bird, a citizen of the United States, was appointed Chief Justice of the Marshall Islands in the late 1980s. His appointment came after several judges were effectively removed from the Court or had resigned in protest of interference by the political branches in the judiciary. The Marshall Islands parliament enacted a law that effectively ordered the High Court to dismiss a long running legal dispute over a chiefly title. When the Chief Justice refused to

[75] Daniel Terris, Cesare Romano and Leigh Swigart, *The International Judge: An Introduction to the Men and Women Who Decide the World's Cases* (Brandeis University Press, 2007) 151.
[76] Paul Kahn, 'Independence and Responsibility in the Judicial Role' in Irwin P Stotzky (ed), *Transition to Democracy in Latin America: The Role of the Judiciary* (Westview Press, 1993) 73.
[77] Ibid 77.
[78] Ibid 82.
[79] Miller, above n 8, 41–2.

uphold that legislation, the parliament passed a resolution to dismiss Chief Justice Bird for failure to faithfully discharge the duties of his office. The Chief Justice resigned, stating that he did so in order to 'alleviate the growing constitutional crisis', but added 'were this my country I would have seen the matter through to the end'.[80] Here, the Chief Justice articulates a deeper commitment to core constitutional principles in his own country, which would incline him to act differently as a national judge. As a foreign judge, however, he did not feel it his place to play a central role in the constitutional crisis of a foreign country. In Kahn's terms, the distinction is between a judge who acts as an 'agent of government' and a judge who shares in the interdependent relationship between citizen and state.[81]

The responsibilities of membership that are presumed to motivate citizen judges can serve to alleviate some of the concerns about the legitimacy of judicial review. The democratic objection to judicial review, broadly put, is that courts, which by virtue of judicial independence are not subject to channels of democratic accountability, should not have the final say on the constitutionality of legislative and executive action.[82] Scholars have sought to counter the democratic objection in a variety of ways.[83] One line of defence claims that judges should have a share in the determination of constitutional questions and review the exercise of power by the political branches of government because they too are 'of the people'. For example, Sir John Muria, the first Solomon Islander to serve his country as a Judge and Chief Justice, refutes the objection to constitutional review 'for one basic reason, that is, the Courts and those who preside over them belong to the particular society or community; they understand the aspirations of the country and its people; they are therefore in the best position to envision the path that the country needs to travel to fulfil that vision.'[84]

[80] Jon M Van Dyke, 'The Pacific Judicial Conference: Strengthening the Independent Judiciary and the Rule of Law in the Pacific' (2011) 22(1–2) *Western Legal History* 127, 153–5.
[81] Kahn, above n 76, 83.
[82] Jeremy Waldron, *Law and Disagreement* (Clarendon Press, 1999) 213; Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge University Press, 2007) ch 1.
[83] Eg Anna Gamper, 'Constitutional Courts and Judicial Law-Making: Why Democratic Legitimacy Matters' (2015) 4(2) *Cambridge Journal of International and Comparative Law* 423, 438; Aileen Kavanagh, 'Participation and Judicial Review: A Reply to Jeremy Waldron' (2003) 22 *Law and Philosophy* 451.
[84] John Muria, 'The Role of the Courts and Legal Profession in Constitutional and Political Disputes in the Pacific Islands Nations' (2002) 6 *Journal South Pacific Law*. See also Claire Palley, 'Rethinking the Judicial Role: The Judiciary and Good Government' (1969) 1 *Zambia Law Journal* 1, 31–2.

In contrast, it might be easier for governments and others to dismiss the legitimacy of judicial review when it is conducted by foreign judges.[85] There are occasions when governments have rejected the decisions of foreign judges as corrupt, incorrect, or serving outside interests, resulting in the resignation of those judges or their forcible removal.[86] Such cases illustrate the risk that rather than engage with the 'vision' of the constitutional path provided in the judicial decision, government actors instead make the foreign judge a scapegoat, expelling him or her from the jurisdiction along with the rejected constitutional vision.[87] Incidentally, the fact that a judge is a foreign judge makes the physical act of expulsion easier: lacking the citizen's right of entry into his or her own country, foreign judges require the government's permission to enter and stay in the country and are vulnerable to removal pursuant to a change in their immigration status.[88] Of course, governments also criticise national judges who make unfavourable decisions. The point is that there is a stronger basis for constitutional negotiation (sometimes cast as 'dialogue') about the meaning of the constitution and the visions and aspirations of the country when the key actors are themselves of the people.

C. Accountability and independence

The responsibilities arising from membership of the national community also provide an avenue for the democratic accountability of judges. Judiciaries are expected to be independent from external influences and control, but also accountable for the way in which they exercise the judicial powers entrusted to them. Independence is a defining feature of judicial office. Judges are expected to be independent from the parties who bring their disputes before the court and from the legislative and executive branches of government. Judicial independence from other branches of government is particularly important for judges tasked with constitutional adjudication, which deals with questions of the exercise of political power and enforces the constitutional limits of the actions of the political branches of government.[89] Independence seeks to ensure that judges make decisions according only to law, free from improper influence. Judicial independence is not, however, absolute. Judges are subject to oversight within the judicial system to guard against incorrect and improper decisions. The appeals process, the

[85] Rhoda E Howard, 'Legitimacy and Class Rule in Commonwealth Africa: Constitutionalism and the Rule of Law' (1985) 7(2) *Third World Quarterly* 323, 331.
[86] In the Pacific: Chapter 3, Part IV; in East Timor: Sara Everingham, 'East Timor Government to Sack Foreign Judges, Advisers' *ABC News*, 27 October 2014 <http://www.abc.net.au/news/2014-10-27/east-timor-government-to-sack-foreign-judges-and-advisers/5843056>; in Swaziland: Maxine Langwenya, 'Swaziland Justice Sector and the Rule of Law' (AfriMAP and the Open Society Initiative for Southern Africa, 2013) 98,101.
[87] On the foreigner as scapegoat see Honig, above n 24, 32–4.
[88] Chapter 3, Part IV.B.
[89] Grimm, above n 40, 200–2.

requirement to conduct judicial proceedings in public, and the duty to give reasons are all ways in which judges account for their decisions. The exercise of constitutional jurisdiction, which entails the power to give a final interpretation of the meaning of the constitution and to set aside the laws and actions of democratically elected representatives of the people, calls for a form of democratic accountability or at least responsiveness to the people and their elected representatives.[90]

The nationality of judges is not typically considered in the context of judicial accountability. However, citizenship can function as a form of accountability because judges, as citizens, are invested in their community, their government and their constitution. Although foreign judges take an oath of allegiance to the state and its constitution, they do not enjoy all the rights and assume all the duties of citizenship. They are not members of 'the people' who are the source of the constitution and who authorise the exercise of political powers by the institutions of government. They do not have to live in the community and be subject to the laws that they have a hand in shaping.[91] While foreign judges might act in the best interests of the community they serve, they are not *invested* in the fate of the community and the nation in the same way that national judges are.[92] The ties of membership mean that citizen judges cannot simply leave, they are invested in the community and accountable to it for their decisions.

The fact that the foreign judge is not invested in the community and the constitutional order may, however, be cast as a virtue. A common justification for the use of foreign judges is that they are not enmeshed in the immediate political and social intrigues of the nation (which in some cases extend to corruption) and so bring impartiality and objectivity.[93] Non-membership of the community can symbolically serve other constitutional values of judicial independence, equality before the law and the separation of powers.[94] The foreign judge is outside the community and its politics, and so adjudicates according to the constitution alone, uninfluenced by extraneous considerations. The foreign judge is outside of 'the people', and so can deliver the law without disturbing the sense that all members of the people are equal before the law.[95]

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[90] Mark Tushnet, 'Judicial Accountability in Comparative Perspective' in Nicholas Bamforth and Peter Leyland (eds), *Accountability in the Contemporary Constitution* (Oxford University Press, 2013) 57.
[91] T Alexander Aleinikoff, 'Thinking Outside the Sovereignty Box: Transnational Law and the US Constitution' (2004) 82(7) *Texas Law Review* 1989, 1998.
[92] Kymlicka, above n 7, 115.
[93] In the Pacific see Chapter 6, Part III, fn 38-41. This idea also informs the idea of 'neutral' foreign judges on courts in post-conflict states: Joseph Marko, 'Foreign Judges: A European Perspective' in Yash Ghai and Simon NM Young (eds), *Hong Kong's Court of Final Appeal* (Cambridge University Press, 2013) 637, 640.
[94] Honig, above n 24, ch 2.
[95] Ibid 21.

The foreign judge arrives when called upon to determine a dispute and leaves having performed his or her task, intervening in democratic politics with due restraint and without self-interest.[96] These virtues however come with costs, including to democratic accountability.

In summary, citizen judges' membership of the national community can affect the way in which judges understand and fulfil the requirements of independent and accountable judicial office, and how in turn the community might understand the role of judges and courts. The notions of allegiance, responsibility and accountability overlap in that they all capture the importance of the *personal* (as opposed to official or professional) commitment that a judge makes to the nation-state and its laws. In this sense, a judge's nationality might function as an indicator for some of the desirable personal qualities or virtues of a judge, which together with institutional and professional qualities, support the effectiveness and legitimacy of judiciaries.[97]

V. Identity

The identity of judges, and in particular nationality as an aspect of identity, highlights the value of appearances. The national identity of individual judges, and the combined identity of members of the judiciary, affect how the community perceives the court. This function of identity is picked up in the literature on 'reflective judiciaries'. This is the idea that the composition of the judiciary ought to reflect the community it serves, and in particular the diversity of gender, ethnic and other kinds of identities within the community. It is claimed that only a judiciary which reflects the diversity of identity characteristics will have the confidence of all communities within the state it serves, and express democratic values of inclusiveness and participation.[98] In this Part, I explore how the identity of judges *as citizens* might express values associated with sovereignty, and argue that judges' nationality, as an aspect of personal identity, has a symbolic or representative function.

The preference for citizen judges, or the rejection of non-citizen judges, is often framed as a matter of sovereignty. In the United States, the citation of foreign judgments was criticised as an illegitimate practice that 'dramatically undermines sovereignty'[99] and it is not difficult to

[96] Ibid 23.
[97] Roderick A MacDonald, 'Exercising Judgement' in *Which Judge for Which Society? Proceedings of the 2008 Judges' Conference* 51.
[98] Lizzie Barmes and Kate Malleson, 'Lifting the Judicial Identity Blackout' (2018) 38(2) *Oxford Journal of Legal Studies* 357, 376; Rackley, above n 41, 23–4; Peter H Russell and Kate Malleson (eds), *Appointing Judges in an Age of Judicial Power: Critical Perspectives from around the World* (University of Toronto Press, 2006) 434.
[99] Austen L Parrish, 'Storm in a Teacup: The US Supreme Court's Use of Foreign Law' [2007] *University of Illinois Law Review* 637, 660.

imagine that foreign judges would be received in the same vein. Writing in Europe, Marko states that the doctrine of state sovereignty makes it 'almost inconceivable that a foreign citizen should serve on the bench of a national supreme court or separate constitutional court of another country with the power to review legislation'.[100] Lord Cooke of Thorndon argued in favour of replacing the Privy Council with a local New Zealand court of final appeal on the grounds that 'it is inconsistent with nationhood to submit our legal issues to the adjudication of those, whoever they may be, who happen at any one time and in any particular case to comprise a majority of Judges of another country'.[101]

'Sovereignty' has a range of different meanings.[102] Two are relevant to the nationality of judges on constitutional courts. The first is an international meaning of sovereignty. At the international level, sovereign states are legally equal, have the power to enter international relations, and are protected against intervention by other states in their domestic affairs. Where foreign judges are appointed to a domestic court by a domestic state authority according to the laws of the state, the state's sovereignty is not infringed. States can consent to relinquish some aspects of their sovereignty, for example to submit to the jurisdiction of an international court. The use of foreign judges would infringe state sovereignty in the international sense only if imposed on the state from outside.

The second is a domestic meaning of sovereignty. Here, sovereignty refers to the ultimate political authority and source of laws within the state. In western nation-states, the sovereign has been conceived in many institutional forms: the monarch, the nation, the people.[103] In modern constitutional democracies the sovereign is conceived as the people ruling through a body of national law.

The functions of courts in resolving disputes according to the laws made by the sovereign, communicating the law, and at times, making the law, serve to associate judging with sovereignty.[104] In interpreting, applying and enforcing the laws made by the sovereign, the court is understood to act on behalf of the sovereign. In this sense, sovereignty has a justificatory

[100] Marko, above n 93, 637.
[101] Lord Cooke of Thorndon, 'Final Appeal Courts: Some Comparisons' (Occasional Paper No 7, New Zealand Centre for Public Law, 2001) 18.
[102] Michael Troper, 'Sovereignty' in Michel Rosenfeld and András Sajó (eds), *Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, 2012) 1304.
[103] Ibid 354; Martin M Shapiro, *Courts, A Comparative and Political Analysis* (University of Chicago Press, 1981) 100.
[104] Shapiro, above n 103, 26, 34; Daniel Smilov, 'The Judiciary: The Least Dangerous Branch?' in Michel Rosenfeld and Andras Sajo (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, 2012) 859, 869.

function, which supports the exercise of power by institutions such as the court.[105] In some European constitutional traditions, this is made explicit by those courts which expressly deliver every judgement 'in the name of the people'.[106]

The use of foreign judges can be reconciled with domestic sovereignty. The people may, through law, authorise foreign judges to determine legal and constitutional disputes. The connection between the nationality of judges and sovereignty seems instead to be predominantly symbolic: a judiciary composed of citizen judges expresses the sovereignty of the people, because a court comprised of members of the people *is* a court of the people.[107] Democratic constitutions seek to promote a sense that the people create and own the laws that bind them. Judges from outside the nation, on the other hand, might express a sense of law as imposed from outside the people, rather than from within: an experience particularly pertinent in post-colonial societies in which the written constitution reflects (and in some cases is a product of) the legal system imposed by the colonising powers.[108] However, a diversity of nationalities on the bench could equally (and less coercively) express a state's own openness to international influence and the value placed on comparative legal experience, institutionally and in the court's jurisprudence.[109]

The nationality of the judges on the courts of a state might express different values in different contexts. My purpose here is not to decide between them, but to note that the identity of judges as national or foreign serves a representative or symbolic function, informed by how people perceive the court and its role in the wider community.

VI. Conclusion

Citizenship is not an essential prerequisite for the judges of constitutional courts. The global norm, however, is that judges will be citizens of the state on whose courts they serve. This Chapter set out a range of reasons for the preference for national judges on courts of constitutional jurisdiction. National judges might be thought to bring knowledge of national laws and community values that is necessary to the task of adjudication and constitutional interpretation. National judges might be considered bound by ties of membership to the nation

[105] Troper, above n 102, 354.
[106] Armin von Bogdandy and Ingo Venzke, *In Whose Name? A Public Law Theory of International Adjudication* (Oxford University Press, 2014) 20.
[107] Kahn, above n 76, 85.
[108] Honig, above n 24, 29; Sally Engle Merry, *Colonizing Hawai'i: The Cultural Power of Law* (Princeton University Press, 2000) 47, 89.
[109] Judith Resnik, 'Law as Affiliation: Foreign Law, Democratic Federalism, and the Sovereigntism of the Nation-State' (2008) 6 *International Journal of Constitutional Law* 33.

and its people which affect how they decide cases and act in judicial office. Finally, national judges might serve as a visible expression of sovereignty.

Different legal systems emphasise different values associated with judging, which might make any of the qualities associated with nationality less or more important in different contexts. A theory of constitutional interpretation that focuses on the meaning of the text and other legal sources of meaning, and not on underlying values or principles, might make the knowledge of community values deemed to accompany nationality less important. The connections between the responsibilities of judicial office and sovereignty traced by Paul Kahn might be distinctive to the experience of the United States and not directly transferrable to other legal and political traditions. In contemporary circumstances of globalisation, some legal systems might more openly embrace the idea of international or universal principles and so be more receptive to foreign judges. As such, the significance of nationality to judging depends on how understandings of nationality, law, adjudication and the role of the court align in a particular context.

The purpose of this Chapter has been to identify the points of connection between nationality and judging in order to develop a framework for assessing the use of foreign judges in the particular context of the Pacific. It has shown how national knowledge, national membership and national identity might, to varying degrees, be significant to each of the three aspects of judging that are identified in the research question for this thesis, namely, constitutional adjudication, judicial independence and the role of judges and judiciaries in Pacific constitutional systems. These three aspects of judging, and how they might be affected by the use of foreign judges, are the focus of the following three chapters. Chapter 5 considers the kinds of knowledge that foreign judges bring to the Pacific and the influence this might have on the constitutional jurisprudence and the role of judges in the region. Chapter 6 assesses a prevalent claim made about foreign judges arising from their non-membership of the state: that foreign judges have a greater degree of distance from the community and therefore impartiality than local judges. Finally, Chapter 7 considers issues relating to the allegiance, responsibility, accountability of foreign judges and the 'reflectiveness' of courts in the Pacific, using the lens of representation as a means to examine the relationships between foreign judges, the people and the state.

CHAPTER 5
CONSTITUTIONAL ADJUDICATION

I. Introduction

Chapter 4 set out a range of ways in which the nationality of judges might be significant to the role and functions of judges on courts of constitutional jurisdiction. One quality associated with nationality is knowledge of the law and the community in which it operates, which citizens might be presumed to have by virtue of their national identity, membership of the state and lived experience. Foreign judges, by contrast, bring different kinds of knowledge to bear on constitutional adjudication. Foreign judges have a knowledge *reach,* in that their knowledge extends beyond local circumstances to encompass direct knowledge and experience of their home jurisdiction. They also face a knowledge *gap*, in that foreign judges generally will not have the depth of knowledge about the national legal, social and political context of the Pacific as local judges.

In Chapter 4, I suggested that the degree to which the kinds of knowledge associated with nationality might be important depends on whether judges are understood to interpret and at times *make* constitutional law, and the kind of constitutional reasoning they adopt when doing so. This Chapter examines the connection between the dimensions of knowledge that foreign judges bring to the Pacific and the approach that Pacific courts take to constitutional adjudication. It suggests that prevalent features of constitutional adjudication across Pacific states are at least partly explicable by reference to the knowledge brought by foreign judges.

From a reading of over 60 constitutional cases across all nine states,[1] I identify three general features of constitutional adjudication: the influence of common law, the limited integration of custom and constitutional law, and a predominantly textualist approach to constitutional interpretation. There are of course differences in the approaches of different national courts in the region, and a greater variety of approaches by individual judges. These three features, however, recur across all jurisdictions, indicating that they are predominant characteristics of Pacific constitutional adjudication.

Drawing on an analysis of these cases, curial and extra-curial statements by judges, and interviews with foreign judges serving in the Pacific,[2] this Chapter shows how each of these features has some degree of fit with the kinds of knowledge that foreign judges bring to the task

[1] The courts of constitutional jurisdiction in each Pacific state are identified in Chapter 2, Part II.
[2] The methodology for the interviews is set out in Chapter 2, Part II.

of constitutional adjudication. Part II explains in greater detail the two dimensions of knowledge foreign judges bring, namely the knowledge reach and the knowledge gap. Part III considers the transnational reach of foreign judges' knowledge, which in the Pacific is most notable in the continued influence of common law concepts in constitutional interpretation, reflecting the shared common law foundations and consequent similarities between Pacific states and the jurisdictions from which foreign judges are recruited. Part IV turns to explore the implications arising from foreign judges' limited knowledge of the national law and context in which they serve. It deals first with the knowledge gap in relation to the customary elements of Pacific legal systems, examining the claim made by some scholars that the use of foreign judges is one reason for the limited integration of custom and constitutional law in Pacific states. It then considers a second knowledge gap, which relates to the community values and cultural context of each Pacific state. This section posits that the knowledge gap is one reason why foreign judges might prefer to adopt a textualist approach to constitutional interpretation, rather than approaches that draw on national values and principles which might be thought, and are sometimes expressed, to underlie and inform the constitutions of Pacific states. Finally, Part V considers ways in which local judges might serve to bridge any real or perceived distance between the law as it is interpreted and applied by foreign judges and the national legal system and wider community, examining ways in which foreign judges draw on their local knowledge.

This Chapter does not seek to make definitive causal claims that foreign judges always approach constitutional adjudication in a particular way or that the contours of constitutional adjudication in the Pacific region are solely attributable to foreign judges. Claims of this kind face a range of methodological challenges. Different judges and different courts employ a variety of approaches to constitutional reasoning, influenced by a wide range of factors, including directives in the constitutional text, conceptualisations of the separation of powers and rule of law; the contemporary social and political context in which constitutional questions arise; and attributes of the judiciary such as the professional qualifications of judges, their social and intellectual backgrounds, and legal education.[3] The diversity of approaches and influences mean that an attempt to demonstrate causation – that foreign judges adopt a particular approach because they are foreign – would be very difficult.[4] This Chapter instead seeks to describe a degree of fit,

[3] Jeffrey Goldsworthy, 'Constitutional Interpretation' in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, 2012) 689, 706–17.

[4] One possibility would be to compare the approach of individual judges in their home country with their approach in a foreign jurisdiction: eg Tracy Robinson and Arif Bulkan, 'Constitutional Comparisons by a Supranational Court in Flux: The Privy Council and Caribbean Bills of Rights' (2017) 80 *Modern Law Review* 379. However, it is difficult to control for all explanatory factors, such as the factual and legal contexts giving rise to the constitutional issue and differences in constitutional texts. A second

by which I mean that prevalent features of constitutional adjudication are understandable in light of the kinds of knowledge that foreign judges are assumed to bring to the task of adjudication. The analysis seeks to identify the potential ways in which the use of foreign judges might, at least in part, have a bearing on interpretative method, in turn affecting judicial decisions in particular cases and the development of law in the Pacific.

II. Two dimensions of knowledge

Judges are expected to have knowledge of the law, as well as the community in which the law operates.[5] However, all judges – foreign and local – will have gaps in their knowledge. The range and complexity of the issues that come before any court mean that judges are called upon to determine issues outside their personal knowledge and experience. Sir David Baragwanath, a judge of the New Zealand Court of Appeal who also served as a foreign judge in Samoa, reflected on the challenges of adjudication at home and abroad:

> It is a real problem, of which my first serious experience was as counsel before the Waitangi Tribunal in the Muriwhenua fishing case. When the enormity of the case dawned upon me – deprivation of the five tribes' access to fishing rights, from being the wealthiest tribes in New Zealand to the poorest – I lost a stone in a week. It was my task to get inside their minds and look out through their eyes in order to equip myself to represent them. I was looking across a cultural and racial divide at what my people had done to theirs. I have had a similar challenge presiding in the Court of Appeal of Samoa – parachuting into others' society, with responsibility for interpreting their Constitution and administering justice according to their culture and their values. It is burdensome and impossible to achieve completely. But one's task is to try.[6]

In this way, local judges in a diverse or pluralist society, as well as foreign judges, confront the boundaries of their knowledge of the law and the community. However, even if they lack specific knowledge of the issue, local judges are likely to have a greater degree of knowledge about the legal, social and political context of the place in which they sit as judges, acquired by virtue of their lived experience as members of the national community. In contrast, foreign judges, who lack this experience, are not, generally speaking, able to claim the same depth of knowledge of the local context.[7] There are of course exceptions. In particular, foreign judges who serve as resident judges, or who have lived and worked in the Pacific state for some time, might claim a

possibility would be to compare the approaches of local and foreign judges giving judgment in the same matter. Again, however, other dimensions of adjudication are likely to contribute: citizen judges on national courts often disagree on questions of method and it is rarely possible to attribute such differences to a single causal factor.

[5] Sophie Turenne, *Fair Reflection of Society in Judicial Systems: A Comparative Study* (Springer, 2015) 3.

[6] David Baragwanath, 'Judging: A Butterfly View' (2010) 16 *Canterbury Law Review* 243, 246.

[7] Mere Pulea, 'Pacific Courts and Personnel' in Guy Powles and Mere Pulea (eds), *Pacific Courts and Legal Systems* (University of the South Pacific and Monash University, 1988) 37, 39; Graham Hassall and Cheryl Saunders, *Asia-Pacific Constitutional Systems* (Cambridge University Press, 2002) 187.

high degree of local knowledge. Other foreign judges admit to having little to no prior knowledge of the country in which they are appointed as judges.[8] Speaking generally, foreign judges face a knowledge gap in relation to the laws of the Pacific state and the social and political context in which those laws operate.

On the other hand, foreign judges have knowledge that reaches beyond local legal circumstances, encompassing direct knowledge and experience of their home jurisdiction, and potentially other national and international jurisdictions.[9] They are in a position to bring comparative knowledge of their home or other jurisdictions to bear on adjudication. This dimension of foreign judging raises issues familiar in comparative constitutional law about the transfer of constitutional concepts and doctrines, and the values that underlie them, from one context to another.[10]

Judges, whether sitting on courts of constitutional jurisdiction at home or abroad, face a weighty task. The challenges are magnified where judges rule 'in and sometimes on' the constitutions of another state.[11] In the early years of Papua New Guinea's independence, Sir William Prentice, then Deputy Chief Justice of the Supreme Court of Papua New Guinea, reflected on the responsibilities that the new *Constitution of Papua New Guinea* placed upon foreign judges:

> The task of commencing the interpretation of the striking document that now forms the Constitution of the Independent State of Papua New Guinea and purports to express in noble sentiments the ambitions devised and entertained by the indigenous people for their own future government and well-being, comes now somewhat invidiously to be performed by the Supreme Court comprised still, as it was initially, by expatriate judges. One can only shoulder the responsibility with all due humility, conscious that the Constitution makers deliberately thrust it upon this Court exclusively, knowing … that its members would for some time be expatriates.[12]

The 'somewhat invidious' task of constitutional adjudication arises from the nature of constitutions. Constitutions structure and regulate the exercise of public power by distributing power between institutions of government and regulating the relationship between government and the people. Constitutions might also have an expressive function, reflecting

[8] Interview F8.
[9] As noted in Chapter 2, Part III, 26 of the 187 foreign judges serving during the period 2000 to 2015 sat in more than one Pacific state. Some foreign judges have served as judges on national courts outside the region or on international or regional courts.
[10] William Twining, 'Diffusion of Law: A Global Perspective' (2004) 49 *Journal of Legal Pluralism and Unofficial Law* 1; Vlad Perju, 'Constitutional Transplants, Borrowing and Migrations' in Michel Rosenfeld and András Sajó (eds), *Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, 2012) 1304.
[11] Natalie Baird, 'Judges as Cultural Outsiders: Exploring the Expatriate Model of Judging in the Pacific' (2013) 19 *Canterbury Law Review* 80, 93.
[12] *Constitutional Reference No 1 of 1977 Re Rights of Person Arrested or Detained* [1977] PGSC 15.

national identity, values and commitments. Constitutions are superior to legislation, such that a court exercising powers of constitutional review has the power to invalidate legislation that is inconsistent with the constitution. Procedures for making formal amendments to a constitution are often more onerous than amendments to ordinary legislation, which may mean that the court, in effect, has the last word on the meaning of a constitutional provision. These features of constitutional adjudication mean that the work of judges can shade into judicial law making, such that courts come to exercise significant political as well as legal power. This has led to concerns about the democratic legitimacy of constitutional adjudication in states with courts composed entirely of citizen judges, concerns which are potentially amplified when the judges are not only unelected but foreign.

Constitutions are written in general, abstract language. They require interpretation to clarify vague provisions, resolve ambiguities and at times, extend the law to cover developments unforeseen at the time the constitution was made. Constitutional interpretation therefore confers a significant degree of discretion on judges. Views differ about what does – and what should – guide judicial discretion.[13] Several possible candidates, such as the 'felt necessities of the time' and community values, would require judges to have a plausible claim to be in touch with local context. The approach that judges take to constitutional interpretation is significant for the implementation of a new constitutional order, particularly in legal systems where the doctrine of precedent means that early judicial opinions are influential into the future.

Many foreign judges are aware of the complexities of their role as constitutional adjudicators in Pacific states. The analysis in this Chapter explores the ways in which these complexities play out, as foreign judges undertake the challenging task of adjudicating constitutional disputes outside of their home jurisdiction.

III. Transnational knowledge reach

Judges require knowledge of the laws they are to apply to determine legal disputes. In most countries, judges must have legal qualifications and professional experience in the jurisdiction in which they are appointed, which effectively serves as a measure of knowledge of the local law. In contrast, Pacific states recognise legal qualifications and experience obtained outside the

[13] Goldsworthy, above n 3; András Jakab, Arthur Dyevre and Giulo Itzcovich, *Comparative Constitutional Reasoning* (Cambridge University Press, 2017) 17.

jurisdiction.[14] All foreign judges serving on Pacific courts are recruited from common law jurisdictions.

A. A shared common law

The idea of a transnational common law provides one way in which foreign judges can claim knowledge of the laws and legal systems of the Pacific. In interviews, several judges cited the shared common law as a factor that enabled them to adjudicate in the Pacific.[15] Pacific constitutions recognise and continue the common law as source of law.[16] Local lawyers and judges are educated in the common law tradition.[17] The common law, and other points of similarity such as a Westminster style parliamentary system, provide judges from common law jurisdictions with familiar concepts and points of reference to assist them in constitutional adjudication.

The common law was transplanted from Britain to countries across the globe as part of the process of colonisation. The imperial history of the common law represents a law that is mobile across different polities and later across national boundaries. The Judicial Committee of the Privy Council was the court of final appeal and served to homogenise the laws applied at the frontiers of the empire.[18] A colonial bureaucracy was created to administer the laws in each colony, including colonial judges who moved across the colonies to take up promotions.[19] After independence, the national courts of former colonies began to develop distinctive national systems of common law, in some cases departing significantly from the English common law that was originally applied. Despite the divergence of national systems, the common law remains a shared foundation that shapes the ways in which common law jurisdictions approach constitutional adjudication.[20] On this understanding of the common law as a transnational legal tradition, legal expertise – and legal personnel – are readily transferable between jurisdictions.

[14] The relevant provisions are detailed in Chapter 3, Part II.C.
[15] Interviews F4, F5, F8, F10, F12, F23.
[16] Guy Powles, 'The Common Law as a Source of Law in the South Pacific: Experiences in Western Polynesia' (1988) 10 *University of Hawaii Law Review* 105, 107–112.
[17] Jennifer Corrin Care, 'Finding the Right Balance in Plural Systems: Training Lawyers in the South Pacific' (2006) 4(2) *Journal of Commonwealth Law and Legal Education* 171; Miranda Forsyth, 'Beyond Case Law: Kastom and Courts in Vanuatu' (2004) 35 *Victoria University of Wellington Law Review* 427, 440–1; Bernard Narokobi, *Lo Bilong Yumi Yet: Law and Custom in Melanesia* (Melanesian Institute for Pastoral and Socio-Economic Service University of the South Pacific, 1989) 116–17.
[18] Rohit De, '"A Peripatetic World Court" Cosmopolitan Courts, Nationalist Judges and the Indian Appeal to the Privy Council' (2014) 32 *Law and History Review* 821, 824.
[19] Charles Jeffries, *The Colonial Empire and Its Civil Service* (The University Press, 1938) ch XI.
[20] Cheryl Saunders, 'Common Law Public Law: Some Comparative Reflections' in John Bell et al (eds), *Public Law Adjudication in Common Law Systems: Process and Substance* (Hart Publishing, 2015) 353.

Judges on Pacific courts frequently draw on the common law in the course of constitutional interpretation. Words in Pacific constitutions are interpreted to correspond to their common law meaning. For example, Justice Pratt, when determining the meaning of the words 'unlimited original jurisdiction' in the *Constitution of Solomon Islands*, noted that while courts should not slavishly follow concepts of English law, there was no reason to think that the constitutional drafters intended to give the phrase a meaning other than that familiar to common law lawyers.[21] The common law has been used to import particular understandings of concepts such as prerogative power,[22] parliamentary privilege,[23] and due process,[24] although recourse to common law definitions is sometimes tempered by making it subject to the written constitution.[25] An example of a different kind arises in the decision of Chief Justice Webster in *Taione v Tonga*, in which the Supreme Court of Tonga considered the validity of amendments to the constitutional provision protecting freedom of speech.[26] The original provision provided that 'no law shall ever be enacted' to restrict freedom of speech, but that this clause should not be held to outweigh the law of slander or laws for the protection of the King and Royal Family.[27] Amendments in 2003 made it lawful to enact laws considered necessary for national security, public order, morality, cultural traditions, the privileges of the legislative assembly and contempt, or to regulate the media. Chief Justice Webster held that some elements of the newly amended provision were unconstitutional because they were inconsistent with the guarantee of freedom of speech. In order to interpret the scope of the freedom of speech, Chief Justice Webster looked to the English common law and the principles in the *European Convention on Human Rights*, which he considered to be substantively the same. The preference for using common law to give content to constitutional rights and freedoms was justified by reference to the context of constitution making. Drawing on histories of Tonga's constitution making, Chief Justice Webster concluded that 'it is undisputed that when the Constitution was adopted in 1875

[21] *Kenilorea v Attorney General* [1984] SBCA 3, taking cues from the decision of Lord Diplock in *Hinds v The Queen* [1977] AC 195, 211-2.
[22] Eg *Lali Media Group Ltd v Lavaka Ata* [2003] TOSC 27; *Qarase v Bainimarama* [2008] FJHC 241, [132]; *Qarase v Bainimarama* [2009] FJCA 67, [78-9].
[23] *Fotofili v Siale* [1987] TOPC 2; *Harris v Adeang* [1998] NRSC 1; *Keke v Scotty* [2014] NRSC 7; *State v Social Democratic Liberal Party, Ex parte Tikoca* [2017] FJHC 654. For decisions that take the view that the written constitution modifies or displaces common law rules on the privileges of parliament see *Huniehu v Attorney-General* [1997] SBCA 9; *Constitutional Reference No 1 of 2008* [2009] 1 LRC 453; *Attorney General v Jimmy* [1996] VUCA 1; *Natapei v Tari (No 2)* [2001] VUSC 38.
[24] *Qalo v Qaloboe* [2004] SBCA 5. On the continuing influence of common law rights in Pacific jurisdictions see Susan Farran, *Human Rights in the South Pacific: Challenges and Changes* (Routledge-Cavendish, 2009) 77–83.
[25] Compare, for example, the reasons for decision of Kidu CJ and Kapi J with those of Greville Smith J on the issue of standing in *Re Somare* [1981] PGSC 23.
[26] *Taione v Tonga* [2004] TOSC 47.
[27] *Constitution of Tonga 1875* s 7.

it was done to reassure the Western powers and prevent them colonising Tonga. In which it succeeded. I therefore consider that the [constitutional] freedoms … have to be understood in a western sense and not in the Tongan sense.'[28] The result was that the newly inserted exceptions that were consistent with the common law understanding of freedom of speech (namely laws to protect national security, public order, morality, privileges of parliament and contempt of court) were upheld, while those deemed inconsistent with the English common law (namely laws to uphold cultural traditions and regulate the media) were not. The case demonstrates how reliance on a shared common law can work to displace efforts to develop a constitutional jurisprudence grounded in local circumstances.

A second possible shared system of law and values is human rights which are protected in both international law and the domestic constitutions of all Pacific states.[29] While some constitutions expressly permit courts to refer to international human rights law when interpreting the bill of rights,[30] Pacific courts tend to look instead to the common law.[31] Chief Justice Webster's decision in *Taione v Tonga* referred to principles of the *European Convention on Human Rights* because they reflected standards of the common law.[32] In *Fiji v Prasad*, the Fiji Court of Appeal had to determine the legality of actions by the military to abrogate the Constitution and assume executive power following the civilian coup in 2000, during which members of parliament were held hostage.[33] The Court of Appeal, composed of judges from Australia, New Zealand, Papua New Guinea and the United Kingdom, held that while the abrogation of the Constitution was justified in the immediate hostage situation, it could not continue after that crisis was resolved. The Court also considered whether, despite the illegality of the military's actions, it had in effect created a new legal order. In doing so, the Court developed a test for the 'efficacy' of a new legal order as part of the common law of Fiji. The Court rejected submissions from foreign counsel to add a criterion to that test which would require that the new regime acknowledge international human rights, stating that the *Constitution*, 'made in Fiji for Fiji by the Parliament and people of Fiji' already contains many rights. The Court instead drew upon decisions of the Judicial Committee of the Privy Council and courts of other common law jurisdictions, although with the caveat that 'in formulating our understanding of the common law of Fiji … we are conscious that

[28] *Taione v Tonga* [2004] TOSC 47.
[29] Farran, above n 24, ch 2.
[30] *Constitution of Fiji 1997* s 43(2); *Constitution of Fiji 2013* s 7(1)(b); *Constitution of Papua New Guinea 1975* s 39(3)(b)-(e); *Constitution of Tuvalu 1986* s 15(5)(c).
[31] For rare examples of constitutional reasoning that proceeds on the basis of human rights see *Singh v Prasad* [2002] FJSC 2, Elias J; *Teonea v Pule o Kaupule of Nanumaga* [2009] TVCA 2, Paterson JA.
[32] *Taione v Tonga* [2004] TOSC 47.
[33] *Fiji v Prasad* [2001] FJCA 2.

we are sitting as Judges of a Fiji Court, [and] consequently, statements by judges which may have been appropriate for other countries … need not be adopted here.'[34] There are several reasons why foreign judges might tend to overlook international human rights law in favour of the common law. One is that it reflects the orthodoxies of constitutional interpretation in judges' home states of Australia, New Zealand and the United Kingdom, where legislative bills of rights are relatively recent introductions.[35] Another is that judges might be concerned that international human rights law will be perceived as a foreign import, rather than grounded in local law.[36]

While it may be possible to characterise the common law as more local than international law, for some it was and continues to be foreign.[37] *Taione v Tonga* represents how reliance on the common law to give content to constitutional provisions can serve to entrench both the colonial common law and dimensions of pre-independence external influence in constitutional interpretation. In this, the preference for common law meanings in constitutional interpretations sits uneasily with efforts taken in some Pacific states to establish an autochthonous constitution representing a break with the colonial legal system.[38]

B. Legal borrowing

The shared common law also facilitates 'borrowing' legal concepts and doctrines from other common law countries in order to interpret, develop or apply constitutional law. Studies of the transnational movement of constitutional ideas generally focus on the citation of foreign law by (citizen) judges on constitutional courts.[39] The movement of judges themselves, carrying their own national law as well as the assumptions and orthodoxies of their own national legal practice, has distinctive implications for constitutional adjudication.

One way in which transnational ties between jurisdictions are manifest in judicial decisions is the citation of foreign judgments where local precedents are not available. In a study of the

[34] Ibid.
[35] *New Zealand Bill of Rights Act 1990* (NZ); *Human Rights Act 1998* (UK); *Human Rights Act 2004* (ACT); *Charter of Human Rights and Responsibilities Act 2006* (Vic).
[36] Interview F4.
[37] Narokobi, *Lo Bilong Yumi Yet*, above n 17, ch 11; Mere Pulea, 'A Regional Court of Appeal for the Pacific' (1980) 9(2) *Pacific Perspective* 1, 9; Arnold Amet, 'Severing the Umbilical Cord from the Common Law' in Jackson Rannells and Jonathan Aleck (eds), *Custom at the Crossroads* (Faculty of Law, University of Papua New Guinea, 1995) 62, 64.
[38] Peter Bayne, 'The Constitution and the Franchise in Western Samoa' (1985) 1 *Queensland Institute of Technology Law Journal* 201, 213.
[39] Eg Vicki C Jackson, *Constitutional Engagement in a Transnational Era* (Oxford University Press, 2010); Tania Groppi and Marie-Claire Ponthoreau (eds), *The Use of Foreign Precedents by Constitutional Judges* (Hart, 2013).

citations in the decisions of foreign judges on Pacific courts across all areas of law, Smith found that foreign judges from Australia, New Zealand and the United Kingdom are more likely to cite cases from their own jurisdictions.[40] Some judges interviewed for this project described a more careful approach, in which they sought to cite cases from across common law jurisdictions rather than their home country as a diplomatic gesture to foreign judges from other jurisdictions on the court[41] or in recognition of constitutional provisions providing for the reception of laws from a particular jurisdiction.[42]

Sometimes, foreign judges carry with them not only their own legal precedents, but inherent understandings of constitutional institutions and offices. The case of *Afeau v Judicial and Legal Services Commission* from the Solomon Islands provides a striking illustration.[43] The Court of Appeal had to determine whether the Prime Minister had the power to direct the Judicial and Legal Services Commission to remove the Attorney General from office. The *Constitution* established the office of the Attorney General and set out the nature and functions of the office but did not expressly provide for the removal of the Attorney General. The gap in the law was to be filled by the Court of Appeal by way of constitutional interpretation. The two judges in the majority, Lord Slynn of Hadley (from the United Kingdom) and Justice Salmon (from New Zealand) held that the Prime Minister had an implied power to dismiss the Attorney General, drawing on the comparable position of the Attorney General in 'Solomon Islands and London' and common law rules relating to prerogative appointments. The dissenting judgment of Justice Adams, an Australian, tied its conclusions more closely to the text of the *Constitution*. Justice Adams emphasised that in Solomon Islands the Attorney General is a public official who serves as the principal legal adviser to government, a position that contrasts with the political role of the Attorney General in Australia, New Zealand and the United Kingdom. He concluded that the removal of the Attorney General was governed by constitutional provisions relating to the removal of public officers and was not vested in the Prime Minister.

The influence of legal understandings of the judge's home jurisdiction can also affect their approach to resolving the constitutional case. In *Namah v Pato* the Supreme Court of Papua New Guinea held that the detention of asylum seekers transferred by Australia to Manus Island was

[40] Stephen Eliot Smith, 'The Way We Do Things Back Home: Do Expatriate Judges Preferentially Cite the Jurisprudence of Their Home Countries?' (2013) 13(2) *Oxford University Commonwealth Law Journal* 331.
[41] Interview F3.
[42] Interview F12.
[43] *Afeau v Judicial and Legal Services Commission* [2007] SBCA 19.

contrary to their right to personal liberty under Papua New Guinea's *Constitution*.[44] While all five judges agreed on the result, only two judges gave reasons for decision: Justice Kandakasi, a Papua New Guinean judge, and Justice Higgins, a judge from Australia. In his reasons, Justice Higgins reads into the general limitations clause in the bill of rights a principle derived from Australian administrative law that detention must be limited to what is reasonably capable of being seen as necessary and incidental to the purpose of the detention.[45] In contrast, Justice Kandakasi held that restrictions on rights must be necessary and justified in all the circumstances having regard to the reasons for the proposed restriction, citing the words of s 38 of the *Constitution* and precedents from the human rights case law of Papua New Guinea.[46] While both judges arrived at the same result, the different approaches illustrate how the law and judicial method of a foreign judge's home state, informed in Australia by the absence of a constitutional bill of rights, may be carried into the very different legal context of the Pacific state.

Afeau v Judicial and Legal Services Commission and *Namah v Pato* demonstrate how foreign judges might bring understandings of constitutional doctrine and institutions from their home jurisdictions to bear on their interpretation of Pacific constitutions. This is especially problematic where these understandings are informed by a very different constitutional context, characterised by the lack of a single written constitution (as in New Zealand and the United Kingdom), a constitutional bill of rights (as in Australia) or the power of post-enactment constitutional review of legislation (as in Sri Lanka). The danger is that concepts and institutions that appear familiar on the surface are in fact very different in the particular Pacific constitutional system. One judge interviewed for this project commented that the biggest difficulty moving across jurisdictions is that judges see a familiar law and assume that it is the same in the Pacific law as it is at home, warning that foreign judges needed to guard against this assumption.[47] Even where institutions or concepts have been directly transplanted, their meanings are likely to change as they adapt to the different legal and social context of a Pacific island state and the constitutional order established by a new written constitution upon independence.[48]

[44] *Namah v Pato* [2016] PGSC 13.
[45] Ibid [81], citing *Plaintiff S4/2014 v Minister for Immigration and Border Protection* (2014) 243 CLR 219.
[46] Ibid [52].
[47] Interview F23. Two other judges interviewed emphasised that there is no 'pan Pacific' common law: Interviews F4, F17.
[48] Twining, above n 10.

C. Audience

The transnational dimension of foreign judging extends the potential audience of judicial decisions. The primary audience of a constitutional judgment are the litigants within the Pacific state itself. In some cases, however, foreign judges write with an eye to the reception of the judgment in their home state. This is not only evident in cases such as *Namah v Pato*, where the litigation directly affected the interests of the foreign judge's home state, but also manifest in more subtle choices about judicial method. For example, Sir Kenneth Keith, a New Zealand judge who served in Samoa, notes the cautious approach taken by the foreign judges on the Samoan Court of Appeal when referring to debates of the Samoan Constitutional Convention.[49] In *Attorney General v Olomalu*, decided in 1982, the Court made it clear that the drafting history was used 'only to confirm the interpretation already reached' on the text of the *Constitution*.[50] In this it seems that the judges were speaking not only to a Samoan audience, but also to their home jurisdiction of New Zealand, where the common law rules of statutory interpretation did not permit reference to parliamentary materials. This position changed four years later, when Lord Cooke (a member of the bench in *Olomalu*) sitting in his home jurisdiction relaxed the prohibition on the use of Hansard as an aid to statutory interpretation.[51]

It is understandable that foreign judges turn to the common law to interpret the constitutions of Pacific states. The similarities between common law jurisdictions serve to minimise the significance of foreign judges' limited knowledge of the local legal system and maximise the significance of their knowledge of comparative foreign jurisdictions. Appeal to shared, or even universal, principles is one way in which foreign judges can minimise the distance between their expertise in their own legal systems and those of the Pacific.[52] This transnational approach can, however, be self-reinforcing. The effect is seen most dramatically in Vanuatu, where, despite combined colonial legal influences from the British common law and the French civil law, the post-independence law of Vanuatu has been largely Anglicised as a result of the use of Australian, British and New Zealand judges and other forms of assistance from those countries.[53] Foreign judges do not merely utilise similarities between their home jurisdiction and the Pacific legal systems in which they serve, but also *create* similarities in the course of adjudication.

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[49] Kenneth Keith, 'Reflections on Some Pacific Constitutions' (2012) 18 *New Zealand Association for Comparative Law Yearbook* 133, 142–3.
[50] *In re the Constitution, Attorney-General v Olomalu* [1982] WSCA 1.
[51] *Marac Life Assurance Ltd v Commissioner of Inland Revenue* [1986] 1 NZLR 694, 701.
[52] Paul Mitchell, 'The Privy Council and the Difficulty of Distance' (2016) 36(1) *Oxford Journal of Legal Studies* 26, 47–50.
[53] William FS Miles, *Bridging Mental Boundaries in a Postcolonial Microcosm: Identity and Development in Vanuatu* (University of Hawai'i Press, 1998) 166.

IV. Local knowledge gaps

Although it has a transnational dimension, the common law proceeds on a view of law as the expression of the shared values of the community, capable of change as the aspirations, political morality and institutions of the community evolve.[54] Foreign judges face the challenge of adjudicating according to the 'customs, conditions and way of life of the people they are judging'.[55] This Part considers how the difficulty of doing so is reflected in two features of constitutional adjudication in the Pacific: first the limited integration of custom and constitutional law; and secondly the predominantly textual approach to constitutional interpretation.

A. Custom

The readiness of Pacific courts to turn to common law understandings to support constitutional interpretation stands in contrast to their reticence to draw on an alternative source of law, custom. Custom refers to the codes of behaviour and values that constituted the legal systems of Indigenous peoples of the Pacific islands prior to colonisation, and which continue today. In some Pacific states, custom is formally recognised as a source of law by the constitution and in legislation.[56] In several states, there are specialised courts or tribunals to deal with customary matters such as land and titles.[57] Local authorities may have jurisdiction to adjudicate disputes according to custom.[58] Whether formally recognised or not, for many Pacific Indigenous peoples, custom operates alongside common law, statute and constitutional law, interacting in different ways in each national legal system.[59] Custom forms part of the social context in which Pacific constitutions operate. Legal recognition, and the continuing role of custom in Pacific societies, provide grounds for judges to take custom into account in constitutional

[54] Terence Etherton, 'Liberty, the Archetype and Diversity: A Philosophy of Judging' [2010] *Public Law* 727, 733.
[55] Pulea, above n 37, 9. See also Baragwanath, above n 6, 246.
[56] Jennifer Corrin Care and Don Paterson, *Introduction to South Pacific Law* (Routledge-Cavendish, 2nd ed, 2008) ch 3; 'Converging Currents: Custom and Human Rights in the Pacific' (Study Paper SP17, New Zealand Law Commission, 2006) 35–6, appendix 4.
[57] Eg *Native Lands Act 1905* c 133 (Fiji); *Magistrates Court Ordinance* c 52 (Kiribati) Pt VI; *Nauru Lands Committee Act 1956* (Nauru); *Land and Titles Act 1981* (Samoa) pt 6; *Land Act* c 132 (Tonga) pt X; *Native Lands Act* c 46.20 (Tuvalu); *Customary Land Tribunal Act 2001* (Vanuatu).
[58] Eg *Village Courts Act 1989* (PNG); *Village Fono Act 1990* (Samoa); *Local Courts Act* c 9 (Solomon Islands); *Island Courts Act* c 7.32 (Tuvalu); *Island Courts Act 1983* c 167 (Vanuatu).
[59] Corrin Care and Paterson, above n 56, ch 3; Jennifer Corrin, 'Getting Down to Business: Developing the Underlying Law in Papua New Guinea' (2014) 46(2) *The Journal of Legal Pluralism and Unofficial Law* 155.

interpretation. Some scholars go further and argue that not only is it permissible for judges to consider custom,[60] but that they ought to do so.[61]

Custom represents an obvious knowledge gap for foreign judges serving on Pacific courts. It derives from the worldviews of Indigenous peoples of the Pacific,[62] which differ fundamentally from those that produced the legal systems of western democracies with which most foreign judges are familiar. As a very broad generalisation, Pacific cultures, informed by custom, are said to be obligation-based or 'other-orientated', placing the individual, in complex ways, within the context of community.[63] This is contrasted with western understandings of communities as comprising autonomous, rights-bearing individuals.[64] Custom is generally uncodified and changes over time and in response to new circumstances, presenting additional challenges for courts seeking to apply or incorporate custom into their legal decisions. There is a great diversity of custom across Pacific states, and sometimes also across different groups within states, such that in countries like Papua New Guinea and Solomon Islands, citizen judges, like foreign judges, may well lack knowledge of the customs of groups other than their own.[65]

Conscious of the limitations of their knowledge, foreign judges might understandably be reticent to deal too closely with custom.[66] The use of foreign judges is cited as one reason why Pacific courts have been slow to develop an indigenous jurisprudence that draws on both custom and common law.[67] While there are examples of judicial decisions in which judges have read

[60] Alex Frame, 'The Tahitian Pomare Code of 1819: First Steps to Written Law in the Pacific' (Paper presented at the Pacific Judicial Conference, Auckland, 9-12 March 2014).
[61] Jonathan Aleck, 'Beyond Recognition: Contemporary Jurisprudence in the Pacific Islands and Common Law Tradition' (1991) 7 *Queensland University of Technology Law Journal* 137, 143; Bernard Narokobi, 'In Search of a Melanesian Jurisprudence' in Peter Sack and Elizabeth Minchin (eds), *Legal Pluralism: Proceedings of the Canberra Law Workshop VII* (Australian National University, 1986) 215, 227.
[62] As a non-Indigenous person, I do not seek to speak to uniquely Indigenous ways of knowing and experiencing Indigenous custom. For examples from Indigenous writers see Narokobi, *Lo Bilong Yumi Yet*, above n 17, ch 2, 4; Tui Atua Tupua Tamasese Efi, *Su'esu'e Manogi In Search of Fragrance: Tui Atua Tupua Tamasese Ta'isi and the Samoan Indigenous Reference* (Centre for Samoan Studies, National University of Samoa, 2008) ch 14,29.
[63] Teleiai Lalotoa Mulitalo Ropinisone Silipa Seumanutafa, *Law Reform in Plural Societies* (Springer, 2018) 50–1; Iutisone Salevao, *Rule of Law, Legitimate Governance and Development in the Pacific* (ANU E Press, 2005) 122–5.
[64] Farran, above n 24, 102–3.
[65] Eg, *To'ofilu v Oimae* [1997] SBHC 33, Palmer J; 'Converging Currents: Custom and Human Rights in the Pacific', above n 56, 205.
[66] Baird, above n 11, 87; Jean Zorn, 'Custom Then and Now: The Changing Melanesian Family' in Anita Jowitt and Tess Newton Cain (eds), *Passage of Change: Law, Society and Governance in the Pacific* (Pandanus Books, 2003) 95, 97.
[67] Peter MacFarlane, 'Some Challenges Facing Legal Strengthening Projects in Small Pacific Island States' (2006) 4(1) *Journal of Commonwealth Law and Legal Education* 103, 108; Falefatu M Sapolu, 'Adjudicators in Western Samoa' in Guy Powles and Mere Pulea (eds), *Pacific Courts and Legal Systems* (University of the South Pacific and Faculty of Law, Monash University, 1988) 60, 61–2.

constitutions by reference to the customs of the society,[68] such instances are rare and courts generally prefer to resolve the issue on either the text or the common law.[69]

Some scholars have been critical of foreign judges' reticence to draw on custom. Bernard Narokobi writes:

> Expatriate judges often say that they are not nationals and cannot pronounce on custom. If they are serious about such views, they should not have accepted appointment. … On being appointed a judge, a lawyer assumes the duty of facilitating the development of the law of the people. If the expatriate judges are shy about developing indigenous law, they may be excused. But what of judges who are citizens? Perhaps they too can be excused on the grounds they do not know the different laws of the people. But at least they can take more interest in encouraging practising lawyers to present material on the people's laws.[70]

The use of foreign judges is not the only reason for the slow integration of custom through judicial development of the law. As Narokobi indicates, in Papua New Guinea local judges have also been reticent to use custom. Tamanaha, writing about Micronesia, suggests that the failure of the law to become more Micronesian is not because of the use of foreign judges, but because of differences between the 'internal legal attitudes' of lawyers and non-lawyers in a legal system comprising both transplanted western law and local customary law.[71] Other factors include the lack of legislative rules for pleading custom, the failure by advocates to raise issues of custom in submissions to the court, difficulties in ascertaining custom, and the marginalisation of custom in legal education.[72]

Another reason why judges on Pacific courts rarely use custom in the course of constitutional adjudication may be that customary concepts are not expressly included in the constitutional text. In something of a self-fulfilling prophecy, there is evidence in two states that custom was deliberately excluded from the constitutional text partly out of concern that it would fall to be interpreted by foreign judges. In response to a question from a member of the Constitutional Convention of Nauru about whether a judge's responsibility to uphold the law included a duty to uphold custom, the (Australian) constitutional adviser stated that

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[68] *In re the Constitution, Taamale v Attorney-General* [1995] WSCA 1; *Teonea v Kaupule* [2005] TVHC 5.
[69] Examples of constitutional cases in which custom was raised by counsel and considered by courts but rejected or held not to be decisive include: *Taione v Tonga* [2004] TOSC 47; *In re the Constitution, Pita v Attorney-General* [1995] WSCA 6; *In re the Constitution, Attorney-General v Olomalu* [1982] WSCA 1; *Re Somare* [1981] PGSC 23.
[70] Narokobi, *Lo Bilong Yumi Yet*, above n 17, 158–9.
[71] Brian Z Tamanaha, *Understanding Law in Micronesia: An Interpretive Approach to Transplanted Law* (EJ Brill, 1993) 56.
[72] Forsyth, above n 17, 438–443; Mulitalo Ropinisone Silipa Seumanutafa, above n 63, 78; John Nonggorr, 'Development of an "Indigenous Jurisprudence" in Papua New Guinea: The Past Record and Future Prospects' in Jackson Rannells and Jonathan Aleck (eds), *Custom at the Crossroads* (Faculty of Law, University of Papua New Guinea, 1995) 68; Zorn, above n 66, 97–8.

> I think that it would be dangerous to give a Judge of the Supreme Court, particularly for so long as the judge of the Supreme Court is not Nauruan, the power of interpreting custom. He, first of all, wouldn't have the same deep understanding of the custom; and, secondly, he would be bound to interpret it, I think, according to the precedents and procedures of the judicial system within which he worked.[73]

In Samoa, members of the Constitutional Convention and the Constitution Drafting Committee discussed at length ways to recognise customary chiefly institutions in the *Constitution*. The idea was resisted by the international advisers, and one of the arguments used to dissuade local constitution makers was that matters written in the *Constitution* would fall to be interpreted by a court likely to be composed of foreign judges for the foreseeable future.[74]

There are a variety of judicial procedures that courts can use to obtain relevant information on local custom. The Court of Appeal of Samoa has acknowledged that

> The judiciary are deemed to be familiar with the laws of the state in which they sit and to take judicial notice of them; to the extent they lack such knowledge, as is sometimes the case with expatriate judges they must take care with the assistance of counsel to educate themselves in such matters.[75]

Prior to independence, some courts in the Pacific region sat with assessors to provide judges with insights into local conditions. The practices of colonial courts varied: in some, the assessors were European settlers, in others they were chiefs or senior members of the local community.[76] Some aspects of this practice continued into independence, although today assessors generally sit only on criminal cases as a substitute for a jury[77] or to advise judges on customary land matters.[78] Although legislation in some states permits appellate courts to appoint an assessor where it appears that special knowledge is required for the proper determination of the case,[79] it is rare for judges hearing a constitutional matter to sit with assessors.

There are some examples of constitutional cases in which a foreign judge has heard evidence of custom, to establish for example, the authority of customary chiefs in a particular subnational community[80] or the nature of customary norms of gifting and reciprocity in a case concerning

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[73] Territory of Nauru, 'Record of Proceedings of the Constitutional Convention' (15 January 1968), 78.
[74] Lauofo Meti, *Samoa: The Making of the Constitution* (National University of Samoa, 2002); JW Davidson, *Samoa Mo Samoa: The Emergence of the Independent State of Western Samoa* (Oxford University Press, 1967) ch 11.
[75] *Ali'i and Faipule of Siumu District v Attorney General* [2010] WSCA 5.
[76] Jon M Van Dyke, 'The Pacific Judicial Conference: Strengthening the Independent Judiciary and the Rule of Law in the Pacific' (2011) 22(1–2) *Western Legal History* 127, 208.
[77] Eric Colvin, 'Criminal Procedure in the South Pacific' (2004) 8(1) *Journal of South Pacific Law* 18–20; Peter Duff, 'The Evolution of Trial by Judge and Assessors in Fiji' (1997) 21 *Journal of Pacific Studies* 189.
[78] Eg *Land and Titles Act 1981* (Samoa) pt XI; *Land Act* c 132 (Tonga) s 147(1).
[79] *Court of Appeal Act 1980* (Kiribati) s 27(e); *Court of Appeal Act* c 6 (SI) s 28(e); *Court of Appeal Act* c 9 (Tonga) s 22(e).
[80] *Teonea v Kaupule* [2005] TVHC 5.

electoral treating.[81] Alternatively, judges might seek submissions from counsel. There are limitations to both approaches. Evidence is a useful way for judges to obtain knowledge of custom in a transparent manner in open court. However, this approach does risk treating custom in the same way as foreign law – that is, as a matter of fact to be determined on expert evidence – rather than as a matter of law, resonating with wider questions about the extent to which Pacific legal systems accommodate legal pluralism.[82] Secondly, the practicalities of foreign judging in the Pacific mitigate against taking detailed evidence, particularly in appellate courts constituted predominantly or solely by foreign judges. As explained in Chapter 2, Pacific courts of appeal sit part time, with foreign judges visiting for sittings of one to two weeks, during which they hear and usually determine several appeal cases. In very small states, the higher trial courts constituted by foreign judges also sit part time.[83] While courts can adjourn a hearing to receive further evidence or submissions, it is a rare occurrence, and can be avoided, for example, by determining the case on other grounds.[84] Finally, the extent to which courts can rely on counsel to provide information on custom is limited by the knowledge and experience of the advocates before the court. In particular, counsel appearing in constitutional matters are sometimes themselves foreign, briefed because of a shortage of local lawyers or in an effort to obtain advocates with specialist legal expertise. It has also been suggested that foreign counsel might be engaged because the judges of the court are foreign.[85] While local advocates may be in a better position to make submissions on custom, their ability to do so is limited by the realities of legal training and practice, which focus predominantly on the common law.[86]

While not the only explanatory factor, the use of foreign judges, who do not have direct experience of the customs of Pacific societies, is likely to inhibit the judicial development of Pacific jurisprudence drawing upon custom. The risk that then arises is the potential mismatch between law and society, in which the values and norms of the law are different to those of the people.[87] For present purposes, the reticence of Pacific courts to directly draw upon custom in

[81] Keith, above n 49, 137–8.
[82] Jean G Zorn and Jennifer Corrin Care, 'Barava Tru: Judicial Approaches to the Pleading and Proof of Custom in the South Pacific' (2002) 51 *International and Comparative Law Quarterly* 611.
[83] Chapter 2, Part IV.
[84] As in *Ali'i and Faipule of Siumu District v Attorney General* [2010] WSCA 5.
[85] Anthony Mason, 'Reflections of an Itinerant Judge in the Asia-Pacific Region' (2000) 28 *International Journal of Legal Information* 311, 316–17.
[86] See citations in n 17 above.
[87] Brian Z Tamanaha, 'Battle between Law and Society in Micronesia' in Dennis Galligan and Mila Versteeg (eds), *Social and Political Foundations of Constitutions* (Cambridge University Press, 2013) 584, 585.

constitutional adjudication is consonant with the knowledge gap faced by foreign judges serving in Pacific jurisdictions.

B. Constitutional text and values

In the Pacific, as elsewhere, constitutions are framed in general language, in words that are susceptible to more than one meaning. Judges tasked with interpreting the constitution are inevitably faced with choice about the application and meaning of constitutional provisions. Building on scholarship first undertaken by Baird in her study of foreign judging in the Pacific,[88] this section examines some factors that potentially guide foreign judges in that choice. It first demonstrates the predominance of a textual approach to constitutional interpretation in the region, even where constitutional provisions encourage recourse to constitutional principles. It then considers how this approach has a degree of fit with both the knowledge gap, and the knowledge reach, of foreign judges.

On the whole, Pacific courts take a textual approach to constitutional interpretation. Textualism refers to methods of interpretation that draw exclusively or primarily on the meaning of the words of the constitutional provisions. In Pacific courts, it takes two forms. The first is the rule that the meaning of a constitutional provision is to be ascertained by applying the ordinary and clear meaning of the words of the text, permitting courts to go beyond the text only where the words are unclear or ambiguous. As a result, constitutional interpretation begins and, in most cases, ends with the text alone. Where the court determines that the words of the constitution are plain, the court has no need or authority to consider preambles,[89] constitutional principles,[90] implications,[91] or common law rules of statutory interpretation.[92] The second approach is to interpret specific words and provisions in the context of the constitution as a whole. Although not as strictly tied to the constitutional text, this approach does not stray far from textualism

[88] Baird, above n 11.

[89] *In re the Constitution, Mulitalo v Attorney-General of Samoa* [2001] WSCA 8; *Minister for Provincial Government v Guadalcanal Provincial Assembly* [1997] SBCA 1, Goldsbrough JA; *Premdas v The State* [1979] PGSC 20, Wilson J. In Solomon Islands, see Kenneth Brown and Jennifer Corrin Care, 'More on Democratic Fundamentals in Solomon Islands: Minister for Provincial Government v Guadalcanal Provincial Assembly' (2001) 32 *Victoria University of Wellington Law Review* 653, 655–9.

[90] *In re the Constitution, Reference by HE the President* [2002] FJSC 1, Tuivaga P, Tikaram, Eichelbaum and Sapolu JJ; *In re the Constitution, Chaudhary v Qarase* [2002] FJCA 1 although on appeal the Supreme Court took a different approach to constitutional interpretation: *Qarase v Chaudhry* [2003] FJSC 1.

[91] *Speaker v Attorney General* [1987] KIHC 1*; Constitutional Reference No 1 of 1977 Re Rights of Person Arrested or Detained* [1977] PGSC 15, Prentice DCJ.

[92] *Vaikona v Fuko* (No 2) [1990] TOSC 11; *In the Matter of the Constitution and in the Matter of the Dissolution of the Eighteenth Parliament* [2010] NRSC 16 in which Von Doussa J noted that 'ritualistic adherence to established rules of statutory interpretation may be too limiting to ensure a constitution is properly understood and applied', but held it was neither helpful nor necessary to go beyond the words of the text.

because judges tend to cite supplementary material (such as the preamble, principles, or the context of constitution making) in order to confirm an interpretation that is primarily supported by the text.[93]

Textualism stands in contrast to other possible approaches to constitutional interpretation. One alternative, considered in the discussion of custom in Part IV.A above, is to interpret constitutional provisions in light of the social context in which the constitution operates. Another, which is the focus here, is to interpret constitutional provisions in a way that best reflects the principles or values that underlie the constitution.

Constitution makers in Fiji, Papua New Guinea and Tuvalu directed judges towards a principles-based approach by setting out constitutional principles and expressly providing that they guide constitutional interpretation. The preamble of the *Constitution of Papua New Guinea* contains the National Goals and Directive Principles, which cover human development and freedom; equality and participation; national sovereignty and economic self-reliance; the use of national resources; and Papua New Guinean forms of social, political and economic organisation. The National Goals and Directive Principles are non-justiciable,[94] but the *Constitution* provides that laws should be applied in such a way as to give effect to the Principles, or at least not derogate from them, where doing so is reasonable and consistent with the intention of parliament or the *Constitution*.[95] There is some evidence that these provisions were included in the *Constitution* to counter what the Constitutional Planning Committee characterised as a judicial tendency to textualism. In canvassing arguments against judicial enforcement of the constitution, the Committee noted that

> The courts tend to be formalistic and legalistic. While it is true that the Constitution is law, it is a special kind of law. All too often the courts approach the Constitution as if it were like ordinary law. They adopt a literal approach and sacrifice the spirit for the letter of the Constitution.[96]

Against this, the Commission was concerned to ensure that judges take full account of the social goals and values set out in the *Constitution*.[97]

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[93] Eg *Minister for Provincial Government v Guadalcanal Provincial Assembly* [1997] SBCA 1, Kapi P; *In re the Constitution, Attorney-General v Olomalu* [1982] WSCA 1.
[94] *Constitution of Papua New Guinea 1975* s 25(1).
[95] Ibid ss 25(3), 63(3).
[96] Constitutional Planning Committee Papua New Guinea, 'Constitutional Planning Committee Report' (1974) ch 8, [144].
[97] Ibid ch 8, [5], [6].

The 1997 *Constitution of Fiji* included a 'Compact', which, while expressed to be non-justiciable, was to inform the interpretation of constitutional provisions where relevant.[98] The Compact gave expression to the principles for the conduct of government in Fiji, including respect for the rights of individuals and communities, special protections for indigenous Fijian custom, and the equitable sharing of political, economic and commercial power amongst all communities in Fiji.[99] A separate provision directed courts to interpret the *Constitution* in a way that promotes the spirit, purpose and objects of the *Constitution* as a whole.[100] As in Papua New Guinea, the inclusion of an express provision on the approach to constitutional interpretation in the 1997 *Constitution* arose from concerns that 'courts have sometimes placed too much stress on what appeared to be the literal meaning of the words used, without looking at the provision in its context and in light of its purpose and spirit of the constitution as a whole'.[101] The interpretation provision was intended to serve as a reminder to judges to take account of factors beyond the immediate text.

Despite constitutional directives of this kind, judges in Fiji and Papua New Guinea took a textualist approach to constitutional interpretation. In Fiji, the use of the Compact was considered in two cases concerning the power-sharing arrangements in the 1997 *Constitution*. The first case sought an advisory opinion from the Supreme Court on the application of s 64 of the *Constitution*, which set out the mechanism by which members of the opposition were to be appointed to the Senate. Opposition parties which held at least 10% of the seats in the House of Representatives were entitled to nominate persons as Senators. The Leader of the Opposition was required to ensure that the eight Senate seats reserved for opposition parties were filled in proportion to representation of each opposition party in the House of Representatives.[102] Following the 2002 election, only one opposition party, the Fiji Labour Party, held more than 10% of the seats in the House of Representatives. The question was whether all eight seats were to be filled by members of the Fiji Labour Party, or if the other minor parties must also be represented. A majority of judges of the Supreme Court – which was composed of two local judges and judges from New Zealand and Samoa – held that on a plain reading of the provisions of the *Constitution* no question of proportional representation arose where only one opposition party held the requisite 10% of seats in the House of Representatives. Because it reached this

[98] *Constitution of Fiji 1997* s 7.
[99] Ibid s 6.
[100] Ibid s 3(a); *Constitution of Fiji 2013* s 3(1).
[101] Paul Reeves, Tomasi Rayalu Vakatora and Brij V Lal, 'The Fiji Islands: Towards a United Future Report of the Fiji Constitution Review Commission 1996' (Parliamentary Paper No 34 of 1996, Parliament of Fiji, 1996) [5.67].
[102] *Constitution of Fiji 1997* s 64, s 99.

conclusion on a plain reading of the text, the majority did not have recourse to the principles relating to power sharing set out in the Compact.[103] Justice Amet, a judge from Papua New Guinea, dissented. He held that the proper starting point for interpreting an autochthonous constitution is the specific guidelines for interpretation set out in that constitution. He held that the principles of power sharing, together with the spirit of the *Constitution* and the context in which the *Constitution* was drafted directed judges to the true interpretation, which was that the eight Senate seats were to be shared among all opposition parties.[104]

The second case, *Qarase v Chaudhry*, concerned whether the Prime Minister had followed the constitutional requirements to secure a multiparty cabinet.[105] In this case, the Court of Appeal (composed of three judges from New Zealand, and judges from Australia and the United Kingdom) held that the meaning of the text was clear, so there was no scope to consider the principle of equitable power set out in the Compact.[106] The Supreme Court (composed of the Fijian Chief Justice, three judges from Australia and one judge from New Zealand) disagreed on this interpretive method, although not on the result. It stated that it was not appropriate to approach a constitutional text on the basis that the court must find an ambiguity before it can seek guidance from the interpretation provision and statements of principle.[107]

A similar tension is evident in judgements of the Supreme Court of Papua New Guinea, with some judges turning to the National Goals and Directive Principles only in cases of doubt while others have developed a 'principles first' approach. The different approaches emerged early in the court's jurisprudence. In the 1979 case of *Premdas v Papua New Guinea*, Justice Wilson, an Australian, adopted the orthodox textual approach that where there is no doubt as to the meaning of a constitutional provision, it is unnecessary and inappropriate to refer to the Principles.[108] The contrasting approach was explained by Justice Barnett, also an Australian, albeit one who had worked as a lawyer in Papua New Guinea:

> It seems to me that the Constituent Assembly gave a clear direction to courts interpreting constitutional laws. That direction is to reverse the previous conservative approach to statutory interpretation which tends to commence the task by a detailed and literal study of the words used, turning to some 'deemed' intention of the legislature only in cases of verbal ambiguity or internal conflict. That direction is to enlighten the judicial mind first and

[103] *In re the Constitution, Reference by HE the President* [2002] FJSC 1, Tuivaga P, Tikaram, Eichelbaum and Sapolu JJ.
[104] Ibid, Amet J.
[105] *Constitution of Fiji 1997* s 99.
[106] *In re the Constitution, Chaudhary v Qarase* [2002] FJCA 1.
[107] *Qarase v Chaudhry* [2003] FJSC 1.
[108] *Premdas v Papua New Guinea* [1979] PGSC 20, Wilson J.

> then examine the actual words used from the viewpoint of that enlightened mind. It must be a mind striving to give effect to the National Goals and Directive Principles.[109]

Vergil Narokobi has traced how the differences in approach persist, with the textual approach prevailing in most cases, with the result that, in his view, the court has failed to fulfil its duty to implement the National Goals and Directive Principles.[110]

Constitutional values, and their interpretation by foreign judges, assume different dimensions in Tuvalu. The *Constitution of Tuvalu 1986* sets out seven constitutional principles, many of which emphasise the importance of Tuvaluan values. The third principle states that

> The people of Tuvalu recognise and affirm … that the stability of Tuvaluan society and the happiness and welfare of the people of Tuvalu, both present and future, depend very largely on the maintenance of Tuvaluan values, culture and tradition, including the vitality and the sense of identity of island communities and attitudes of co-operation, self-help and unity within and amongst those communities.[111]

The sixth principle states that the 'life and laws of Tuvalu should … be based on respect for human dignity, and on the acceptance of Tuvaluan values and culture, and on respect for them'. The Principles are 'part of the basic law of Tuvalu, from which human rights and freedoms derive and on which they are based'.[112] A specific provision on constitutional interpretation requires the *Constitution* to be interpreted and applied consistently with the Principles, and subject to this, in 'such a way as to achieve the aims of fair and democratic government, in the light of reason and experience and of Tuvaluan values'.[113] Levine characterises this approach as a way to constrain the judiciary, which has always comprised foreign judges, from 'imprinting their own particular philosophies on constitutional language'.[114]

This approach to constitutional drafting has presented the judges of the Tuvaluan courts, all of whom are foreign, with challenges. The primary example is *Teonea v Pule o Kaupule of Nanumaga*[115] in which the courts had to decide whether the *Falekaupule*, the local island authority, had the power to ban the establishment of new religions on their island. The *Falekaupule* resolved to prohibit new religions out of concern that they caused division and

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[109] *Constitutional Reference No 3 of 1987, Reference by Simbu Provincial Executive* [1987] PGSC 17. See also *State v Independent Leadership Tribunal; Ex Parte Sasakila* [1976] PNGLR 491, Kearney J.
[110] Vergil Narokobi, *The Implementation of Papua New Guinea's National Goals and Directive Principles and Basic Social Obligations* (PhD thesis, Victoria University of Wellington, 2016) 68–81. See also Peter J Bayne, 'Judicial Method and the Interpretation of Papua New Guinea's Constitution' (1980) 11 *Federal Law Review* 121.
[111] *Constitution of Tuvalu 1986*, Preamble.
[112] Ibid s 13.
[113] Ibid ss 4(2), (3).
[114] Stephen Levine, 'Constitutional Change in Tuvalu' (1992) 27(3) *Australian Journal of Political Science* 492, 502.
[115] *Teonea v Kaupule* [2005] TVHC 5; *Teonea v Pule o Kaupule of Nanumaga* [2009] TVCA 2.

conflict within the community. The *Constitution*, anticipating such concerns, included an express limitation on the freedoms of religion and expression, permitting laws that restrict the right to spread beliefs or communicate ideas which might be divisive, unsettling or offensive to the people or directly threaten Tuvaluan values and culture.[116] Chief Justice Ward, a citizen of the United Kingdom with long judicial experience in several Pacific states, held at first instance that the *Falekaupule* was entitled to impose the ban on new religions. The Court of Appeal, composed of three judges from New Zealand, overturned this decision by majority and held the ban was unconstitutional. The inclusion of constitutional principles, covering both respect for rights and the maintenance of Tuvaluan values, culture and tradition, effectively precluded a textual approach to constitutional interpretation. Judges instead had to balance competing constitutional values to decide whether the constitutional right had been infringed. Justice Tompkins, like Chief Justice Ward in the High Court below, found that the *Falekaupule* had come to its decision in the exercise of its traditional decision-making powers on legitimate grounds. Noting the constitutional framework, these judges came to the view that the protection of Tuvaluan values and customs should be the dominant consideration.[117] In contrast, the judges in the majority on the Court of Appeal sought to balance the competing values, enshrined in the Constitution, of respect for traditional authority and freedom of religion. The case demonstrates the potential 'contradictions' that result from a constitution that seeks to enshrine both customary values and values deriving from western constitutionalism.[118] Resolving such tensions is difficult for any judge, but perhaps more so for a foreign judge, who has only the text and cannot draw on personal knowledge of the pluralist constitutional system to assist in arriving at, and communicating, a controversial decision to the community.

This study of cases from Fiji, Papua New Guinea and Tuvalu shows that the methods of constitutional interpretation adopted by individual judges vary. Some are tightly tied to the text, while others expressly draw on local context and values. It also shows that there is no neat distinction between foreign judges and local judges in their approaches to constitutional interpretation. There are differences within and across each cohort, with examples of local and foreign judges taking strongly textual approaches, and local and foreign judges taking principles-based approaches. Despite the variation, the generally accepted, orthodox approach is clearly

[116] *Constitution of Tuvalu 1986* s 19(4), (5).
[117] *Teonea v Pule o Kaupule of Nanumaga* [2009] TVCA 2 [35], Tompkins JA; *Teonea v Kaupule* [2005] TVHC 5, Ward CJ.
[118] Described in the Samoan context by Malama Meleisea, *The Making of Modern Samoa: Traditional Authority and Colonial Administration in the History of Western Samoa* (Institute of Pacific Studies, University of the South Pacific, 1995) 208 but the observation is applicable to other Pacific contexts.

textualist, with only a few judges taking a principles-based approach, and then usually in dissent.[119]

The textualist approach to constitutional interpretation taken by Pacific courts fits with both dimensions of knowledge attributed to foreign judges. The first is the knowledge gap that foreign judges face. Textual approaches are motivated in part by distrust of judicial law-making.[120] They seek to limit judicial discretion in interpretation out of concern that the judge's subjective views will come to displace the intentions of the legislator or constitution makers. Textualism casts the judge's role as a technical one, such that the judge's personal views – and the judge's background and nationality (to the extent they are thought to influence those views[121]) – do not matter. Textualism, and its relationship to a judge's nationality, is illustrated by Chief Justice Ward in the Tongan case of *Attorney-General v Namoa.*[122] In that case, a member of the Tongan parliament and an academic publicly criticised a decision made by a foreign judge of Tonga's Supreme Court, saying that the case should have been heard in the Land Court where an assessor could have 'clarified matters to the Chief Justice pertaining to how we live as Tongans, our culture and our connection to the land'. One discussant went further and noted that the judges had since left Tonga and suggested that the King should intervene because 'this King does not accept a Chief Justice or a foreigner to come here and want to make decisions concerning the land of this country'. Chief Justice Ward ruled that this second comment amounted to a contempt of court, because there was a real risk that it would diminish the authority of the court. He stated that:

> The judges are here to apply the law as it stands and, if that law is such that it is necessary to be Tongan to understand its true meaning, I would venture to suggest it is poorly worded. If the law is clear in its terminology, the nationality of the judge will have no effect upon his interpretation.[123]

In this way, textualism purports to offer a value-free method of constitutional interpretation: if the language of the law is clear, it should make no difference whether a local or foreign judge interprets it. One criticism, however, is that reference only to the text serves to conceal, rather than eliminate, the choices that judges inevitably make when determining the meaning and

[119] *In re the Constitution, Reference by HE the President* [2002] FJSC 1, Amet J; *Constitutional Reference No 3 of 1987, Reference by Simbu Provincial Executive* [1987] PGSC 17, Barnett J. See also *Guadalcanal Provincial Assembly v Speaker of National Parliament* [1997] SBHC 5.
[120] Goldsworthy, above n 3, 690.
[121] The idea of a connection between a judge's identity characteristics or background is developed most extensively in the literature on a reflective judiciary: see Rachel J Cahill-O'Callaghan, 'Reframing the Judicial Diversity Debate: Personal Values and Tacit Diversity' (2015) 35(1) *Legal Studies* 1; Erika Rackley, *Women, Judging and the Judiciary: From Difference to Diversity* (Routledge, 2013) 27–8.
[122] *Attorney-General v Namoa* [2000] TOSC 13.
[123] Ibid.

application of a constitutional provision.[124] It allows judges to 'escape from the somewhat awful responsibility of interpreting the community to itself, a responsibility which [common law] judges … have always had.'[125] Although the idea of the law as a reflection of the community's values is strong in the common law tradition,[126] foreign judges might understandably be reluctant to take on this role. How can judges who are not part of the community have knowledge of the nation's history, culture, legal system and political morality sufficient to 'interpret the community to itself'? The difficulty is apparent even where constitutions provide guidance on values in the constitutional text, partly in order to assist foreign judges who may be 'hampered in their attempt to contextualise [constitutional] rights by lack of knowledge of cultural nuance'.[127]

The second point of fit between foreign judging and the predominantly textual approach to constitutional interpretation is that foreign judges are likely to bring the orthodoxies of their home jurisdictions to bear on constitutional interpretation in the Pacific.[128] As comparative scholars acknowledge, it is difficult, if not impossible, to shed the deeply ingrained assumptions, practices and understandings of one's own legal system when coming to consider another.[129] The four countries from which most foreign judges are drawn are Australia, New Zealand, Sri Lanka and the United Kingdom. Legalism, in which interpretation proceeds on the ordinary meaning of the text supplemented by other legal sources, is a common approach of the Australian High Court to constitutional interpretation.[130] Judges from New Zealand and the United Kingdom, countries without an entrenched written constitution, are also likely to draw on the traditional rules of statutory interpretation that apply in their home jurisdictions.[131] Finally, constitutional review of post-enactment legislation is not possible in Sri Lanka, and this is likely to shape how Sri Lankan judges approach constitutional cases in Fiji.[132]

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[124] Frederick Schauer, 'Formalism' (1987) 97 *Yale Law Journal* 509, 511–17.
[125] Bayne, above n 38, 219, 221; citing KS Jacobs, 'Lawyers' Reasonings: Some Extra-Judicial Reflections' (1965) 5 *Sydney Law Review* 425, 428.
[126] Etherton, above n 54, 733.
[127] Jennifer Corrin, 'Breaking the Mould: Constitutional Review in Solomon Islands' (2007) 13 *Revue Juridique Polynésienne* 143, 149.
[128] Bayne, above n 110, 166.
[129] Gunter Frankenberg, 'Critical Comparisons: Re-Thinking Comparative Law' (1985) 26 *Harvard International Law Journal* 411.
[130] Cheryl Saunders and Adrienne Stone, 'The High Court of Australia' in András Jakab, Arthur Dyevre and Giulo Itzcovich (eds), *Comparative Constitutional Reasoning* (Cambridge University Press, 2017) 36, 50.
[131] In New Zealand and the United Kingdom, the approach to statutory interpretation used to be formalistic, but is now purposive: *Pepper v Hart* [1993] AC 593, 617; *Interpretation Act 1999* (NZ) s 5(1).
[132] Sri Lankan citizens have sat only on courts in Fiji since 2009 and have heard few constitutional matters.

V. The role of local judges in bridging the national and transnational

This Chapter has identified characteristics of constitutional adjudication which are explicable, in part, by the extensive use of foreign judges on courts of constitutional jurisdiction. It is not possible to say whether a judiciary wholly comprising local judges would have led to significant differences in approach. Styles of constitutional adjudication are influenced by too great a variety of factors to pinpoint a single cause. It is possible, however, to identify a sense that local judges are understood to have different knowledge and authority because they are *local* judges.

Several judges interviewed noted the benefits of sitting with local judges on panels of the courts of appeal. They were seen to provide the court with local knowledge and a better understanding of custom and tradition[133] and to foster a sense of the court as belonging to the nation and its people.[134] These potential benefits are, however, limited by actual practice. The composition of courts of appeal varies across the Pacific. In states where there are few or no local judges, it is often not possible to include local judges on panels. In Fiji, Samoa, Solomon Islands and Vanuatu, panels of local and foreign judges are becoming more common on courts of appeal. In Papua New Guinea, the extent of localisation means that foreign judges now sit on constitutional cases in smaller numbers and always with local judges, and sometimes not at all.[135]

Another way in which the knowledge of local judges is recognised arises when foreign judges defer to or expressly endorse the decisions of local judges. As a general rule in common law systems, judges in appeal cases will defer to courts below on issues of fact and evaluative judgment, on the basis that the primary decision maker has had the benefit of hearing the evidence first hand. In some cases, judges on Pacific courts have added the circumstances of foreign judging as a reason to respect the findings of a court below. One example is a decision of the Court of Appeal of Kiribati, constituted by a bench of two judges from New Zealand and one from Australia, concerning a dispute about land boundaries. The Court of Appeal upheld the decisions of two magistrates at first instance and of the Chief Justice, assisted by local magistrates, on appeal. In doing so, the Court of Appeal noted that 'it would be a rare case indeed where expatriate judges could reverse such concurrent findings, and this is manifestly not such a case.'[136] In *Teonea v Nanumaga*, the Tuvaluan freedom of religion case discussed above, Justice Tomkins on the Court of Appeal noted as a 'significant consideration' that

> An impressive body of those very familiar with Tuvaluan culture has concluded that … the introduction of the [new] church may be divisive, unsettling, or offensive to the Nanumaga

[133] Interviews F1, F2, F7, F12, F20.
[134] Interviews F1, F7.
[135] Chapter 2, Part VI.
[136] *Temarewe v Tekautu* [2017] KICA 1.

> community. The Falekaupule itself, … the Attorney General and the Chief Justice, who has had many years in this role in Tuvalu, have all reached that conclusion. In the face of these views of what is in essence a matter of fact, it would not be appropriate for an appellate court with no prior knowledge of Tuvalu or its culture to overrule that factual finding.[137]

This approach reflects the 'double concurrence principle' developed by the Privy Council when considering appeals from India and other dominions, which held that the court would not depart from concurrent findings of fact from local courts below without strong grounds.[138] Justice Tomkins appears to extend it to defer also to other local decision makers.[139]

In Samoa, the Court of Appeal, which until very recently was composed only of foreign judges, gave weight to local Samoan judges of the Supreme Court in cases on the sensitive issue of banishment. Banishment is a custom in Samoa, which in the past occurred when village authorities ordered a person or family to leave the village. In a series of cases, Samoan courts have considered whether banishment offends the constitutionally protected right to freedom of movement.[140] In *Taamale v Attorney General*, the Court of Appeal, comprised of three judges from New Zealand, held that the power to order banishment, now exercised by the Land and Titles Court, was constitutional.[141] In its decision, the Court of Appeal extracted long quotations from the decision of Chief Justice Sapolu, a Samoan, in the Supreme Court below, which set out the role and function of banishment in Samoan society. The Court of Appeal agreed with the Chief Justice that banishment was a reasonable restriction imposed by law in the interests of public order. The extended quotation of Chief Justice Sapolu's findings and analysis assisted the Court of Appeal to speak with authority on the place of banishment in contemporary Samoan society and law, matters otherwise outside of their direct knowledge and experience. It stands in contrast to the approach of former foreign judges, one of whom had issued a unilateral practice direction that banishment was unconstitutional.[142]

The Court of Appeal in *Taamale* explicitly left open the prospect for future change, noting that 'like the Chief Justice, we by no means exclude the prospect that as … Samoan society continues to develop the time may come when banishment will no longer be justifiable'.[143] Ten years later, the Court of Appeal revisited the issue, this time to consider whether village councils themselves could order banishment. This time, Justice Va'ai, a Samoan judge of the Supreme Court, had

[137] *Teonea v Pule o Kaupule of Nanumaga* [2009] TVCA 2 [34], Tompkins JA.
[138] *Devi v Roy* [1946] AC 508 [13].
[139] This element of deference in *Teonea v Nanumaga* is discussed in Chapter 7, Part IV.
[140] *Constitution of Samoa 1960* s 13.
[141] *In re the Constitution, Taamale v Attorney-General* [1995] WSCA 1.
[142] Meleisea, above n 118, 231.
[143] *In re the Constitution, Taamale v Attorney-General* [1995] WSCA 1.

decided that village councils did not have authority to order banishment, under either legislation or custom, leaving the power solely in the hands of the Land and Titles Court.[144] The Court of Appeal upheld that decision, stating:

> We agree with Va'ai J that to go further by holding that a village council also ha[s] the power [of banishment], would be 'tantamount to winding back the clock of progress'. And we are fortified in our ruling by noting that it is one of Samoa's own indigenous Supreme Court Judges who has said as such.[145]

The Samoan Court of Appeal has taken a cautious approach to constitutional adjudication, confining its role to the determination of legal issues and leaving policy changes, especially those affecting custom, to the legislature.[146] These cases fit that trend. However, they also show how the Court of Appeal uses the findings of local judges to more confidently uphold developments in constitutional law as reflective of changing social attitudes. As members of the local community and as judges with legal qualifications and professional experience, local judges can serve to bridge real or perceived distance between the law, as it is interpreted and applied by foreign judges, and the national community.

VI. Conclusion

Constitutional adjudication in the Pacific is characterised by three general features: first, the reliance on the common law to inform understandings of constitutional concepts and institutions; secondly, the limited integration of custom and constitutional law; and thirdly, a predominantly textualist approach to constitutional interpretation.

This Chapter has shown how each of these characteristics is consistent with the extensive use of foreign judges on courts of constitutional jurisdiction in the region. Emphasising the common law foundations shared between foreign judges' home jurisdictions and the Pacific states in which they sit, serves to close the gap between foreign judges' expert knowledge of their home legal systems and more limited knowledge of Pacific legal systems. It minimises the significance of foreign judges' knowledge gap and maximises the significance of their knowledge reach into comparative foreign jurisdictions.

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[144] *Leituala v Mauga* [2004] WSSC 9.

[145] *Mauga v Leituala* (Samoa Court of Appeal, unreported, March 2005), extracted in Leulua'iali'i Tasi Malifa, 'Village Fono Act Reforms: Paper Presented at Samoa Law Society Biennial Law Symposium' *Samoa Observer* (Apia, Samoa), 20 December 2015 <http://www.samoaobserver.ws/en/20_12_2015/sunday_reading/491/Village-Fono-Act-Reforms.htm>. See also *Punitia v Tutuila* [2014] WSCA 1 (Samoa Court of Appeal, 31 January 2014).

[146] AH Angelo, '"Steady as She Goes": The Constitution and Court of Appeal of Samoa' (2012) 18 *New Zealand Association for Comparative Law Yearbook* 145. The implications of this cautious approach for the representative function of the court is discussed in Chapter 7, Part IV.

Shrinking the bounds of the constitution by excluding customary institutions and practices from the text and minimising the role of custom in constitutional matters also reflects the use of foreign judges. Foreign judges, particularly those drawn from outside the Pacific region, are unlikely to have knowledge of customary legal rules and institutions and the values on which they are based. Foreign judges are understandably reticent to directly draw upon custom in constitutional adjudication, or to make assumptions about its continuing influence on community life. Recognising this, constitution makers and judges themselves developed understandings of the constitution as separate from local custom.

Finally, the predominantly textual approach fosters an understanding of constitutional adjudication as a largely technical activity, in which the task of the judge is to interpret and apply the text of the constitution. It minimises the sense that judges might create new legal understandings by drawing on national aspirations, community values or social context – all of which are unlikely to be within the direct knowledge and experience of foreign judges. The strength of textualism can be seen in its persistence even where the text of the constitution expressly sets out principles and values to guide constitutional interpretation.

Each of these features is not unique to courts composed of foreign judges: many courts around the world (mostly comprising citizen judges) adopt a form of textualism as the preferred method of constitutional interpretation, while courts in common law jurisdictions regularly refer to shared common law concepts and doctrines in the course of constitutional adjudication. One explanation for the use of such techniques by Pacific courts is not that judges on those courts are outsiders, but rather that as foreign judges they bring the orthodoxies of their home jurisdictions to bear on constitutional adjudication in the Pacific, orthodoxies which are then reinforced through the operation of precedent and in legal education.

I do not claim that foreign judges in the Pacific consciously take a deliberately different approach to constitutional adjudication. Only occasionally, when judges expressly situate themselves as foreign or expatriate judges or emphasise the views of a local judge, are there hints that judges themselves tailor their role around their foreignness. Instead, the analysis in this Chapter is directed to understanding the ways in which the use of foreign judges might, at least in part, influence the contours of constitutional adjudication and the development of constitutional law in the Pacific.

CHAPTER 6
JUDICIAL IMPARTIALITY AND INDEPENDENCE

I. Introduction

The use of foreign judges raises distinctive issues about the impartiality and independence of judiciaries which are not fully covered in the existing literature or international guidelines on judicial independence. Some of these issues arise as a consequence of attributes of foreignness (such as the claim that as outsiders, foreign judges are more impartial than local judges), others from the practice of foreign judging as it arises in the Pacific (such as the appointment of foreign judges on short renewable contracts). Some of these issues are unique to foreign judges, while others resonate with issues encountered by judiciaries elsewhere.

The courts of Pacific island states are often overlooked in global studies of judicial independence.[1] The distinctive conditions in which Pacific courts operate, including the circumstances of small island developing states, post-colonialism and the use of foreign judges, are rarely accounted for in the global standards on judicial independence developed by a range of international bodies over the last thirty years. Part II of this Chapter therefore develops an understanding of judicial impartiality and independence that sufficiently accommodates foreign judging and the circumstances of Pacific states. The practice of foreign judging opens judiciaries up to a range of potential sources of influence beyond the government of the Pacific state in which the judges serve. It also highlights the ways in which the personal attributes of individual judges, including their citizenship, interact with institutional and legal structures for judicial independence in the Pacific state and in judges' home states. It therefore requires an understanding of judicial independence that adapts the standards of impartiality, as well as structural and behavioural forms of independence, to the context of Pacific states.

From this basis, Parts III and IV assess the effect that the use of foreign judges has on the impartiality and independence of Pacific judiciaries respectively. A common justification for the use of foreign judges is that they bring, or are seen to bring, a greater degree of impartiality than local judges. In Part III, I argue, contrary to this claim, that the impartiality of local judges is not compromised by their membership of the small Pacific communities they serve and that foreign judges, as a class, should not be considered more impartial than local judges by virtue of their distance from the local community.

[1] An exception is HP Lee and Marilyn Pittard (eds), *Asia-Pacific Judiciaries: Independence, Impartiality and Integrity* (Cambridge University Press, 2017) which includes chapters on Fiji and Vanuatu.

While such claims about the impartiality of foreign judges have been overstated, the risks to judicial independence posed by the widespread appointment of foreign judges on short renewable contracts and their vulnerability to arbitrary removal from office have not been adequately addressed. In Part IV, I assess whether the appointment of foreign judges on short renewable contracts is justified, and whether the risks to judicial independence are ameliorated by mitigating factors such as the kinds of persons appointed foreign judges and the independence of the authority responsible for renewing judicial appointments. Part IV also assesses the risks to judicial independence that arise from the susceptibility of foreign judges to arbitrary removal. I argue that both practices pose a risk to judicial independence because they expose foreign judges to the risk of undue influence from the governments of Pacific states and authorities involved in the appointment of judges, as well as external organisations that fund and recruit foreign judges.

II. Assessing judicial impartiality and independence

Theories of judicial impartiality and independence, and the ways in which these qualities are met in practice, are anchored in particular contexts and legal systems. This section defines judicial impartiality and independence and outlines how these concepts ought to be understood in the context of Pacific states and the attitudes and values of the communities that Pacific judiciaries serve.

A. Components

Judicial independence and impartiality are overlapping but distinguishable concepts.[2] Judicial impartiality requires that a judge is not biased towards a party or the outcome of the case before him or her. It is generally measured by reference to the conduct, attitudes and beliefs of individual judges in relation to a particular case before the court.[3] Judicial independence, on the other hand, refers to the relationship between the judiciary as an institution and other social and political actors.[4] It seeks to ensure that judges are not subject to improper influences from social actors such as the media or lobby groups but most significantly from the political branches of government.

[2] *Valente v R* [1985] SCR 673 (Supreme Court of Canada).
[3] Christopher M Larkins, 'Judicial Independence and Democratization: A Theoretical and Conceptual Analysis' (1996) 44(4) *American Journal of Comparative Law* 605, 609.
[4] Peter H Russell, 'Toward a General Theory of Judicial Independence' in Peter H Russell and David M O'Brien (eds), *Judicial Independence in the Age of Democracy: Critical Perspectives from Around the World* (University Press of Virginia, 2001) 6.

Judicial impartiality and independence can be measured by reference to institutional structures and judges' behaviour.[5] Structural measures focus on the legal frameworks, court procedures and the formal conditions of judicial service which seek to insulate individual judges and the judiciary as a whole from improper influences.[6] These frameworks relate to methods for appointing and removing judges and the terms of judicial service, and the extent to which a judiciary controls its own budget, administration and procedures. In contrast, behavioural measures focus on the conduct of judges and judiciaries that demonstrates their autonomy, impartiality and independence.[7] It is measured by personal qualities and actions of individual judges which show that they are in fact free from undue influence and capable of making impartial decisions.[8]

Structural and behavioural understandings of judicial impartiality and independence interact in particular ways for foreign judges. Foreignness is thought to bring with it particular behavioural qualities, including, most relevantly here, impartiality. In addition, weaknesses in the structural safeguards for judicial independence in Pacific states, such as the appointment of foreign judges on short renewable contracts, are sometimes thought to be ameliorated by the strength of structural independence in foreign judges' home states. The analysis in this Chapter therefore encompasses both structural and behavioural measures, as interacting components of judicial impartiality and independence.

B. The purpose of judicial impartiality and independence

Judicial impartiality and independence are instrumental to the core judicial function of determining disputes according to law, the separation of powers and public confidence in the courts.

The judge's position as an independent and impartial adjudicator is central to the 'logic' of courts: people will entrust courts to resolve their disputes only if they are assured that the judge is not partial to one party over the other and has no interest in the outcome of the case.[9] The

[5] Ibid; Stephen B Burbank and Barry Friedman, 'Reconsidering Judicial Independence' in *Judicial Independence at the Crossroads: An Interdisciplinary Approach* (Sage Publications, 2002) 16.
[6] Larkins, above n 3, 609.
[7] Russell, above n 4, 6; John Ferejohn, 'Independent Judges, Dependent Judiciary: Explaining Judicial Independence' (1999) 72 *Southern California Law Review* 353, 353.
[8] Roderick A MacDonald and Hoi Kong, 'Judicial Independence as a Constitutional Virtue' in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, 2012) 833. See also David Pimental, 'Reframing the Independence v Accountability Debate: Defining Judicial Structure in Light of Judges' Courage and Integrity' (2009) 57 *Cleveland State Law Review* 1.
[9] Mauro Cappelletti, *The Judicial Process in Comparative Perspective* (Clarendon Press, 1989) 31; Martin M Shapiro, *Courts, A Comparative and Political Analysis* (University of Chicago Press, 1981) 8.

independence of courts seeks to ensure that judges determine disputes based only on the principles of law and the facts of the case, such that all people are treated equally before the law and the law is applied in a consistent way. An independent and impartial judiciary is therefore necessary to the rule of law.

Judicial independence is also important to the separation of powers, which seeks to ensure that the branches of government – the legislature, executive and judiciary – do not abuse or exceed the constitutional limits of their powers. Courts of constitutional jurisdiction in all nine Pacific states have the power of judicial review, by which the court can declare legislation and executive actions invalid on the ground that they are inconsistent with the constitution. In order to be effective in this constitutional role, the judiciary must have an appropriate degree of independence from the other branches of the government. Without an independent arbiter, there is a risk that conflicts about constitutionality will be decided in accordance with the political inclinations of elected representatives, rather than in accordance with the constitution.[10]

Judicial independence and impartiality are also necessary to public confidence in the judiciary. People are unlikely to seek to resolve disputes, including constitutional disputes, through the court or accept a court's decision where they are concerned that the court will not give them a fair and impartial hearing. As such, judicial independence is a prerequisite for effective legal regulation. On this basis, judicial independence is sometimes also characterised as instrumental to the achievement of other outcomes. For example, literature on rule of law development often characterises judicial independence as instrumental to the economic growth of developing states, because investors require confidence in the systems of legal regulation.[11]

C. Standards

The written constitutions of each of the nine Pacific states reflect these values of judicial impartiality and independence. They all contain express guarantees that criminal matters, and sometimes also civil disputes, will be heard by an independent and impartial tribunal,[12] drawing

[10] Dieter Grimm, *Constitutionalism* (Oxford University Press, 2016) ch 9, 220.
[11] Kenneth W Dam, *The Law-Growth Nexus: The Rule of Law and Economic Development* (Brookings Institution Press, 2006) ch 5; Ibrahim FI Shihata, *The World Bank in a Changing World* (M Nijhoff Publishers, 1991).
[12] *Constitution of Fiji 2013* s 15; *Constitution of Kiribati 1979* ss 10(1), (8); *Constitution of Nauru 1968* s 10(2), (9); *Constitution of Papua New Guinea 1975* ss 37(3), 59(2); *Constitution of Samoa 1960* s 9(1); *Constitution of Solomon Islands 1978* s 10(1); *Constitution of Tonga 1875* s 15; *Constitution of Tuvalu 1986* s 22(2), (11); *Constitution of Vanuatu 1980* s 5(2).

on the right to a fair trial enshrined in international human rights instruments.[13] These constitutional guarantees emphasise the value of an impartial adjudicator for the fair resolution of disputes. In addition, two written constitutions expressly provide for the independence of the judiciary from other branches of government. The *Constitution of Fiji* states that 'all judicial officers are independent of the legislative and executive branches of government and subject only to the Constitution and the law'.[14] The *Constitution of Papua New Guinea* states that neither the Minister responsible for justice nor another person or authority, other than the parliament through legislation, has power to give directions to the court in respect of the exercise of judicial powers or functions.[15] Even where the written constitution contains no express language of this kind, the independence of the judicial branch from the political branches is considered an essential component of the system of government.[16]

While judicial impartiality and independence are universally recognised as important, there is no single, uniform standard by which to measure them. There are different views on the ends to which judicial impartiality and independence are directed and how those ends might be achieved.[17] Judicial impartiality and independence might be balanced against other values that serve the ends of rule of law and separation of powers, including the need for consistency in adjudication and some form of judicial accountability.[18] The rules and structures that support an independent and impartial judiciary therefore vary across different constitutional systems, informed by the practical realities in which courts operate, including the size and wealth of the state, its history, and understandings of the court's role in the constitutional system.[19]

The legal rules, institutional arrangements and conduct required to support judicial impartiality and independence have been derived from constitutional texts, the common law, and scholarship. In an effort to identify universal minimum standards, several international

[13] *Universal Declaration of Human Rights* (1948) art 10; *International Covenant on Civil and Political Rights* (1966) art 14. The exception is the *Constitution of Tonga 1875* s 15 which instead requires that courts and judges be 'unbiased'.
[14] *Constitution of Fiji 2013* s 97(2).
[15] *Constitution of Papua New Guinea 1975* s 157.
[16] *Kenilorea v Attorney General* [1984] SBCA 4.
[17] Luc Heuschling, 'Why Should Judges Be Independent? Reflections on Coke, Montesquieu and the French Tradition of Judicial Dependence' in Katja S Ziegler, Denis Baranger and AW Bradley (eds), *Constitutionalism and the Role of Parliaments* (Hart Publishing, 2006) 220.
[18] Larkins, above n 3, 618; Sanford Levinson, 'Identifying "Independence"' (2006) 86 *Boston University Law Review* 1297, 1299; Peter H Russell, 'A General Theory of Judicial Independence Revisited' in Adam Dodek and Lorne Sossin (eds), *Judicial Independence in Context* (Irwin Law, 2010) 599, 12.
[19] Antony Allott, 'The Independence of the Judiciary in Commonwealth Countries: Problems and Provisions' (1994) 20(4) *Commonwealth Law Bulletin* 1428, 1431; Daniel Smilov, 'The Judiciary: The Least Dangerous Branch?' in Michel Rosenfeld and Andras Sajo (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, 2012) 859, 860–2.

associations have developed guidelines for judicial impartiality and independence. Four such guidelines have particular relevance to the Pacific, two because of their global acceptance, and two because they arose from regional or international processes that included Pacific states.

The *Basic Principles on the Independence of the Judiciary* were developed by United Nations bodies in the early 1980s.[20] They set out the duty of judges to decide cases impartially and according to law and proscribe improper interference in judicial decision-making by state and private entities. The Principles themselves deal mainly with matters of structural independence, covering critical aspects of the selection, appointment, discipline, remuneration, tenure and removal of judges. The *Basic Principles* have become the standard reference point for international and regional human rights bodies and those engaged in reviewing and reforming national judiciaries.

The *Bangalore Principles of Judicial Conduct* were developed in 2002 by an international group of judges.[21] In contrast to the *Basic Principles*, the *Bangalore Principles* emphasise behavioural independence. The document identifies six values of judicial conduct – independence, impartiality, integrity, propriety, equality, and competence and diligence – and sets out ways to support each. The *Bangalore Principles* were endorsed by the United Nations Economic and Social Council in 2006 as complementary to the *Basic Principles*.[22] They have been affirmed by nine Chief Justices in the Pacific region and have been used in several states as the basis for guidelines for judicial conduct.[23]

The *Latimer House Principles on the Accountability of and the Relationship between the Three Branches of Government* were adopted by the Commonwealth heads of government, including each of the nine Pacific Commonwealth member states, in 2003.[24] The *Latimer House Principles* and supplementary Guidelines define the roles of each of the three branches of government in Commonwealth countries. In doing so, they set out structural requirements to secure judicial

[20] *Basic Principles on the Independence of the Judiciary,* adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.
[21] *Bangalore Principles of Judicial Conduct,* Judicial Group on Strengthening Judicial Integrity, The Hague, 25-26 November 2002.
[22] United Nations Economic and Social Committee, resolution 2006/23 of 2006.
[23] Pacific Judicial Development Programme, *Toolkit for Review of Guidance on Judicial Conduct* (Federal Court of Australia and New Zealand Ministry of Foreign Affairs and Trade, 2014) 13.
[24] *Commonwealth (Latimer House) Principles on the Three Branches of Government,* agreed by Law Ministers and endorsed by the Commonwealth Heads of Government Meeting, Abuja, Nigeria, 2003 (*'Latimer House Principles'*).

independence, covering the appointment, tenure and removal of judges, the adequate resourcing of courts, and interactions between the parliament, executive and the judiciary.

The *Beijing Statement of Principles of the Independence of the Judiciary in the Law Asia Region* were adopted in 1997 and signed by 32 Chief Justices from the Asia-Pacific region, including Chief Justices of the nine Pacific states the subject of this study.[25] The *Beijing Statement* covers similar ground to the *Basic Principles*, but with some recognition of the different contexts in which judiciaries in the Asia-Pacific operate, acknowledging for example, different approaches to appointing and removing judges.

These international documents do not prescribe institutional arrangements or rules for judges and judiciaries. Rather, they operate as checklists as to the kinds of issues that might affect the impartiality of judges and the independence of judiciaries. In this way they seek to accommodate the variety of ways in which states organise and regulate their judiciaries. However, the international standards have been informed predominantly by the laws and practices of select established national legal systems, with the result that they rest on assumptions that do not necessarily capture the circumstances of judiciaries in Pacific states and the phenomenon of foreign judging. Two examples illustrate the point.

First, international standards tend to assume that the greatest source of influence over the judiciary is the political branches of the state. This is the case in many countries, where the political branches select and appoint judges and are responsible for remunerating judges and the costs of maintaining the judicial system. While international guidelines acknowledge the possibility that litigants, media and others can influence judges, they are mostly directed at insulating judges and judiciaries from interference by the state's political branches. The political branches of Pacific governments, however, do not necessarily hold all of these levers of influence over foreign judges. As the findings in Chapter 3 show, while the final decisions about judicial appointments rest with the appointing authority in the Pacific state, donor states and organisations have a role in the selection of foreign judges. Some (although not all) foreign judges serving in the Pacific are paid not by the state but directly or indirectly by external organisations, their home courts or through development aid. Laws and policies in the judge's home state can also affect foreign judges' abilities to travel, work and receive remuneration in Pacific states. While donor states and organisations take care to ensure that they respect both the independence of the judiciary and state sovereignty, their involvement in key areas of

[25] *Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region*, 19 August 1995 ('*Beijing Statement').*

judicial administration means that they are also a potential source of influence over the judiciary.[26]

A second example relates to the relationship between judges and society. The *Bangalore Principles* state that 'a judge shall be independent in relation to society in general and in relation to the particular parties to a dispute which the judge has to adjudicate'.[27] Judges in the Pacific work in small, isolated communities where they have family and community connections to many people. Noting that those who drafted and provide guidance on judicial independence did not necessarily have the distinctive circumstances of small island states in mind, the *Pacific Toolkit on Judicial Conduct* recognises that Pacific judiciaries might need to adapt the *Bangalore Principles* to suit the Pacific context.[28] Several Pacific jurisdictions, in developing their own guidelines on judicial conduct, have come to their own understandings of proper relations between judges and society.[29]

Although the need to adapt international standards and comparative models to the circumstances of small island states has been acknowledged by several writers,[30] there is little theoretical or practical guidance as to what these adaptations should involve. For example, the *Latimer House Principles* note that in small jurisdictions, the appointment of judges on fixed term contracts may be 'inevitable'.[31] However, there is limited guidance on the justifications for such appointments, their duration, and protections for tenure.[32] The phenomenon of foreign judging, although prevalent in the Commonwealth, is not explicitly addressed by the *Latimer House Principles* or in any other international guidelines.

Standards that serve to protect judicial impartiality and independence in one context may not be practical or appropriate in another. Rather than characterise departures from these standards as deficiencies in judicial impartiality and independence, this Chapter considers whether the standards themselves might require sensitive adaptation to the context of Pacific states, before being applied to assess the practice of foreign judging. Adopting this approach,

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[26] On this issue in the different context of Bosnia Herzegovina, see David Feldman, 'The Independence of International Judges in National Courts: Lessons from Bosnia Herzegovina' in CF Forsyth and Shimon Shetreet (eds), *The Culture of Judicial Independence: Conceptual Foundations and Practical Challenges* (Martinus Nijhoff Publishers, 2011) 215.

[27] *Bangalore Principles of Judicial Conduct* art 1.2.

[28] Pacific Judicial Development Programme, above n 23, 13.

[29] See Part III below.

[30] Allott, above n 19, 1431–2.

[31] *Latimer House Principles* pt II, para 1.

[32] Jan van Zyl Smit, *The Appointment, Tenure and Removal of Judges under Commonwealth Principles: A Compendium and Analysis of Best Practice* (Commonwealth Secretariat, 2015) [2.2.15] outlines possible justifications for contractual appointments but places this issue outside the scope of the study.

this Chapter examines points at which the practice of foreign judging, as it arises in the Pacific, poses a risk to judicial impartiality and independence or, alternatively, enhances it, by reference to its core value in the adjudication of disputes according to law and the separation of powers.[33] This examination necessarily covers the interacting components of judicial impartiality and independence, and their structural and behavioural aspects. It also appreciates the practice of foreign judging within its context, adjusting the requirements of international standards of judicial independence to the circumstances of Pacific states.

III. Impartiality

Chapter 4 outlined the significance of nationality to the role and functions of judges on courts of constitutional jurisdiction. It suggested that one reason why states might require their judges to be citizens is because of the value placed on their allegiance to the state. Not only do foreign judges lack ties of membership to the nation, but they hold such ties to a foreign state. In some contexts, a discussion of the impartiality of foreign judges might assess whether a foreign judge's allegiance to their home state compromised their impartiality, or the appearance of it. For example, concerns about the perception of bias due to the ties of nationality have led international courts and tribunals to develop a range of procedures to remove or counterbalance judges adjudicating cases that involve parties from their home state.[34] The issue of whether a judge's nationality and allegiance to his or her home state constitutes an influence sufficient to compromise impartiality is the subject of judicial decisions[35] and scholarship.[36] Issues of this kind, however, rarely arise in relation to the use of foreign judges on Pacific courts, even where foreign judges hear cases affecting fellow nationals or the interests of their home country.[37] Instead, foreign judges are widely regarded as impartial because they are not

[33] Ferejohn, above n 7, 370; Larkins, above n 3, 618; Russell, above n 4, 12.
[34] Such as the appointment of an ad hoc judge by a state not otherwise represented on the bench: Tom Dannenbaum, 'Nationality and the International Judge: The Nationalist Presumption Governing the International Judiciary and Why It Must Be Reversed' (2012) 45(1) *Cornell International Law Journal* 77.
[35] International criminal tribunals have held that a judge's nationality will not be a sufficient ground for disqualification: *Prosecutor v Seselj* Case No IT-03-67-PT, Decision on Motion for Disqualification (International Criminal Tribunal for the Former Yugoslavia, 10 June 2003); *Prosecutor v Nourain and Jamus* Case No ICC-02/05-03/09-344-Anx, Decision of the Plenary of the Judges on the Defence Request for the Disqualification of a Judge (International Criminal Court, 5 June 2012).
[36] For different views on whether the nationality of a judge affects impartiality compare Dannenbaum, above n 34; Milan Markovic, 'International Criminal Trials and the Disqualification of Judges on the Basis of Nationality' (2014) 13 *Washington University Global Studies Law Review*.
[37] While rare, such cases do arise: eg *Namah v Pato* [2016] PGSC 13, in which a five-member bench of the Papua New Guinea Supreme Court, including an Australian judge, was required to determine the constitutionality of arrangements made by the Australia and Papua New Guinean governments for the detention of asylum seekers.

members of the Pacific community they serve. In this, the emphasis is less on foreign judges as nationals of their home states, but as non-nationals of the Pacific state.

A common argument in favour of using foreign judges is that they provide impartiality to Pacific judiciaries. As outsiders, foreign judges are distanced from the personal, political and professional connections that are regarded as inevitable in small communities.[38] In the Pacific, this argument is reinforced by cultural values of reciprocity and communal harmony, the hierarchical structure of some Pacific societies, and the extended character of kinship or 'wantok' ties, to which local judges are subject.[39] These social values are regarded by some external commentators[40] as well as in Pacific communities[41] as a potential influence on local judges to give preferential treatment to members of their own group. Foreign judges, free from these social connections and cultural demands, are thought to provide greater impartiality and in turn support public confidence in the judiciary.[42]

The claim therefore is that the use of foreign judges enhances the independence of Pacific judiciaries because they are likely to have a greater degree of impartiality than local judges. While this is a common claim, it is a problematic rationale for the use of foreign judges in the Pacific. Applying the common law tests for bias and guidelines for judicial conduct, I argue that the impartiality of local judges is not compromised by their membership of the small Pacific communities they serve, but only where judges have personal connections to the parties or a

[38] Derek Schofield, 'Maintaining Judicial Independence in a Small Jurisdiction' in John Hatchard and Peter Slinn (eds), *Parliamentary Supremacy and Judicial Independence: A Commonwealth Approach* (Cavendish Publishing Limited, 1999) 73, 73–4; Wouter Veenendaal, *Politics and Democracy in Microstates* (Routledge, 2015) 187.

[39] Wantok (one-talk) means, broadly, a member of the same group, and indicates the reciprocal ties within and between tribal, filial or kinship groups: John Nonggorr, 'The Maintenance of Judicial Independence and Integrity in Papua New Guinea: Some Recent Developments' (1992) 18(3) *Commonwealth Law Bulletin* 1181, 1188.

[40] Susan Boyd, 'Australian Judges at Work Internationally: Treason, Assassinations, Coups, Legitimacy of Government, Human Rights, Poverty and Development' (2003) 77 *Australian Law Journal* 303, 306; Katie King, 'Order from the Court: Judiciaries as a Bulwark Against Legislative Corruption in Vanuatu' *The Global Anticorruption Blog*, 2015 <http://globalanticorruptionblog.com/2015/12/18/order-from-the-court-judiciaries-as-a-bulwark-against-legislative-corruption-in-vanuatu/>; Thuy Mellor and Jak Jabes, *Governance in the Pacific: Focus for Action, 2005-2009* (Asian Development Bank, 2004) 37; William FS Miles, *Bridging Mental Boundaries in a Postcolonial Microcosm: Identity and Development in Vanuatu* (University of Hawai'i Press, 1998) 167–8.

[41] Rose Lesley Kautoke, 'The Jury System in Tonga' (2009) 13(1) *Journal of South Pacific Law* 8, 18; John A Keniapisia, 'Judges from Other Commonwealth Jurisdictions Serving in the High Court and Court of Appeal of Solomon Islands' (Paper presented at the 20th Commonwealth Law Conference, Melbourne, 22 March 2017) 6; Patu Falefatu Sapolu et al, 'Law and Custom' in Malama Meleisea, Penelope Schoeffel Meleisea and Ellie Meleisea (eds), *Samoa's Journey 1962-2012: Aspects of History* (Victoria University Press, 2012) 18, 25–6.

[42] This view was expressed by some participants interviewed in this study: Interviews F3, F4, F7, F26, although refuted by others: Interview F11, F23.

direct interest in the case. An assumption that foreign judges are, as a class, more impartial than local judges, is misleading and diminishes public confidence in local Pacific judges.

Judicial impartiality requires that a judge must not be biased towards or against a party or the outcome of the case. Two kinds of processes seek to ensure that judges are impartial. The first is the rule against bias, which requires that a judge who is, or might appear to be, biased in a particular case must not hear that case. There are various formulations of the legal test for bias across common law jurisdictions. The test is framed around whether the court, or alternatively a fair minded and informed observer, having considered the facts would conclude there is a danger or real possibility that the decision-maker was biased.[43] Different versions of the test have been adopted in the law of Pacific states.[44] The second method for ensuring judicial impartiality focuses on the behaviour and integrity of judges. All judges take an oath of office in which they swear to impartially discharge the functions of judicial office and do right to all manner of people according to law, without fear or favour, affection or ill will.[45] Conventions of judicial conduct, which in some states have been set out in written guidelines,[46] seek to ensure that a judge's conduct, in court and outside it, maintains public confidence in the judge's impartiality and minimises the occasions in which it will be necessary for a judge to disqualify him or herself.[47] These conventions restrain the ways in which a judge may associate with people in government and politics, publicly comment upon contentious matters, and engage in other employment or activities.

The common law rules and guidance on judicial conduct do not seek to insulate judges from *all* influences, but only certain kinds. Cultural or community ties which might cause a judge to identify with one party more than another may well give rise to a kind of impartiality, but such ties are not considered to be grounds for bias in either the laws relating to disqualification for bias or guidelines on judicial conduct. The legal tests for bias narrow the grounds of bias down to a direct and personal connection to a party or interest in the outcome of the case. In the

[43] On the difference between the tests see Matthew Groves, 'The Rule Against Bias' (2009) 39 *Hong Kong Law Journal* 485, 495–8.
[44] *Koya v State* [1998] FJSC 2; *Boateng v State* [1990] PGSC 7; *Peniamina v Land and Titles Court* [2004] WSCA 1; *SMM Solomon Ltd v Axiom KB Ltd* [2017] SBCA 12; *Latu v Lavulavu* [2015] TOSC 46; *Matarave v Talivo* [2010] VUCA 3.
[45] *Constitution of Fiji 2013* s 109; *Constitution of Kiribati 1979* s 82; *Constitution of Nauru 1968* s 52; *Constitution of Papua New Guinea 1975* s 249; *Constitution of Samoa 1960* s 67; *Constitution of Solomon Islands 1978* s 141; *Constitution of Tonga 1875* s 95; *Oaths and Statutory Declarations Act* c 7.48 (Tuvalu) s 3; *Oaths Act* c 37 (Vanuatu) s 4.
[46] Judicial Department of Fiji, *Judicial Code of Conduct* (2005); *Code of Conduct for Judicial Officers of the Republic of Kiribati* (2011); *Judicial Code of Conduct Rules 2010* (Tonga); *Code of Judicial Conduct for Tuvalu* (2011). See generally Pacific Judicial Development Programme, above n 23.
[47] *Bangalore Principles of Judicial Conduct* arts 2.2, 2.3.

English case of *Locabail v Bayfield Properties*, the High Court considered it inconceivable that an objection to a judge could be based on the judge's community ties, expressed in the form of religion, ethnic or national origin, gender, age, or class; and unlikely based on the judge's social, educational or professional background.[48]

The legal tests of bias reflect the nature of the judge's role.[49] Court procedures and the methodologies of judicial reasoning encourage judges to set aside irrelevant biases and decide cases only on the law and facts of the particular case. On this view, membership of a community is irrelevant to the task of judging and will be put aside by all judges. Those critical of the possibility of such objectivity reframe a judge's identity and life experience as an asset to the judicial role. On this view, judges necessarily bring their own values to bear on judicial decision making, particularly when called upon to apply community standards (such as reasonableness or fairness) and when making law. The appropriate response is not to seek to suppress such influences, but to ensure that judges understand and reflect the diversity of community values.[50] There are also policy reasons why the law of bias and judicial guidelines do not characterise community ties as prohibited impartiality. The necessity for there to be a judge requires that judges should not be disqualified for reason of their race, ethnicity, religion or cultural affiliations. Every judge has these attributes and the claim that a judge might be partial to a party who shares those attributes would serve to disqualify most judges from most cases.[51]

For these reasons, there is no legal basis to claim that the impartiality of local Pacific judges is compromised in all cases by virtue of membership of their own Pacific communities. The claim is also not reflected by the practice of foreign judging in Pacific states. It would be expected that the judges most likely to have personal connections to parties or a direct interest in the case are the lay judges and magistrates serving on lower courts, who are members of the small communities they serve. However, foreign judges serve mainly on higher national courts which are already at a greater distance from the local community.[52]

It is well established that where a judge has a close family or other connection to a party or an interest in the outcome, the judge should not sit on that case. Local judges will recuse

[48] *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451, 480.
[49] John Leubsdorf, 'Theories of Judging and Judge Disqualification' (1987) 62 *New York University Law Review* 237, 237.
[50] Terence Etherton, 'Liberty, the Archetype and Diversity: A Philosophy of Judging' [2010] *Public Law* 727, 740; Erika Rackley, *Women, Judging and the Judiciary: From Difference to Diversity* (Routledge, 2013) 28, 131.
[51] Leubsdorf, above n 49, 241.
[52] Interview F23.

themselves in appropriate circumstances and failure to recuse is a ground of appeal.[53] However, the appropriate circumstances for recusal will be different in small island communities than in larger jurisdictions. Judges working in small, isolated communities will have family and community connections to many people.[54] For example, in one Samoan case, the judge disclosed distant family relationships to both the applicant and the respondent and did not find it necessary to recuse himself.[55] The requirements of recusal and guidelines for judicial conduct are adapted to meet this practical reality. The *Code of Conduct for Judicial Officers of Kiribati* states:

> Kiribati is a small country and the island jurisdictions are very small. If Judicial Officers were to disqualify themselves in every case where they know one or other participant, the hearing of minor matters might be considerably delayed. Undue delay can, in itself, constitute a denial of justice. Therefore, the interest of justice requires that Judicial Officers are careful not to disqualify themselves too readily. Inevitably Judicial Officers will hear cases where they know something of the parties. In every case it should be clear to all observers that the trial is conducted fairly. The Judicial Officers should explain their decision clearly giving their full reasoning. The reasons should leave no doubt that the decision was based on the law as applied only to those facts established by evidence in open court.[56]

The *Niue Code of Judicial Conduct* suggests that the public in small island communities understand better than most the separation of the person from their office, noting that 'the Niuean people are used to the idea that individuals may "wear a number of different hats" and the judges must make it clear from the way they conduct themselves, that with the judicial hat comes impartiality'.[57]

These guidelines emphasise impartiality as a personal and professional quality, rather than something to be guaranteed only through legal rules and institutional structures. They suggest that the challenges of impartial judging in small jurisdictions are addressed most effectively by the behaviour of individual judges. The integrity of senior local judges has gone a long way to secure the reputations of the judiciary in Papua New Guinea and Vanuatu.[58] This has been achieved in different ways, including strategies of social isolation to avoid conflicts of interest and the professionalism of judges as demonstrated through transparent and consistent judicial

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[53] Peter MacFarlane, 'Some Challenges Facing Legal Strengthening Projects in Small Pacific Island States' (2006) 4(1) *Journal of Commonwealth Law and Legal Education* 103, 106.
[54] Pacific Judicial Development Programme, above n 23, 13.
[55] *Leleua v Land and Titles Court* [2009] WSSC 123.
[56] *Code of Conduct for Judicial Officers of the Republic of Kiribati* (2011) art 2.6. *The Code of Judicial Conduct for Tuvalu* (2011) contains a similar paragraph.
[57] *Code of Judicial Conduct for Niue* (2011) extracted in Pacific Judicial Development Programme, above n 23, Additional Documents A-18. While not included in this study, Niue shares the challenges of smallness with other Pacific island states.
[58] In Papua New Guinea: Nonggorr, above n 39, 1187; in Vanuatu: Miranda Forsyth, 'Understanding Judicial Independence in Vanuatu' (SSGM Discussion Paper 2015/9, State, Society and Governance in Melanesia, 2015) 10–12.

decision making.[59] Where judiciaries are becoming more localised with the appointment of citizen judges, the claim that foreign judges bring a special degree of impartiality to adjudication can be particularly damaging, as it diminishes the reputation of, and public confidence in, local judges. The story of localisation in Samoa illustrates the point. Following independence in 1962, there was 'continuing public uncertainty as to whether Samoans would be able to resist pressure from their families and apply the law impartially'.[60] Litigants at this time preferred their cases to be heard by foreign judges. In 1966, Meleisea Folitau was the first Samoan appointed to a senior judicial position in the Land and Titles Court; while in the same year Su'a Leituposa Thomson was appointed a Magistrate. These appointments succeeded in 'breaking through public attitudes to Samoan judges' and opened the way to increasing the numbers of Samoan judges.[61] Localisation has changed the perceptions of local judges. In 2018, the Supreme Court of Samoa refused a request from the Attorney General for a foreign judge to be appointed to hear a criminal case involving a judge of the Land and Titles Court. Chief Justice Sapolu stated that '[i]t would be taking a retrograde step for Samoa if we are to engage an overseas Judge because all the local Judges are said to be disqualified from hearing a case on the ground of apparent or perceived bias' and 'an unnecessary surrender of our judicial sovereignty to an outsider when we have our own Judges to deal with these cases'.[62]

The potential for an individual judge to be, or appear to be, biased in a particular case should not be given wide and general application to all local judges. Claims about the impartiality provided by foreign judges should be narrowed down to better reflect the legal rule against bias and the challenges of smallness. In a small community it is likely that a local judge will encounter situations in which he or she has a direct and personal connection, by way of family relationships, close friendships or business connections, with parties in the case, or a personal interest in the outcome. This, combined with limited numbers of judges, means that a foreign judge might need to be recruited to hear a specific case or class of cases. Pacific judiciaries have occasionally sought foreign judges on this basis. For example, in 2006 two Australian judges were appointed to the Supreme Court of Samoa to hear election petitions over a three-month period. This arrangement was made at the request of the Chief Justice, who was concerned that as many of Samoa's senior judges had family or social connections with election candidates,

[59] Gavan Donne, 'Introduction' in Guy Powles and Mere Pulea (eds), *Pacific Courts and Legal Systems* (University of the South Pacific and Monash University, 1988) 3, 4–5; Forsyth, above n 58, 11; Schofield, above n 38, 79; Veenendaal, above n 38, 188–9.
[60] Sapolu et al, above n 41, 25.
[61] Ibid 26.
[62] *Police v Ropati* [2018] WSSC 85, [11].

perceived conflicts of interest might arise.[63] In Nauru, the parties to the long running 'Nauru 19' case, which involved the criminal prosecution of a group of protesters and which raised significant constitutional issues, sought the appointment of a judge from outside the Nauruan judiciary to ensure that the trial was independent and fair.[64] This has parallels with practices in larger states. For example in Australia, instead of recruiting foreign judges, judges from other state and territory jurisdictions have been appointed on a temporary basis to hear cases to which local judges are, or would appear to be, too closely connected.[65]

Foreign judges therefore support the independence of Pacific judiciaries where they stand in for local judges who must recuse themselves from hearing a particular case or cases of a particular kind, in circumstances where an alternative local judge is unavailable. Putting the argument for foreign judges' impartiality on this more precise basis better reflects the legal requirements of impartiality and the realities of judging in Pacific states.

IV. Independence

Chapter 3 outlined the processes for the appointment, remuneration, tenure and removal of foreign judges in the Pacific. International guidelines on judicial independence tend to focus on processes of this kind as objective conditions of judicial independence.[66] However, the guidelines require adaptation to meet the needs of Pacific island jurisdictions and the practicalities of foreign judging. This Part considers each of these structural features by focusing on the two issues of greatest concern for judicial independence, that is, the insecurity of tenure arising from the appointment of foreign judges on short renewable contracts and the vulnerability of foreign judges to arbitrary removal from office.

A. Short renewable appointments

Many foreign judges serve on Pacific courts on short renewable appointments. In some states, the law requires that foreign judges may only be appointed for a specified maximum term. Other states permit flexible arrangements, which allow the appointing body to determine the duration of a judge's appointment, which might be specified in the instrument of appointment or by contract. The duration of short-term appointments varies across Pacific states and courts within

[63] Supreme Court of Tasmania, 'Report of the Chief Justice of the Supreme Court of Tasmania: Annual Report 2005-2006' (2006) 11.
[64] *Nauru v Batsiua (No 1)* [2018] NRSC 37, [29-30].
[65] Robert French, 'Judicial Exchange: Debalkanising the Courts' (2006) 15 *Journal of Judicial Administration* 142.
[66] *Basic Principles on the Independence of the Judiciary* above n 20; *Latimer House Principles* above n 24; *Beijing Statement* above n 25.

them but might range from a period of weeks or months to one to five years. There are no legal or procedural limits on the renewal of judges' appointments. While some foreign judges are appointed until retirement or for no specified term, this occurs as a result of the exercise of discretion by the appointing authority, rather than because it is mandated by law. Even where constitutions provide for appointment until retirement age, Pacific states often avoid this by appointing foreign judges as acting judges.[67]

The risk to judicial independence

International principles on judicial independence generally insist on tenure, whether for life, for a fixed term, or until the judge reaches retirement age, that is secure against executive interference.[68] The *renewability* of appointments poses a risk to judicial independence. It raises the concern that judges will be influenced to decide cases in the interests of those responsible for renewing their appointment, rather than independently on the merits of each case.[69] For foreign judges in the Pacific, those responsible for renewal might include the executive government, members of the Judicial Services Commission, the Chief Justice, or external organisations who fund the judge's position.

A study of judicial decisions in Namibia, where foreign judges on short renewable contracts also serve, found that foreign judges were slightly more likely to decide in favour of the government.[70] There has been no similar empirical study of whether foreign judges on short renewable appointments in the Pacific decide cases more favourably to those responsible for their reappointment. However, there are concerns that short-term appointments provide an avenue for the executive and others to exert pressure on foreign judges. Several judges

[67] Chapter 3, Part IV.A.

[68] *Latimer House Principles* above n 24, II(1); *Beijing Statement* above n 25, art 20*;* International Bar Association, *Minimum Standards of Judicial Independence*, New Delhi, 22 October 1982, art 22. Cf *Basic Principles on the Independence of the Judiciary* above n 20, art 12 which provides for guaranteed tenure until judges' retirement age or the expiry of their term of office. See also *Valente v R* [1985] SCR 673 (Supreme Court of Canada) [31].

[69] In the Pacific: Carl B Ingram, 'The Length of Terms of Judges in the Pacific and Its Impact on Judicial Independence' in *Land Law and Judicial Governance in the South Pacific: Comparative Studies* (New Zealand Association for Comparative Law, 2011) 375, 377; Guy Powles, 'Law, Courts and Legal Services in Pacific Societies' in Guy Powles and Mere Pulea (eds), *Pacific Courts and Legal Systems* (University of the South Pacific and Monash University, 1988) 6, 27; Bruce Robertson, 'Judicial Independence in the Pacific' in *Land Law and Judicial Governance in the South Pacific: Comparative Studies* (New Zealand Association for Comparative Law and Association de Législation Comparée des Pays du Pacifique, 2011) 267, 272. In other Commonwealth states: John Hatchard, Muna Ndulo and Peter Slinn, *Comparative Constitutionalism and Good Governance in the Commonwealth: An Eastern and Southern African Perspective* (Cambridge University Press, 2004) 159; Schofield, above n 38, 75; van Zyl Smit, above n 32, [2.2.17].

[70] Peter VonDoepp, 'Context-Sensitive Inquiry in Comparative Judicial Research: Lessons from the Namibian Judiciary' (2008) 41(11) *Comparative Political Studies* 1515.

interviewed for this project provided examples of judges who made decisions unfavourable to the government and did not have their contracts renewed.[71] Instances of this kind have been reported in Fiji,[72] Nauru[73] and Tonga[74] but strongly denied by the respective governments. There are also examples in these states where foreign judges' appointments were renewed, despite the unpopularity of their decisions.[75]

There is also a risk that the extensive use of judges on short renewable contracts creates a perception that the government is filling the judiciary with compliant judges, impairing public confidence in the independence of the judiciary. In an early decision, a judge of the Papua New Guinea Supreme Court considered that public criticisms of the Court by the Minister for Justice amounted to a contemptuous attempt to influence the court because, amongst other factors, they occurred in a context in which judges are appointed for short terms.[76] In Fiji, the appointment of large numbers of foreign judges serving on short renewable contracts has been criticised as a means by which a strong executive can create a 'compliant judiciary'.[77] Similar concerns have been raised in African countries which also use foreign judges.[78]

The appointment of judges on short renewable contracts clearly poses a risk to judicial independence. In some countries outside the Pacific, short renewable appointments have been found to be incompatible with judicial independence,[79] while in others they have been upheld.[80] Much depends on the context in which renewable appointments are used, including the reasons

[71] Interviews F1, F8, F20, F25.
[72] Jyoti Pratihba, 'Judiciary Independent: Chief Justice' *Fiji Sun* (Suva), 28 August 2018 <http://fijisun.com.fj/2018/08/28/judiciary-independent-chief-justice/>.
[73] 'Nauru Magistrate Departs after Contract Non Renewed' *Radio New Zealand*, 12 December 2016 <http://www.radionz.co.nz/international/pacific-news/320219/nauru-magistrate-departs-after-contract-non-renewed>.
[74] 'The Political Scene: More Supreme Court Judges Resign' *The Economist Intelligence Unit*, 1 October 2010 <http://country.eiu.com/article.aspx?articleid=1927474177>.
[75] Kautoke, above n 41, 18.
[76] *Public Prosecutor v Rooney (No 2)* [1979] PNGLR 448, 497, Wilson J; cf 488 Kearney J. For discussion of the Rooney affair, see Chapter 7, Part V.A.
[77] Brij V Lal, *Historical Dictionary of Fiji* (Rowman & Littlefield, 2016) 24. See also Venkat Iyer, 'The Judiciary in Fiji: A Broken Reed?' in HP Lee and Marilyn Pittard (eds), *Asia-Pacific Judiciaries: Independence, Impartiality and Integrity* (Cambridge University Press, 2017) 109, 115.
[78] In Kenya: Makau Mutua, 'Justice under Siege: The Rule of Law and Judicial Subservience in Kenya' (2001) 23(1) *Human Rights Quarterly* 96; in The Gambia: International Bar Association, 'Under Pressure: A Report on the Rule of Law in The Gambia' (August 2006).
[79] South Africa: *Justice Alliance of South Africa v President* 2011 (5) SA 388; East Timor: *Decision regarding the appeal of Judge Ivo Rosa against the non-renewal of his Contract by the Superior Council for the Judiciary* (Unreported, East Timor Court of Appeal, 31 December 2008).
[80] Belize: *Bar Association of Belize v Attorney General* [2017] CCJ 4 (AJ), *Attorney General v Bar Association of Belize* (Belize Court of Appeal, 14 October 2015); Botswana: *President v National Amalgamated Local Central Government and Parastatal Workers Union* (Botswana Court of Appeal, June 2017).

for their use, and mitigating factors such as the kinds of persons appointed and the independence of the authority responsible for renewing judicial appointments. The following sections consider how each of these factors affect judicial independence in Pacific states.

Reasons for short renewable appointments

The appointment of foreign judges on short renewable contracts has become accepted practice in the Pacific. It resonates with earlier colonial practices. The judges appointed to colonial courts were employees of the Colonial Legal Service and generally served on a court for a short period before being transferred across jurisdictions.[81] They were appointed 'at pleasure', but by convention would not be removed except in the event of proved misconduct.[82]

The *Latimer House Principles* state that the circumstances of small jurisdictions may make the appointment of judges on short term contract appointments 'inevitable',[83] an assertion which has been cited in case law in the Pacific and other Commonwealth countries.[84] Some authors characterise short renewable contracts as a 'necessary evil' in small jurisdictions,[85] where 'for reasons of size and geography' there is 'no alternative but to seek judges prepared to serve … for a fixed term of years.'[86] However, it is not always made clear why short term appointments are necessary or inevitable in all circumstances in which foreign judges are used in small jurisdictions.

Several explanations have been offered for the appointment of foreign judges for short renewable terms in small jurisdictions. One Commonwealth-wide study suggested that fixed term contracts are more attractive to individuals willing to serve on a part time and non-residential basis, but this claim was not supported by empirical evidence.[87] The information collected in interviews for this thesis suggests that individual judges hold a range of views but generally defer to the terms proposed by the appointing authority and, where relevant, external funding organisations.[88] The evidence therefore suggests that short-term appointments reflect the preferences of states and external donor organisations, rather than judges themselves. The

[81] Allott, above n 19, 1431.
[82] Charles Jeffries, *The Colonial Empire and Its Civil Service* (The University Press, 1938) 147–8.
[83] *Latimer House Principles* above n 24, II(1).
[84] Eg *Bar Association of Belize v Attorney General* [2017] CCJ 4 (AJ), [52]; *Tu'ifua v Public Service Tribunal* [2014] TOSC 14, [19].
[85] Schofield, above n 38, 76. See also Yash Vyas, 'The Independence of the Judiciary: A Third World Perspective' (1992) 11 *Third World Legal Studies* 127, 144.
[86] van Zyl Smit, above n 32, [2.2.15].
[87] Ibid places an inquiry into the use of fixed-term appointments in small jurisdictions beyond the scope of the study. See also Territory of Nauru, 'Record of the Proceedings of the Constitutional Convention' (15 January 1968) 59.
[88] Chapter 3, Part IV.A.

most significant pragmatic reason for the appointment of foreign judges on short term contracts is the financial constraints in which small developing states operate. In small states, the institutions and functions of government are particularly expensive on a per capita basis.[89] The appointment of judges for long terms imposes significant costs on states, particularly where there is uncertainty about whether the need for that judicial position will be sustained over time. Short appointments can be used flexibly to meet demand.[90] In addition, small developing states rely on foreign aid, including to support the institutions of law and justice. External donors recruit foreign judges on a contractual basis, usually for terms of one to two years, after which funding arrangements, and with it a judge's appointment, are reconsidered. While valid, these financial constraints really only apply to the appointment of full-time, resident judges. Visiting judges on courts of appeal, whatever the term of their appointment, sit only when invited to constitute a panel of the court. They do not draw a fixed salary or pension, but instead receive a daily sitting fee. As a result, in some Pacific states foreign judges of appeal are appointed without any specified term or for significantly longer periods than foreign judges appointed to the courts below.[91]

Other reasons for short-term appointments are pragmatically oriented to the perceived realities of foreign judging. One author suggests that Pacific states prefer to appoint retired judges on short-term contracts due to concerns over their age and potential healthcare needs.[92] Short-term appointments are sometimes seen as a way to redress shortcomings in the recruitment process, by providing an opportunity for both the judge and the appointing authority to assess whether the judge is suited to local conditions.[93] These justifications point to problems that are better met by other processes which avoid burdening judicial independence. Concerns about a judge's suitability for appointment are more appropriately addressed through the appointment process, while concerns about a judge's age and health care needs can be addressed through specific contractual arrangements.

A compendium of best practice in the appointment, tenure and removal of judges across the Commonwealth notes that it is 'difficult to justify the appointment of judges for a fixed period

[89] Lino Briguglio, 'Small Island Developing States and Their Economic Vulnerabilities' (1995) 23 *World Development* 1615, 1617.
[90] Brian Opeskin, 'The Supply of Judicial Labour: Optimising a Scarce Resource in Australia' (2017) 7(4) *Oñati Socio-Legal Series* 847, 856.
[91] Appendix 1.
[92] Ingram, above n 69, 376.
[93] Ibid; Schofield, above n 38, 77; Paul Reeves, Tomasi Rayalu Vakatora and Brij V Lal, 'The Fiji Islands: Towards a United Future Report of the Fiji Constitution Review Commission 1996' (Parliamentary Paper No 34 of 1996, Parliament of Fiji, 1996) [13.108].

of years to serve alongside judges holding permanent appointments in the same courts.'[94] This is commonly the case in the Pacific where foreign judges (who are usually appointed for short terms) sit alongside local judges (who are usually appointed until a specified retirement age).[95] There is, however, a principled justification for the different treatment of foreign judges and citizen judges. Where the use of foreign judges is understood as a transitional measure pending localisation, the appointment of foreign judges on short terms means that there will be a judicial position readily available when a qualified citizen becomes eligible for appointment.[96] The appointment of a judge (foreign or local) for a short term is also justified where the appointment seeks to address a temporary shortage of judges, for example because a permanent judge is conflicted out of hearing particular cases (as discussed in Part III above) or to address a backlog of cases.

This analysis suggests that the most compelling justifications for the appointment of foreign judges on short renewable appointments relate first to the recruitment of foreign judges to sit as acting judges where permanent judges are not available; and secondly to localisation, to ensure that there is space on the bench for suitably qualified local candidates. These justifications fit with the predominant rationale for the use of foreign judges in Pacific states, in which foreign judges are used because there are insufficient numbers of qualified citizens willing and able to take up judicial office. These justifications also provide a principled basis for assessing whether a short-term appointment is indeed appropriate. For example, in circumstances were localisation is slow or unlikely, there is less justification for appointing a foreign judge for a short term, and consideration ought to be given to longer term appointments. Where these justifications do not apply, there is a risk that the appointment of foreign judges on short renewable contracts compromises judicial independence.[97]

The relevance of professional background

It may be argued that the risk of undue influence associated with renewable contracts does not arise as sharply for some categories of foreign judge. Foreign judges who are sitting judges in their own state or retired judges with a judicial pension are less dependent on reappointment to the Pacific court for personal financial or career security.[98] As such, they are considered to be

[94] van Zyl Smit, above n 32, [2.2.16].
[95] Chapter 3, Part IV.A.
[96] Schofield, above n 38, 76; Constitutional Planning Committee Papua New Guinea, 'Constitutional Planning Committee Report' (1974) ch 8, [90].
[97] Rationales for the use of foreign judges and best practices to protect judicial independence are discussed in Chapter 8, Parts II and IV.D.
[98] Jon M Van Dyke, 'The Pacific Judicial Conference: Strengthening the Independent Judiciary and the Rule of Law in the Pacific' (2011) 22(1–2) *Western Legal History* 127, 161.

relatively immune to the implied threat to independence that arises from appointment on short renewable contracts.[99] Assumptions of this kind underlie some of the case law on the appointment of foreign judges on short renewable contracts in other Commonwealth countries. In *Bolkiah v Brunei Darussalam,* the Judicial Committee of the Privy Council considered whether the fact that a foreign judge was appointed on a short-term contract renewable at the discretion of the Sultan of Brunei created a perception of bias. In holding that it did not, the Privy Council emphasised the position and reputation of the judge in question, noting that he was 'a judge of unblemished reputation, nearing the end of a long and distinguished judicial career in more than one jurisdiction, … and already enjoying what he described as "reasonably adequate" pension provision'.[100] The Privy Council considered that a fair-minded observer would 'dismiss as fanciful the notion that such a judge would break his judicial oath and jeopardise his reputation in order to curry favour with the Sultan and secure a relatively brief extension to his contract'.[101]

Arguments of this kind place faith in the integrity of individual foreign judges and the institutional safeguards for structural judicial independence in their home countries (such as security of tenure at home and a guaranteed judicial pension), rather than the constitutional structures of Pacific systems. Some Pacific states, as a matter of practice, recruit only persons with judicial experience in their home states to be foreign judges. In Kiribati, Samoa and Vanuatu this is the case for both the superior court and court of appeal; and in Solomon Islands, Tonga and Tuvalu for courts of appeal.[102] However, not all foreign judges serving on Pacific courts are sitting or retired judges. Over the period 2000 to 2015, roughly a quarter of the foreign judges serving in the Pacific were recruited from the legal profession or public service in their home state or abroad.[103] For these candidates, judicial appointment in the Pacific might be a promotion, bringing greater pay and prestige and better conditions, such that they are in a position where they may be influenced by the prospect of the renewal of their appointment. Further, as Iyer notes in his assessment of the Fijian judiciary, foreign judges in Fiji have proven just as prone as their local counterparts to factionalism and the pursuit of preferment.[104] While

[99] Gabrielle Appleby et al, 'Temporary Judicial Officers in Australia: A Report Commissioned by the Judicial Conference of Australia' (2017) 28 citing *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45, 62 [26], 68 [44]; Peter H Russell and Kate Malleson (eds), *Appointing Judges in an Age of Judicial Power: Critical Perspectives from around the World* (University of Toronto Press, 2006) 5.
[100] *Bolkiah v Brunei Darussalam* [2007] UKPC 62, [21].
[101] Ibid. See also *Misick v The Queen (Turks and Caicos)* [2015] UKPC 31, [27-8]; *Bar Association of Belize v Attorney General* [2017] CCJ 4 (AJ), [39].
[102] Appendix 1.
[103] See Chapter 2, Part V.B.
[104] Iyer, above n 77, 130.

the status and reputation of individual foreign judges is important, it should not be assumed to apply across the board so as to compensate for weaknesses in structural judicial independence arising from short renewable appointments.

The nature of the appointing authority

Finally, concerns about undue influence over the renewal of judicial appointments might be addressed by ensuring that the renewal of judicial appointments is in the hands of an independent body rather than the executive.[105]

In small states, there may be concerns about cronyism or favouritism on the part of the executive appointing body when it comes to making judicial appointments,[106] raising concerns about the extent to which judges – both local and foreign – are independent from the government. In some small states outside the Pacific, the use of foreign judges is seen as a way to address such concerns. However, this is the result of very different institutional arrangements in which foreign judges sit on a regional or supranational court. In these circumstances it has been argued that foreign judges provide a greater degree of independence, because the processes for their appointment are removed from the hands of domestic political actors and placed in a regional or foreign body. For example, it has been suggested that the judges of the Eastern Caribbean Supreme Court are perceived to be free from domestic political influence because they are appointed by a regional body, rather than national political elites.[107] Similar arguments are made in support of the independence of the Judicial Committee of the Privy Council, which is composed of judges appointed by a foreign government.[108]

Pacific states follow a different model, in which responsibility for the appointment of foreign judges rests with the state concerned. Even where foreign judges are recruited by international organisations or their home courts, the final decisions relating to appointment are made by the relevant authority in the state. As a result, foreign judges no more than local judges can avoid the risks associated with an executive controlled appointment process. As described in Chapter 3, Pacific states variously vest the power of judicial appointment in the Head of State acting on the advice of government, the Head of State acting on the advice of a specialist judicial services commission, or in a judicial services commission alone. The use of judicial services commissions

[105] *Bar Association of Belize v Attorney General* [2017] CCJ 4 (AJ), [34-5], [53]; *Misick v The Queen (Turks and Caicos)* [2015] UKPC 31, [24].
[106] Briguglio, above n 89, 1617; Ingram, above n 69, 377.
[107] Veenendaal, above n 38, 120.
[108] Stefan Voigt, Michael Ebeling and Lorenz Blume, 'Improving Credibility by Delegating Judicial Competence: The Case of the Judicial Committee of the Privy Council' (2007) 82(2) *Journal of Development Economics* 348, 350.

is one way in which Pacific states seek to ensure integrity of the processes for the appointment of local and foreign judges alike.[109]

The smallness of Pacific legal communities creates conditions in which judges deal directly with those responsible for renewing their appointments. This opens up a range of potential avenues for influence (or the appearance of it). A case from the Supreme Court of Tonga, in which a litigant sought to prevent the Lord Chancellor from appearing as a barrister for the opposing party, illustrates the point. The litigant argued that because the Lord Chancellor, as chair of the Judicial Appointments and Discipline Panel (JADP), was involved in decisions about the appointment, remuneration and discipline of judges, there was a risk that the judge might favour, or be seen to favour, the party represented by the Lord Chancellor.[110] In his judgment, the Chief Justice noted that the Attorney-General, a Law Lord (also a member of the JADP) and the Minister for Justice all regularly appeared as legal representatives before the Court. He dismissed the concerns for impartiality as having little regard to the realities of legal practice and foreign judging in Tonga.[111] The case shows that it should not be assumed that the executive is the only source of potential influence over reappointment, and that, in small states, other appointing authorities might also be directly involved in litigation before the court. When foreign judges are funded by organisations outside the state, donors may also have a role in the renewal of a foreign judge's appointment. The diversity of influences might work to protect independence by ensuring that no one source of influence can prevail. On the other hand, it might also serve to obscure sources of influences beyond the executive, which is the usual focus of attention.

Addressing the risk to judicial independence

This discussion suggests that the appointment of foreign judges on short renewable contracts does not in itself necessarily undermine the independence of Pacific judiciaries, but there are circumstances in which it might combine with other dimensions of foreign judging to do so. One such circumstance is where there is limited localisation such that most, if not all, judges serve on renewable short terms. The appointment of a few foreign judges on a temporary basis to supplement local judges with longer tenure does not raise the same concerns about independence as a judiciary composed predominantly or entirely of judges on short renewable contracts. Concerns for independence might also arise where judicial service in the Pacific

[109] Nuno Garoupa and Tom Ginsburg, 'Guarding the Guardians: Judicial Councils and Judicial Independence' (2009) 57 *American Journal of Comparative Law* 103.
[110] *Tu'ifua v Public Service Tribunal* [2014] TOSC 14.
[111] Ibid [21-3].

supports the judge's career progression and provides greater pay and benefits than opportunities in the judge's home state, increasing the sense in which a foreign judge is dependent on reappointment for personal financial and career security. Finally, judicial independence might be compromised where executives or other appointing authorities have demonstrated that they will not renew the appointments of judges who make decisions that are perceived to be against their interests.

In Chapter 8 I suggest some good practice initiatives to support the legitimacy and effectiveness of foreign judging in the Pacific, including a range of solutions to prevent the use of short renewable appointments compromising the independence of Pacific judiciaries. Not all such measures would be necessary or suitable in each Pacific state or for all instances of foreign judging. In light of the widespread and almost automatic use of short renewable contracts in the Pacific, I suggest that the most significant reform would consist of a general requirement that states which use foreign judges, and the organisations that provide and fund them, confine the use of short renewable appointments to circumstances in which they can be justified. These are the appointment of acting judges to meet a temporary need for judicial services and to support localisation. Confining short term renewable appointments to these circumstances would require states, donor organisations and judges themselves to more carefully consider and justify the appointment of foreign judges on short terms. It would reduce the number and proportion of foreign judges on short term contracts and minimise the risks that renewable contracts pose to the independence of the judiciary as a whole.

B. Arbitrary removal

Foreign judges are susceptible to removal by means other than the formal constitutional process. The formal removal processes advocated by international guidelines ensure that judges are subject to removal only for reasons of incapacity or misbehaviour, and that procedures for removal are fair and set out in law.[112] They seek to protect judges from arbitrary removal and the improper influence that the threat of arbitrary removal entails. Pacific constitutions establish formal procedures for the removal of judges. They are, however, rarely used. Instead, states and other actors have used means outside the formal processes to remove foreign judges, including non-renewal or termination of a judge's contract, the cessation of invitations to visit to sit on the Court of Appeal, and the cancellation of a foreign judge's visa.[113] Unlike the formal procedures for removal, these processes are not transparent. No reasons are required, and as

[112] *Basic Principles on the Independence of the Judiciary* above n 20, arts 17-20; *Latimer House Principles* above n 24, art VI 1(a); *Beijing Statement* above n 25, arts 22-6.
[113] Instances of all three are described in Chapter 3, Part IV.B.

the case law discussed in Chapter 3 indicates, legal remedies are more likely to arise in private law (such as damages for breach of contract) than constitutional law. These kinds of extra-constitutional removal are made possible by the ad hoc, part time nature of foreign judges' service and the fact that as non-citizens, foreign judges are susceptible to immigration regulations.

The removal of foreign judges by cessation of invitations to sit on the court of appeal raises similar kinds of concerns for judicial independence as the use of short renewable appointments. Just as there is a risk that a judge on a short-term contract might feel beholden to the authority responsible for his or her reappointment, there is a risk that visiting judges of appeal might similarly feel beholden to the Chief Justice to continue in service. This concern is particularly acute in circumstances where the Court of Appeal is hearing appeals from decisions of the Chief Justice.[114] Some international standards on judicial independence recognise that the judiciary itself, and ultimately the Chief Justice, ought to be responsible for the administration of the court, including the assignment of cases to judges.[115] However, where the exercise of this responsibility can, in effect, result in the removal of a judge, there may be concerns about 'internal judicial independence' – that is, the ability of individual judges to decide cases without undue pressure from their fellow judges.[116] In *Rees v Crane,* the Privy Council held that while the Chief Justice is responsible for controlling the administrative arrangements of the court, a decision by the Chief Justice that a judge was not to sit went beyond administration and was tantamount to suspension.[117] There are some practical ways in which these concerns might be allayed. One is to place the responsibility for inviting judges of appeal to sit in the hands of the President of the Court of Appeal, rather than the Chief Justice.[118] Another is to prepare panels for the court of appeal well in advance of each sittings, although the unpredictability of the court's caseload may make this difficult. Another is to cap the number of judges of appeal. Smaller, more settled pools reduce the risk of 'judge shopping' when it comes to settling the bench for each court of appeal. For example, for a time in Tonga, only three judges held commissions for the Court of Appeal and would visit for each sitting, although this process has changed since 2013.

[114] Interview F12.
[115] *Beijing Statement* above n 25, art 35.
[116] Shimon Shetreet, 'The Challenge of Judicial Independence in the Twenty-First Century' (2000) 8(2) *Asia Pacific Law Review* 153, 156–7.
[117] *Rees v Crane* [1994] 1 All ER 933; Allott, above n 19, 1439.
[118] As is the case in Samoa and Solomon Islands.

Decisions about the status and immigration of non-citizens provide a way in which executive governments can directly interfere in the judiciary. The powers of the executive to control the entry and presence of non-citizens have been held to override considerations of judicial independence. In its review of the conduct of the immigration minister in revoking the visa of Chief Justice D'Imecourt, the Supreme Court of Vanuatu stated that 'if any person, Chief Justice or otherwise' falls within the prohibited classes under the *Immigration Act*, 'he will become a prohibited immigrant, even if the consequence means that the person is unable to carry out … the office of Chief Justice'.[119] The vulnerability of foreign judges to removal by cancellation of their visas constitutes a significant threat to judicial independence in states that rely on foreign judges. Claims about the right of sovereign states to determine the entry of non-citizens are difficult to counter. One small, but potentially significant counterpoint is that the removal of a foreign judge in this way is likely to garner international attention, in the judge's home state and beyond. For example, the removal of Australian Geoffrey Eames as Chief Justice of Nauru was met with condemnation from regional and international bodies,[120] although not by the Australian government, which stated that such matters were 'domestic matters' for the Nauruan government to resolve.[121]

V. Conclusion

It is commonly claimed that foreign judges support impartiality and independence because as outsiders they are removed from the personal, political and professional connections that arise in small communities. This notion is often taken for granted. When it is countered, it is by contrasting the social distance that foreign judges provide with the local knowledge that comes from living within the community.[122] This Chapter has sought to assess the impartiality and independence of foreign judges in the Pacific on its own merits.

This Chapter challenges the received wisdom on the impartiality and independence of foreign judges. The analysis in Part III demonstrates that the claim that foreign judges provide an impartiality otherwise lacking in local judges does not provide a principled justification for the use of foreign judges, except in cases where local judges must recuse themselves under the

[119] *D'Imecourt v Manatawai* [1998] VUSC 59.
[120] Geoffrey Eames, 'The Rule of Law in Nauru: An Evolving Concept?' (Paper presented at Law Society of South Australia Criminal Law Conference, McLaren Vale, 24 October 2014) 4; 'Judicial Independence and Human Rights Issues: Nauru' (2014) 35 *CMJA News: The Newsletter of the Commonwealth Magistrates' and Judges' Association* 3–4.
[121] Eames, above n 120, 4, 7.
[122] Powles, above n 69, 27–8; Van Dyke, above n 98, 180–83.

established legal tests for bias. The discussion in Part IV shows that foreign judges are vulnerable to particular forms of influence from a variety of sources including the government, authorities responsible for their appointment and, in some cases, the organisations that fund them. These vulnerabilities arise primarily as a result of insecure tenure: first, the prevalent and entrenched use of short renewable appointments for foreign judges; and secondly the removal of foreign judges by extra-constitutional means, taking advantage of their status as part-time judges and as non-citizens.

Impartiality and independence are critical to the legitimacy and effectiveness of Pacific judiciaries. Not every point of dependence identified in this Chapter will, in and of itself, be fatal to judicial impartiality and independence. They may be mitigated by the behaviour of judges, and respect for independence by governments and funding organisations. However, taken together and in combination, the structural shortcomings identified here can put both the practice and the perception of judicial independence at risk. Greater awareness and good practice initiatives, including to reduce the appointment of foreign judges on short renewable contracts, would assist Pacific states, funding organisations and judges themselves to identify and address the potential risks to judicial independence.

The findings of this Chapter suggest that there has been a tendency to overstate the benefits and understate the risks of foreign judging to the impartiality and independence of Pacific judiciaries. Scholars have made a similar finding in the analogous context of hybrid tribunals, in which local and foreign judges sit together to hear cases to support transitional justice after conflict. Scholars have observed a dynamic on these tribunals in which the local is overly personalised and contextualised to the point that local judges are presumed to be partial, while international judges are regarded as neutral experts.[123] However, 'over-valorising the international' in this way risks overlooking the sources of influence and conflicts of interest that foreign judges face.[124] The implication that local judges are not, and cannot be, impartial is particularly damaging to public confidence in Pacific judiciaries.

While not rationally justifiable, the perception of foreign judges as more impartial and independent is persistent. In Chapter 5, I suggested that emphasising the technical legal expertise of foreign judges facilitates the movement of judges across national borders. The

[123] Elizabeth M Bruch, 'Hybrid Courts: Examining Hybridity through a Post-Colonial Lens' (2010) 28(1) *Boston University International Law Journal* 1, 35–6; Harry Hobbs, 'Hybrid Tribunals and the Composition of the Court: In Search of Sociological Legitimacy' (2016) 16(2) *Chicago Journal of International Law* 482, 487.
[124] Bruch, above n 123, 35–6.

emphasis on impartiality performs a similar function, in that it casts foreign judges as professionals with the necessary expertise and impartiality to provide the judicial services of dispute resolution according to law.

CHAPTER 7
REPRESENTATION

I. Introduction

Specialist legal knowledge and impartiality are core attributes of judicial office.[1] There is, however, more to the judicial role, which attention to the nationality of judges helps to draw out. Chapter 4 surveyed a range of reasons for the global norm that the judges on national courts of constitutional jurisdiction must be citizens. It found that nationality was potentially relevant to a judge's knowledge of national law and the national community, while a judge's membership of the national community could, on some understandings, affect impartiality. The nationality of a judge was, however, far more significant to other qualities associated with judicial office, namely the responsibility and accountability of judges, and the expressive function of the judiciary as a national institution. These qualities all relate to the relationship between judges, the state and the people. They all point to a sense that the attributes of judicial office extend beyond the core judicial function of the impartial adjudication of disputes according to law, to encompass the virtues, agency and identity of the individuals who hold judicial office. In other words, the significance of nationality demonstrates that *who* a judge is, and not just what they do, matters.

What follows when foreign citizens hold judicial office? Intuitively, it is likely that the use of foreign judges will attenuate or diminish the significance placed on a judge's allegiance to the state; his or her sense of membership of, and responsibility to, the people; and the extent to which the judiciary, as an institution, is seen to be 'of the people'. If this is so, what alternative loyalties, responsibilities and expressive values might arise in their place? This Chapter explores these issues in light of the experience of Pacific states. It does so using the lens of representation, as a means of examining the different ways in which the individuals who hold judicial office are connected to that office, the state and its people. While there are other possible lenses through which to examine such connections, the concept of representation is apt for several reasons.

In some respects, describing the judiciary in terms of representation is incongruent because it seems inconsistent with judicial impartiality.[2] A judge cannot represent a particular constituency or stakeholder in the way a member of parliament might be said to represent his or her electorate. However, judges are representative in other ways. As public officials, they act on

[1] Martin M Shapiro, *Courts, A Comparative and Political Analysis* (University of Chicago Press, 1981) 1–7; Lizzie Barmes and Kate Malleson, 'Lifting the Judicial Identity Blackout' (2018) 38(2) *Oxford Journal of Legal Studies* 357, 358.
[2] Anne Phillips, *The Politics of Presence* (Clarendon Press, 1995) 186.

behalf of the state, and, in democracies, the people. As adjudicators, judges speak for the community in pronouncing judgment, stating and at times making the law, and might be said to represent the law or justice. In her conceptual analysis of representation, Pitkin shows that representation takes on different meanings which each become part of 'an incomplete jigsaw puzzle'.[3] Pitkin's approach to understanding representation by identifying various 'views' of representation is helpful when it comes to examining the different ways in which judges may be characterised as representative. It permits judges to be understood as representatives in some contexts and to a certain extent, without having to say that representation is their only or even predominant function or characteristic.

The concept of representation is also capable of capturing the range of potential relationships between an individual, their office, and more abstract notions such as the law, the state or the people. At its most general, representation means making present, in some sense, something which is not literally present.[4] This definition implies first, a representor, the person or thing who is making something present; second, something or someone being represented; and third an audience to whom the representation is communicated.[5] In this Chapter, the representor is the foreign judge, but it will be shown that the something or someone being represented might be the law, the people, or the state, and the audience might be the litigants before the court, the judge's professional peers, or people in and beyond the state. The concept of representation provides a way to disaggregate these various connections, rather than privileging one kind of connection, such as between judges and the people (as an analysis from the standpoint of democratic legitimacy might tend to do[6]) or judges and the state (as might be foregrounded in an analysis based on sovereignty) or between judges themselves (as in a study of judicial culture or ethics). Finally, because representation deals in appearances, expression and perceptions, all of which can be understood only in their context, the concept of representation directs attention to contextual, rather than global, understandings of the role of judges in a particular constitutional system.

Part II explains the ways in which a judiciary is – and is not – representative. It identifies three senses in which a judiciary might be understood as representative, each of which is taken up in Parts III, IV and V respectively to examine the implications of foreign judging as it arises in the

[3] Hanna Fenichel Pitkin, *The Concept of Representation* (University of California Press, 1967) 10, 59.
[4] Ibid 8.
[5] Andrew Rehfeld, 'Towards a General Theory of Representation' (2006) 68(1) *Journal of Politics* 1, 4.
[6] The challenges posed by the use of foreign judges to the legitimacy of courts of constitutional jurisdiction are discussed in Chapter 8.

Pacific. In Part III, the significance of loyalty to the state is examined through the *formalities* of representation, that is the procedures by which a person is given authority to act as a judge and held accountable in that position, with particular attention to the oath of allegiance. Part IV considers how judges, in the course of constitutional adjudication, *act or speak for* particular values. Finally, the expressive function of the judiciary as an institution is examined in Part V by considering the value placed on a judiciary that represents – in the sense of reflecting or resembling – the society it serves. In each case, the circumstances of foreign judging limit the extent to which foreign judges are understood to be authorised by, accountable to, speaking for, or reflective of the people or the state. As such, any sense that foreign judges represent the nation or the community, which might feature in other constitutional systems, is downplayed. In its place, an understanding emerges of foreign judges as representatives of a *profession*, with duties and responsibilities arising primarily from their professional commitments.

II. How are judges and judiciaries representative?

It is important to first be clear about the ways in which judges and judiciaries are *not* representative. One understanding of representation involves a relationship where the representative acts on behalf of another person or group.[7] For example, a member of the legislature might represent his or her constituency or political party by presenting its views in the legislature. In an agent-principal relationship, the agent represents the principal by acting as the principal directs. Pettit characterises this as 'responsive representation' because the elected representative or agent must track and respond to the wishes of those he or she represents or risk being removed.[8] Judges are not representative in this responsive sense. They do not act on behalf of a particular person, group or interest, because to do so would compromise their impartiality. Nor are they held to account for being 'unresponsive' to the wishes of others: judicial independence requires that judges cannot be removed from office except in very narrow circumstances, and certainly not for making a decision that is unpopular or contrary to the wishes of the government or anyone else.[9] There are, however, a range of other categories of representation, some of which accord with aspects of the judicial role.[10]

[7] Pitkin, above n 3, 113.

[8] Philip Pettit, 'Varieties of Public Representation' in Ian Shapiro et al (ed), *Political Representation* (Cambridge University Press, 2009) 61, 65.

[9] Mark Tushnet, 'Judicial Accountability in Comparative Perspective' in Nicholas Bamforth and Peter Leyland (eds), *Accountability in the* Contemporary *Constitution* (Oxford University Press, 2013) 57, 60. Grounds for the removal of judges by political process are generally confined to capacity and misbehaviour.

[10] I draw primarily on Pitkin, above n 3; and Pettit, above n 8 as their accounts focus on the representative functions of public officials. Many other accounts of the concept of representation, while

A. Formal representation

A representative can be understood as someone who has been authorised to act or will be held accountable for his or her actions. Pitkin characterises this as a 'formalistic' view of representation, because it focuses on the transactions that take place prior to (authorisation) or after (accountability) the representing occurs.[11] As Pitkin explains, it is a partial view of representation because it does not consider the substance of what a representative does.[12] It does, however, capture the sense in which public officials are representatives.[13] Judges, like other public officials, are authorised to perform functions and exercise powers on behalf of the state. Their decisions are not private opinions but are attributed to the state and binding upon it.[14]

The formal view focuses on the 'transactions' of representation, that is, the conferral and acceptance of public office. For judges, this includes the means by which individuals are selected to become judges, the processes of appointment, the ritual of the oath of office. These formalities distinguish public officials from employees of the state or its government.[15] They reflect the distinctive commitment that public officials have to the state and its people. The formalities provide avenues by which judges are held accountable, or at least made responsive, to the public interest.

B. 'Acting for' representation

A second sense of representation that is relevant to the judiciary conceives of representation as an activity, in which the representative *acts for* or *speaks for* others. This understanding of representation focuses on the substance of what a representative *does*, rather than the formal transactions that initiate or terminate representation.[16]

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useful, are framed around political representatives: eg, Andrew Rehfeld, 'Representation Rethought: On Trustees, Delegates, and Gyroscopes in the Study of Political Representation and Democracy' (2009) 103(2) *American Political Science Review* 214; Jane Mansbridge, 'Clarifying the Concept of Representation' (2011) 105(3) *American Political Science Review* 621; Andrew Rehfeld, 'The Concepts of Representation' 105(3) *American Political Science Review* 631.

[11] Pitkin, above n 3, 58.

[12] Ibid 59.

[13] Ibid 40–1.

[14] Ibid 116–17; Nicole Roughan, 'The Legitimacy of Whom?' in Kevin Walton, Wojciech Sadurski and Michael Sevel (eds), *Legitimacy: The State and Beyond* (Oxford University Press, forthcoming, 2018) 9 <https://papers.ssrn.com/abstract=3029928>.

[15] Roughan, above n 14, 9; Mark R Rutgers, 'The Oath of Office as Public Value Guardian' (2010) 40(4) *American Review of Public Administration* 428.

[16] Pitkin, above n 3, 113–19.

Pitkin uses the example of a judge to illustrate 'acting for' representation, in that judges are thought to represent what guides their actions.[17] A judge is said to decide cases in accordance with the pre-existing law, irrespective of his or her personal views and values.[18] Here, the judge is guided by law, and so might be said to represent the law.[19]

However, judges must sometimes move beyond this traditional view of judging, especially when interpreting constitutions. A judge might be faced with a provision which is unclear or which appears to lead to an unjust outcome, or a question of constitutional interpretation which has wide social or political ramifications. In such cases, judges might be guided by a range of values outside the law, speaking for – and so representing – an abstract ideal such as justice or fairness.[20] A judge might understand the law to be a 'reflection of the community's values'[21] and so be guided by those values. The judiciary is sometimes characterised as counterbalancing the group pressures and popular demands made on other branches of government, using its 'representative judgment to bring these pressures to balance'.[22] In these circumstances, judges might be guided by the range of social and political considerations that influence the other branches of government, albeit filtered through distinctively judicial modes of deliberation and reasoning.[23] My point here is not to decide between these different views about the basis for judicial decisions, but rather to show that they share in common a sense that judges' actions are guided by a range of values or interests which they might then be said to represent.

C. Descriptive representation

The third relevant category of representation is the idea that the representative person or institution *stands for* or *resembles* that which it represents. Pitkin calls this 'descriptive representation'.[24] Examples of descriptive representation include the idea of the legislature as the 'mirror' of the people,[25] and the jury as reflecting a cross section of the community.[26] The idea of the judiciary as descriptively representative has been most fully developed in the

[17] Ibid 116–18.
[18] Philip Hamburger, 'Judicial Office' (2011) 6 *Journal of Law, Philosophy and Culture* 53.
[19] Pitkin, above n 3, 117.
[20] Ibid 117–18.
[21] Terence Etherton, 'Liberty, the Archetype and Diversity: A Philosophy of Judging' [2010] *Public Law* 727, 733.
[22] Pitkin, above n 3, 117; citing Arthur F Bentley, *The Process of Government: A Study of Social Pressures* (Principia Press, 1949) 393.
[23] Eg Robert Alexy, 'Balancing, Constitutional Review, and Representation' (2005) 3(4) *International Journal of Constitutional Law* 572; David Dyzenhaus, 'Are Legislatures Good at Morality? Or Better at It than the Courts?' (2009) 7(1) *International Journal of Constitutional Law* 46, 51–2.
[24] Pitkin, above n 3, ch 4.
[25] Ibid 62.
[26] Pettit, above n 8, 67.

literature on a 'reflective judiciary'. While there are many ways in which a judiciary might be said to be reflective,[27] the predominant understanding is a judiciary whose *composition* reflects that of the community. In most cases, a reflective judiciary requires that diverse identity groups within the citizenry, in terms of gender, ethnicity, territorial origin, religion or linguistic affiliation, are included in the composition of the judiciary.[28]

It is claimed that a reflective judiciary supports public confidence because people are more likely to respect and trust a judiciary in which they can 'see themselves'.[29] In this, descriptive representation focuses on appearances: it is about what the judiciary *looks like*, rather than how it speaks or acts. There is, however, some degree of overlap between descriptive representation and 'acting for' representation. Judges with diverse identities and experiences will be a source of information for the court and contribute to the way in which courts understand and develop the law.[30] The reflectiveness of the judiciary can also function as a justification in support of the claim that judiciaries can 'speak for' the whole of society.[31]

The Parts that follow explain how the use of foreign judges in the Pacific affects each of these three representative functions of the judiciary and who or what foreign judges might be thought to represent. In relation to formal and 'acting for' representation, the focus is on the connections between individual judges and who or what they might represent. In relation to descriptive representation, the focus broadens to the composition of the judiciary as a whole.

III. Formal representation: Authorisation and accountability

Judges, by virtue of holding public office, are representatives in the formal sense: they are authorised to act on behalf of the state and to exercise the judicial powers of the state. Accounts of judges as formal representatives seek to explain how the state – and more specifically in a democracy, the people of the state – ensure that judges act in its interests. Garoupa and Ginsburg employ an agent-principal model in which the principal – in their account the people or society – hires judges as its agents to provide the service of judging.[32] They seek to explain

[27] Sophie Turenne, *Fair Reflection of Society in Judicial Systems: A Comparative Study* (Springer, 2015) 3–12.
[28] Barmes and Malleson, above n 1; Erika Rackley, *Women, Judging and the Judiciary: From Difference to Diversity* (Routledge, 2013) 24.
[29] Rackley, above n 28, 23–4; Peter H Russell and Kate Malleson (eds), *Appointing Judges in an Age of Judicial Power: Critical Perspectives from around the World* (University of Toronto Press, 2006) 434.
[30] Rachel J Cahill-O'Callaghan, 'Reframing the Judicial Diversity Debate: Personal Values and Tacit Diversity' (2015) 35(1) *Legal Studies* 1, 5–7; Pitkin, above n 3, 81.
[31] Barmes and Malleson, above n 1, 376–8; Pitkin, above n 3, 82.
[32] Nuno Garoupa and Tom Ginsburg, *Judicial Reputation: A Comparative Theory* (University of Chicago Press, 2015) 3, 59–60.

how a society might manage what they characterise as the 'agency costs' which arise when the preferences of the judiciary do not match those of the society or when judges do not perform well in their role.[33] Pettit suggests that judges are 'indicative representers' or 'proxies' of the public. They are 'professionally constrained and motivated to implement' the public's objective in having a judiciary, that is the impartial adjudication of disputes according to law. As independent office holders who are not subject to removal or reappointment, judges are motivated by 'professional reputation to act reliably in a manner that answers to the interest of the people as a whole'.[34]

There are various mechanisms which seek to ensure that judges will properly represent the interests of the state and the people. One is processes for the selection and appointment of judges which involve or are responsive to the people. A second is the oath of office and allegiance, by which an individual commits to perform the duties of judicial office and to be loyal to the state. These mechanisms are *ex ante* formalities which authorise an individual to hold judicial office. However, they also function as means of accountability, by defining the mandate of judicial office and constraining judges to act within it.[35] This Part shows how these two mechanisms operate differently for local and foreign judges in the Pacific, in practice and also sometimes in law.

A. Selection of foreign judges

In the Pacific, judges are appointed by the head of state on the advice of the executive government or a judicial services commission. As such, the authorities responsible for selecting judges are generally elected representatives of the people (as members of the executive) and/or representatives of constituencies within the community such as the legal profession or a chiefly institution (as members of a judicial services commission). The formal procedures for appointing both local and foreign judges thereby maintain links to the people.

The primary, and in most cases only, criterion for judicial appointment is a minimum period of years of judicial or legal experience.[36] However, in addition to professional experience, there are a range of other qualities that are highly valued in a judge, such as impartiality, integrity, fairness and loyalty to law.[37] In Vanuatu, the Judicial Service Commission is directed by law to consider

[33] Ibid 59–65.
[34] Pettit, above n 8, 70.
[35] Russell and Malleson, above n 29, 427–30; Tushnet, above n 9.
[36] Chapter 3, Part II.C
[37] Roderick A MacDonald, 'Exercising Judgement' in *Which Judge for Which Society? Proceedings of the 2008 Judges' Conference* 51, 62–3.

the candidate's experience, abilities, character and standing in the community.[38] Appointing authorities in other states must presumably also consider such qualities when making or recommending judicial appointments. It is only by assessing these qualities that selectors can be confident that candidates will be desirable representatives of the people and the state in judicial office.

It is at this point that the selection processes for local and foreign judges diverge in practice. As in many other common law countries, the local judges on Pacific courts are recruited from the local legal profession. Those responsible for selecting candidates for appointment are likely to have ready access to information about local candidates – either from their own knowledge or from judges and members of the legal profession – to enable them to assess whether the person will fulfil the mandate of judicial office in the interests of the people. When appointing foreign judges, however, the local appointing body is generally at much greater distance from potential candidates,[39] presenting challenges in identifying and assessing their suitability for judicial appointment. Chapter 3 identified a range of different processes for recruiting foreign judges, including through advertisements, recommendations of other judges, the networks developed at international judicial conferences, and donor organisations.[40] In all cases, local appointing authorities are at a disadvantage when assessing a candidate's suitability for judicial appointment in the particular legal and social context of the Pacific state. Appointing authorities are unlikely to have direct knowledge of the candidate and must rely instead on recommendations from people in the candidate's home state and their professional qualifications on paper. This can have serious implications. Where a foreign judge does not meet the standards expected of a judge, collegial relations within the court and the standing of the court in the eyes of the community are at risk.

The difficulties associated with assessing the personal qualities of foreign candidates for judicial appointment are likely to result in an emphasis on their professional qualifications and experience, likely to have been gained in the judge's home state. Professional qualifications are mandated and recognised by the legal profession in each jurisdiction. Tushnet suggests that the predominance of professional, rather than political standards in judicial appointment processes can nevertheless provide a form of political responsibility on the basis that there is a rough correlation between wider social values and the values of the legal profession which inform

[38] *Judicial Services and Courts Act 2003* c 270 (Vanuatu) s 33(3).
[39] While this is often the case, a notable exception would be those judges who, although non-citizens, have worked or practiced in the Pacific state: See Chapter 2, Parts II and V.B.
[40] Chapter 3, Part II.B.

professional standards.[41] However, this attenuated connection to the people of the state is further weakened when the assessment of professional standards is predominantly formed in a foreign legal context.

B. Oath of office

Foreign judges take a judicial oath upon the commencement of their service in a Pacific state. The precise words of the judicial oath vary across Pacific jurisdictions, but generally include a commitment to 'well and truly' serve the sovereign or the state, to act in accordance with the constitution and the law, and to 'do right to all manner of people, without fear or favour, affection or ill will'.[42] The oath is a personal commitment and public promise to fulfil the obligations of judicial office. Traditionally, it was made to a divine witness. Today, however, the significance of the oath rests on a person's sense of honour, that is, the desire to think well of one's self (conscience) and to be thought of well by others (reputation).[43]

The judicial oath is also a statement of the requirements of judicial office – of service and fidelity to the people, impartiality, and loyalty to law and the attainment of justice.[44] It is often used as the touchstone for determining whether an individual's conduct is consistent with judicial office. The oath therefore operates to *define* a profession and commits its members to upholding the standards of that profession. The oath sets out the duties and the constraints of office and in doing so provides an avenue of accountability.

Oath of allegiance

In five Pacific states, judges take a separate oath of allegiance, in which the judge swears to 'bear true allegiance' to the state or sovereign. In all states, the judicial oath includes a commitment to serve the sovereign or the state.[45] The concept of allegiance was historically understood as an obligation of fidelity and obedience to the sovereign. Now, it might describe personal feelings of attachment to the nation or denote a formal legal relationship between a state and its citizens.[46] Although some consider allegiance to be an outdated, even irrelevant, notion in the

[41] Tushnet, above n 9, 64.
[42] Chapter 3, Part II.A.
[43] Paul Horwitz, 'The Constitutional Marriage of Personality and Impersonality: Office, Honor, and the Oath' (2018) 33 *Constitutional Commentary* 101, 106–7.
[44] Sir Gerard Brennan, 'Speech on Swearing in as a Chief Justice' (1995) 183 CLR ix, x.
[45] Chapter 3, Part II.A. The *Constitution of Tonga 1875* s 95 is unique in setting out a separate oath for non-citizen judges which excludes a statement of loyalty to the King.
[46] Elise Arcioni, 'Identity at the Edge of the Constitutional Community' in Fiona Jenkins, Mark Nolan and Kim Rubenstein (eds), *Allegiance and Identity in a Globalised World* (Cambridge University Press, 2014) 31, 38.

modern context of globalisation,[47] the concept still has resonance. New citizens take an oath of allegiance to their new country. And, of most relevance to this discussion, public officials are required to swear or affirm their allegiance to the state they serve. The reason to require public officials to do so goes to their formal representative function. Appointment to public office authorises an individual to exercise the powers of the state, vesting in them special status and authority. As a representative, a public official is obliged to act in the public interest. The oath of allegiance serves to make this obligation not only a public duty, but also a personal moral commitment.[48]

Some foreign judges have expressed discomfort about taking an oath of allegiance to a foreign state. Lord Millett, a citizen of the United Kingdom, served as a non-permanent judge of the Hong Kong Court of Final Appeal, as well as on the House of Lords. To allay his concerns about taking an oath of allegiance to Hong Kong, he says he 'carefully put my British passport in my breast pocket and took the oath in the American manner with my right hand over my heart and, more importantly, over my passport'.[49] There might also be concerns that a judge who swears allegiance to different jurisdictions will have divided loyalties, which animate much of the discussion about the motivations of national judges on international courts.[50] There is, however, little discussion of such concerns in the Pacific.[51]

The reason that most foreign judges serving in the Pacific seem comfortable taking the oath of allegiance is because it is understood not as a commitment directly to the state, but to the laws of the state. This interpretation is not unique to foreign judges: the oath of allegiance does not impose a duty to be obedient to a particular government or individual, but an abstract and higher loyalty to the state and the public interest.[52] When taken by a judge, the oath is understood to mean allegiance to law. Lord Neuberger, a British judge who also served on the Hong Kong Court of Final Appeal, dismissed concerns about swearing an oath of allegiance to Hong Kong because 'the way in which judges demonstrate their patriotism is by an irrevocable

[47] Rishi Gulati, 'The Relevance of Nationality in the Age of Google, Skype and Facebook' in Fiona Jenkins, Mark Nolan and Kim Rubenstein (eds), *Allegiance and Identity in a Globalised World* (Cambridge University Press, 2014) 542, 561.
[48] Rutgers, above n 15, 430.
[49] Peter Millett, *As in Memory Long* (Wildy, Simmonds & Hill Publishing, 2015) 191.
[50] Tom Dannenbaum, 'Nationality and the International Judge: The Nationalist Presumption Governing the International Judiciary and Why It Must Be Reversed' (2012) 45(1) *Cornell International Law Journal* 77, 112–3; Yuval Shany, 'Dédoublement Fonctionnel and the Mixed Loyalties of National and International Judges' in Filippo Fontanelli, Giuseppe Martinico and Paolo Carrozza (eds), *Shaping Rule of Law through Dialogue: International and Supranational Experiences* (Europa, 2010) 27.
[51] Susan Boyd, 'Australian Judges at Work Internationally: Treason, Assassinations, Coups, Legitimacy of Government, Human Rights, Poverty and Development' (2003) 77 *Australian Law Journal* 303, 308.
[52] Rutgers, above n 15, 435.

and undiluted commitment to the rule of law'.[53] One judge serving in the Pacific expressed a similar view, noting that his home jurisdiction and the Pacific state he served both shared a commitment to the rule of law and as a result he was faithful to his judicial oath by supporting the rule of law in both countries.[54]

Taking an oath of allegiance has special significance for foreign judges because it expresses a commitment to a state in which they do not hold the ties of identity and membership implicit in citizenship. The oath, along with responsibility for appointment in the hands of the Pacific state, are the clearest points of connection between a foreign judge and the Pacific state which he or she serves. This connection is, however, attenuated. The emphasis in both cases is on the professional qualifications and responsibilities of the foreign judge, rather than a sense that the foreign judge commits to the specific social values of the Pacific state in which he or she serves. The foreign judge represents the state by fulfilling the professional requirements of judicial office.

Acceptance of authority

Oaths of office and allegiance do not only formalise the *conferral* of public authority, but also the *acceptance* of that authority by the individual office holder.[55] Acceptance of judicial office has special significance for foreign judges. In her work on representations of the foreigner in stories of democratic founding, Honig explains that one symbolic function of the foreigner is to reassure citizens of the 'choice-worthiness' of their social and political regime.[56] Immigrants who voluntarily swear allegiance to the state symbolically affirm the legitimacy of the legal, social and political regime of the state for all citizens.[57]

There is a similar sense in which the use of foreign judges is seen to bestow legitimacy on courts and regimes.[58] This comes to the fore not only in the act of accepting judicial office, but in resigning from it. There have been several instances in the Pacific where foreign judges have

[53] Stuart Lau, 'No Need to Fear Beijing's White Paper: Top UK Judge' *South China Morning Post* (Hong Kong), 26 August 2014 <https://www.scmp.com/news/hong-kong/article/1580878/no-need-fear-beijings-white-paper-says-top-uk-judge-lord-neuberger>.
[54] Interview F24.
[55] Roughan, above n 14, 20.
[56] Bonnie Honig, *Democracy and the Foreigner* (Princeton University Press, 2001) 75, 109.
[57] Ibid 92–5.
[58] Joseph Fok, 'The Use of Non-Local Judges in Overseas Jurisdictions' (2017) 23(1) *Journal of the Commonwealth Magistrates' and Judges' Association* 28, 31: 'It is perfectly reasonable to ask, "Would so many eminent serving and retired judges have sat, and continue to sit, in a court [overseas] if any of them thought the system was subject to improper interference from outside agencies?"'.

resigned *en masse*.[59] One prominent example occurred in the wake of the military coup in Fiji in 2006, when eight foreign judges resigned, citing concerns about judicial independence and the administration of the court.[60] Other foreign judges stayed for the duration of their existing commissions but did not seek reappointment.[61] Whether to accept or continue judicial appointment from a government of questionable legality was regarded ultimately as a question for the 'conscience' of the individual.[62] On the one hand, Fiji needed judges so that the judiciary could continue to operate despite the political crisis. On the other hand, by accepting appointment, judges might be seen to acquiesce or accept an unlawful regime.[63] One foreign judge framed this issue using the language of allegiance, stating that 'any expat now thinking of taking a position will effectively be swearing allegiance to an illegal dictator'.[64] Justice French, an Australian judge who was appointed to the Supreme Court of Fiji prior to the coup, outlined the dilemma as follows:

> Australian judges involved in the Supreme Court of Fiji after the coup have had to consider the benefits gained from their continued contribution to the rule of law against the risk that they may be perceived to have made an implicit bargain with a government whose legality is in question.[65]

Both views emphasise the degree of choice that individuals have in accepting judicial appointment. In voluntarily making that choice, individuals confer a degree of legitimacy on the court and the state in which they accept appointment by demonstrating, in Honig's terms, its 'choice-worthiness'. Foreign judges, by virtue of their foreignness, are in a special position to do this. As visiting non-citizens, the personal costs of leaving are less than those for citizen judges,

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[59] Including in Papua New Guinea after the Rooney affair (see Part V.A below) and in Fiji following coups in 1987, 2000 and 2006. Outside the Pacific, six foreign judges resigned from the courts of Swaziland after the Prime Minister accused them of being influenced by outside forces: Maxine Langwenya, 'Swaziland Justice Sector and the Rule of Law' (AfriMAP and the Open Society Initiative for Southern Africa, 2013) 98, 101.

[60] Six judges of appeal resigned on 3 September 2007: 'Aust, NZ Judges Quit Fiji's Appeal Court' *ABC News*, 4 September 2007 <http://www.abc.net.au/news/2007-09-04/aust-nz-judges-quit-fijis-appeal-court/660062>. Sir John Steele Henry resigned early in 2007; Roger Coventry resigned in January 2009: 'Fiji Judge Urges Lawyers to Speak Out' *FijiLive*, 25 January 2008 <http://fijilive.com/fijliive-print-story.Fijilive?1356.Fijilive>.

[61] Graham Leung, 'The Erosion of Judicial Independence' in Jon Fraenkel, Stewart Firth and Brij V Lal (eds), *The 2006 Military Takeover in Fiji: A Coup to End All Coups?* (ANU Press, 2009) 301, 303; International Bar Association, 'Dire Straits: A Report on the Rule of Law in Fiji' (2009) 49–50. Interviews F3, F4, F23.

[62] Robert French, 'Judges in Fiji Face "interim" Problem' *The Australian* (Canberra), 2 May 2008 29. Interviews F3, F4, F23.

[63] Jennifer Corrin, 'Judge or Be Judged: Accepting Judicial Appointment in an Unlawful Regime' (2009) 16(2–3) *International Journal of the Legal Profession* 191, 197–8; Graham Leung, 'Some Challenges to the Rule of Law in Fiji' (Paper presented at the 36th Australian Legal Convention, Perth, 18 September 2009) 4. See also *Qarase v Bainimarama* [2009] FJCA 67, [168-9].

[64] Chris Merritt, 'Sacked Fiji Judges Warn Expats on Treason' *The Australian* (Canberra), 13 April 2009 1.

[65] French, above n 62.

especially where the foreign judge is not reliant on judicial service in the Pacific for his or her livelihood.[66] Foreign judges bring with them an international audience in their home country and perhaps beyond, such that acceptance, but particularly resignation, of judicial office can garner international attention.[67] Resignations can signal, intentionally or not, that there is something wrong.[68]

The Fijian experience also demonstrates how the lines of accountability for foreign judges who accept appointment lead predominantly to professional peers in the judges' home state, rather than to the people of the country on whose courts they serve. While local bodies such as the Fiji Law Society and local non-governmental organisations criticised the erosion of judicial independence in Fiji,[69] pressure from peers in their home states seemed most likely to dissuade foreign judges from accepting appointment. Warnings from Australian and New Zealand Bar Associations, who advised their members against accepting 'tainted' judicial appointments from the military government,[70] spoke directly to their members in ways that voices from Fiji could not. In Sri Lanka, criticisms of judicial appointments to the Fijian courts were framed in terms of the negative effect that judges serving an overseas 'military dictatorship' would have on the integrity of the Sri Lankan judiciary.[71]

These dynamics, and their limitations, are illustrated by the challenge to appointment of Jocelynne Scutt, an Australian barrister practicing in the state of Victoria, as a judge of the High Court of Fiji. The Pacific Centre for Public Integrity, a non-government organisation based in Suva ('the NGO'), made a complaint to the Legal Services Commission of Victoria, accusing Scutt of

[66] Many foreign judges hold – or can easily return to – full-time employment in their home state. Foreign judges who are retired judges in their home state receive pensions.
[67] Eg Geoffrey Eames, 'The Rule of Law in Nauru: An Evolving Concept?' (Paper presented at Law Society of South Australia Criminal Law Conference, McLaren Vale, 24 October 2014) 4.
[68] A representative of the Australian Minister for Foreign Affairs commented that 'the state of the Fijian judiciary is a matter of concern, as evidenced by the fact that most expatriate judges, including a number of Australian nationals, have resigned or have refused to renew their contracts': Nicola Berkovic, 'Judge Criticised over Fiji Posting' *The Australian* (Canberra), 10 March 2008 4.
[69] Tupou Draunidalo, 'The Rule of Law and Judicial Independence amidst the Coups and Attempted Coups in Fiji since 1987' in Jon Fraenkel, Stewart Firth and Brij V Lal (eds), *The 2006 Military Takeover in Fiji: A Coup to End all Coups* (ANU E Press, 2009) 311; Fiji Women's Rights Movement, *Herstory: Celebrating 25 Years of Balancing the Scales 1986-2011* (2011) 34 <www.fwrm.org.fj/images/fwrm2017/PDFs/fwrmherstory1984_2011final.pdf>.
[70] Chris Merritt, 'When Backlogs Lead to Payback' *The Australian* (Canberra), 1 May 2009 27; 'NZ Lawyers Should Not Work for Fiji Regime, Law Society Says' *NZ Herald* (Auckland), 21 April 2009 <http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10567736>.
[71] Uvindu Kurukulasuriya, 'Can We Expect Justice and Independence from Servants of Military Dictators?' *Colombo Telegraph* (Colombo), 30 October 2011 <https://www.colombotelegraph.com/index.php/can-we-expect-justice-and-independence-from-servants-of-military-dictators/>.

professional misconduct. It alleged that, by accepting judicial appointment from the 'constitutionally unlawful regime' in post-coup Fiji, Scutt had undermined the integrity and independence of Fiji's judiciary. The NGO argued that the Australian legal profession had a duty to regulate the activities of Australian lawyers overseas, especially in countries such as Fiji 'where the national legal processes are politically and legally not able to address these issues'.[72] The Victorian Legal Services Commissioner held that Scutt had not engaged in professional misconduct. She said that the acceptance of judicial appointment in these circumstances would not, in itself, 'be regarded as disgraceful or dishonourable by members of the legal profession'. Scutt was also found not guilty of a less serious charge of unprofessional conduct because the conduct was not in connection with the practice of law.[73] The Commissioner's decision appears narrowly bounded to her own territorial jurisdiction. She seems to have considered only how the conduct was connected to the practice of law in *Victoria*, and how it would be regarded by members of the *Victorian* legal profession*,* even though, as Corrin points out, there is no legal requirement to confine the considerations in such a way.[74]

Both the complaint and the reasons for its dismissal highlight the way in which foreign judges are considered to be, first and foremost, members of the legal profession of their home state. As the NGO noted, there was no practical way to challenge judicial appointments in Fiji. However, by bringing a complaint in Victoria, the NGO recognised that it is among peers in a foreign judge's home state that his or her reputation is forged, maintained and of greatest professional importance. Similarly, by assessing Scutt's acceptance of judicial appointment in Fiji only by reference to how it was perceived in Victoria, the reasons of the Legal Services Commissioner suggest that professional legal conduct is understood and assessed primarily by reference to the foreign judge's home state. The case shows how, once again, the conditions of foreign judging mean that any sense that a judge, as a public official, represents and is responsible to the people of the state in which he or she serves, is mediated through channels of professional, rather than political, accountability. Importantly, however, those professional obligations and reputation are connected not to the Pacific state, but to the foreign judge's home state.

[72] Chris Merritt and Nicola Berkovic, 'Fiji's Democracy Lobby Tries to Scuttle Scutt Appointment' *The Australian* (Canberra), 14 March 2008 33.
[73] The decision of the Legal Services Commissioner is not publicly available. The findings were reported in Chris Merritt, 'Jocelynne Scutt Cleared of Misconduct' *The Australian* (Canberra), 8 August 2008 33.
[74] Corrin, above n 63, 203 noting precedents where Legal Services Commissioners considered conduct occurring overseas.

C. An attenuated accountability

An understanding of judges as public officials, and in this sense representatives of the state, highlights ways in which judges are connected to the state and its people. The formalities of representation, by which individuals are authorised to hold judicial office are – formally speaking – in the hands of the Pacific state, providing an important point of connection between foreign judges and the state they serve. There is no sense, for example, that a foreign judge is a representative of his or her home state, in the way that judges on some international courts are regarded.[75] The formalities of representation provide a framework of accountability to a judge's peers, the legal profession and the community. The practicalities of foreign judging, however, distance judges from the legal profession and community in the Pacific state and import the judge's home state and its legal profession and community into authorisation and accountability processes. Channels for the recruitment of judges and lines of professional accountability tend to lead back to the foreign judge's peers and profession in his or her home state, attenuating the degree to which foreign judges represent the Pacific state and its people.

IV. 'Acting for' representation: What guides foreign judges' decisions?

'Acting for' representation captures the sense in which judges are guided in their decisions by a variety of values and interests. As explained in Part II.B, there are different views about the kinds of values and interests that judges do, and ought to, represent. This Part considers what *foreign* judges might be understood to represent and the effect this might have on how they approach constitutional adjudication.

Foreign judges who serve in the Pacific are themselves fairly clear that they represent the law and the judicial qualities of impartiality and expertise. When asked about their role on Pacific courts, several judges interviewed stated that they were there to be judges, with no expectation or encouragement to take on additional roles.[76] There was, however, a sense, shared in a few interviews, in which foreign judges were understood to represent what might be broadly characterised as the rule of law. Foreign judges, especially those funded by development programs, are sometimes seen as part of and complementary to wider efforts to strengthen law and justice systems and promote good governance and the rule of law in Pacific states.[77]

[75] Ruth Mackenzie et al, *Selecting International Judges: Principle, Process, and Politics* (Oxford University Press, 2010) 31.
[76] Interviews F4, F5, F8, F9.
[77] John Logan, 'Law and Justice in Papua New Guinea' (Paper presented at the Australian Institute of International Affairs, Brisbane, 23 June 2015) 48–50. Interviews F1, F7, F11, F20, F24.

The analysis of constitutional cases across the nine Pacific jurisdictions set out in Chapter 5 supports the idea that foreign judges tend to speak for the law and minimise or avoid overt claims to speak for the people or the community. Chapter 5 examined this issue in light of the kinds of knowledge that foreign judges bring to bear on constitutional adjudication. It suggested that foreign judges, generally speaking, will have gaps in their knowledge regarding custom and the social values of Pacific communities. As a result, it is understandable that foreign judges turn to legalistic methods – such as textual approaches to constitutional interpretation – rather than attempt to 'speak for' the place of social values and custom in (what is to them) a foreign jurisdiction.

The preference for textualism may not only be a consequence of the kinds of knowledge that foreign judges bring to the task of constitutional adjudication in the Pacific. It might also arise as a result of perceptions about the legitimacy of judges, and foreign judges in particular, to represent the people or community. Writing in the context of the United States, Kahn argues that the authority of a court depends on the ability of its audience – the people – to identify with the narrative that the court constructs about the constitutional order.[78] Kahn argues that a foreign judge would undermine this sense of identification between speaker and audience, breaking the relationship between the judge, the law and the people.[79] Barmes and Malleson make a similar connection when they argue that judicial office must be open to all groups within society so as to 'give voice' to different perspectives within the society.[80] We might expect foreign judges to be hesitant about leading social change or developing the law in light of changing social values because, as outsiders, they lack the authority to speak for the people in this way. This Part examines this expectation by comparing the way in which the Courts of Appeal of Samoa and Tuvalu have approached politically and socially sensitive constitutional cases.

In her study of the reasoning of foreign judges on Pacific courts, Baird discusses judicial deference as a potential way in which foreign judges might deal with contentious cases with significant cultural or customary elements.[81] Deference occurs when courts openly accord

[78] Paul Kahn, 'Independence and Responsibility in the Judicial Role' in Irwin P Stotzky (ed), *Transition to Democracy in Latin America: The Role of the Judiciary* (Westview Press, 1993) 73, 82.
[79] Ibid 83.
[80] Barmes and Malleson, above n 1, 376–9.
[81] Natalie Baird, 'Judges as Cultural Outsiders: Exploring the Expatriate Model of Judging in the Pacific' (2013) 19 *Canterbury Law Review* 80, 93–5.

weight to the judgement of another decision maker.[82] There are two main rationales for deference.[83] The first is deference on the ground that the other decision maker has greater institutional competence – or knowledge – to determine the issue. One example, discussed in Chapter 5, is deference to a local judge on a court below on the grounds he or she has greater knowledge of custom and local conditions.[84] The second rationale arises from the recognition that the other decision maker has greater legitimacy to determine the issue. On this basis, courts composed of foreign judges might defer, to some extent, to the decisions of local authorities composed of members who are 'of the people', such as legislatures or village councils.

The Samoan Court of Appeal, which until very recently comprised only foreign judges, provides an example of this second kind of deference. The deferential approach of this court may be illustrated by its approach to electoral matters. In Samoa the franchise was initially restricted to *matai* (chiefs). The Court of Appeal's first constitutional case, *Attorney General v Olomalu,* was a challenge to the restricted franchise.[85] The plaintiff argued that the constitutional guarantee of equality required universal suffrage. The Samoan government, however, argued that the unique nature of Samoan culture should weigh in favour of the preservation of *matai*-only suffrage. The Court of Appeal held that *matai*-only suffrage was constitutional. Its decision was primarily based on the text of the *Constitution*. However, the Court also looked to the debates of the Constitutional Convention, which had expressly considered and rejected a provision for universal suffrage and had purposely decided not to entrench *matai* suffrage so that the Parliament might revisit the question in the future. In 1990 the Parliament did revisit the question, conducting a plebiscite and amending the *Electoral Act* to provide for universal suffrage. Once again, the Court of Appeal upheld this amendment, refusing to find that the *Constitution* entrenched either universal or *matai*-only suffrage.[86] Finally, in the *Samoa Party* case, the Court of Appeal upheld the validity of legislation which restricted the right to bring a petition to challenge an election result to *matai* who had received a significant number of votes to challenge an election result.[87]

[82] Paul Horwitz, 'Three Faces of Deference' (2008) 83 *Notre Dame Law Review* 1061, 1072; Aileen Kavanagh, 'Defending Deference in Public Law and Constitutional Theory' (2010) 126 *Law Quarterly Review* 222, 223.
[83] Horwitz, above n 82, 1078–90.
[84] Eg *To'ofilu v Oimae* [1997] SBHC 33, Palmer J; Chapter 5, Part V.
[85] *In re the Constitution, Attorney-General v Olomalu* [1982] WSCA 1.
[86] *In re the Constitution, Pita v Attorney-General* [1995] WSCA 6.
[87] *Samoa Party v Attorney General* [2010] WSCA 4. Only *matai* are eligible to stand for election to the Samoan parliament.

The picture that emerges from these cases is of a Court that seeks to follow changes in the community's views rather than lead such change.[88] The Court expressly defined its role narrowly in relation to that of the Parliament. In *Olomalu*, the Court stated that its decision to uphold the constitutionality of the restricted franchise should not be read to 'imply any view of the Court about whether continuing with matai voting is in the long term interest of Samoa – this a question of social and political philosophy determined by parliament'.[89] Similarly, in the *Samoa Party* case, the Court expressly confined its role to determining whether the *Constitution* had been infringed; it was not to 'impose its own ideas'.[90] It recognised Parliament, 'with its double legitimacy as the chosen representatives of the people and as composed of *matai* who are versed in both Christian principles and Samoan tradition' as the appropriate body to determine the rights of electoral petitioners.[91] While an expansive right to bring electoral petitions would provide greater protection of free and fair elections, the Court noted that parliamentarians are answerable to the community for allocation of resources, stating that 'for a court to rule otherwise would place it, not the parliament, in breach of the Constitution, unless that course was essential to achieve the standards required by the Constitution'.[92] The deferential approach of the Court of Appeal of Samoa is not necessarily replicated in other Pacific jurisdictions, nor is it unique to courts that comprise foreign judges. It has, however been suggested that the court's cautious approach is a model for how a court comprising foreign judges might contribute to the stable development of state law.[93]

The approach of the Samoan Court of Appeal has been compared to the approach of the Tuvalu Court of Appeal in the case of *Teonea v Pule of Kaupule of Nanumaga,* the freedom of religion case discussed in Chapter 5, Part IV.B.[94] This case was narrowly decided. Chief Justice Ward in the High Court and Justice Tomkins in dissent in the Court of Appeal upheld the authority of the *Falekaupule* to prohibit the establishment of a new church, in essence deferring to the local customary decision maker. The two judges in the majority in the Court of Appeal, however, held that the *Falekaupule's* decision to ban the new church was inconsistent with the *Constitution*. Justice Fisher did not accept that once it was shown that there was a threat to Tuvaluan values that the Court should defer to the *Falekaupule* or that the Tuvaluan values should automatically

[88] AH Angelo, '"Steady as She Goes": The Constitution and Court of Appeal of Samoa' (2012) 18 *New Zealand Association for Comparative Law Yearbook* 145, 157–8; Baird, above n 81, 90.
[89] *In re the Constitution, Attorney-General v Olomalu* [1982] WSCA 1.
[90] *Samoa Party v Attorney-General* [2010] WSCA 4, [45].
[91] Ibid [10]; Baird, above n 30, 89–90.
[92] *Samoa Party v Attorney-General* [2010] WSCA 4, [55].
[93] Angelo, above n 88, 164–5. For discussion, see Baird, above n 81, 93–5.
[94] *Teonea v Kaupule* [2005] TVHC 5; *Teonea v Pule o Kaupule of Nanumaga* [2009] TVCA 2. For comparisons see Angelo, above n 88; Baird, above n 81.

prevail. Rather, it is for the Court to determine whether the *Falekaupule's* decision is consistent with the Constitution.[95] He stated:

> I can well understand the view that the threat to Nanumaga stability, culture and unity is a high price to pay for permitting the introduction of another religion on the island. However in the end I have concluded that the time has come to allow the people of Nanumaga their constitutional freedoms.[96]

Justice Paterson framed the issue for determination as 'the extent to which universally accepted human rights can be modified or restricted by the customs and traditions of Tuvalu'.[97] For Justice Paterson, the starting point was Tuvalu's international obligation to protect and promote all human rights and fundamental freedoms.[98] Justice Paterson emphasised the desire, expressed in the preamble, 'that Tuvalu must take its rightful place amongst the community of nations',[99] and the recognition, also in the preamble, that the principles on which the *Constitution* is based are subject to change over time.[100] Like Justice Fisher, Justice Paterson determined that 'the time has come' to recognise – and indeed to effect – a change in the value that Tuvalu placed on the freedom of religion.

The decision caused social unrest and division. Many people on Nanumaga did not accept the decision, to the point where police on the island could not or would not enforce the court's ruling.[101] The Tuvaluan Parliament acted quickly to pass a constitutional amendment that further emphasised traditional values and expressly permitted restrictions on freedom of religion of the kind at issue in *Teonea*.[102] Parliament's response might be read positively, as an engagement by the Court and the Parliament in 'dialogue' over the meaning and scope of constitutional rights, which was only possible because the Court did not defer but rather dealt with the rights claim before it. The events can also be read as a case in which foreign judges on the Court of Appeal misread the significance placed by the Tuvaluan people and their *Constitution* on the maintenance and protection of Tuvaluan values, and which was met by backlash and non-compliance as a result.[103] Angelo has criticised the case as one where the

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[95] *Teonea v Pule o Kaupule of Nanumaga* [2009] TVCA 2, [125-7], [134].
[96] Ibid [158].
[97] Ibid [167].
[98] Ibid [211].
[99] *Constitution of Tuvalu 1986*, Principle 3; *Teonea v Pule o Kaupule of Nanumaga* [2009] TVCA 2, [217].
[100] *Constitution of Tuvalu 1986,* Principle 7; *Teonea v Pule o Kaupule of Nanumaga* [2009] TVCA 2, [215].
[101] Angelo, above n 88, 164.
[102] *Constitution (Recognition of Traditional Standards, Values and Practices) Amendment Act 2010* (Tuvalu).
[103] Twomey speculates that a similar dynamic might have been at play in the Fiji coup cases, where courts were faced with the need to uphold the constitution while also recognising political realities. She queries whether the decision in *Qarase v Bainimarama* [2009] FJCA 67 that the actions of the coup leaders were unlawful was influenced, in part, by the fact that the Court of Appeal, unlike the courts below which had given greater latitude to the coup leaders, was composed of visiting foreign judges:

Court of Appeal sought to impose a radical constitutional development, rather than allow constitutional change to 'occur organically at the instigation of the people of Tuvalu and their elected representatives' after the approach modelled by the Samoan Court of Appeal.[104]

Teonea is a case in which the constitutional understandings about the authority of the *Falekaupule* expressed by the judges in the majority did not reflect those of the wider society.[105] In Kahn's terms, the constitutional narrative offered by the court, although guided by law, was not one in which the people could 'see themselves'.[106] This is clearly not a problem that arises only for foreign judges: all courts face the challenge of keeping in step with the public. Foreign judges, however, face particular difficulties. Many foreign judges, particularly on courts of appeal, visit the Pacific state only occasionally for short periods, and so have limited opportunity to experience and understand public sentiment. Only in a few Pacific states do foreign judges sit on panels with local judges, again limiting the opportunities to hear a local perspective on the constitutional question before the court. While these difficulties relate to access to knowledge, they compound the problem of legitimacy, that is, the sense that it is not appropriate for foreign judges, as outsiders, to speak for local values or sentiments.

It is not surprising therefore that foreign judges on courts of constitutional jurisdiction filter their role through a view of the judge as a representative of the law. Just as foreign judges understand the oath of allegiance as an undertaking to serve the state *as judges* in allegiance to law, foreign judges can understand their role in constitutional adjudication as serving the people by being guided by their laws. Difficulties arise, however, when the law runs out.

V. Descriptive representation: Foreign judges and a reflective judiciary

The use of foreign judges means that the judiciaries of the Pacific are not reflective of the communities they serve, although variations in the proportion of foreign judges vis-à-vis local judges makes this more prominent in some states than others. Where foreign judges predominate, the court is composed, at least by majority, of judges of a different nationality and generally also of a different ethnic and cultural identity to the community.

Anne Twomey, 'The Fijian Coup Cases: The Constitution, Reserve Powers and the Doctrine of Necessity' (2009) 83 *Australian Law Journal* 319, 328, fn 37.

[104] Angelo, above n 88, 164–5.

[105] Eselealofa Apinelu, 'Societal Culture and Constitutions: The Case of Tuvalu' in *Implications of Culture for Constitution Building: Report of the Third Melbourne Forum on Constitution Building in Asia and the Pacific* (International IDEA and Constitution Transformation Network, 2018) <https://law.unimelb.edu.au/constitutional-transformations/MF/melbourne-forum-2018/melbourne-forum-2018-final-report>.

[106] Kahn, above n 78, 82.

This Part considers how the use of foreign judges, and the increasing use of local judges, might affect public perceptions of the judiciary. It begins with a discussion of the 1979 'Rooney affair' in Papua New Guinea, where a constitutional contest between the executive and the judiciary tested public confidence in a court composed of foreign judges. Aside from the Rooney affair, however, the use of foreign judges has not, by and large, threatened public confidence in Pacific judiciaries. Instead, the idea of judges as descriptive representatives directs attention to the kinds of constituencies that foreign judges 'reflect', both within and outside the state.

A. Public confidence

The value of a reflective judiciary is generally framed in terms of public confidence. Because this focuses on public perceptions of the judiciary, it takes different forms in different contexts. In the United Kingdom, for example, it is claimed that public confidence is undermined when people see judges as distant, elite or 'other'.[107] In countries where certain groups have historically been excluded from the judiciary and legal profession, the representation of persons from those groups on the courts signals equal rights and inclusion.[108] In both cases, the common claim is that people are more likely to respect and trust a judiciary in which they can 'see themselves'[109] and which, collectively, has greater and wider knowledge of the community it serves.[110]

In some countries, a judiciary predominantly composed of foreign judges would be regarded illegitimate, even if legally permissible. This has not, generally speaking, been the case in the Pacific. While there is no comprehensive empirical study of public confidence in Pacific judiciaries, the superior courts in most of the nine Pacific states – all of which include foreign judges – are generally respected and hold a high degree of public confidence.[111] Two exceptions are Nauru and Fiji, where concerns have been raised about interference by the executive or

[107] Cahill-O'Callaghan, above n 30, 4; Etherton, above n 21, 744.
[108] Eg in United States, see Edward M Chen, 'The Judiciary, Diversity, and Justice for All' (2003) 91(4) *California Law Review* 1109, 1117; in South Africa, see Francois Du Bois, 'Judicial Selection in Post-Apartheid South Africa' in Peter H Russell and Kate Malleson (eds), *Appointing Judges in an Age of Judicial Power: Critical Perspectives from Around the World* (University of Toronto Press, 2006) 280, 283–4.
[109] Paige Hoster, 'Understanding the Value of Judicial Diversity through the Native American Lens' (2011) 36 *American Indian Law Review* 457, 459–61; Rackley, above n 28, 23–4; Russell and Malleson, above n 29, 434.
[110] Framed in this way, judicial diversity does not demand proportional representation of identity groups, rejecting the idea that judges 'represent' a particular identity group and the essentialist implication that all persons of a particular identity group share the same experience and speak with one voice: Cahill-O'Callaghan, above n 30; Etherton, above n 21, 745.
[111] Thuy Mellor and Jak Jabes, *Governance in the Pacific: Focus for Action, 2005-2009* (Asian Development Bank, 2004) 37.

military government with judicial independence, compromising public confidence. In these cases, however, the concern is not so much that the judges are foreign, but rather that foreign judges have been particularly susceptible to influence by a powerful executive.[112]

It is in Papua New Guinea that the use of foreign judges tested the confidence of the public and other branches of government in the judiciary, in what is known as the 'Rooney affair'.[113] Nahau Rooney was the Minister for Justice. In July 1979, she wrote a letter to the Chief Justice, following a decision by a judge of the National Court to grant an injunction to prevent the executive from deporting a non-citizen. Seeking 'to bring to [his] attention the feelings of the Nation', the Minister accused the Court of intervening in matters properly left to the executive. She urged the judges to 'make a greater effort to use their discretion effectively to develop the National legal system in the context of a proud and growing National consciousness'. In reply, the Chief Justice accused the Minister of an 'unconstitutional attempt to interfere with the Judiciary in its duty' and asserted that judges would not accept directions or pressure from a Minister or anyone else. Rooney responded with an apology, stating she did not intend to interfere in a particular decision, but rather sought to identify some 'grey areas' of potential conflict between the executive and judiciary. The Chief Justice, in a special sitting of the Supreme Court, revealed the correspondence, which was widely reported in the press. Rooney also went public, stating on radio that she had 'no confidence in the Chief Justice and the other Judges' because 'it appears that the foreign judges on the bench are only interested in the administration of foreign laws, and not the feelings and aspirations of the Nation's political leaders'.[114]

The State Prosecutor charged Rooney with contempt, alleging that her letter to the Chief Justice was an attempt to influence the judges hearing the deportation case and that her comments on radio had scandalised the court, because there was a real risk that the comments would impair public confidence in the judiciary. A majority of the Supreme Court found Rooney guilty of contempt and sentenced her to eight months imprisonment with light labour.[115] One day into

[112] Eames, above n 67; Leung, above n 63.
[113] The following description of events is drawn from accounts in Bernard Narokobi, 'How Independent Are the Courts in Papua New Guinea? The Somare/Rooney Affair' (1980) 9(2) *Pacific Perspective* 12; John Nonggorr, 'The Maintenance of Judicial Independence and Integrity in Papua New Guinea: Some Recent Developments' (1992) 18(3) *Commonwealth Law Bulletin* 1181; David Weisbrot, 'Judges and Politicians' (1979) 4 *Legal Service Bulletin* 240.
[114] Letters and interviews are extracted in *Public Prosecutor v Rooney (No 2)* [1979] PNGLR 448, 453-7.
[115] Ibid. Four judges held that a sentence of imprisonment was warranted on the more serious charge of attempting to influence the court in a pending case. Justice Kearney dissented, dismissing this charge on the grounds that there was no pending case at the time Rooney made her comments. He would have imposed a fine for the lesser offence of scandalising the court.

her sentence, the Prime Minister appointed himself the new Minister for Justice and exercised that Minister's powers to release Rooney. By the end of the affair, five foreign judges had resigned in protest at what they characterised as executive interference in judicial independence. In the aftermath, the government appointed the first Papua New Guinean judges to the National and Supreme Courts, beginning an early and distinctive trend to localisation that Papua New Guinea has sustained ever since.[116]

It is not necessary here to determine whether Minister Rooney was justified in her criticisms or whether the Court was right to convict her of contempt. What is relevant is the way in which the composition of the court, which consisted entirely of foreign judges, affected how the dispute was perceived by the government, the public and the court itself. Rooney's trial was a dramatic illustration of a non-reflective judiciary. In the Supreme Court on the day of the trial, the only Papua New Guinean present was Rooney herself: 'she was prosecuted by foreigners, defended by foreigners and judged by foreigners according to foreign law which PNG has adopted under its Constitution'.[117] The Court refused Rooney's offer of a customary apology.[118] As Minister for Justice, Rooney had worked towards nationalising the judiciary and had earlier clashed with the Chief Justice, when he, as a member of the Judicial and Legal Services Commission, had blocked the appointment of a senior Papua New Guinean lawyer to the judiciary.[119] The Minister was also a former member of the Law Reform Commission, which at that time was promoting the development of a national Papua New Guinean jurisprudence based on custom.[120] A court of foreign judges was sitting in judgment on a Minister who had advocated for localisation and had criticised foreign judges for failing to develop the law to suit the conditions of Papua New Guinea.

The judgment shows how the unreflective nature of the bench can affect how the court perceives its own authority. Some judges expressly recognised that, in a contest between the judiciary and the executive, they could not rely on the support of the public. In his reasons for decision, Wilson J acknowledged that it remained to be seen whether the judiciary has the 'support and confidence of the community at large' and 'whether its independence from

[116] See Chapter 2, VI.A.
[117] Narokobi, above n 113, 18.
[118] Ibid 17.
[119] Weisbrot, above n 113, 244.
[120] A connection that informed the language of her criticism of the court, as recognised by Kearney J at 487. See 'Declaration and Development of Underlying Law' (Working Paper No 4, Law Reform Commission of Papua New Guinea, 1976); Bernard Narokobi, 'The System of Selecting Judges of the National and Supreme Courts: A Proposal' (Occasional Paper No 7, Law Reform Commission of Papua New Guinea, 1978).

government is not only known to exist but, more importantly, is valued'. He acknowledged that the court's 'show of strength' against the executive might cause short term damage, but hoped 'in the long-term that will be seen as being in the interests of the people'.[121] It has been suggested that the Court's invocation of the outdated offence of scandalising the court revealed the Court's own lack of confidence in the community's respect for it.[122] As in other contexts, the resignation of the judges communicated concerns for the integrity of the constitutional system.[123]

The judges in the majority framed Rooney's comments as an overt attempt by the executive to pressure the judiciary. The use of foreign judges does provide an easy way for governments and others to discredit judicial decisions, representing them, as Rooney did, as foreigners applying foreign laws. In other Pacific states, foreign judges are sometimes criticised for failing to fully understand the local context, in ways that sometimes are regarded as contempt.[124] In Nauru, for example, government ministers criticised Australian judges who decided cases against the government's interests by labelling them 'white ears' (a disparaging Nauruan term for white people) with very different values to the people of Nauru[125] and accusing them of 'conflicts of interest and disregard for the laws of our nation'.[126]

In *Rooney*, the judges' response was to insist on the independence and authority of the court by taking the Minister's comments not as criticisms of the practice of foreign judging, but as attacks on judicial independence and therefore on the *Constitution*. One judge characterised the affair as Rooney daring 'to pit her puny might, not against unimportant foreign judges administering insignificant foreign laws, but against the majesty of law and justice which the people of this country had freely adopted as their own.'[127] A court of judges drawn predominantly from Australia, the former colonial power, risks being perceived as neo-colonial. Weisbrot comments that the judges in Papua New Guinea at this time were not unaware of this, but notes that their

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[121] *Public Prosecutor v Rooney (No 2)* [1979] PNGLR 448, 506-7, Wilson J. See also 469, Raine DCJ.
[122] David Brown, 'Judicial Independence: An Examination' (1986) 58(4) *The Australian Quarterly* 348, 349–50.
[123] See above Part III.B.
[124] Eg in Tonga *Attorney-General v Namoa* [2000] TOSC 13; in Samoa: Maurice Casey, 'New Zealand Judges in Overseas Courts' in Ian Barker and Graham Wear (eds), *Law Stories: Essays on the New Zealand Legal Profession 1969-2003* (LexisNexis NZ, 2003) 89, 100.
[125] 'Nauru Justice Minister Attacks Nauru 19 Lawyers' *Radio New Zealand*, 15 August 2018 <https://www.radionz.co.nz/international/pacific-news/364161/nauru-justice-minister-attacks-nauru-19-lawyers>.
[126] Government of Nauru, 'Nauru Government Sets the Record Straight' *Media Release*, 24 February 2014 <http://www.naurugov.nr/government-information-office/media-release/nauru-government-sets-the-record-straight.aspx>.
[127] *Public Prosecutor v Rooney (No 2)* [1979] PNGLR 448, 483, Saldanha J.

reaction, with few exceptions, 'has been hyper-sensitivity in their own defence … rather than sensitivity to the special cultural conditions and jurisprudential traditions of Papua New Guinea.'[128] Much has changed across the Pacific since 1979, including the temperament and attitude of individual foreign judges, the best of whom are described as acting with humility and sensitivity to local conditions.[129] Nevertheless, the Rooney affair illustrates how foreign judges might rely on the 'majesty' of law[130] and a conception of the foreign judge as an impartial expert who only applies the law[131] to shield themselves from criticisms of the wider practice of foreign judging.

The Rooney affair shows how the use of foreign judges can contribute to a sense that the court is out of step with the government and the people. This, combined with other circumstances, might diminish the confidence of the government, the people, and the judges themselves, in the judiciary. Papua New Guinea recovered from the Rooney affair. It continues to use foreign judges, although in much smaller proportions than any other Pacific state. The judiciary is highly respected for its independence.[132] As in other Pacific states, public confidence in the judiciary has not suffered because of the use of foreign judges: indeed, it is more commonly claimed that foreign judges enhance public confidence because of popular perceptions about their impartiality and expertise.[133] It seems, therefore that while the use of foreign judges *risks* compromising public confidence in the courts, in the Pacific it has not actually done so.

This is not to say that the use of foreign judges does not affect the public perception of courts in the Pacific. Rather, it directs attention to the *audiences* whose perception matters, both within and outside the state.

B. External audiences and the sovereignty paradox

Scholarship on the idea of a reflective judiciary proceeds on the assumption that the judiciary ought to resemble the *national* community. Courts however have other audiences. The use of foreign judges can be understood as one way to support the confidence of those outside the state.

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[128] Weisbrot, above n 113, 243.
[129] Interviews F14, F23, F24.
[130] Brown, above n 122.
[131] Chapter 6, Part III.B.
[132] Sean Dorney, *The Embarrassed Colonialist* (Penguin Group Australia, 2016) 40.
[133] Eg Miranda Forsyth, 'Understanding Judicial Independence in Vanuatu' (SSGM Discussion Paper 2015/9, State, Society and Governance in Melanesia, 2015) 11–12; Venkat Iyer, 'The Judiciary in Fiji: A Broken Reed?' in HP Lee and Marilyn Pittard (eds), *Asia-Pacific Judiciaries: Independence, Impartiality and Integrity* (Cambridge University Press, 2017) 109, 128–9.

The independence, expertise and credibility of the judiciary has been characterised by the World Bank and others as a critical condition for foreign investment and economic growth in developing countries.[134] Foreign judges are sometimes seen as a way to provide specialist expertise, for example in complex commercial matters, to a Pacific court.[135] Even where they do not have specialist expertise, foreign judges, particularly when they are recruited from among the sitting or retired judges of 'trusted' courts of developed countries, are seen to assure foreign investors. Lin Feng explains this dynamic in the context of Hong Kong, where, although there is no evidence that local judges are less competent or independent, the presence of foreign judges 'preserves an image' of an impartial and corruption-free judiciary for foreign investors.[136] This image is a function of descriptive representation: foreign investors who 'see themselves' or at least a judge associated with their own or a more familiar national jurisdiction, are thought to have greater confidence in both the judiciary and the legal system.

A similar idea is also apparent in the use of foreign judges to bolster the credibility of the constitutional decisions by Pacific courts to a regional or international audience. Boyd writes that foreign judges on Pacific courts of appeal are valuable because

> it is vitally important, if the review judgement is to be respected by all parties, and to be worthy of serving as precedent for future judgments in a wider range of jurisdictions, that the judges are seen to be impartial, experienced, respected and wiser than the judges who brought down the original judgement.[137]

One judge interviewed noted that sometimes Pacific courts of appeal hearing contentious constitutional cases are deliberately composed of judges from a diverse range of jurisdictions to give the decision credibility.[138] Again, the value of foreign judges is, at least in part, understood to lie in the way that they reflect an external audience – in these cases the regional or international community – which is thought to bolster the credibility of the decision.

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[134] Kenneth W Dam, *The Law-Growth Nexus: The Rule of Law and Economic Development* (Brookings Institution Press, 2006) ch 5; Ibrahim FI Shihata, *The World Bank in a Changing World* (M Nijhoff Publishers, 1991).

[135] Interviews F9, F11, F22, F24.

[136] Lin Feng, 'The Expatriate Judges and Rule of Law in Hong Kong: Its Past, Present and Future' in Shimon Shetreet and Wayne McCormack (eds), *The Culture of Judicial Independence in a Globalised World* (Brill Nijhoff, 2016) 279, 21. In the Pacific, see eg, Iyer, above n 133, 128–9.

[137] Boyd, above n 51, 307.

[138] Interview F4. Cases in this category might include *Fiji v Prasad* [2001] FJCA 2, concerning the legality of the purported abrogation of the constitution during the 2000 coup, heard by a panel of five judges from Australia, New Zealand, Papua New Guinea and the United Kingdom; and *In re the Constitution, Reference by HE the President* [2002] FJSC 1, concerning the allocation of seats in the Fiji Senate, heard by a panel of five judges from Fiji, New Zealand, Papua New Guinea and Samoa.

The colonial resonances of such ideas are difficult to ignore. Colonial narratives characterised the Indigenous peoples of the Pacific as uncivilised and incapable of self-government.[139] Some Indigenous leaders, predominantly in Polynesian polities, established written constitutions drawing on western precedents in the hope that establishing systems of government familiar to western eyes would demonstrate self-government and ward off colonisation.[140] European settlers, however, were generally hostile to the idea of submitting to courts presided over by Indigenous judges, demanding instead their own judges.[141] A similar dynamic played out as Pacific colonies obtained independence over the years between 1962 and 1980. Independent Pacific states chose to continue the Westminster system of government modelled by colonial administrations, including their judicial systems, in part to signal their capacity for self-government to the departing colonial regime and the international community.[142] The continued use of foreign judges on the courts of newly independent states was regarded as necessary given the scarcity of qualified local judges and lawyers. But the historical examples demonstrate what Merry describes as the 'sovereignty paradox', whereby Pacific nations adopted western forms of governance in order to gain international recognition as sovereign states, but required skilled foreigners to administer the very institutions of government that marked their independence.[143] MacFarlane's critique of foreign judges in the Pacific is compelling in light of this history, when he writes that the continued use of foreign judges, particularly where there are local judges available, is 'akin to saying that these independent states are not ready or able to be self-governing'.[144] These tensions lie deep in colonialism as well as modern international development assistance and rule of law initiatives.[145] For newly

[139] Tracey Banivanua-Mar, *Decolonisation and the Pacific: Indigenous Globalisation and the Ends of Empire* (Cambridge University Press, 2016) ch 5; AM Healy, 'Colonial Law and Metropolitan Defence: The Curious Case of Australia in New Guinea' in Hermann Hiery and John M MacKenzie (eds), *European Impact and Pacific Influence: British and German Colonial Policy in the Pacific Islands and the Indigenous Response* (Tauris Academic Studies, 1997) 214, 221–5.

[140] Sione Lātūkefu, 'Constitution-Making in the Pacific Islands in the Nineteenth Century' in Peter G Sack (ed), *Pacific Constitutions: Proceedings of the Canberra Law Workshop VI* (Australian National University, 1982) 21.

[141] In Fiji: Tracey Banivanua-Mar, 'Frontier Space and the Reification of the Rule of Law: Colonial Negotiations in the Western Pacific, 1870-74' (2009) 30 *Australian Feminist Law Journal* 23, 30–32; in Tonga: Guy Powles, 'The Common Law as a Source of Law in the South Pacific: Experiences in Western Polynesia' (1988) 10 *University of Hawaii Law Review* 105, 120–1.

[142] Anthony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, 2005) 107–8; Banivanua-Mar, above n 139, 146.

[143] Sally Engle Merry, *Colonizing Hawai'i: The Cultural Power of Law* (Princeton University Press, 2000) 47, 89.

[144] Peter MacFarlane, 'Some Challenges Facing Legal Strengthening Projects in Small Pacific Island States' (2006) 4(1) *Journal of Commonwealth Law and Legal Education* 103, 105–6.

[145] Mark Brown, '"An Unqualified Human Good"? On Rule of Law, Globalization, and Imperialism' [2017] *Law and Social Inquiry* advance online version.

independent states, localisation across government and the private sector was, and continues to be, a visible and achievable expression of nationalism.[146] The appointment of local judges, particularly to the highest courts, is 'a symbol of independence' and one way in which Pacific states express their sovereignty and self-sufficiency.[147]

Another way in which sovereignty is expressed and maintained is through control over *who* is selected to sit on the courts of Pacific states. Upon independence, several African states undertook to 'Africanise' their judiciaries, recruiting judges from other African countries and the Caribbean in preference to white judges from the former colonial power, until localisation was possible.[148] As the empirical work set out in Chapter 2 demonstrates, Pacific courts did not adopt a similar strategy. The majority of foreign judges are still recruited from the former colonial powers of Australia, New Zealand and the United Kingdom. There are, however, indications that some states are increasingly looking within the region as the numbers of local judges increase in each state.[149] One notable example is Nauru, which since 2014 has appointed two highly respected Fijian judges to the office of Chief Justice[150] and in 2018 created a new Court of Appeal whose inaugural members were all senior judges from other Pacific states.[151] Sir John Muria, a Solomon Islander and former Chief justice in his own country, has served as Chief justice of Kiribati since 2011. Papua New Guinea, which has a much larger local legal profession and judiciary, has a long history of providing judges to Solomon Islands, Vanuatu, and now Nauru.[152] Independent Pacific states have always had choice and control, in the formal legal sense, over the judges appointed to their courts, although the realities of aid dependence and foreign judging might limit the degree of actual choice in practice. Recruiting judges from within the region and from other post-colonial states in the global south changes the appearance of the judiciary, and with it, the way in which internal and external audiences perceive it. It is possible to read a variety of meanings into this development: an affirmation of regional self-sufficiency and solidarity; the greater integration of customary values into Pacific legal systems; and a

[146] Weisbrot, above n 113, 243.
[147] MacFarlane, above n 144, 105; Narokobi, above n 120, 3–4, 6.
[148] Rachel L Ellett, *Pathways to Judicial Power in Transitional States: Perspectives from African Courts* (Routledge, 2013) 56.
[149] These developments are recent and not fully captured in the empirical study conducted for this project which collected data for the years 2000 to 2015.
[150] Joni Madraiwiwi and Filimone Jitoko.
[151] Vincent Lunabek (Vanuatu); Sir Albert Palmer and Sir John Muria (Solomon Islands).
[152] These include Kubulan Los (in Solomon Islands); Reggett Maram (in Vanuatu) and Sir Arnold Amet (Fiji and Vanuatu). On 9 November 2018, Justice Nicholas Kirriwom was sworn in as a judge of the new Nauru Court of Appeal, pursuant to an MOU: 'Senior PNG Judge Sworn in as Nauru Judge' *Loop PNG*, 18 November 2018 <http://www.looppng.com/png-news/senior-png-judge-sworn-nauru-judge-80846>.

rejection of colonial assumptions about Indigenous peoples and a recognition of the expertise, independence and integrity of Pacific judges.

C. Internal audiences and legal pluralism

Democratic political theory rests on the idea that the people are the authors of their own law. A non-reflective judiciary composed of foreign judges raises questions about the extent to which, in an independent democratic state governed 'by the people', the judiciary that applies and sometimes makes laws should be composed of members 'of the people'.[153]

The circumstances of legal pluralism that pertain in Pacific and other states complicate democratic theories about the connection between law, people and judges. Legal pluralism in Pacific states entails the coexistence of transplanted laws and indigenous custom. The interaction between these legal systems differs across states, areas of law and institutions, giving rise to a great deal of complexity. Sometimes the systems mix, in that statutes or common law might recognise or incorporate custom; or custom might operate within a statutory framework.[154] Sometimes, the interaction is at the point of legal or constitutional values, in that customary values are used to inform the interpretation of constitutional law and institutions.[155] Other times, the legal systems are regarded as separate and exclusive spheres of jurisdiction, as a result of law or practice.[156]

Both the western-derived constitutional system and indigenous legal systems are laws of the people, but in different ways, and potentially, with different degrees of ownership. Writing in the context of Fiji, Kaplan argues that coup leaders and chiefs have understood their actions as justified by values of Fijian society that are more fundamental than constitutions and courts.[157] Nanau suggests that Solomon Islanders see government institutions as alien and turn instead to cultural structures and allegiances.[158] Tamanaha, in his study of law in Micronesia, develops a theory to explain these dynamics in situations of transplanted law. For Tamanaha, understanding law requires an inquiry not into substantive legal rules, but how different

[153] Chapter 4, Part V.
[154] Jennifer Corrin, 'Moving beyond the Hierarchical Approach to Legal Pluralism in the South Pacific' (2009) 59 *Journal of Legal Pluralism and Unofficial Law* 29.
[155] Chapter 5.
[156] Miranda Forsyth, *A Bird That Flies with Two Wings: The Kastom and State Justice Systems in Vanuatu* (ANU E Press, 2009) ch 4.
[157] Martha Kaplan, 'Promised Lands: From Colonial Lawgiving to Postcolonial Takeovers in Fiji' in Sally Engle Merry and Donald Lawrence Brenneis (eds), *Law and Empire in the Pacific: Fiji and Hawaiì* (School of American Research Press, 2004) 153, 182.
[158] Gordon Leua Nanau, 'Solomon Islands' in Stephen I Levine (ed), *Pacific Ways: Government and Politics in the Pacific Islands* (Victoria University Press, 2nd ed, 2016) 291, 297.

communities think and act about law.[159] He identifies four such communities in Micronesia: expatriate lawyers and judges, Micronesian lawyers, lay Micronesian judges, and the wider population.[160] These groups each have a different internal understanding of what law means, which emerge in the different ways in which they understand, for example, the authority of a judge[161] or the function of the constitution.[162] For the wider community of Micronesian citizens, law is important but exists apart from community life: law is a source of rules and powers, but not the only, or even central, source.[163] The assumption animating theories about the democratic legitimacy of law is that the community generates the social norms enforced by legal institutions.[164] In Micronesia, however, the different ways of thinking about law within each community mean that there is no shared community understanding, with the result that law is 'autonomous' and detached from community life.[165]

Tamanaha's theory of transplanted law helps to explain, at least in part, why the use of foreign judges on domestic courts is accepted practice in the Pacific but would be regarded as illegitimate in countries such as the United States. The use of imported, technical experts to administer transplanted laws seems appropriate, because in one sense, the laws are as foreign as the judges. Recruiting an outsider to determine disputes according to custom, would, in contrast, disrupt the internal logic of the customary legal system. Because the two legal systems are not completely separate, tensions are most likely to arise when formal courts and foreign judges are required to determine matters that affect custom, as illustrated in Tuvalu by the *Teonea* case. This is not to suggest that one or other of the component bodies of law in a pluralist legal system is illegitimate or irrelevant. The point is rather that they are understood in different ways and directed to different purposes, and that this affects the degree to which it matters that the judiciary reflect the people.

D. Accounting for public confidence in foreign judges

Why do courts comprising foreign judges retain public confidence in the Pacific, when they would not do so in other countries? One answer relates to the context in which Pacific legal systems operate and the realities of small developing states and the continuing effects of colonisation. The intricacies of the internal and external audiences described above provide an

[159] Brian Z Tamanaha, *Understanding Law in Micronesia: An Interpretive Approach to Transplanted Law* (EJ Brill, 1993) 17–18.
[160] Ibid 32.
[161] Ibid 41–7.
[162] Ibid 52–5.
[163] Ibid 169.
[164] Ibid 109.
[165] Ibid 29, 160, 170.

explanation – albeit partial – for how the use of foreign judges shapes perceptions of Pacific courts in ways that do not diminish public confidence. Writing in the context of the United Kingdom, Barmes and Malleson pose a similar question: why, despite 'its grossly unreflective composition' over many years, does the United Kingdom judiciary continue to enjoy public confidence? Their answer is that, in the absence of any serious crisis of confidence, the authority of courts might be secured by maintaining the traditional view of the judge as technicians, applying the law in impartially in allegiance to law alone.[166] A similar dynamic is at play in the Pacific: any sense that the judiciary ought to be a descriptive representative of the society it serves is overshadowed by the perception of the foreign judge as an impartial professional, skilled in adjudicating disputes according to law, and in particular, those laws derived from the transplanted western legal system.

VI. Conclusion

Seyla Benhabib describes how the movement of people across national borders 'scrambles' national identities and permits individuals to develop and sustain multiple allegiances.[167] The movement of judges across national boundaries has a similar effect. It multiplies the allegiances that a judge – as an individual and a public official – holds and the audiences of his or her actions, blurring the lines of authorisation and accountability. Foreign judges serving on courts of constitutional jurisdiction in the Pacific are not regarded as representatives of their home state, guided by patriotic or nationalist feelings. But nor are they able to act for the Pacific state in which they serve in the same way that they might do in their home jurisdiction, for example by proactively leading social or legal reforms, when the occasion arises.

The experience of foreign judging in the Pacific suggests that the way that states, communities and judges themselves deal with this is to focus, as much as possible, on the sense that judges are professionals, authorised by, acting for and representative of, the law. Foreign judges might swear allegiance to the state and its people but they also swear a judicial oath of professional performance. While some lines of accountability for the appointment of foreign judges lead to the political institutions and people of the Pacific state, reputational and professional links tie foreign judges more firmly to their peers and constituencies in their home states. Foreign judges might not feel that they are legitimate representatives of the nation and its people, but they are qualified representatives of the law. Rather than speak for the community or the state, foreign

[166] Barmes and Malleson, above n 1, 374–5.
[167] Seyla Benhabib, *The Rights of Others: Aliens, Residents, and Citizens* (Cambridge University Press, 2004) 174.

judges much more readily adopt a role in which they act on, and thus represent, the law. The presence of foreign judges means that the composition of the judiciary is not reflective of the community it serves, but resemblance to constituencies outside the state fosters a view of judges as transnational legal experts, as skilled at judging overseas as in their own country. Emphasising the professional and technical aspects of judging require glosses and omissions that result in some tensions. By and large, however, it is this understanding of foreign judges as professionals for hire that underwrites the practice of foreign judges in the Pacific.

CHAPTER 8
CONCLUSION

I. Introduction

This thesis has provided a wide-ranging study of the use of foreign judges in the Pacific and an exploration of its implications for constitutional adjudication, judicial independence, and the role of judges and judiciaries in Pacific constitutional systems.

The picture that emerges from this study is of a prevalent and widely accepted practice. The use of foreign judges is a longstanding and familiar 'custom' in Pacific states[1] that reaches back to a colonial past in which judges were recruited by colonial administrators from outside the Pacific and courts of appeal were located in metropolitan centres. Aspects of these arrangements continued into independence; the difference being that the governments of independent Pacific states now exercised the authority to appoint the judges and to opt in or out of the jurisdiction of external courts of appeal. It is, however, an evolving practice that changes with the political circumstances of the Pacific states that use foreign judges and the countries and organisations that provide them. The countries of origin and professional backgrounds of foreign judges, the rationales for their use, and the expectations placed upon them have all changed in response to the appointment of local judges in greater number, the pressures of political crises of the kinds seen in Fiji and Solomon Islands, and the nature of law and justice development assistance as it is provided by donors and received by states. There are signs that future practice may be more strongly influenced by an emerging regional Pacific identity, with foreign judges recruited from within the Pacific region and judicial exchanges with other states of the global south. Although the practice is evolving, Pacific states are likely to continue to use foreign judges for the foreseeable future.

Despite its entrenchment, foreign judging is a somewhat precarious practice for both foreign judges and Pacific judiciaries. It is subject to limited regulation, through the law and practices of Pacific states and the policies of institutions in judges' home states and donor organisations. For judges, appointments tend to be ad hoc and tenure insecure. For judiciaries, the practice introduces an element of instability, as positions are filled by a succession of foreign judges rather than by a single permanent judge. The challenges in recruiting foreign judges have led, in some cases, to shortcomings in the assessment of candidates, negotiable conditions of employment, and the use of incentives such as equivalent rates of pay as in the judge's home

[1] Venkat Iyer, 'The Judiciary in Fiji: A Broken Reed?' in HP Lee and Marilyn Pittard (eds), *Asia-Pacific Judiciaries: Independence, Impartiality and Integrity* (Cambridge University Press, 2017) 109, 130.

country, leading to disparities in the treatment of citizen and foreign judges. In other cases, however, the appointment of foreign judges who have a commitment to the Pacific state and an approach appropriate to the context in which Pacific courts operate has provided Pacific judiciaries with expertise and enhanced their independence and reputation.

This thesis has shown that foreign judges are subject to different conditions of service to local judges, sometimes by express legal provision and inevitably in practice. This different treatment is justified because foreign judges *are*, in certain ways, different to local judges. Foreign judges bring different dimensions of knowledge to bear on constitutional adjudication. They face distinctive burdens on their independence, deriving not only from the insecurities of tenure but from their commitments to their home countries and institutions involved in their appointment. Finally, foreign judges have a different relationship with the people and the state, such that they are most readily understood as representatives of a profession, while citizen judges are capable of also representing the state and its people.

The empirical description and critical analysis of the implications of the use of foreign judges presented in this thesis provide the evidence necessary to understand the rationales for the use of foreign judges and assess the benefits and the challenges that arise. I take up this task in this concluding chapter. In Part II, I set out four rationales for the use of foreign judges in the Pacific and assess the extent to which the practice meets its own objectives. I suggest that greater clarity about the rationales for using foreign judges would provide a more secure foundation for some of the distinctive features of the legal frameworks and practices that facilitate foreign judging. In Part III, I examine the distinctive challenges that the use of foreign judges poses to the legitimacy of courts of constitutional jurisdiction, identifying ways in which foreign judges might support, or alternatively test, the legitimacy of Pacific judiciaries. On the basis of these assessments, I propose five 'good practice' initiatives to better support the rationales and address the challenges of foreign judging, which might be used to inform the regulation of the use of foreign judges, in Pacific states and in the external organisations that recruit and fund foreign judges. I conclude with some observations about the global significance of this study, as the use of foreign judges takes different forms in new contexts across the world.

II. Rationale

The examination in this thesis of the practice of foreign judging prompts reconsideration of the rationales generally offered for their use. Constitution makers, legislators, executives, courts, donors and judges have suggested a range of rationales for the use of foreign judges. The legal

frameworks and the practices of foreign judging disclose further, and sometimes different, understandings of the function that foreign judges are to perform. The mixed messages point to the existence of several rationales, which may be invoked to suit different audiences and to serve different purposes.

This Part discusses four rationales commonly offered for the use of foreign judges in the Pacific: as a transitional measure pending localisation; to develop local capacity; to enhance the reputation of the court; and to provide impartiality. All four rationales relate, in different ways, to the challenges of smallness shared by Pacific island states. This Part assesses the effectiveness of the practice of foreign judging in meeting each rationale by analysing the concurrence between the rationale, the conception of the role of foreign judges, and the legal frameworks and practices regulating the service of foreign judges.

A. Transition

The predominant rationale for the use of foreign judges in Pacific states is the lack of qualified citizens willing and able to take up judicial office. In these circumstances, foreign judges with legal expertise take the place of local judges. In development assistance parlance, this practice is known as 'gap filling'. Foreign experts are recruited to fill gaps in government agencies to ensure that essential government services, including judicial services, are delivered.[2]

As Pacific polities moved from colonies or protectorates to independent states, personnel from the former colonial administrations continued to provide assistance as states established and operated new institutions of government. It was assumed that the institutions of government, including the courts, would localise over time as more citizens obtained the necessary skills and qualifications.[3] However, 40 to 50 years after independence, foreign judges continue to be used in high numbers in the majority of Pacific states.

The shortage of local judges is not only a matter of the limited number of qualified citizens. It is rather the result of a more complex combination of challenges associated with smallness, isolation and limited resources that affect both the supply of and demand for local judges. The examples of Solomon Islands and Fiji demonstrate that other factors, such as increased and

[2] Marcus Cox, Emele Duituturaga and Eric Scheye, 'Solomon Islands Case Study: Evaluation of Australian Law and Justice Assistance' (Australian Government Office of Development Effectiveness, Ausaid, 2012) 21.

[3] Michael A Ntumy (ed), *South Pacific Islands Legal Systems* (University of Hawaii Press, 1993) xx.

unexpected demands on the courts resulting from political instability or discrimination between groups within the population, can also contribute to a shortage of local judges.[4]

Under the transition rationale, foreign judges provide necessary judicial services for Pacific polities until a local judge becomes available. This rationale accords with the predominant understanding that foreign judges in the Pacific are there, first and foremost, to sit as judges. Foreign judges have the same status, powers and duties as local judges. In most cases, the terms of their commissions are not limited to hearing particular kinds of cases or to performing particular judicial and non-judicial tasks. There are no quotas that require a certain proportion of the bench, when sitting in a panel, be local or foreign judges.

The exception is the different treatment of tenure. Foreign judges tend to be appointed on short renewable contracts, while local judges generally have tenure to a specified retirement age. I argue in Chapter 6 that the most compelling justification for the appointment of foreign judges on short renewable contracts is to assist localisation. The short-term appointment of foreign judges means that a judicial position will be available when a qualified citizen becomes eligible for appointment.[5] The transition rationale therefore justifies short-term appointments for foreign judges. It could also justify mandatory term limits for non-citizen judges, as is the case in Fiji and Papua New Guinea.[6]

However, the transitional rationale does not properly apply in circumstances where short-term appointments are not accompanied by efforts towards localisation. This appears to be the case in Fiji, where the number of local judges appointed to courts of constitutional jurisdiction has decreased since 2009, to the point that in 2015 there were fewer Fijian judges than in 2000.[7] Indeed, the Fijian government expresses an entirely different rationale for the use of foreign judges. The understanding, or at least rhetoric, in Fiji post-2009 is that there is no difference between foreign and local judges[8] and that all judges are assessed on merit against the same criteria.[9] The problem is then a disconnect between the merit-based rationale for the use of foreign judges and the practice of short-term appointments. The mandatory requirement that non-citizen judges be appointed on renewable terms of up to three years[10] lacks justification in

[4] Chapter 2, Part VI.
[5] Chapter 6, Part III.
[6] *Constitution of Fiji 2013* s 110; *Organic Law on the Terms and Conditions of Employment of Judges* (PNG) s 2 discussed in Chapter 4, Part IV.A.
[7] Chapter 2, Part VI.B.
[8] Letter from AHCT Gates, Chief Justice of Fiji, to Anna Dziedzic, 6 October 2016.
[9] Fiji, *Parliamentary Debates,* 10 February 2016, 1063-5 (Aiyaz Sayed-Khaiyum, Attorney General).
[10] *Constitution of Fiji 2013* s 110.

the absence of efforts at localisation. This, and the high number of foreign judges on short term appointments, opens the Fijian judiciary to claims that judicial independence is compromised.[11] In contrast, Papua New Guinea, which also has a mandatory three-year term for non-citizen judges, is not subject to the same criticism because of the efforts it has taken to localisation and the high proportion of local judges, who serve for longer terms.

Another concern raised by the transition rationale, particularly where the transition takes as long as it has in the Pacific, relates to the stability of the judiciary. Where foreign judges temporarily stand in for local judges, membership of the judiciary is potentially very fluid. The high number of foreign judges serving over the case study period indicates a high turnover of foreign judges. Part-time service, particularly on courts of appeal, and the use of short-term appointments, contribute to the high number and movement of foreign judges. This has implications for the expertise of the judges because the high turnover means that foreign judges have limited opportunity to gain knowledge of the local conditions. Instability is, however, more apparent in some Pacific states than others. In some states, courts have benefitted from having a core group of foreign judges who return to sit on the court for many years, even without the security of long-term appointments. It is claimed that this continuity has bolstered public confidence in Vanuatu's judiciary, for example.[12]

Finally, there is a risk that the use of foreign judges to 'fill gaps' makes Pacific judiciaries overly dependent on external assistance. This was acknowledged by an assessment of the Regional Assistance Mission to Solomon Islands (RAMSI) which found that 'the practice of inserting foreigners into line positions in … law and justice institutions and agencies is not a sustainable development activity, unless Australia makes an undertaking to fund an open-ended commitment to maintain [Solomon Islands'] law and justice operations'.[13] Reliance on foreign judges without developing and appointing local judges is not sustainable for Pacific judiciaries.[14]

Several Pacific courts, particularly full time superior courts, are well down the path to localisation. For many years now, the majority of judges on the National and Supreme Court of Papua New Guinea have been citizens. Since 2000, Samoa, Solomon Islands and Vanuatu have

[11] Iyer, above n 1, 115; Brij V Lal, *Historical Dictionary of Fiji* (Rowman & Littlefield, 2016) 24.
[12] Miranda Forsyth, 'Understanding Judicial Independence in Vanuatu' (SSGM Discussion Paper 2015/9, State, Society and Governance in Melanesia, 2015) 12.
[13] Cox, Duituturaga and Scheye, above n 2, 33.
[14] Bernard Narokobi, 'The System of Selecting Judges of the National and Supreme Courts: A Proposal' (Occasional Paper No 7, Law Reform Commission of Papua New Guinea, 1978) 6.

made significant progress in localisation, while Tonga has just begun.[15] Even so, Pacific states are likely to continue to rely on foreign judges for the foreseeable future.

Transition, albeit a long transition, provides a compelling rationale for the use of foreign judges. In turn, however, foreign judges are justified only if their presence is indeed temporary pending the appointment of local judges in their place. Where this is not the case, some of the practices to accommodate transition, such as short-term judicial appointments, can be problematic and open to abuse.

B. Capacity building

A second rationale for the use of foreign judges is to support the capacities of Pacific judiciaries. Foreign judges can be understood as part of and complementary to wider efforts to strengthen law and justice systems and promote good governance and the rule of law in Pacific states.[16] To again adopt the language of development assistance, this rationale for using foreign judges is to support 'capacity building'. This may be cast as building the capacity of the judiciary as an institution or the capacities of personnel, such as judges, court staff and the local legal profession.

Foreign judges might contribute to the institutional capacity of a Pacific judiciary by providing specific expertise otherwise lacking. Papua New Guinea provides an example. The emphasis on localisation since the 1979 Rooney affair means that the National and Supreme Courts of Papua New Guinea are predominantly composed of Papua New Guinean judges. The renewed use of visiting foreign judges on the Supreme Court since 2011 is not, therefore, readily justified by the transitional rationale.[17] Instead, the appointment of part-time foreign judges was seen as a way to build the expertise of the Court, by providing judges experienced in dealing with commercial matters of the kind increasingly before Papua New Guinean courts.[18] An example of a different kind occurred in Samoa, where two judges of the District Court of New Zealand were appointed judges in Samoa for approximately a year each, to assist in the establishment of a new family court and drug and alcohol court.[19] This sense of capacity building is similar to the 'gap-filling'

[15] Chapter 2, Part VI. Some of these developments have occurred since 2015, the end of the period for the empirical study in this thesis. For example, in 2018 the first Tongan was appointed to the Supreme Court since the early 20th century: 'Laki Is First Local Judge in 100 Years' *Nuku'alofa Times*, 29 June 2018 <http://nukualofatimes.tbu.to/?p=8118>.

[16] John Logan, 'Law and Justice in Papua New Guinea' (Paper presented at the Australian Institute of International Affairs, Brisbane, 23 June 2015) 48–50.

[17] These developments are discussed in Chapter 2, Part VI.A.

[18] Logan, above n 16, 41–2.

[19] 'NZ Judge Praised for Work Samoa' *Radio New Zealand,* 27 June 2014 <https://www.radionz.co.nz/international/pacific-news/248369/nz-judge-praised-for-work-samoa>;

rationale described above, only instead of filling gaps arising from insufficient numbers of judges, foreign judges fill gaps in judicial expertise.

This understanding of capacity building stands in contrast with the idea that foreign judges help to build the capacity of *personnel* in Pacific judiciaries, which is most apparent when foreign judges are recruited and paid for by a donor state or organisation. As noted in Chapter 3, advertisements for judges from organisations such as RAMSI or the Commonwealth Fund for Technical Cooperation tend to include in the foreign judge's job description tasks such as improving judicial systems; transferring knowledge and skills to the national judiciary, government staff and practitioners; and mentoring and training court staff and judicial officers.[20] Aid agencies in donor states tend to regard this kind of capacity building as part of the work of foreign judges, or at least a desirable outcome of their service.

The practice of foreign judging would appear only sometimes to support a personnel capacity building rationale. The judicial positions advertised in terms of capacity building are for full-time, resident foreign judges, generally to serve for a period of one to two years. The capacity building rationale does not easily explain the use of part-time foreign judges who visit only occasionally to conduct hearings, and who therefore have limited opportunity to identify knowledge gaps or build relationships with judicial colleagues, court staff or the profession.

The degree to which foreign judging should be linked to foreign aid and development outcomes is a contested and sensitive issue. The idea of the foreign judge as an impartial expert, teaching local judges and lawyers about the law and 'building capacity' for judicial administration carries overtones of paternalism and imperialism. It risks creating the perception – internally within the state and externally – that local judges and lawyers are not sufficiently qualified and able in their roles. Concerns of this kind are canvassed in the literature on hybrid tribunals, where, in some instances, the 'unstated assumption that the role of the international judge is to impart her wisdom on lesser local counterparts' has undermined the collegiality of the court and opportunities for mutual learning.[21]

Much depends on the attitudes of foreign judges, local judges, and the heads of jurisdiction who have a key role in shaping the role of foreign judges within Pacific judiciaries. Several foreign

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Lanuola Tusani Tupufia, 'Court Tackles Drugs and Alcohol Abuse' *Samoa Observer* (Apia), 28 February 2016.

[20] Chapter 3, Part II.C.

[21] Harry Hobbs, 'Hybrid Tribunals and the Composition of the Court: In Search of Sociological Legitimacy' (2016) 16(2) *Chicago Journal of International Law* 482, 519.

judges interviewed stated that there was no need or expectation that they take on any capacity building type functions.[22] Some acknowledged the sensitivities of taking on such a role and did so only with the agreement of the Chief Justice of the Pacific state. These judges tended to regard their contributions to legal education and court reforms, and their engagement with local judges, as incidental to their role rather than a core purpose, akin to the position they would take in their home jurisdictions.[23] A few noted that foreign judges were in a position to connect Pacific courts and legal professions with experts, trainers and donors in their home states, facilitating for example, training for the legal profession, research assistance from law students or donations of library and other resources.[24] This approach implicitly acknowledges that other programs and providers may be more appropriate avenues for personal capacity building than foreign judges themselves.[25]

The capacity building rationale for the use of foreign judges is therefore best confined to institutional capacity building by providing specific and sought-after expertise, or as complementary to other programs that seek to build the personal capacity of local judges, court staff and legal professions. This rationale for foreign judges ought only to apply in circumstances where capacity building activities (such as training, mentoring or administrative reforms) are needed, have the support of the head of jurisdiction, and where the full time, periodic or residential nature of the foreign judge's service supports a capacity building function.

C. Reputation

A third rationale sometimes offered is that the presence of foreign judges enhances a court's reputation.[26] In contrast to capacity building, in which foreign judges provide specific expertise and engage in activities directed to education or reform, reputational benefits are fulfilled by the mere presence of foreign judges on the bench. This rationale thus draws predominantly on the representative role of a foreign judge. By appointing foreign judges, Pacific judiciaries import perceptions about expertise and status by way of judges' reputation, or the reputation of their home courts. This rationale therefore exploits the status of the judge and the donor jurisdiction in order to express the 'choice-worthiness' of the Pacific court.[27]

[22] Interviews F4, F5, F8.
[23] Interviews F9, F10.
[24] Interviews F1, F7, F11, F13, F19, F20, F24.
[25] Eg Pacific Judicial Strengthening Initiative (formerly the Pacific Justice Development Programme) funded by the New Zealand Government and implemented by the Federal Court of Australia.
[26] Eg Susan Boyd, 'Australian Judges at Work Internationally: Treason, Assassinations, Coups, Legitimacy of Government, Human Rights, Poverty and Development' (2003) 77 *Australian Law Journal* 303, 307; Iyer, above n 1, 128–9.
[27] Chapter 7, Part III.B.

This rationale is only sometimes reflected in the Pacific practice of foreign judging. It fits most easily when foreign judges are (or were) judges of courts in their home countries which themselves have a high reputation. However, as the data presented in Chapter 3 shows, the cohort of foreign judges serving in the Pacific over the case study period is far more diverse. In particular, approximately 25% of foreign judges were practicing lawyers or barristers prior to their appointment as judges in the Pacific. While such appointments can and do bring valued expertise to Pacific judiciaries, they do not carry the kind of reputational value that this rationale relies upon.

Another disconnect between the reputation rationale and the practice of foreign judging in the Pacific arises, once again, from the smallness of Pacific island states. The small developing states of the Pacific have limited resources, including to fund judiciaries and remunerate judges. They are sometimes isolated and difficult places to work. Pacific states have benefited from judicial service from eminent and highly regarded jurists, some who take up judicial office in the Pacific out of a sense of service,[28] others who are supported in various ways by their home jurisdictions or donor organisations.[29] However, it is to be expected that, with limited resources, Pacific states will struggle to compete in the global marketplace for judges. The costs of attracting good foreign judges can also lead to its own problems, such as disparity in pay between local and foreign judges.

Because this rationale deals in reputation and appearances, it also risks reinforcing colonial assumptions about the qualities and capacities of foreign and local judges. Foreign judges in the Pacific tend to be citizens of the global north, with the social and economic capital to work transnationally.[30] There are, however, some signs of change, such as the appointment of judges from Africa;[31] Fiji's turn to Sri Lanka;[32] the appointment of eminent Pacific islander judges to the newly created Nauru Court of Appeal;[33] and the emphasis on south-south collaborations by the

[28] Interviews F3, F8, F9, F11, F12, F24. Sir Salamo Injia, Chief Justice of Papua New Guinea paid tribute to foreign judges, commenting on their 'deeply felt desire and conviction to help those in need of their professional expertise. The undertaking is purely voluntary and comes with personal sacrifices … knowing full well the nature of their calling': Michael Arnold, 'PNG Judiciary Honors Late Justice Foulds' *Post Courier* (Port Moresby), 8 October 2018 <https://postcourier.com.pg/png-judiciary-honors-late-justice-foulds/>.

[29] Chapter 3, Part II.B.

[30] Elizabeth M Bruch, 'Hybrid Courts: Examining Hybridity through a Post-Colonial Lens' (2010) 28(1) *Boston University International Law Journal* 1, 14 identifies a similar dynamic on hybrid tribunals.

[31] Eg the appointment of Botswanan judge Oagile Key Dingake to the National and Supreme Courts of Papua New Guinea in late 2017.

[32] Chapter 2, Part V.A.

[33] Anna Dziedzic, 'A New Court for Nauru' *The Interpreter* (Lowy Institute), 8 August 2018 <https://www.lowyinstitute.org/the-interpreter/new-court-nauru>.

Commonwealth Fund for Technical Cooperation.[34] These examples aside, reputation – rightly or wrongly – like the majority of foreign judges, is seen to travel from developed western states to developing Pacific island states.

These factors suggest that the use of foreign judges to enhance a court's reputation is a problematic rationale, at least in Pacific states.

D. Impartiality

A fourth rationale for the use of foreign judges is that, as outsiders, foreign judges are distanced from small Pacific communities and are thus able to provide a degree of impartiality not available to local judges. In Chapter 6, I argued that while this view is prevalent, it does not provide a coherent rationale for the use of foreign judges. Judges on Pacific courts who are, or appear to be, partial in a particular case will recuse themselves or be disqualified according to the common law test for bias. Membership of the community and ethnic, religious or cultural affiliations do not, in and of themselves, give rise to impermissible conflicts of interest or bias. The Pacific practice of foreign judging presents a further problem for justifications based on impartiality. The local judges most likely to have personal connections to parties or an interest in the outcome would be lay judges and magistrates serving on lower courts, but foreign judges almost exclusively serve on higher courts which are at a greater distance from the community.[35]

For these reasons, impartiality does not provide a sound rationale for the widespread use of foreign judges. In the conditions of smallness that pertain in most Pacific jurisdictions, however, the impartiality rationale does support the use of foreign judges in more confined circumstances, that is, where they stand in for local judges who must recuse themselves from hearing a particular case.

E. An exceptional practice

The predominant rationale for the use of foreign judges in the Pacific is transitional: that until such time as there are sufficient numbers of qualified local candidates willing to take up judicial appointment in the conditions in which Pacific judiciaries operate, Pacific states will continue to rely on foreign judges. As Pacific courts develop specialist jurisdictions, such as commercial, family and youth matters, foreign judges might also be used to provide expertise to Pacific courts for the same 'gap-filling' reasons. The capacity building and impartiality rationales, when properly circumscribed, are supplementary rationales, explaining the use of foreign judges for

[34] 'Report of the Commonwealth Secretary-General 2011-2013' (Commonwealth Secretariat, 2013) 21.
[35] Chapter 6, Part III.

particular purposes, which might, over time and with localisation, be met by citizen judges. The idea that the use of foreign judges enhances the reputation of the court is the most problematic justification for the use of foreign judges. While it may be true in instances where individual foreign judges have a strong personal reputation, the idea that foreign judges, as a class, bestow credibility on a national judiciary is not sustainable and risks damaging the esteem in which local judges are held.

Being clear about the rationale for the use of foreign judges affects the justifications available for some of the distinctive features of foreign judging, such as short-term appointments, funding and payment arrangements, and the involvement of entities outside the Pacific state. Rationales for the use of foreign judges might differ across jurisdictions and change over time, including as prospects for the appointment of local judges increase. Rationales might also differ across the courts within a state, for example between full-time superior courts, part-time courts of appeal and emerging specialist courts. In all cases, clarity about the rationale for using foreign judges ought to inform the laws and policies that regulate the use of foreign judges, both in Pacific states themselves, and in the external state agencies and organisations that recruit and fund foreign judges.

On all four rationales, the use of foreign judges is understood as an exceptional practice. They take the preference and the goal to be that Pacific courts should be composed of local judges when the circumstances of Pacific states support it.[36] Although the practice is conceived as exceptional, the period of transition has been, and is likely to continue to be, long. As such, it is important to also understand the effect that the sustained use of foreign judges has on the legitimacy of Pacific courts and address the concerns that arise.

III. Legitimacy

The legitimacy of judges, judiciaries, and the judgments they issue, are open to challenge in all constitutional systems. In this Part I consider the distinctive challenges posed by the use of foreign judges to the legitimacy of courts of constitutional jurisdiction, in order to identify the points at which pressures on the legitimacy of foreign judges are likely to arise.

[36] Natalie Baird, 'Judges as Cultural Outsiders: Exploring the Expatriate Model of Judging in the Pacific' (2013) 19 *Canterbury Law Review* 80, 96.

Legitimacy is the quality that explains why the decisions of a court (or other authority) are morally binding and why people and governments obey them.[37] To investigate the challenges posed to legitimacy by the use of foreign judges, two major accounts of legitimacy will be considered here: the service conception of authority articulated by Raz[38] and a democratic account of legitimacy. On both accounts, whether or not foreign judges pose a challenge to the legitimacy of courts depends on the view one takes on what judges do, and ought to do, in constitutional adjudication.

A. The service conception of authority

On the service conception, an authority (in this case, a court) is legitimate to the extent its directives promote greater conformity to right reason than if its subjects tried to undertake their own assessment of the reasons that apply to them.[39] Judges have legitimate authority when they are better placed, or more likely, than those subject to their authority to determine the right reasons for action. Judges might be in this position because of their impartiality, their expertise about the facts and law, and, potentially, because they are in a superior position to solve social problems of coordination or cooperation.[40] A foreign judge, to the extent that he or she is in a position to bring these qualities to bear on constitutional adjudication, has legitimate authority – or at least the same degree of legitimate authority – as any other judge. For example, the impartiality of foreign judges makes them just as capable as citizen judges of fairly resolving legal disputes.

The legal expertise of foreign judges means that they are in position to state authoritatively what the law is. It is here, however, that the kinds of knowledge imputed to foreign judges might affect their legitimacy, depending on what the law is understood to be. Where law is understood to be based on familiar legal sources, then foreign judges with access to those sources can determine what the law is. In this thesis, this is illustrated by the preference of foreign judges to look to familiar and reasonably clear sources, such as the constitutional text and shared common law principles, when adjudicating constitutional issues.[41] Moving away from positivist conceptions of law, a foreign judge might also be able to speak to the moral content of law,

[37] This is a normative conception of legitimacy, rather than a social or descriptive account: Fabienne Peter, 'Political Legitimacy' in Edward N Zalta (ed), *Stanford Encyclopedia of Philosophy* (Stanford University, 2010) pt 1.
[38] Joseph Raz, 'The Problem of Authority: Revisiting the Service Conception of Authority' (2006) 90 *Minnesota Law Review* 1003.
[39] Ibid.
[40] Scott J Shapiro, 'Authority' in Jules L Coleman, Scott J Shapiro and Kenneth Einar Himma (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford University Press, 2002) 382, 405–6.
[41] Chapter 5, Part IV.

particularly where that content is understood to be universal. One example might be where foreign judges apply international human rights norms, which, although a relatively uncommon approach to constitutional adjudication in the Pacific region, might support legitimacy in other contexts.[42]

A problem for legitimacy arises when judges are required to speak to what is (to them) foreign sources of law or a different morality. One example is sources of law based on the customs, habits and common views of a community.[43] The most pressing example considered in this thesis is custom, which is a source of law in all Pacific legal systems. Conscious of the limitations of their knowledge, foreign judges might understandably be reticent to deal too closely with custom in the course of constitutional adjudication, preferring instead to draw on more familiar sources of law or to defer to the decisions of local authorities.[44] The risk that foreign judges will overlook or marginalise custom can have serious ramifications. The community's response to the *Teonea* case in Tuvalu, in which the Court's decision was seen to undermine the customary authority of the *Falekaupule*, demonstrate the kinds of tensions that can arise when foreign judges rule on customary matters in a way that does not accord with community understandings.[45]

Problems for legitimacy also arise when judges are required to address gaps in the law or to choose between different interpretations of a legal provision. In 'hard cases' where the law 'runs out', judges bring their own moral and political convictions and values to bear to determine what the law is. Hard cases test the legitimate authority of all courts because they take courts beyond the core judicial function of resolving disputes according to law and into the realm of law making. There are a range of views about how judges should decide hard cases.[46] MacCormick proposes that judges consider the effect on the coherence and consistency of the legal system and the effect on society, when choosing between different possible rulings.[47] Dworkin suggests that judges should decide on grounds of principle, seeking an interpretation that fits the law with the political morality of the community.[48] Noting the institutional

[42] Chapter 5, Part III.A.
[43] Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford University Press, 2nd ed, 2009) 46 n 7.
[44] Chapter 5, Part IV; Chapter 7, Part IV.
[45] *Teonea v Kaupule* [2005] TVHC 5; *Teonea v Pule o Kaupule of Nanumaga* [2009] TVCA 2, discussed in Chapter 7, Part IV.
[46] William Lucy, 'Adjudication' in Jules L Coleman and Scott J Shapiro (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford University Press, 2002) 207, pt 2.1.
[47] Neil MacCormick, *Legal Reasoning and Legal Theory* (Clarendon Press, rev ed 1993, 1978) 100; cited by Lucy, above n 46, 217.
[48] Ronald Dworkin, *Law's Empire* (Fontana, 1986) 255–6; cited by Lucy, above n 46, 218.

constraints on judicial law making, Raz suggests that judges should choose between partial reform and conservatism, rather than carry out wide-ranging reforms.[49] On all of these views, however, judges deciding hard cases are required to be in a position to determine the effect of their decisions on society, the community's political morality, or the relationships between political institutions. When they come from within a national culture, judges can draw on the understandings embedded in a common history, tradition and practice[50] and their own knowledge and experience of institutional relationships and community expectations. Judges from outside the national culture, however, are in a more tenuous position to assess not only the law but its operation in practice. As such, it is difficult to claim that foreign judges are in an equal or better position than local judges to determine the right reasons for action that apply to subjects, making the legitimacy of their authority questionable in these circumstances.

B. Democratic legitimacy

The democratic account provides that an authority is legitimate to the extent that its procedures for decision making, or its decisions themselves, treat all citizens fairly and with equal respect in the process of making law.[51] Constitutional judicial review challenges the legitimacy not just of foreign judges but all judiciaries, because it involves judges who lack the trappings of democratic accountability overruling the determinations of the democratically elected legislature and executive.[52] The pressures on legitimacy are heightened when it is acknowledged that judges do not only *enforce* the law, but sometimes *make* the law in the course of constitutional adjudication. In the Pacific, as elsewhere, these challenges to legitimacy are most apparent when judges are called upon to determine genuinely contested constitutional concepts and provisions.

One response is to emphasise the democratic credentials of judges. This claim, outlined in greater detail in Chapter 4, is that the citizenship of judges provides a form of democratic accountability because judges who are citizens are bound by the laws they have a hand in shaping and invested in their community and their constitution. As citizens, they have the right to participate in the decisions that affect the community and they share in the community's

[49] Raz, above n 43, 200–1; cited by Lucy, above n 46, 220.
[50] Ronald Dworkin, 'Discussion: International Criminal Justice' in Robert Badinter and Stephen Breyer (eds), *Judges in Contemporary Democracy: An International Conversation* (New York University Press, 2004) 189, 215.
[51] Tom Christiano, 'Authority' in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Stanford University, 2013) ch 7.
[52] Jeremy Waldron, *Law and Disagreement* (Clarendon Press, 1999) 239–43.

responsibility for the law as it stands and as it might become.[53] While the judge's citizenship does not make judicial *procedures* more democratic, it does signify a representative connection to the people, found in a shared national identity or in common membership of the community.

Foreign judges, on the other hand, lack even this attenuated connection to the people. In the absence of the ties of identity and membership implicit in citizenship, the clearest points of connection between a foreign judge and the people he or she serves are found in the judge's oath of service and allegiance, and the fact that their appointment is, at least formally, in the hands of a body responsible to the people.[54] The use of foreign judges stretches, and sometimes breaks, the range of representative connections between the people on one hand and judges on the other, connections which support the judiciary's engagement in law making and reform. All judges, when engaging in law making, do not score highly on democratic measures of legitimacy, but foreign judges would appear to be at an even greater disadvantage.

C. A conception of the foreign judge

On both accounts of legitimacy, the legitimacy of foreign judges is tested when the conception of judging moves away from a traditional, technical understanding of judging as the impartial resolution of disputes through the application of pre-existing law. It is when foreign judges move beyond this conception and apply values beyond the clear legal sources or engage in law making, that the pressures on legitimacy emerge.[55]

It is in light of these concerns about legitimacy that the predominant conception of the foreign judge as an expert, impartial professional assumes significance. Tying the approach to constitutional adjudication to pre-existing laws derived from clear and familiar sources, such as the constitutional text and shared common law, means that foreign judges are understood to have the relevant knowledge and expertise to determine constitutional questions. The emphasis placed on the impartiality of foreign judges (although problematic for the reasons outlined in Part II.D above), and the sense that foreign judges are representatives of a profession, rather than the people or the state, further bolsters the conception of the foreign judge as impartial expert. It also supports the transitional rationale for the use of foreign judges, by presenting

[53] Paul Kahn, 'Independence and Responsibility in the Judicial Role' in Irwin P Stotzky (ed), *Transition to Democracy in Latin America: The Role of the Judiciary* (Westview Press, 1993) 73; Roderick A MacDonald, 'Exercising Judgement' in *Which Judge for Which Society? Proceedings of the 2008 Judges' Conference* 51, 60 challenging the assumption that judges 'necessarily have a personal agenda that is untethered to the society and community within which they live'.

[54] Chapter 7, Part III.

[55] This finding reflects Shapiro's thesis that the burdens on the legitimacy are greater as they move beyond the core function of dispute resolution: Martin M Shapiro, *Courts, A Comparative and Political Analysis* (University of Chicago Press, 1981) ch 1.

foreign judges as having the necessary expertise and impartiality to temporarily stand in the place of local judges and provide essential judicial services to Pacific communities.

This conception of the foreign judge is, of course, a construct that requires glosses and omissions to maintain. In this, foreign judges share with all judges an *appearance* of legitimacy, based on notions of expertise, impartiality and purported neutrality, all of which support public confidence in the judiciary.[56] However, applying this particular conception to *foreign* judges carries its own distinctive risks. One is the risk that casting foreign judges as neutral, professional experts can imply that citizen judges do not have these qualities. Another is that this conception informs an approach to constitutional adjudication that confines it too closely to constitutional text and fails to give a sufficient role to constitutional and customary values, creating law that is out of step with the understandings and values of Pacific polities.

IV. Good practice initiatives

The discussion in this thesis of the implications of the use of foreign judges in the Pacific has identified a range of benefits and challenges that arise from the practice. In this Part I suggest some good practice initiatives that would support the legitimacy and effectiveness of foreign judging in the Pacific. The initiatives I outline here are deliberately non-prescriptive. It is a matter for each Pacific state, in consultation with stakeholders including the states and organisations that provide foreign judges, to develop their own laws and practices to address the issues that arise as a result of the use of foreign judges in the context of each state. It is important to also note that this thesis has assessed the use of foreign judges by considering the implications for constitutional adjudication and that different issues might arise for consideration if the focus were to shift to commercial litigation or criminal law for example. The five areas for consideration identified in this Part are therefore generally framed and intended to respond to the most pressing challenges facing foreign judges in the Pacific.

A. Localisation

Efforts towards localisation – that is, the appointment of citizen judges – serve to support the legitimacy of foreign judges. The transitional and capacity building rationales make sense only where there is a local judiciary and legal profession. The presence of local judges supports the legitimacy and effectiveness of courts in other ways. Local judges provide direct knowledge and experience of local law, custom and community values, enabling the court to adjudicate constitutional cases and develop the law in ways that meet community expectations. Local

[56] Lucy, above n 46, 265–6.

judges are resident, full time and appointed for longer and more secure terms, providing stability to the judiciary. They are citizens as well as judicial officers, and thus have the distinctive commitments to the law and the community that membership entails. Finally, the presence of local judges increases the extent to which Pacific judiciaries reflect the communities they serve, supporting public confidence.

Across Pacific states, there do not appear to be any express policies that seek to marry legal frameworks and policies for judicial appointment with the objective of localisation. In Papua New Guinea, the Constitution Review Committee and the Law Reform Commission considered the value of localisation and laws and practices to facilitate it.[57] These efforts, however, were undertaken in the 1970s and were somewhat overtaken by the hurried localisation in the aftermath of the Rooney affair. In other states which have achieved a degree of localisation, such as Samoa, Solomon Islands and Vanuatu, this seems due mainly to the efforts of Chief Justices and the authorities responsible for judicial appointments.

A localisation policy would commit the state to the appointment of local judges and perhaps even nominate a timeline for meeting that goal. The policy could identify necessary steps towards localisation, including support for legal education and professional experience; progression paths for citizens to judicial office; and addressing barriers to qualified citizens taking up judicial appointments (such as remuneration, retirement ages, and the terms and conditions of service). It might provide guidance to ensure appointing authorities first consider local candidates whenever a judicial position is vacant. It could also assist courts themselves in the management of judicial workload. For example, a court might consider ways to enable more local judges to sit alongside foreign judges on courts of appeal, whether by increasing the size of the bench (as in Vanuatu) or by including a local judge on the bench where possible (as in Samoa). A localisation policy could also set out the kinds of external assistance that is most likely to assist the transition from a judiciary predominantly composed of foreign judges to one that is predominantly local, to guide donor states and organisations.

In some Pacific states, particularly the smallest states of Nauru and Tuvalu, the appointment of local judges is some time away. Even here, however, a localisation policy would be valuable. In Tuvalu, for example, the constitutional provision setting out the requirements for eligibility for

[57] Narokobi, above n 14; Constitutional Planning Committee Papua New Guinea, 'Constitutional Planning Committee Report' (1974) ch 8. In 2018, the Government of Tonga announced a policy to localise its Supreme Court by 2020: Philip Cass, 'Gov't Wants All-Tongan Supreme Court Bench and Government Control of Salaries by 2020' *Kaniva Tonga*, 23 April 2018 <http://kanivatonga.nz/2018/04/govt-wants-all-tongan-supreme-court-bench-and-government-control-of-salaries-by-2020/>.

appointment to judicial office appears to preclude a person who has served as a Magistrate in Tuvalu, thus cutting off a significant pathway for citizens to judicial appointment.[58] A localisation policy might encompass law reforms to identify and amend such laws, making the appointment of a citizen judge possible in the future.

B. Regionalisation

The recruitment of foreign judges from other Pacific island states is an emerging trend.[59] The appointment of Pacific Islander judges may be seen as a half-way step towards localisation, especially in the smallest Pacific states where the appointment of citizen judges is not yet possible. Judges from within the Pacific region bring knowledge and experience of comparable jurisdictions and an awareness of the social and cultural issues that arise in conditions of legal pluralism. The use of regional judges on national courts might also build upon shared Pacific identities, making Pacific judiciaries more reflective. The appointment of judges from within the region is more likely to evolve into a genuine judicial 'exchange', in contrast to the unidirectional movement of foreign judges from outside.

Intra-regional exchanges have to date been limited by the low number of local judges, which has meant that many Pacific courts are reluctant to release their judges to sit overseas. Exchanges are, however, likely to increase as national judiciaries become more localised and as Pacific judges reach the statutory retirement age and make themselves available for service overseas.

The creation of a regional court of appeal is sometimes mooted as a way to address some of the concerns arising from the practice of foreign judging. Advocates argue that a single Pacific court of appeal could operate in place of the Judicial Committee of the Privy Council and national courts of appeal, providing a more cost-effective appeals mechanism. It is also claimed that a regional court comprising judges from within the region would promote the development of a Pacific jurisprudence based on an understanding of Pacific society, customs and culture.[60] Depending on its structure, a regional court might also protect judicial independence by taking

[58] *Constitution of Tuvalu 1978* s 124; Chapter 3, Part II.C.
[59] Chapter 7, Part V.B.
[60] Peter MacFarlane, 'Some Challenges Facing Legal Strengthening Projects in Small Pacific Island States' (2006) 4(1) *Journal of Commonwealth Law and Legal Education* 103, 111; Mere Pulea, 'A Regional Court of Appeal for the Pacific' (1980) 9(2) *Pacific Perspective* 1, 1, 7–8.

decisions about the appointment, renewal and removal of judges out of the direct control of national executives.[61]

The idea has a long history, encompassing several pre-independence models and post-independence proposals.[62] It has not, however, received widespread support from Pacific states. One concern is that a regional court will not have the capacity to deal with distinctively national issues and customs. Pacific states are reluctant to relinquish jurisdiction and sovereignty, while states and donor organisations are concerned about the costs and viability of a regional court.[63] These concerns are significant, although, as Powles notes, some of these objections might also apply to the use of foreign judges on domestic courts.[64]

The idea of a regional court appears to have little traction in the Pacific at present. For this reason, encouraging the recruitment of foreign judges from within the Pacific to sit on existing national courts seems the most feasible way of realising the advantages of regionalisation.

C. Stability

One consequence of the practice of foreign judging in the Pacific is an element of instability on Pacific judiciaries, as positions are filled by a succession of foreign judges serving for short terms, sometimes on a part-time, non-residential basis. This can exacerbate concerns about foreign judges' limited knowledge of local law and conditions. The stability of the bench is also important for capacity building – if that is what is sought from foreign judges – as it provides judges with an opportunity to build the relationships and trust required to build capacity in a sustainable way.

One way to address these concerns is to encourage greater continuity and stability in the cohort of foreign judges serving in the judiciaries of each state. A good start would be to provide greater security in judicial appointments, for example by appointing foreign judges for longer terms. Another might be to foster formal connections between particular Pacific and donor courts, thereby building a cohort of foreign judges with knowledge of and connections to a particular

[61] Interview F20. See also Wouter Veenendaal, *Politics and Democracy in Microstates* (Routledge, 2015) 120 in relation to the Eastern Caribbean Supreme Court.
[62] Pulea, above n 60, 3–6; John Logan, 'A Regional Final Court of Appeal for the South Pacific?' (paper presented at the 21st Pacific Judicial Conference 2014: Equal Access to Justice, 9 March 2014) 2–6 <http://pjc2014.org.nz/conference-papers/>. The Pacific Islands Forum explored the possibility in 2011: Lorraine Kershaw, 'Presentation to Pacific Constitutions and the Rule of Law Conference' (Auckland, 7 December 2011).
[63] Pulea, above n 60, 8; Isikeli Mataitoga, 'South Pacific Court of Appeal: Some Critical Issues' (1981) 11(1) *Pacific Perspective* 70.
[64] Guy Powles, 'Law, Courts and Legal Services in Pacific Societies' in Guy Powles and Mere Pulea (eds), *Pacific Courts and Legal Systems* (University of the South Pacific and Monash University, 1988) 6, 26.

country. Finally, courts of appeal in the region sit part time and are constituted by judges drawn from a pool of foreign, and increasingly, local, judges. A smaller, settled pool of foreign judges of appeal could also encourage greater stability. For example, in Tonga until 2013, only three judges at a time held commissions for the Court of Appeal and would return to visit for each sitting. A smaller pool of appeal judges would also reduce the risk of 'judge shopping' or any perception of preference in the assignment of appeal cases.

D. Judicial independence

In Chapter 6 I identified risks to judicial independence arising from the appointment of foreign judges on short renewable contracts and the susceptibility of foreign judges to extra-constitutional removal from office. While these features of foreign judging do not, in and of themselves, compromise judicial independence, they can, in combination with other factors, put judicial independence at risk. These factors include circumstances where most, if not all, judges serve on short renewable appointments; where the individuals appointed to Pacific courts depend on that position for career progression or financial security; and where executives or other appointing authorities have demonstrated that they will act to remove judges who have made decisions that are perceived to be against their interests.

In Chapter 6, I argued that the appointment of foreign judges on short terms is justifiable where the judge is, in effect, an acting judge to meet a temporary need, or to support localisation so that there will be positions available on the bench for qualified citizens.[65] A localisation policy could provide appointing authorities within states as well as external donor agencies with clearer direction about the circumstances that justify the appointment of a foreign judge on a short term. If, for example, the localisation policy identifies that the appointment of local judges will take a significant number of years, there is less justification for appointing a foreign judge for a short renewable term.

If legal measures are required, comparative experience provides some possible options to limit or reduce the involvement of the appointing authority in decisions about the renewal of a judge's appointment, thereby mitigating the risks to judicial independence. One option is to limit or prohibit the renewal of judicial contracts. Short term contracts would still be available, but once the term expired, the judge could not be reappointed.[66] In Seychelles, a small island state

[65] Chapter 6, Part III.

[66] The South African Constitutional Court has held that the authorities responsible for appointing judges do not have the discretion to renew a judge's appointment after the expiry of the term: *Justice Alliance of South Africa v President* 2011 (5) SA 388. A similar decision was made by the High Court of Botswana but overturned on appeal: *National Amalgamated Local Central Government and Parastatal Workers*

that also uses foreign judges, a constitutional provision specifies that foreign judges are to be appointed for one term not exceeding seven years, with reappointment only in 'exceptional circumstances'.[67] An alternative approach is to create a presumption that a judge's appointment will be renewed. This approach was taken by the East Timorese court, which held that a foreign judge has a legal expectation that his or her contract will be renewed as long as there is a need for the judge in the legal system.[68] Other proposals include contractual provisions for automatic renewal or renewal at the option of the judge,[69] and a legal requirement that appointing authorities to give reasons for non-renewal.[70]

These considerations should also inform the approach of external organisations that recruit and fund foreign judges, guiding the selection of candidates and the terms on which they are engaged. Providing a foreign judge on a fixed term contract to fill what is in essence a permanent judicial position supports neither the independence nor the stability of the judiciary. If the status and protections afforded to judges in their home state are relevant to the independence of foreign judges, it might be preferable to direct aid funding to secondment programs between courts, such as the longstanding program between the Supreme Court of Vanuatu and the District Court of New Zealand, rather than the ad hoc recruitment of individuals to specific judicial positions. Providing development aid funds through judicial institutions, rather than directly to judges, also dilutes the link between the funder and individual judges, which might be perceived as a channel for improper influence.

E. Exchange of knowledge

Foreign judging can sometimes be characterised as a one-way process, in which foreign judges provide skills and expertise to Pacific courts. However, foreign judges face knowledge gaps of

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Union v President (Botswana High Court, 16 February 2017) [66]; *President v National Amalgamated Local Central Government and Parastatal Workers Union* (Botswana Court of Appeal, June 2017).

[67] *Constitution of the Republic of the Seychelles 1993* s 131(3), (4). The reappointments of several foreign judges have been challenged before the courts with mixed success. The Court of Appeal held that it has the power to determine whether 'exceptional circumstances' exist (*Bar Association of Seychelles v President* [2004] SCCA 1, 42-3), but it will give the phrase 'exceptional circumstances' a wide interpretation to encompass all circumstances relevant to a particular reappointment (*Michel v Dhanjee* [2012] SLR 1, 19).

[68] *Decision regarding the appeal of Judge Ivo Rosa against the non-renewal of his Contract by the Superior Council for the Judiciary* (Unreported, East Timor Court of Appeal, 31 December 2008).

[69] Carl B Ingram, 'The Length of Terms of Judges in the Pacific and Its Impact on Judicial Independence' in *Land Law and Judicial Governance in the South Pacific: Comparative Studies* (New Zealand Association for Comparative Law, 2011) 375, 377; Derek Schofield, 'Maintaining Judicial Independence in a Small Jurisdiction' in John Hatchard and Peter Slinn (eds), *Parliamentary Supremacy and Judicial Independence: A Commonwealth Approach* (Cavendish Publishing Limited, 1999) 73, 76. Two judges noted in interviews that they had negotiated such terms: Interviews F1, F6.

[70] Schofield, above n 69, 76.

their own, most notably in relation to the national laws and legal systems, including custom, of Pacific states. The analysis in Chapter 5 showed how this knowledge gap can affect how foreign judges approach constitutional adjudication. One risk is that the use of judges unfamiliar with custom and the legal context of Pacific jurisdictions can hamper efforts to develop an indigenous jurisprudence.

A final good practice initiative is therefore to assist foreign judges to gain knowledge of the legal system, including custom, in the states in which they sit. One way in which this can be done on courts of appeal is to ensure that local and foreign judges sit together on panels, where there are sufficient numbers of local judges available. This practice is seen to provide the foreign judges on the court with access to local knowledge and a better understanding of custom and tradition.[71] There is also a range of possible procedures to assist courts to access custom, from adjusting the applicable rules of evidence to the use of amicus, expert witnesses or assessors.[72]

Another way is to provide specific training for foreign judges or to include foreign judges in court-wide judicial education programs.[73] Foreign lawyers who wish to practice in Papua New Guinea are required to pass an exam covering customary law, land law and constitutional law.[74] There is no similar requirement for foreign judges in Papua New Guinea or anywhere else in the Pacific. However, in Papua New Guinea, foreign judges participate in judicial trainings and conferences alongside local judges, including a series on the development of the underlying law.[75] Writing in the Samoan context, Mulitalo recommends joint training on law and custom for judges of the Supreme Court and the Land and Titles Court, as well as the development of a reference guide or bench book on customary law and practice.[76] Initiatives such as these are important for ensuring that foreign judges have the expertise necessary to adjudicate according to Pacific law, and for building collegiality between foreign and local judges.

[71] Interviews F1, F2, F7, F12, F20.
[72] 'Converging Currents: Custom and Human Rights in the Pacific' (Study Paper SP17, New Zealand Law Commission, 2006) 194–202.
[73] Ibid 204–5.
[74] *Lawyers Act 1986* (PNG) s 25; *Lawyers (Examination) Regulation 1992* (PNG). APEC Legal Services Initiative, *Inventory: Papua New Guinea* (2010) <http://www.legalservices.apec.org/inventory/papua_new_guinea.html>.
[75] Conferences on the development of the underlying law were held in 2010, 2013 and 2017.
[76] Teleiai Lalotoa Mulitalo Ropinisone Silipa Seumanutafa, *Law Reform in Plural Societies* (Springer, 2018) 133–4, 136.

V. A global phenomenon

While it has historical roots and takes a particular form in the Pacific, the use of foreign judges is part of a wider story of contemporary globalisation. The use of foreign judges is most prevalent in small states, where, as in the Pacific, foreign judges are used because of the limited numbers of qualified citizens able to accept judicial appointment. It is not, however, confined to such circumstances, but is rather a growing and evolving global trend. States transitioning from conflict or authoritarian rule turn to foreign judges to administer domestic judiciaries while the state rebuilds its institutions.[77] International peace-brokers have advocated, and at times required, that foreign judges sit on domestic constitutional courts in countries with deeply entrenched societal conflict.[78] Foreign judges have been proposed, although not always accepted, to sit on transitional justice tribunals.[79] In countries seeking to address entrenched corruption, foreign judges and legal personnel are regarded as necessary to ensure the integrity of the judiciary where the institution has been tainted by corruption.[80] Finally, while they do not exercise constitutional jurisdiction, the globalisation of commerce and investment has led several states to establish commercial and arbitration courts staffed by foreign judges.[81] These developments suggest that, far from declining as decolonisation proceeds, the practice of foreign judging is expanding and becoming more diverse.

Despite its growing global prevalence, the use of foreign judges receives limited attention in the literature on judicial institutions and globalisation and in comparative constitutional law and policy. To conclude this thesis, I identify how greater study of the practice of foreign judging across different contexts contributes to three pressing debates in these areas.

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[77] Eg in East Timor: Hansjoerg Strohmeyer, 'Policing the Peace: Post-Conflict Judicial System Reconstruction in East Timor' (2001) 24 *University of New South Wales Law Journal* 171.
[78] Eg in Bosnia Herzegovina and Kosovo: Constance Grewe and Michael Riegner, 'Internationalized Constitutionalism in Ethnically Divided Societies: Bosnia-Herzegovina and Kosovo Compared' (2011) 15 *Max Planck Yearbook of United Nations Law* 1; in Cyprus: Hubert Faustmann and Andrekos Varnava (eds), *Reunifying Cyprus: The Annan Plan and Beyond* (IB Tauris, 2009) 33, 76–7,102.
[79] Eg in Colombia: Kai Ambos and Susann Aboueldahab, 'Foreign Jurists in the Colombian Special Jurisdiction for Peace: A New Concept of Amicus Curiae?' on *EJIL Talk: Blog of the European Journal of International Law* (19 December 2017) <https://www.ejiltalk.org/foreign-jurists-in-the-colombian-special-jurisdiction-for-peace-a-new-concept-of-amicus-curiae/comment-page-1/>; in Sri Lanka: Bhavani Fonseka and Luwie Ganeshathasan, 'Hybrid vs Domestic: Myths, Realities and Options for Transitional Justice in Sri Lanka' (Centre for Policy Alternatives, 2016) 4–8.
[80] Eg in Honduras: 'Agreement between the Government of the Republic of Honduras and the General Secretariat of the Organization of American States for the Establishment of the Mission to Support the Fight against Corruption and Impunity in Honduras' (signed 19 January 2016), art 2.1.1.
[81] In Singapore, Qatar and Dubai: Andrew Godwin, Ian Ramsay and Miranda Webster, 'International Commercial Courts: The Singapore Experience' (2017) 18 *Melbourne Journal of International Law* 219.

A. Globalisation

The use of foreign judges is part of the phenomenon of judicial globalisation, traced by Slaughter and developed by others,[82] in which judges interact across national boundaries in various ways. Slaughter identified a range of interactions, including references to foreign judgments, engagements with foreign courts in determining transnational legal disputes, and face to face meetings of judges through judicial conferences and exchange programs. While she does not mention the practice of foreign judging, it is clearly an example of judicial globalisation, connecting judges and legal systems across national borders.

The emphasis, identified in this thesis, on foreign judges as representatives of a profession rather than a state, resonates with Slaughter's study of judges in conditions of globalisation. She claims that judicial globalisation changes how judges think about their role, fostering a sense of judging as a global profession in which 'judges see each other not only as servants and representatives of a particular polity, but also as fellow professionals in an endeavour that transcends national borders'.[83] For Slaughter, transnational interactions between individual judges can create a 'global community of courts', fostering dialogue and exchange that enriches the jurisprudence of each nation.

The practice of foreign judging in the Pacific, however, introduces at least two significant points of tension overlooked in Slaughter's vision of a community of judicial professionals. First, aside from the limited examples of intra-Pacific judicial exchange, the movement of foreign judges is unidirectional: that is, judges from large developed states travel to smaller, developing states and rarely if ever in reverse. It is unlikely, and for many unthinkable, that a judge from Papua New Guinea might sit on the High Court of Australia or a judge from Samoa on the Supreme Court of New Zealand. The disparity in the international status of states and their judiciaries and judges, make metaphors of 'dialogue' and 'exchange' inapt.

Secondly, this thesis highlights some of the risks that arise from the idea of judging as, first and foremost, a profession. The connections between judges and states, for which citizenship serves as the proxy, continue to be important. The qualities of membership and identity implied in citizenship are significant to the way in which judges understand the responsibilities of judicial office and approach adjudication, and to the way in which the public perceives the judges on its national courts. Taken to an extreme, the vision of a global judicial profession de-identifies and

[82] Anne-Marie Slaughter, 'A Global Community of Courts' (2003) 44(1) *Harvard International Law Journal* 191; Sam Muller, Sidney Richards and Laura Henderson (eds), *Highest Courts and Globalisation* (Hague Academic Press, 2010).
[83] Slaughter, above n 82, 193.

de-nationalises judges, such that one judge can easily stand for another, losing the sense that who a judge is matters, because it serves to connect judicial office with the law, the state and the people.

B. Internationalisation

The use of foreign judges is also part of the story of the internationalisation of constitutional systems. Internationalisation is the impact of international and supranational norms, institutions and processes on domestic constitutional arrangements, through vertical interactions between international law and state law, horizontal interactions between states, and transnational networks of constitutional actors.[84] The usual understanding is that the structure and composition of constitutional institutions is exclusively a matter for the state concerned. However, the use of foreign judges on national courts shows how domestic institutions may be subject to a range of external influences and sources of regulation.

Constitutional and legislative provisions in each of the nine Pacific states set out the legal framework for their judiciaries. However, giving effect to these provisions through the use of foreign judges exposes the judiciary to many kinds of external influence. The use of foreign judges also opens constitutional jurisprudence to a range of national and international influences, as foreign judges cite foreign law and bring constitutional understandings shaped in their home jurisdictions to bear on the interpretation of Pacific constitutions. Choices about which foreign judges to appoint, and on what terms and conditions, are influenced by transnational personal relationships between judges, formal and informal relations between courts, international relations between states, and global market forces. Legal frameworks are supplemented (and sometimes bypassed) by contractual relationships between governments, courts, donor organisations and foreign judges themselves. Lines of accountability flow in various different directions – to professional peers, foreign judges' home states, Pacific states and Pacific communities. Allegiances are multiplied, 'scrambled' even, as citizens move across national borders to take up constitutional office in foreign states.[85]

As an example of internationalisation, the use of foreign judges illustrates a complex, somewhat messy process, that exposes Pacific judges and judiciaries to gaps in regulation, instability and multiple and potentially competing sources of influence. It shows that the channels of

[84] Cheryl Saunders, 'The Impact of Internationalisation on National Constitutions' in Albert HY Chen (ed), *Constitutionalism in Asia in the Early Twenty-First Century* (Cambridge University Press, 2014) 391, 391–2.

[85] Seyla Benhabib, *The Rights of Others: Aliens, Residents, and Citizens* (Cambridge University Press, 2004) 174.

international influence on national constitutions are varied and indirect, and not without their costs.

C. Comparative insights

Despite the increasing use of foreign judges on national courts in a range of different contexts, it is still an exceptional phenomenon. It remains the case that the global norm is that the judges on courts of constitutional jurisdiction will be citizens of the state they serve. This fact is often taken for granted, to the point that the citizenship of judges is treated either as the default assumption or irrelevant in global studies of judicial independence and in theories of constitutional adjudication. The examination of the use of foreign judges in this thesis not only sheds light on a distinctive practice in the Pacific region. It also opens the way for an examination of widespread, but often unarticulated, presumptions about the significance of nationality to the functions and qualities of constitutional judges. In identifying the implications of the use of foreign judges to constitutional adjudication, judicial independence and the role of judges and judiciaries in the Pacific, this thesis shows how a judge's nationality is important to understanding the role of judges, even in constitutional systems that use only citizen judges. This suggests that the requirement of nationality, whether by law or practice, in the majority of the world's constitutional systems deserves further study and justification, particularly in contemporary conditions of globalisation.

The island states of the Pacific region have been largely overlooked in comparative constitutional studies. This thesis demonstrates that the constitutional experience of the Pacific region is important to understand, not just in its own right, but for the contribution that it can make to global understandings of constitutional practice and to the development of constitutional theory. The use of foreign judges on courts of constitutional jurisdiction is just one aspect of the rich and distinctive constitutional histories and practices of the Pacific region that deserves greater recognition and rewards further study.

BIBLIOGRAPHY

I. Articles, books and reports

About the Small Island Developing States (2015) United Nations Office of the High Representative for the Least Developed Countries, Landlocked Developing Countries and Small Island Developing States <http://unohrlls.org/about-sids/>

Adams, Maurice, 'Doing What Doesn't Come Naturally: On the Distinctiveness of Comparative Law' in Mark Van Hoecke (ed), *Methodologies of Legal Research* (Hart Publishing, 2011) 229

Aleck, Jonathan, 'Beyond Recognition: Contemporary Jurisprudence in the Pacific Islands and Common Law Tradition' (1991) 7 *Queensland University of Technology Law Journal* 137

Aleinikoff, T Alexander, 'Thinking Outside the Sovereignty Box: Transnational Law and the US Constitution' (2004) 82(7) *Texas Law Review* 1989

Alexy, Robert, 'Balancing, Constitutional Review, and Representation' (2005) 3(4) *International Journal of Constitutional Law* 572

Allott, Antony, 'The Independence of the Judiciary in Commonwealth Countries: Problems and Provisions' (1994) 20(4) *Commonwealth Law Bulletin* 1428

Ambos, Kai and Susann Aboueldahab, 'Foreign Jurists in the Colombian Special Jurisdiction for Peace: A New Concept of Amicus Curiae?' on *EJIL Talk: Blog of the European Journal of International Law* (19 December 2017) <https://www.ejiltalk.org/foreign-jurists-in-the-colombian-special-jurisdiction-for-peace-a-new-concept-of-amicus-curiae/comment-page-1/>

Amet, Arnold, 'Severing the Umbilical Cord from the Common Law' in Jackson Rannells and Jonathan Aleck (eds), *Custom at the Crossroads* (Faculty of Law, University of Papua New Guinea, 1995) 62

Anderson, Benedict, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (Verso, Rev ed, 2006)

Anderson, Michael, Joachim Luma and Carmen Voigt-Graf, 'Recent Developments Regarding Non-Citizen Technical Advisers in Papua New Guinea' (Issues Paper 24, National Research Institute, March 2017)

Angelo, AH, '"Steady as She Goes": The Constitution and Court of Appeal of Samoa' (2012) 18 *New Zealand Association for Comparative Law Yearbook* 145

Anghie, Anthony, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, 2005)

APEC Legal Services Initiative, *Inventory: Papua New Guinea* (2010) <http://www.legalservices.apec.org/inventory/papua_new_guinea.html>

Apinelu, Eselealofa, 'Societal Culture and Constitutions: The Case of Tuvalu' in *Implications of Culture for Constitution Building: Report of the Third Melbourne Forum on Constitution Building in Asia and the Pacific* (International IDEA and Constitution Transformation Network, 2018) <https://law.unimelb.edu.au/constitutional-transformations/MF/melbourne-forum-2018/melbourne-forum-2018-final-report>

Appleby, Gabrielle et al, 'Temporary Judicial Officers in Australia: A Report Commissioned by the Judicial Conference of Australia' (2017)

Arcioni, Elise, 'Identity at the Edge of the Constitutional Community' in Fiona Jenkins, Mark Nolan and Kim Rubenstein (eds), *Allegiance and Identity in a Globalised World* (Cambridge University Press, 2014) 31

Arnold, Michael, 'PNG Judiciary Honors Late Justice Foulds' *Post Courier* (Port Moresby), 8 October 2018 <https://postcourier.com.pg/png-judiciary-honors-late-justice-foulds/>

Atkinson, Beith, 'Regional Co-Operation in the Courts: A Tuvalu View' in Guy Powles and Mere Pulea (eds), *Pacific Courts and Legal Systems* (University of the South Pacific and Monash University, 1988) 241

'Aust, NZ Judges Quit Fiji's Appeal Court' *ABC News*, 4 September 2007 <http://www.abc.net.au/news/2007-09-04/aust-nz-judges-quit-fijis-appeal-court/660062>

Australasian Institute of Judicial Administration, *Guide to Judicial Conduct* (2nd ed, 2007)

Baird, Natalie, 'Judges as Cultural Outsiders: Exploring the Expatriate Model of Judging in the Pacific' (2013) 19 *Canterbury Law Review* 80

Banivanua-Mar, Tracey, 'Frontier Space and the Reification of the Rule of Law: Colonial Negotiations in the Western Pacific, 1870-74' (2009) 30 *Australian Feminist Law Journal* 23

Banivanua-Mar, Tracey, *Decolonisation and the Pacific: Indigenous Globalisation and the Ends of Empire* (Cambridge University Press, 2016)

Baragwanath, David, 'Judging: A Butterfly View' (2010) 16 *Canterbury Law Review* 243

Barak, Aharon, 'The Role of the Supreme Court in a Democracy' in Mads Tønnesson Andenæs, Lord Slynn of Hadley and Duncan Fairgrieve (eds), *Judicial Review in International Perspective* (Kluwer Law International, 2000) 121

Barker, Ian, 'Judging the Pacific' (paper presented at Lincoln's Inn, 24 October 2011)

Barmes, Lizzie and Kate Malleson, 'Lifting the Judicial Identity Blackout' (2018) 38(2) *Oxford Journal of Legal Studies* 357

Bauböck, Rainer, 'Political Membership and Democratic Boundaries' in Ayelet Shachar et al (eds), *The Oxford Handbook of Citizenship* (Oxford University Press, 2017) 60

Bayne, Peter, 'The Constitution and the Franchise in Western Samoa' (1985) 1 *Queensland Institute of Technology Law Journal* 201

Bayne, Peter J, 'Judicial Method and the Interpretation of Papua New Guinea's Constitution' (1980) 11 *Federal Law Review* 121

Bellamy, Richard, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge University Press, 2007)

Benhabib, Seyla, *The Rights of Others: Aliens, Residents, and Citizens* (Cambridge University Press, 2004)

Berkovic, Nicola, 'Judge Criticised over Fiji Posting' *The Australian* (Canberra), 10 March 2008 4

Bilimoria, Nilesh N, 'Choices for the South Pacific Region's Bar Associations and Law Societies?' in Petra Butler and Caroline Morris (eds), *Small States in a Legal World* (Springer International Publishing, 2017) 245

Black, Vaughan and Stephen GA Pitel, 'Out of Bounds: Can a Court Sit Outside Its Home Jurisdiction?' (2013) 41 *Advocates' Quarterly* 503

Bobbitt, Philip, *Constitutional Fate: A Theory of the Constitution* (Oxford University Press, 1982)

Bogdandy, Armin von and Ingo Venzke, *In Whose Name? A Public Law Theory of International Adjudication* (Oxford University Press, 2014)

Boyd, Susan, 'Australian Judges at Work Internationally: Treason, Assassinations, Coups, Legitimacy of Government, Human Rights, Poverty and Development' (2003) 77 *Australian Law Journal* 303

Briguglio, Lino, 'Small Island Developing States and Their Economic Vulnerabilities' (1995) 23 *World Development* 1615

Brown, David, 'Judicial Independence: An Examination' (1986) 58(4) *The Australian Quarterly* 348

Brown, Kenneth and Jennifer Corrin Care, 'More on Democratic Fundamentals in Solomon Islands: Minister for Provincial Government v Guadalcanal Provincial Assembly' (2001) 32 *Victoria University of Wellington Law Review* 653

Brown, Mark, '"An Unqualified Human Good"? On Rule of Law, Globalization, and Imperialism' [2017] *Law and Social Inquiry* advance online version

Bruch, Elizabeth M, 'Hybrid Courts: Examining Hybridity through a Post-Colonial Lens' (2010) 28(1) *Boston University International Law Journal* 1

Bukurura, Sufian Hemed, 'A Judiciary in Transition: Reflections on the Selection of Judges in Namibia' in Peter H Russell and Kate Malleson (eds), *Appointing Judges in an Age of Judicial Power: Critical Perspectives from around the World* (University of Toronto Press, 2006) 313

Burbank, Stephen B and Barry Friedman, 'Reconsidering Judicial Independence' in *Judicial Independence at the Crossroads: An Interdisciplinary Approach* (Sage Publications, 2002)

Byron, Dennis and Maria Dakolias, 'The Regional Court Systems in the Organization of the Eastern Caribbean States and the Caribbean' in Edgardo M Favaro (ed), *Small States, Smart Solutions* (World Bank Publications, 2008) 91

Cahill-O'Callaghan, Rachel J, 'Reframing the Judicial Diversity Debate: Personal Values and Tacit Diversity' (2015) 35(1) *Legal Studies* 1

Cappelletti, Mauro, *The Judicial Process in Comparative Perspective* (Clarendon Press, 1989)

Casey, Maurice, 'New Zealand Judges in Overseas Courts' in Ian Barker and Graham Wear (eds), *Law Stories: Essays on the New Zealand Legal Profession 1969-2003* (LexisNexis NZ, 2003) 89

Cass, Philip, 'Gov't Wants All-Tongan Supreme Court Bench and Government Control of Salaries by 2020' *Kaniva Tonga*, 23 April 2018 <http://kanivatonga.nz/2018/04/govt-wants-all-tongan-supreme-court-bench-and-government-control-of-salaries-by-2020/>

Chen, Edward M, 'The Judiciary, Diversity, and Justice for All' (2003) 91(4) *California Law Review* 1109

Chetwynd, David, 'Judicial Independence and Integrity' (2001) 5 *Journal of South Pacific Law*

'Chief Magistrate Says Foreigners No Solution to Solomons Shortage' *ABC News*, 21 October 2013 <http://www.abc.net.au/news/2013-10-21/an-chief-magistrate-says-foreigners-not-the-answer-to-magistrat/5035402>

Chief Justice Lunabek, 'Speech on the Official Opening of the Courts of Vanuatu' (Port Vila, 27 January 2012) <https://mjcs.gov.vu/images/research_database/Chief_Justice_2012_SPEECH2-_Opening_of_Court.pdf.>

Chief Justice New Zealand, *Protocol Containing Guidance on Extra-Judicial Employment and Offices (Senior Courts)* (2017)

Chitty, Joseph, *A Treatise on the Law of the Prerogatives of the Crown* (J Butterworth, 1820)

Christiano, Tom, 'Authority' in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Stanford University, 2013)

Code of Conduct for Judicial Officers of the Republic of Kiribati (2011)

Code of Judicial Conduct for Tuvalu (2011)

Colvin, Eric, 'Criminal Procedure in the South Pacific' (2004) 8(1) *Journal of South Pacific Law*

Commonwealth Secretariat, 'Evaluation of the Commonwealth Fund for Technical Cooperation (CFTC)' (2008)

Commonwealth Secretariat, 'Report of the Commonwealth Secretary-General 2011-2013' (Commonwealth Secretariat, 2013)

Constitutional Planning Committee Papua New Guinea, 'Constitutional Planning Committee Report' (1974)

'Converging Currents: Custom and Human Rights in the Pacific' (Study Paper SP17, New Zealand Law Commission, 2006)

Corrin Care, Jennifer, 'Cultures in Conflict: The Role of the Common Law in the South Pacific' (2002) 6 *Journal of South Pacific Law*

Corrin Care, Jennifer, 'Finding the Right Balance in Plural Systems: Training Lawyers in the South Pacific' (2006) 4(2) *Journal of Commonwealth Law and Legal Education* 171

Corrin Care, Jennifer and Don Paterson, *Introduction to South Pacific Law* (Routledge-Cavendish, 2nd ed, 2008)

Corrin, Jennifer, 'Breaking the Mould: Constitutional Review in Solomon Islands' (2007) 13 *Revue Juridique Polynésienne* 143

Corrin, Jennifer, 'Judge or Be Judged: Accepting Judicial Appointment in an Unlawful Regime' (2009) 16(2–3) *International Journal of the Legal Profession* 191

Corrin, Jennifer, 'Moving beyond the Hierarchical Approach to Legal Pluralism in the South Pacific' (2009) 59 *Journal of Legal Pluralism and Unofficial Law* 29

Corrin, Jennifer, 'A Question of Identity: Complexities of State Law Pluralism in the South Pacific' (2010) 61 *Journal of Legal Pluralism and Unofficial Law* 145

Corrin, Jennifer, 'Getting Down to Business: Developing the Underlying Law in Papua New Guinea' (2014) 46(2) *The Journal of Legal Pluralism and Unofficial Law* 155

Cotterrell, Roger, *Law, Culture and Society: Legal Ideas in the Mirror of Social Theory* (Ashgate, 2006)

Cox, Marcus, Emele Duituturaga and Eric Scheye, 'Solomon Islands Case Study: Evaluation of Australian Law and Justice Assistance' (Australian Government Office of Development Effectiveness, Ausaid, 2012)

Dale, Gregory, 'Appealing to Whom? Australia's "Appellate Jurisdiction" Over Nauru' (2007) 56(3) *International and Comparative Law Quarterly* 641

Dam, Kenneth W, *The Law-Growth Nexus: The Rule of Law and Economic Development* (Brookings Institution Press, 2006)

Dannenbaum, Tom, 'Nationality and the International Judge: The Nationalist Presumption Governing the International Judiciary and Why It Must Be Reversed' (2012) 45(1) *Cornell International Law Journal* 77

Davidson, JW, *Samoa Mo Samoa: The Emergence of the Independent State of Western Samoa* (Oxford University Press, 1967)

De, Rohit, '"A Peripatetic World Court" Cosmopolitan Courts, Nationalist Judges and the Indian Appeal to the Privy Council' (2014) 32 *Law and History Review* 821

'Declaration and Development of Underlying Law' (Working Paper No 4, Law Reform Commission of Papua New Guinea, 1976)

De Smith, Stanley A, *The New Commonwealth and Its Constitutions* (Stevens & Sons, 1964)

Dickinson, Laura A, 'The Promise of Hybrid Courts' (2003) 97 *American Journal of International Law* 295

Dixon, Rosalind and Vicki C Jackson, 'Constitutions Inside Out: Outsider Interventions in Domestic Constitutional Contests' (2013) 48(1) *Wake Forest Law Review* 149

Domah, SB, 'Judicial Assistance to Small Jurisdictions in the Commonwealth: The Case for a Special Chapter and Forum' (2011) 37(4) *Commonwealth Law Bulletin* 605

Donne, Gavan, 'Introduction' in Guy Powles and Mere Pulea (eds), *Pacific Courts and Legal Systems* (University of the South Pacific and Monash University, 1988) 3

Dorney, Sean, *The Embarrassed Colonialist* (Penguin Group Australia, 2016)

Draunidalo, Tupou, 'The Rule of Law and Judicial Independence amidst the Coups and Attempted Coups in Fiji since 1987' in Jon Fraenkel, Stewart Firth and Brij V Lal (eds), *The 2006 Military Takeover in Fiji: A Coup to end all Coups* (ANU E Press, 2009) 311

Du Bois, Francois, 'Judicial Selection in Post-Apartheid South Africa' in Peter H Russell and Kate Malleson (eds), *Appointing Judges in an Age of Judicial Power: Critical Perspectives from Around the World* (University of Toronto Press, 2006) 280

Duff, Peter, 'The Evolution of Trial by Judge and Assessors in Fiji' (1997) 21 *Journal of Pacific Studies* 189

Dworkin, Ronald, *Law's Empire* (Belknap Press, 1986)

Dworkin, Ronald, 'Discussion: International Criminal Justice' in Robert Badinter and Stephen Breyer (eds), *Judges in Contemporary Democracy: An International Conversation* (New York University Press, 2004) 189

Dyzenhaus, David, 'Are Legislatures Good at Morality? Or Better at It than the Courts?' (2009) 7(1) *International Journal of Constitutional Law* 46

Dziedzic, Anna, 'No Confidence Votes' in *Max Planck Encyclopedia of Comparative Constitutional Law* (Oxford University Press, 2017)

Dziedzic, Anna, 'A New Court for Nauru' *The Interpreter* (Lowy Institute), 8 August 2018 <https://www.lowyinstitute.org/the-interpreter/new-court-nauru>

Eames, Geoffrey, 'The Rule of Law in Nauru: An Evolving Concept?' (Paper presented at Law Society of South Australia Criminal Law Conference, McLaren Vale, 24 October 2014)

Efi, Tui Atua Tupua Tamasese, *Su'esu'e Manogi In Search of Fragrance: Tui Atua Tupua Tamasese Ta'isi and the Samoan Indigenous Reference* (Centre for Samoan Studies, National University of Samoa, 2008)

Ellett, Rachel, *Politics of Judicial Independence in Lesotho* (Freedom House Southern Africa, 2012)

Ellett, Rachel L, *Pathways to Judicial Power in Transitional States: Perspectives from African Courts* (Routledge, 2013)

Ellis, Graham, 'Life on the Bench in PNG' [2010] *Bar News: The Journal of the New South Wales Bar Association* 96

Epstein, Lee, Jack Knight and Olga Shvetsova, 'The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government' (2001) 35(1) *Law and Society Review* 117

Etherton, Terence, 'Liberty, the Archetype and Diversity: A Philosophy of Judging' [2010] *Public Law* 727

Everingham, Sara, 'East Timor Government to Sack Foreign Judges, Advisers' *ABC News*, 27 October 2014 <http://www.abc.net.au/news/2014-10-27/east-timor-government-to-sack-foreign-judges-and-advisers/5843056>

Farran, Susan, *Human Rights in the South Pacific: Challenges and Changes* (Routledge-Cavendish, 2009)

Farran, Susan, 'Palm Tree Justice? The Role of Comparative Law in the South Pacific' (2009) 58(1) *International & Comparative Law Quarterly* 181

Faustmann, Hubert and Andrekos Varnava (eds), *Reunifying Cyprus: The Annan Plan and Beyond* (IB Tauris, 2009)

Feldman, David, 'The Independence of International Judges in National Courts: Lessons from Bosnia Herzegovina' in CF Forsyth and Shimon Shetreet (eds), *The Culture of Judicial Independence: Conceptual Foundations and Practical Challenges* (Martinus Nijhoff Publishers, 2011) 215

Feldman, David John, 'Statutory Interpretation and Constitutional Legislation' (2014) 130 *Law Quarterly Review* 473

Feng, Lin, 'The Expatriate Judges and Rule of Law in Hong Kong: Its Past, Present and Future' in Shimon Shetreet and Wayne McCormack (eds), *The Culture of Judicial Independence in a Globalised World* (Brill Nijhoff, 2016) 279

Ferejohn, John, 'Independent Judges, Dependent Judiciary: Explaining Judicial Independence' (1999) 72 *Southern California Law Review* 353

Ferreyra, Aleida, Ramzi Mabsout and United Nations Office of the High Representative for the Least Developed Countries, Landlocked Developing Countries and Small Island Developing States, *Best Practices in the Implementation of the Brussels Programme of Action for the Least Developed Countries for the Decade 2001-2010* (United Nations, 2008)

'Fiji Expels Envoys over Interference Claims' *ABC Radio*, 4 November 2009 <http://www.abc.net.au/news/2009-11-04/fiji-expels-envoys-over-interference-claims/1128378>

'Fiji Judge Urges Lawyers to Speak Out' *FijiLive*, 25 January 2008 <http://fijilive.com/fijliive-print-story.Fijilive?1356.Fijilive>

Fiji Women's Rights Movement, *Herstory: Celebrating 25 Years of Balancing the Scales 1986-2011* (2011) <www.fwrm.org.fj/images/fwrm2017/PDFs/fwrmherstory1984_2011final.pdf>

Firth, Stewart, 'Sovereignty and Independence in the Contemporary Pacific' (1989) 1(1/2) *The Contemporary Pacific* 75

Fiss, Owen M, 'The Social and Political Foundations of Adjudication' (1982) 6(2) *Law and Human Behavior* 121

Flathman, Richard E, 'Legitimacy' in Robert E Goodin, Thomas W Pogge and Philip Pettit (eds), *A Companion to Contemporary Political Philosophy* (Wiley, 2nd ed, 2009) 678

Fok, Joseph, 'The Use of Non-Local Judges in Overseas Jurisdictions' (2017) 23(1) *Journal of the Commonwealth Magistrates' and Judges' Association* 28

Fonseka, Bhavani and Luwie Ganeshathasan, 'Hybrid vs Domestic: Myths, Realities and Options for Transitional Justice in Sri Lanka' (Centre for Policy Alternatives, 2016)

Forsyth, Miranda, 'Beyond Case Law: Kastom and Courts in Vanuatu' (2004) 35 *Victoria University of Wellington Law Review* 427

Forsyth, Miranda, *A Bird That Flies with Two Wings: The Kastom and State Justice Systems in Vanuatu* (ANU E Press, 2009)

Forsyth, Miranda, 'Understanding Judicial Independence in Vanuatu' (SSGM Discussion Paper 2015/9, State, Society and Governance in Melanesia, 2015)

Forsyth, Miranda, 'The Vanuatu Judiciary: A Critical Check on Executive Power' in HP Lee and Marilyn Pittard (eds), *Asia-Pacific Judiciaries: Independence, Impartiality and Integrity* (Cambridge University Press, 2017) 354

Fraenkel, Jon, Joni Madraiwiwi and Henry Okole, 'The RAMSI Decade: A Review of the Regional Assistance Mission to Solomon Islands, 2003-2013' (2014)

Frame, Alex, 'The Tahitian Pomare Code of 1819: First Steps to Written Law in the Pacific' (Paper presented at the Pacific Judicial Conference, Auckland, 9-12 March 2014)

Frankenberg, Gunter, 'Critical Comparisons: Re-Thinking Comparative Law' (1985) 26 *Harvard International Law Journal* 411

French, Robert, 'Judicial Exchange: Debalkanising the Courts' (2006) 15 *Journal of Judicial Administration* 142

French, Robert, 'Judges in Fiji Face "Interim" Problem' *The Australian* (Canberra), 2 May 2008 29

Gamper, Anna, 'Constitutional Courts and Judicial Law-Making: Why Democratic Legitimacy Matters' (2015) 4(2) *Cambridge Journal of International and Comparative Law* 423

Gans, Chaim, 'Citizenship and Nationhood' in Ayelet Shachar et al (eds), *The Oxford Handbook of Citizenship* (Oxford University Press, 2017) 107

Garoupa, Nuno and Tom Ginsburg, 'Guarding the Guardians: Judicial Councils and Judicial Independence' (2009) 57 *American Journal of Comparative Law* 103

Garoupa, Nuno and Tom Ginsburg, *Judicial Reputation: A Comparative Theory* (University of Chicago Press, 2015)

Ghai, Yash, 'Themes and Arguments' in Yash Ghai and Simon NM Young (eds), *Hong Kong's Court of Final Appeal* (Cambridge University Press, 2013) 1

Godwin, Andrew, Ian Ramsay and Miranda Webster, 'International Commercial Courts: The Singapore Experience' (2017) 18 *Melbourne Journal of International Law* 219

Goldsworthy, Jeffrey, 'Constitutional Interpretation' in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, 2012) 689

Government of Nauru, 'Nauru Government Sets the Record Straight', *Media Release*, 24 February 2014 <http://www.naurugov.nr/government-information-office/media-release/nauru-government-sets-the-record-straight.aspx>

Government of Tuvalu, 'Te Kakeega III: National Strategy for Sustainable Development 2016 to 2020' (March 2016)

Grewe, Constance and Michael Riegner, 'Internationalized Constitutionalism in Ethnically Divided Societies: Bosnia-Herzegovina and Kosovo Compared' (2011) 15 *Max Planck Yearbook of United Nations Law* 1

Grimm, Dieter, *Constitutionalism* (Oxford University Press, 2016)

Groppi, Tania and Marie-Claire Ponthoreau (eds), *The Use of Foreign Precedents by Constitutional Judges* (Hart, 2013)

Groves, Matthew, 'The Rule Against Bias' (2009) 39 *Hong Kong Law Journal* 485

Gulati, Rishi, 'The Relevance of Nationality in the Age of Google, Skype and Facebook' in Fiona Jenkins, Mark Nolan and Kim Rubenstein (eds), *Allegiance and Identity in a Globalised World* (Cambridge University Press, 2014) 542

Hamburger, Philip, 'Judicial Office' (2011) 6 *Journal of Law, Philosophy and Culture* 53

Hassall, Graham and Cheryl Saunders, *Asia-Pacific Constitutional Systems* (Cambridge University Press, 2002)

Hatchard, John, Muna Ndulo and Peter Slinn, *Comparative Constitutionalism and Good Governance in the Commonwealth: An Eastern and Southern African Perspective* (Cambridge University Press, 2004)

Healy, AM, 'Colonial Law and Metropolitan Defence: The Curious Case of Australia in New Guinea' in Hermann Hiery and John M MacKenzie (eds), *European Impact and Pacific Influence: British and German Colonial Policy in the Pacific Islands and the Indigenous Response* (Tauris Academic Studies, 1997) 214

Heuschling, Luc, 'Why Should Judges Be Independent? Reflections on Coke, Montesquieu and the French Tradition of Judicial Dependence' in Katja S Ziegler, Denis Baranger and AW Bradley (eds), *Constitutionalism and the Role of Parliaments* (Hart Publishing, 2006)

Hewitson, Michele, 'First Female Pacific Island Judge Ready to Be Tough but Caring' *New Zealand Herald*, 13 September 2002 <http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=2847011>

Hezel, Francis X, 'Pacific Island Nations: How Viable Are Their Economies?' (Pacific Islands Policy No 7, East-West Center, 2012)

Hirschl, Ran, 'The Judicialization of Politics' in Robert E Goodin (ed), *The Oxford Handbook of Political Science* (Oxford University Press, 2011) 253

Hobbs, Harry, 'Hybrid Tribunals and the Composition of the Court: In Search of Sociological Legitimacy' (2016) 16(2) *Chicago Journal of International Law* 482

Honig, Bonnie, *Democracy and the Foreigner* (Princeton University Press, 2001)

Horwitz, Paul, 'Three Faces of Deference' (2008) 83 *Notre Dame Law Review* 1061

Horwitz, Paul, 'The Constitutional Marriage of Personality and Impersonality: Office, Honor, and the Oath' (2018) 33 *Constitutional Commentary* 101

Hoster, Paige, 'Understanding the Value of Judicial Diversity through the Native American Lens' (2011) 36 *American Indian Law Review* 457

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

Ingram, Carl B, 'The Length of Terms of Judges in the Pacific and Its Impact on Judicial Independence' in *Land Law and Judicial Governance in the South Pacific: Comparative Studies* (New Zealand Association for Comparative Law, 2011) 375

International Bar Association, 'Under Pressure: A Report on the Rule of Law in The Gambia' (August 2006)

International Bar Association, 'Dire Straits: A Report on the Rule of Law in Fiji' (2009)

Iyer, Venkat, 'The Judiciary in Fiji: A Broken Reed?' in HP Lee and Marilyn Pittard (eds), *Asia-Pacific Judiciaries: Independence, Impartiality and Integrity* (Cambridge University Press, 2017) 109

Jackson, Vicki C, 'Methodological Challenges in Comparative Constitutional Law' (2010) 28 *Penn State International Law Review* 319

Jackson, Vicki C, 'Paradigms of Public Law: Transnational Constitutional Values and Democratic Challenges' (2010) 8 *International Journal of Constitutional Law* 517

Jackson, Vicki C, *Constitutional Engagement in a Transnational Era* (Oxford University Press, 2010)

Jacobsohn, Gary Jeffrey, 'Constitutional Values and Principles' in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, 2012) 777

Jakab, András, Arthur Dyevre and Giulo Itzcovich, *Comparative Constitutional Reasoning* (Cambridge University Press, 2017)

Jamieson, Lynn, 'Theorising Identity, Nationality and Citizenship: Implications for European Citizenship Identity' (2002) 34(6) *Sociologia* 507

Jayawickrama, Nihal, 'A Compromised Judiciary' *The Island*, 13 December 2014 <http://www.island.lk/index.php?page_cat=article-details&page=article-details&code_title=115882>

Jeffries, Charles, *The Colonial Empire and Its Civil Service* (The University Press, 1938)

Judges Chambers Supreme Court of Nauru, 'Geoffrey Eames Resigns as Chief Justice of Nauru' (Media Release, No 5, 13 March 2014)

Judicial Department of Fiji, Judicial Code of Conduct (2005)

'Judicial Independence and Human Rights Issues: Nauru' (2014) 35 *CMJA News: The Newsletter of the Commonwealth Magistrates' and Judges' Association*

Judiciary of England and Wales, *Guide to Judicial Conduct* (2013)

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

Kaplan, Martha, 'Promised Lands: From Colonial Lawgiving to Postcolonial Takeovers in Fiji' in Sally Engle Merry and Donald Lawrence Brenneis (eds), *Law and Empire in the Pacific: Fiji and Hawaiì* (School of American Research Press, 2004) 153

Kautoke, Rose Lesley, 'The Jury System in Tonga' (2009) 13(1) *Journal of South Pacific Law* 8

Kavanagh, Aileen, 'Participation and Judicial Review: A Reply to Jeremy Waldron' (2003) 22 *Law and Philosophy* 451

Kavanagh, Aileen, 'Defending Deference in Public Law and Constitutional Theory' (2010) 126 *Law Quarterly Review* 222

Keith, Kenneth, 'Reflections on Some Pacific Constitutions' (2012) 18 *New Zealand Association for Comparative Law Yearbook* 133

Kempton, Helen, 'A Busy and Varied Career in Law' *The Mercury* (Hobart), 8 June 2015 <http://at.themercury.com.au/link/efc1fdeefb395b81fce7d96f465a897e?domain=themercury.com.au>

Keniapisia, John A, 'Judges from Other Commonwealth Jurisdictions Serving in the High Court and Court of Appeal of Solomon Islands' (Paper presented at the 20th Commonwealth Law Conference, Melbourne, 22 March 2017)

Kershaw, Lorraine, 'Presentation to Pacific Constitutions and the Rule of Law Conference' (Auckland, 7 December 2011)

King, Katie, 'Order from the Court: Judiciaries as a Bulwark Against Legislative Corruption in Vanuatu' *The Global Anticorruption Blog*, 2015 <http://globalanticorruptionblog.com/2015/12/18/order-from-the-court-judiciaries-as-a-bulwark-against-legislative-corruption-in-vanuatu/>

Koval, Ramona, 'Geoffrey Eames, Former Nauru Chief Justice' *The Saturday Paper*, 21 March 2015 <https://www.thesaturdaypaper.com.au/world/asia-pacific/2015/03/21/geoffrey-eames-former-nauru-chief-justice/14268564001645>

Kurukulasuriya, Uvindu, 'Can We Expect Justice and Independence from Servants of Military Dictators?' *Colombo Telegraph* (Colombo), 30 October 2011 <https://www.colombotelegraph.com/index.php/can-we-expect-justice-and-independence-from-servants-of-military-dictators/>

Kusapa, Jennifer, 'Expatriate Judges, Not an Answer: Chief Justice' *Island Sun* (Honiara), 21 January 2015 <http://www.islandsun.com.sb/index.php/latest-news/national/7391-expatriate-judges-not-an-answer-chief-justice>

Kymlicka, Will, 'Citizenship in an Era of Globalization' in Ian Shapiro and Casiano Hacker-Cordón (eds), *Democracy's Edges* (Cambridge University Press) 112

'Laki Is First Local Judge in 100 Years' *Nuku'alofa Times*, 29 June 2018 <http://nukualofatimes.tbu.to/?p=8118>

Lal, Brij V, *A Time Bomb Lies Buried: Fiji's Road to Independence, 1960-1970* (ANU E Press, 2008)

Lal, Brij V, *Historical Dictionary of Fiji* (Rowman & Littlefield, 2016)

Langwenya, Maxine, 'Swaziland Justice Sector and the Rule of Law' (AfriMAP and the Open Society Initiative for Southern Africa, 2013)

Larkins, Christopher M, 'Judicial Independence and Democratization: A Theoretical and Conceptual Analysis' (1996) 44(4) *American Journal of Comparative Law* 605

Lātūkefu, Sione, *The Tongan Constitution: A Brief History to Celebrate Its Centenary* (Tonga Traditions Committee, 1975)

Lātūkefu, Sione, 'Constitution-Making in the Pacific Islands in the Nineteenth Century' in Peter G Sack (ed), *Pacific Constitutions: Proceedings of the Canberra Law Workshop VI* (Australian National University, 1982) 21

Lātūkefu, Sione, 'The Impact of the British on the Tongan Traditional Concept of Justice and Law' in Hermann Hiery and John M MacKenzie (eds), *European Impact and Pacific Influence* (IB Tauris, 1997) 177

Lau, Stuart, 'No Need to Fear Beijing's White Paper: Top UK Judge' *South China Morning Post* (Hong Kong), 26 August 2014 <https://www.scmp.com/news/hong-kong/article/1580878/no-need-fear-beijings-white-paper-says-top-uk-judge-lord-neuberger>

Lealofi, Etuale, 'Samoan Jurisprudence: A Commentary' in Tamasailau Sua'ali'i-Sauni et al (eds), *Su'esu'e Manogi In Search of Fragrance: Tui Atua Tupua Tamasese Ta'isi and the Samoan Indigenous Reference* (Centre for Samoan Studies, National University of Samoa, 2008) 340

Lee, HP and Marilyn Pittard (eds), *Asia-Pacific Judiciaries: Independence, Impartiality and Integrity* (Cambridge University Press, 2017)

Lee, Ilhyung, 'Practice and Predicament: The Nationality of the International Arbitrator (With Survey Results)' (2008) 31 *Fordham International Law Journal* 603

Leubsdorf, John, 'Theories of Judging and Judge Disqualification' (1987) 62 *New York University Law Review* 237

Leung, Graham, 'The Impact of the Coup on Fiji's Judiciary' in Jon Fraenkel, Stewart Firth and Brij V Lal (eds), *The 2006 Military Takeover in Fiji: A Coup to End All Coups?* (ANU Press, 2009) 291

Leung, Graham, 'The Erosion of Judicial Independence' in Jon Fraenkel, Stewart Firth and Brij V Lal (eds), *The 2006 Military Takeover in Fiji: A Coup to End All Coups?* (ANU Press, 2009) 301

Leung, Graham, 'Some Challenges to the Rule of Law in Fiji' (Paper presented at the 36th Australian Legal Convention, Perth, 18 September 2009)

Levine, Stephen, 'Constitutional Change in Tuvalu' (1992) 27(3) *Australian Journal of Political Science* 492

Levine, Stephen (ed), *Pacific Ways: Government and Politics in the Pacific Islands* (Victoria University Press, 2nd edition, 2016) 350

Levinson, Sanford, 'Identifying "Independence"' (2006) 86 *Boston University Law Review* 1297

Logan, John, 'A Regional Final Court of Appeal for the South Pacific?' (Paper presented at the 21st Pacific Judicial Conference 2014: Equal Access to Justice, 9 March 2014) <http://pjc2014.org.nz/conference-papers/>

Logan, John, 'A Year in the Life of an Australian Member of the PNG Judiciary' (SSGM Discussion Paper 2015/16, State, Society and Governance in Melanesia Program, Australian National University, 2015)

Logan, John, 'Law and Justice in Papua New Guinea' (Paper presented at the Australian Institute of International Affairs, Brisbane, 23 June 2015)

Lord Cooke of Thorndon, 'The Dream of an International Common Law' in Cheryl Saunders (ed), *Courts of Final Jurisdiction: The Mason Court in Australia* (Federation Press, 1996) 138

Lord Cooke of Thorndon, 'Final Appeal Courts: Some Comparisons' (Occasional Paper No 7, New Zealand Centre for Public Law, 2001)

Lord Reid, 'The Judge as Lawmaker' (1972) 12(1) *Journal of the Society of Public Teachers of Law* 22

Loughlin, Martin, *Foundations of Public Law* (Oxford University Press, 2010)

Loughlin, Martin, *The British Constitution: A Very Short Introduction* (Oxford University Press, 2013)

Lucy, William, 'Adjudication' in Jules L Coleman and Scott J Shapiro (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford University Press, 2002) 207

MacCormick, Neil, *Legal Reasoning and Legal Theory* (Clarendon Press, rev ed 1993, 1978)

Macdonald, Barrie, 'Decolonization and Beyond: The Framework for Post-colonial Relationships in Oceania' (1986) 21(3) *The Journal of Pacific History* 115

MacDonald, Roderick A and Hoi Kong, 'Judicial Independence as a Constitutional Virtue' in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, 2012)

MacDonald, Roderick A, 'Exercising Judgement' in *Which Judge for Which Society? Proceedings of the 2008 Judges' Conference* 51

MacFarlane, Peter, 'Some Challenges Facing Legal Strengthening Projects in Small Pacific Island States' (2006) 4(1) *Journal of Commonwealth Law and Legal Education* 103

Mackenzie, Ruth et al, *Selecting International Judges: Principle, Process, and Politics* (Oxford University Press, 2010)

Malleson, Kate 'Diversity in the Judiciary: The Case for Positive Action' (2009) 36(3) *Journal of Law and Society* 376

Mansbridge, Jane, 'Clarifying the Concept of Representation' (2011) 105(3) *American Political Science Review* 621

Marko, Joseph, 'Foreign Judges: A European Perspective' in Yash Ghai and Simon NM Young (eds), *Hong Kong's Court of Final Appeal* (Cambridge University Press, 2013) 637

Markovic, Milan, 'International Criminal Trials and the Disqualification of Judges on the basis of Nationality' (2014) 13 *Washington University Global Studies Law Review*

Mason, Anthony, 'Reflections of an Itinerant Judge in the Asia-Pacific Region' (2000) 28 *International Journal of Legal Information* 311

Mason, Anthony, 'Sharing Expertise with the Developing World' (2001) 26 *Alternative Law Journal* 7

Mason, Jennifer, 'Semistructured Interview' in Michael Lewis-Beck, Alan Bryman and Tim Futing Liao (eds), *The SAGE Encyclopedia of Social Science Research Methods* (Sage Publications, 2004) 1021

Mataitoga, Isikeli, 'South Pacific Court of Appeal: Some Critical Issues' (1981) 11(1) *Pacific Perspective* 70

Matsuda, Matt K, *Pacific Worlds: A History of Seas, Peoples, and Cultures* (Cambridge University Press, 2012)

Mattei, Ugo, 'Three Patterns of Law: Taxonomy and Change in the World's Legal Systems' (1997) 45(1) *The American Journal of Comparative Law* 5

McCrone, David and Richard Kiely, 'Nationalism and Citizenship' (2000) 34(1) *Sociology* 19

McHugh, MH, 'The Judicial Method' (1999) 73 *Australian Law Journal* 37

Meleisea, Malama, *The Making of Modern Samoa: Traditional Authority and Colonial Administration in the History of Western Samoa* (Institute of Pacific Studies, University of the South Pacific, 1995)

Mellor, Thuy and Jak Jabes, *Governance in the Pacific: Focus for Action, 2005-2009* (Asian Development Bank, 2004)

Merritt, Chris and Nicola Berkovic, 'Fiji's Democracy Lobby Tries to Scuttle Scutt Appointment' *The Australian* (Canberra), 14 March 2008, 33

Merritt, Chris, 'Jocelynne Scutt Cleared of Misconduct' *The Australian* (Canberra), 8 August 2008, 33

Merritt, Chris, 'Sacked Fiji Judges Warn Expats on Treason' *The Australian* (Canberra), 13 April 2009, 1

Merritt, Chris, 'When Backlogs Lead to Payback' *The Australian* (Canberra), 1 May 2009, 27

Merritt, Chris, 'Flawed Memo behind Fiji's Decision to Expel Top Australian Diplomats' *The Australian* (Canberra), 9 November 2009, 1

Merry, Sally Engle, *Colonizing Hawai'i: The Cultural Power of Law* (Princeton University Press, 2000)

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

Meti, Lauofo, *Samoa: The Making of the Constitution* (National University of Samoa, 2002)

Miles, William FS, *Bridging Mental Boundaries in a Postcolonial Microcosm: Identity and Development in Vanuatu* (University of Hawai'i Press, 1998)

Miller, David, *On Nationality* (Oxford University Press, 1997)

Millett, Peter, *As in Memory Long* (Wildy, Simmonds & Hill Publishing, 2015)

Ministry of Justice, *The District Courts of New Zealand* (2008)

Mitchell, Paul, 'The Privy Council and the Difficulty of Distance' (2016) 36(1) *Oxford Journal of Legal Studies* 26

Moti, Julian R, '"The Law Giveth ... And My Lord Taketh Away" - Constitutional Redress in the Pacific Islands' in Mads Tønnesson Andenæs and Duncan Fairgrieve (eds), *Judicial Review in International Perspective* (Kluwer Law International, 2000) 121

Mulitalo Ropinisone Silipa Seumanutafa, Teleiai Lalotoa, *Law Reform in Plural Societies* (Springer, 2018)

Muller, Sam, Sidney Richards and Laura Henderson (eds), *Highest Courts and Globalisation* (Hague Academic Press, 2010)

Muria, John, 'The Role of the Courts and Legal Profession in Constitutional and Political Disputes in the Pacific Islands Nations' (2002) 6 *Journal South Pacific Law*

Murray, Sarah, 'Dual Federal and State Judicial Appointments: An Australian Impossibility?' (2014) 25 *Public Law Review* 284

Mutua, Makau, 'Justice under Siege: The Rule of Law and Judicial Subservience in Kenya' (2001) 23(1) *Human Rights Quarterly* 96

Naidu, Richard, 'Coup and Crisis: Comments on the Fiji Experience' (Paper presented at the 20th Annual Conference of the Australian Institute of Judicial Administration, Brisbane, 13 July 2002)

Nanau, Gordon Leua, 'Solomon Islands' in Stephen I Levine (ed), *Pacific Ways: Government and Politics in the Pacific Islands* (Victoria University Press, 2nd ed, 2016) 291

Narokobi, Bernard, 'The System of Selecting Judges of the National and Supreme Courts: A Proposal' (Occasional Paper No 7, Law Reform Commission of Papua New Guinea, 1978)

Narokobi, Bernard, 'How Independent Are the Courts in Papua New Guinea? The Somare/Rooney Affair' (1980) 9(2) *Pacific Perspective* 12

Narokobi, Bernard, 'In Search of a Melanesian Jurisprudence' in Peter Sack and Elizabeth Minchin (eds), *Legal Pluralism: Proceedings of the Canberra Law Workshop VII* (Australian National University, 1986) 215

Narokobi, Bernard, *Lo Bilong Yumi Yet: Law and Custom in Melanesia* (Melanesian Institute for Pastoral and Socio-Economic Service University of the South Pacific, 1989)

Narokobi, Vergil, *The Implementation of Papua New Guinea's National Goals and Directive Principles and Basic Social Obligations* (PhD thesis, Victoria University of Wellington, 2016)

'Nauru Bringing in Australian Judge for "Riot" Trial' *Radio New Zealand*, 1 August 2017 <http://www.radionz.co.nz/international/pacific-news/336293/nauru-bringing-in-australian-judge-for-riot-trial>

Nauru Constitutional Review Committee, *Naoero Ituga: Report* (2007)

'Nauru Magistrate Departs after Contract Non Renewed' *Radio New Zealand*, 12 December 2016 <http://www.radionz.co.nz/international/pacific-news/320219/nauru-magistrate-departs-after-contract-non-renewed>

'Nauru Justice Minister Attacks Nauru 19 Lawyers' *Radio New Zealand*, 15 August 2018 <https://www.radionz.co.nz/international/pacific-news/364161/nauru-justice-minister-attacks-nauru-19-lawyers>

Neuberger, David, 'The Judicial Committee of the Privy Council in the 21st Century' (2014) 3(1) *Cambridge Journal of International and Comparative Law* 30

New Zealand Law Commission, 'Review of the Judicature Act 1908: Towards a New Courts Act' (Report 126, 2012)

Nir, Esther, 'Approaching the Bench: Accessing Elites on the Judiciary for Qualitative Interviews' (2018) 21(1) *International Journal of Social Research Methodology* 77

Nonggorr, John, 'The Maintenance of Judicial Independence and Integrity in Papua New Guinea: Some Recent Developments' (1992) 18(3) *Commonwealth Law Bulletin* 1181

Nonggorr, John, 'Development of an "Indigenous Jurisprudence" in Papua New Guinea: The Past Record and Future Prospects' in Jackson Rannells and Jonathan Aleck (eds), *Custom at the Crossroads* (Faculty of Law, University of Papua New Guinea, 1995) 68

Ntumy, Michael A, (ed), *South Pacific Islands Legal Systems* (University of Hawaii Press, 1993)

'NZ Lawyers Should Not Work for Fiji Regime, Law Society Says' *NZ Herald* (Auckland), 21 April 2009 <http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10567736>

'NZ Judge Praised for Work Samoa' *Radio New Zealand,* 27 June 2014 <https://www.radionz.co.nz/international/pacific-news/248369/nz-judge-praised-for-work-samoa>

O'Brien, Derek, *The Constitutional Systems of the Commonwealth Caribbean: A Contextual Analysis* (Hart Publishing, 2014)

Office of the Attorney General, 'Country Report of the Office of the Attorney General Tuvalu' (Report to the 34th Pacific Islands Law Officers' Network Meeting, October 2015)

Opeskin, Brian, 'The Supply of Judicial Labour: Optimising a Scarce Resource in Australia' (2017) 7(4) *Oñati Socio-Legal Series* 847

Osii, Alice, 'Agreement Signed for PNG Judge to Sit in Nauru's Appeals Court' *The National* (Port Moresby), 26 July 2018 <https://www.thenational.com.pg/agreement-signed-for-png-judge-to-sit-in-naurus-appeals-court/>

Pacific Judicial Development Programme, '2010-2015 Completion Report' (Federal Court of Australia, June 2015)

Pacific Judicial Development Programme, *Toolkit for Review of Guidance on Judicial Conduct* (Federal Court of Australia and New Zealand Ministry of Foreign Affairs and Trade, 2014)

Pacific Media Centre News Desk, 'Fiji's Chief Justice Condemns Australian, NZ "Interference" and "Hostility"' *Pacific Scoop*, 3 November 2009 <http://pacific.scoop.co.nz/2009/11/fijis-chief-justice-condemns-australian-nz-interference-and-hostility/>

Palley, Claire, 'Rethinking the Judicial Role: The Judiciary and Good Government' (1969) 1 *Zambia Law Journal* 1

Palmer, Albert, 'The Ethnic Conflict in Solomon Islands' in Ustinia Dolgopol and Judith Gail Gardam (eds), *The Challenge of Conflict: International Law Responds* (Martinus Nijhoff Publishers, 2006) 49

Parrish, Austen L, 'Storm in a Teacup: The US Supreme Court's Use of Foreign Law' [2007] *University of Illinois Law Review* 637

'Pay Disparity a Thorny Issue' *The National* (Port Moresby), 6 December 2011 <https://www.thenational.com.pg/pay-disparity-a-thorny-issue/>

Perju, Vlad, 'Constitutional Transplants, Borrowing and Migrations' in Michel Rosenfeld and András Sajó (eds), *Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, 2012) 1304

Peter, Fabienne, 'Political Legitimacy' in Edward N Zalta (ed), *Stanford Encyclopedia of Philosophy* (Stanford University, 2010)

Pettit, Philip, 'Varieties of Public Representation' in Ian Shapiro et al (ed), *Political Representation* (Cambridge University Press, 2009) 61

Phillips, Anne, *The Politics of Presence* (Clarendon Press, 1995)

Pimental, David, 'Reframing the Independence v Accountability Debate: Defining Judicial Structure in Light of Judges' Courage and Integrity' (2009) 57 *Cleveland State Law Review* 1

Pitkin, Hanna Fenichel, *The Concept of Representation* (University of California Press, 1967)

Powles, Guy, 'Law, Courts and Legal Services in Pacific Societies' in Guy Powles and Mere Pulea (eds), *Pacific Courts and Legal Systems* (University of the South Pacific and Monash University, 1988) 6

Powles, Guy, 'The Common Law as a Source of Law in the South Pacific: Experiences in Western Polynesia' (1988) 10 *University of Hawaii Law Review* 105

Powles, Guy and Mere Pulea (eds), *Pacific Courts and Legal Systems* (University of the South Pacific and Monash University, 1988)

Pratihba, Jyoti, 'Judiciary Independent: Chief Justice' *Fiji Sun* (Suva), 28 August 2018 <http://fijisun.com.fj/2018/08/28/judiciary-independent-chief-justice/>

Premdas, Ralph R, 'The Dynamics of Ethnic Minority Domination in Fiji' in Eric P Kaufmann (ed), *Rethinking Ethnicity: Majority Groups and Dominant Minorities* (Routledge, 2004) 195

Pulea, Mere, 'A Regional Court of Appeal for the Pacific' (1980) 9(2) *Pacific Perspective* 1

Pulea, Mere, 'Pacific Courts and Personnel' in Guy Powles and Mere Pulea (eds), *Pacific Courts and Legal Systems* (University of the South Pacific and Monash University, 1988) 37

Rackley, Erika, *Women, Judging and the Judiciary: From Difference to Diversity* (Routledge, 2013)

Raz, Joseph, 'The Problem of Authority: Revisiting the Service Conception of Authority' (2006) 90 *Minnesota Law Review* 1003

Raz, Joseph, *The Authority of Law: Essays on Law and Morality* (Oxford University Press, 2nd ed, 2009)

Reeves, Paul, Tomasi Rayalu Vakatora and Brij V Lal, 'The Fiji Islands: Towards a United Future Report of the Fiji Constitution Review Commission 1996' (Parliamentary Paper No 34 of 1996, Parliament of Fiji, 1996)

Rehfeld, Andrew, 'Towards a General Theory of Representation' (2006) 68(1) *Journal of Politics* 1

Rehfeld, Andrew, 'Representation Rethought: On Trustees, Delegates, and Gyroscopes in the Study of Political Representation and Democracy' (2009) 103(2) *American Political Science Review* 214

Rehfeld, Andrew, 'The Concepts of Representation' 105(3) *American Political Science Review* 631

Resnik, Judith, 'Law as Affiliation: Foreign Law, Democratic Federalism, and the Sovereigntism of the Nation-State' (2008) 6 *International Journal of Constitutional Law* 33

Robertson, Bruce, 'Judicial Independence in the Pacific' in *Land Law and Judicial Governance in the South Pacific: Comparative Studies* (New Zealand Association for Comparative Law and Association de Législation Comparée des Pays du Pacifique, 2011) 267

Robinson, Tracy and Arif Bulkan, 'Constitutional Comparisons by a Supranational Court in Flux: The Privy Council and Caribbean Bills of Rights' (2017) 80 *Modern Law Review* 379

Robinson, Tracy S, Arif Bulkan and Adrian Saunders, *Fundamentals of Caribbean Constitutional Law* (Sweet & Maxwell, 2015)

Roughan, Nicole, 'The Legitimacy of Whom?' in Kevin Walton, Wojciech Sadurski and Michael Sevel (eds), *Legitimacy: The State and Beyond* (Oxford University Press, forthcoming, 2018) <https://papers.ssrn.com/abstract=3029928>

Russell, Peter H and Kate Malleson (eds), *Appointing Judges in an Age of Judicial Power: Critical Perspectives from around the World* (University of Toronto Press, 2006)

Russell, Peter H, 'Toward a General Theory of Judicial Independence' in David M O'Brien and Peter H Russell (eds), *Judicial Independence in the Age of Democracy: Critical Perspectives from around the World* (University Press of Virginia, 2001)

Russell, Peter H, 'A General Theory of Judicial Independence Revisited' in Adam Dodek and Lorne Sossin (eds), *Judicial Independence in Context* (Irwin Law, 2010) 599

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

Rutgers, Mark R, 'The Oath of Office as Public Value Guardian' (2010) 40(4) *American Review of Public Administration* 428

Salevao, Iutisone, *Rule of Law, Legitimate Governance and Development in the Pacific* (ANU E Press, 2005)

Sapolu, Falefatu, 'Adjudicators in Western Samoa' in Guy Powles and Mere Pulea (eds), *Pacific Courts and Legal Systems* (University of the South Pacific and Faculty of Law, Monash University, 1988) 60

Sapolu, Patu Falefatu et al, 'Law and Custom' in Malama Meleisea, Penelope Schoeffel Meleisea and Ellie Meleisea (eds), *Samoa's Journey 1962-2012: Aspects of History* (Victoria University Press, 2012) 18

Saunders, Cheryl, 'Towards a Global Constitutional Gene Pool' (2009) 4(3) *National Taiwan University Law Review* 1

Saunders, Cheryl, 'The Impact of Internationalisation on National Constitutions' in Albert HY Chen (ed), *Constitutionalism in Asia in the Early Twenty-First Century* (Cambridge University Press, 2014) 391

Saunders, Cheryl, 'Common Law Public Law: Some Comparative Reflections' in John Bell et al (eds), *Public Law Adjudication in Common Law Systems: Process and Substance* (Hart Publishing, 2015) 353

Saunders, Cheryl and Adrienne Stone, 'The High Court of Australia' in András Jakab, Arthur Dyevre and Giulo Itzcovich (eds), *Comparative Constitutional Reasoning* (Cambridge University Press, 2017) 36

Saunders, Rebecca, *The Concept of the Foreign: An Interdisciplinary Dialogue* (Lexington Books, 2003)

Schauer, Frederick, 'Formalism' (1987) 97 *Yale Law Journal* 509

Scheppele, Kim Lane, 'Declarations of Independence: Judicial Reactions to Political Pressure' in Stephen B Burbank and Barry Friedman (eds), *Judicial Independence at the Crossroads: An Interdisciplinary Approach* (Sage Publications, 2002)

Scheppele, Kim Lane, 'Constitutional Ethnography: An Introduction' (2004) 38 *Law and Society Review* 389

Schofield, Derek, 'Maintaining Judicial Independence in a Small Jurisdiction' in John Hatchard and Peter Slinn (eds), *Parliamentary Supremacy and Judicial Independence: A Commonwealth Approach* (Cavendish Publishing Limited, 1999) 73

Schwartz, Alex, 'International Judges on Constitutional Courts: Cautionary Evidence from Post-Conflict Bosnia' [2017] *Law and Social Inquiry* advance online version

Scott, Michael, 'Fiji's Judicial Department: A Review' in Michael A Ntumy (ed), *South Pacific Islands Legal Systems* (University of Hawaii Press, 1993)

'Senior PNG Judge Sworn in as Nauru Judge' *Loop PNG*, 18 November 2018 <http://www.looppng.com/png-news/senior-png-judge-sworn-nauru-judge-80846

Shany, Yuval, 'Dédoublement Fonctionnel and the Mixed Loyalties of National and International Judges' in Filippo Fontanelli, Giuseppe Martinico and Paolo Carrozza (eds), *Shaping Rule of Law through Dialogue: International and Supranational Experiences* (Europa, 2010) 27

Shapiro, Martin M, *Courts, A Comparative and Political Analysis* (University of Chicago Press, 1981)

Shapiro, Scott J, 'Authority' in Jules L Coleman and Scott J Shapiro (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford University Press, 2002) 382

Shetreet, Shimon, 'The Challenge of Judicial Independence in the Twenty-First Century' (2000) 8(2) *Asia Pacific Law Review* 153

Shihata, Ibrahim FI, *The World Bank in a Changing World* (M Nijhoff Publishers, 1991)

Sirimanna, Bandula, 'Fiji Courts Want 6 of Our Judges' *Sunday Times* (Colombo), 16 August 2009 <http://www.sundaytimes.lk/090816/News/nws_07.html>

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

Smellie, Robert, *Few Regrets: Reflections on a Life in the Law* (Auckland District Law Society, 2008)

Smilov, Daniel, 'The Judiciary: The Least Dangerous Branch?' in Michel Rosenfeld and Andras Sajo (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, 2012) 859

Smith, Stephen Eliot, 'The Way We Do Things Back Home: Do Expatriate Judges Preferentially Cite the Jurisprudence of Their Home Countries?' (2013) 13(2) *Oxford University Commonwealth Law Journal* 331

Solomon Islands Constitutional Review Committee, *Constitutional Review Committee Report 1987* (Solomon Islands Government Printer, 1987)

Stone, Adrienne, 'Judicial Reasoning' in Cheryl Saunders and Adrienne Stone (eds), *Oxford Handbook of the Australian Constitution* (Oxford University Press, 2018) 472

Strohmeyer, Hansjoerg, 'Policing the Peace: Post-Conflict Judicial System Reconstruction in East Timor' (2001) 24 *University of New South Wales Law Journal* 171

Supreme Court of Tasmania, 'Report of the Chief Justice of the Supreme Court of Tasmania: Annual Report 2005-2006' (2006)

Tamanaha, Brian Z, *Understanding Law in Micronesia: An Interpretive Approach to Transplanted Law* (EJ Brill, 1993)

Tamanaha, Brian Z, 'Battle between Law and Society in Micronesia' in Dennis Galligan and Mila Versteeg (eds), *Social and Political Foundations of Constitutions* (Cambridge University Press, 2013) 584

Terris, Daniel, Cesare Romano and Leigh Swigart, *The International Judge: An Introduction to the Men and Women Who Decide the World's Cases* (Brandeis University Press, 2007)

Territory of Nauru, 'Record of Proceedings of the Constitutional Convention' (3-29 January 1968, 19 April – 17 May 1968)

'The Political Scene: More Supreme Court Judges Resign' *The Economist Intelligence Unit*, 1 October 2010 <http://country.eiu.com/article.aspx?articleid=1927474177>

Thompson-Barrow, Cheryl, *Bringing Justice Home: The Road to Final Appellate and Regional Court Establishment* (Commonwealth Secretariat, 2008)

Tierney, Stephen, *Constitutional Law and National Pluralism* (Oxford University Press, 2004)

Troper, Michael, 'Sovereignty' in Michel Rosenfeld and András Sajó (eds), *Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, 2012) 1304

Tupufia, Lanuola Tusani, 'Court Tackles Drugs and Alcohol Abuse' *Samoa Observer* (Apia), 28 February 2016

Turenne, Sophie, *Fair Reflection of Society in Judicial Systems: A Comparative Study* (Springer, 2015)

Tushnet, Mark, 'The Possibilities of Comparative Constitutional Law' (1999) 108 *Yale Law Journal* 1225

Tushnet, Mark, 'Judicial Accountability in Comparative Perspective' in Nicholas Bamforth and Peter Leyland (eds), *Accountability in the Contemporary Constitution* (Oxford University Press, 2013) 57

'Tuvalu Judge Unable to Transit via Fiji' *Cook Islands News* (Rarotonga, Cook Islands), 24 January 2014

Twining, William, 'Diffusion of Law: A Global Perspective' (2004) 49 *Journal of Legal Pluralism and Unofficial Law* 1

Twining, William L, *General Jurisprudence: Understanding Law from a Global Perspective* (Cambridge University Press, 2009)

'Two Australian Judges Take up Temporary Positions in Samoa' *Radio New Zealand*, 18 May 2006 <http://www.radionz.co.nz/international/pacific-news/162130/two-australian-judges-take-up-temporary-positions-in-samoa>

Twomey, Anne, 'The Fijian Coup Cases: The Constitution, Reserve Powers and the Doctrine of Necessity' (2009) 83 *Australian Law Journal* 319

United Nations, Department of Economic and Social Affairs, Population Division, *World Population Prospects: The 2015 Revision* (United Nations, 2015) <http://esa.un.org/unpd/wpp/>

United Nations Development Programme, Bangkok SURF, 'Global Experiences Using Expatriate Judges' (Substantive Research Piece - East Timor, UNDP, August 2002)

Va'ai, Asiata, 'The Idea of Law: A Pacific Perspective' (1997) 21 *Journal of Pacific Studies* 225

Van Dyke, Jon M, 'The Pacific Judicial Conference: Strengthening the Independent Judiciary and the Rule of Law in the Pacific' (2011) 22(1–2) *Western Legal History* 127

Vanberg, Georg, 'Constitutional Courts in Comparative Perspective: A Theoretical Assessment' (2015) 18 *Annual Review of Political Science* 167

Veenendaal, Wouter, *Politics and Democracy in Microstates* (Routledge, 2015)

Voigt, Stefan, Michael Ebeling and Lorenz Blume, 'Improving Credibility by Delegating Judicial Competence: The Case of the Judicial Committee of the Privy Council' (2007) 82(2) *Journal of Development Economics* 348

VonDoepp, Peter, 'Context-Sensitive Inquiry in Comparative Judicial Research: Lessons from the Namibian Judiciary' (2008) 41(11) *Comparative Political Studies* 1515

Vyas, Yash, 'The Independence of the Judiciary: A Third World Perspective' (1992) 11 *Third World Legal Studies* 127

Waldron, Jeremy, *Law and Disagreement* (Clarendon Press, 1999)

Weisbrot, David, 'Judges and Politicians' (1979) 4 *Legal Service Bulletin* 240

Williams, Glen, 'McPherson JA in the Solomon Islands' in Aladin Rahemtula (ed), *Justice According to Law: A Festschrift for the Honourable Mr Justice BH McPherson CBE* (Supreme Court of Queensland Library, 2006) 632

Winter, Gerard, 'Judicial Guidelines: The Five Way Test' (2006) 1(2) *International Judicial Monitor*

Young, Ernest, 'The Constitution Outside the Constitution' (2006) 117 *Yale Law Journal* 408

Young, Simon NM and Antonio Da Roza, 'The Judges' in Simon NM Young and Yash Ghai (eds), *Hong Kong's Court of Final Appeal* (Cambridge University Press, 2013) 253

Zorn, Jean, 'Custom Then and Now: The Changing Melanesian Family' in Anita Jowitt and Tess Newton Cain (eds), *Passage of Change: Law, Society and Governance in the Pacific* (Pandanus Books, 2003) 95

Zorn, Jean G and Jennifer Corrin Care, 'Barava Tru: Judicial Approaches to the Pleading and Proof of Custom in the South Pacific' (2002) 51 *International and Comparative Law Quarterly* 611

van Zyl Smit, Jan, *The Appointment, Tenure and Removal of Judges under Commonwealth Principles: A Compendium and Analysis of Best Practice* (Commonwealth Secretariat, 2015)

II. Cases

Belize

Attorney General v Bar Association of Belize (Belize Court of Appeal, 14 October 2015)

Bar Association of Belize v Attorney-General (Supreme Court of Belize, Legall J, 19 April 2013)

Bar Association of Belize v Attorney General [2017] CCJ 4 (AJ)

Botswana

National Amalgamated Local Central Government and Parastatal Workers Union v President (Botswana High Court, 16 February 2017)

President v National Amalgamated Local Central Government and Parastatal Workers Union (Botswana Court of Appeal, June 2017)

Canada

Valente v R [1985] SCR 673

East Timor

Decision regarding the appeal of Judge Ivo Rosa against the non-renewal of his Contract by the Superior Council for the Judiciary (Unreported, East Timor Court of Appeal, 31 December 2008)

Fiji

Fiji v Prasad [2001] FJCA 2

In re the Constitution, Chaudhary v Qarase [2002] FJCA 1

In re the Constitution, Reference by HE the President [2002] FJSC 1

Koya v State [1998] FJSC 2

Qarase v Bainimarama [2008] FJHC 241

Qarase v Bainimarama [2009] FJCA 67

Qarase v Chaudhry [2003] FJSC 1

Singh v Prasad [2002] FJSC 2

State v Social Democratic Liberal Party, Ex parte Tikoca [2017] FJHC 654

Kiribati

Muhammad v Attorney-General [1995] KIHC 1

Mwemwenikarawa v Timeon [2011] KIHC 8

Speaker v Attorney General [1987] KIHC 1

Temarewe v Tekautu [2017] KICA 1

Nauru

Constitutional Reference No 1 of 2008 [2009] 1 LRC 453

Harris v Adeang [1998] NRSC 1

In the Matter of the Constitution and in the Matter of the Dissolution of the Eighteenth Parliament [2010] NRSC 16

Keke v Scotty [2014] NRSC 7

Nauru v Batsiua (No 1) [2018] NRSC 37

Re President of the Republic of Nauru and in the matter of Article 53 and 55 of the Constitution of Nauru [2010] NRSC 14

Re President of the Republic of Nauru and in the matter of Article 53 and 55 of the Constitution of Nauru (No 2) [2010] NRSC 15

New Zealand

Marac Life Assurance Ltd v Commissioner of Inland Revenue [1986] 1 NZLR 694

Papua New Guinea

Boateng v State [1990] PGSC 7

Constitutional Reference No 1 of 1977 Re Rights of Person Arrested or Detained [1977] PGSC 15

Constitutional Reference No 3 of 1987, Reference by Simbu Provincial Executive [1987] PGSC 17

Namah v Pato [2016] PGSC 13

Premdas v The State [1979] PGSC 20

Public Prosecutor v Rooney (No 2) [1979] PNGLR 448

Re Somare [1981] PGSC 23

State v Independent Leadership Tribunal; Ex Parte Sasakila [1976] PNGLR 491

Samoa

Ali'i and Faipule of Siumu District v Attorney General [2010] WSCA 5
In re the Constitution, Attorney-General v Olomalu [1982] WSCA 1
In re the Constitution, Mulitalo v Attorney-General of Samoa [2001] WSCA 8
In re the Constitution, Pita v Attorney-General [1995] WSCA 6
In re the Constitution, Taamale v Attorney-General [1995] WSCA 1
Leituala v Mauga [2004] WSSC 9
Leleua v Land and Titles Court [2009] WSSC 123
Mauga v Leituala (Samoa Court of Appeal, unreported, March 2005),
Peniamina v Land and Titles Court [2004] WSCA 1
Police v Ropati [2018] WSSC 85
Punitia v Tutuila [2014] WSCA 1 (Samoa Court of Appeal, 31 January 2014).
Samoa Party v Attorney General [2010] WSCA 4

Seychelles

Bar Association of Seychelles v President of the Republic [2004] SCCA 1
Michel v Dhanjee 2012 SLR 1

Solomon Islands

Afeau v Judicial and Legal Services Commission [2007] SBCA 19
Guadalcanal Provincial Assembly v Speaker of National Parliament [1997] SBHC 5
Huniehu v Attorney-General [1997] SBCA 9
Kenilorea v Attorney General [1984] SBCA 3
Kenilorea v Attorney General [1984] SBCA 4.
Minister for Provincial Government v Guadalcanal Provincial Assembly [1997] SBCA 1
Qalo v Qaloboe [2004] SBCA 5
SMM Solomon Ltd v Axiom KB Ltd [2017] SBCA 12
To'ofilu v Oimae [1997] SBHC 33

South Africa

Justice Alliance of South Africa v President 2011 (5) SA 388

Tonga

Attorney-General v Namoa [2000] TOSC 13
Fotofili v Siale [1987] TOPC 2
Lali Media Group Ltd v Lavaka Ata [2003] TOSC 27
Latu v Lavulavu [2015] TOSC 46
Taione v Tonga [2004] TOSC 47
Tu'ifua v Public Service Tribunal [2014] TOSC 14
Vaikona v Fuko (No 2) [1990] TOSC 11

Tuvalu

Ielemia v Crown (Unreported, Court of Appeal of Tuvalu, 18 September 2017)
Teonea v Kaupule [2005] TVHC 5
Teonea v Pule o Kaupule of Nanumaga [2009] TVCA 2

United Kingdom (including decisions of the Judicial Committee of the Privy Council)

Bolkiah v Brunei Darussalam [2007] UKPC 62
Devi v Roy [1946] AC 508
Hinds v The Queen [1977] AC 195
Locabail (UK) Ltd v Bayfield Properties Ltd [2000] QB 451
Misick v The Queen (Turks and Caicos) [2015] UKPC 31
Pepper v Hart [1993] AC 593
Rees v Crane [1994] 1 All ER 933

Vanuatu

Attorney General v Jimmy [1996] VUCA 1
D'Imecourt v Manatawai [1998] VUSC 59
Matarave v Talivo [2010] VUCA 3
Natapei v Tari (No 2) [2001] VUSC 38

III. Legislation

Australia

Charter of Human Rights and Responsibilities Act 2006 (Vic)
Conciliation and Arbitration Act 1904 (Cth)
Constitution Act 1975 (Vic)
Human Rights Act 2004 (ACT)
Judicial Officers Act 1986 (NSW)
Judicial Office (Papua New Guinea) Act 1979 (NSW)
Supreme Court Act 1991 (Qld)

Fiji

Administration of Justice Decree No 5 of 2000
Constitution of Fiji 1970, schedule to the *Fiji Independence Order 1970* (Imp)
Constitution Amendment Act 1997 (Fiji) ('*Constitution of Fiji 1997*')
Constitution of the Republic of Fiji 2013 ('*Constitution of Fiji 2013*')
Fiji Judicature Decree No 4 of 1987
Judicial Tribunals (Prescribed Countries) Promulgation No 32 of 2007
Native Lands Act 1905 c 133
Revocation of Judicial Appointments Decree No 4 of 2009

Kiribati

Constitution of Kiribati 1979, schedule to the *Kiribati Independence Order 1979* (Imp) (‘*Constitution of Kiribati 1979’*)

Court of Appeal Act 1980

Magistrates Court Ordinance c 52

Nauru

Constitution of Nauru 1968

Constitution of Nauru (Parliamentary Amendments) Act 2009

Legal Practitioners Act 1973

Nauru Lands Committee Act 1956

New Zealand

District Courts Act 1947

Interpretation Act 1999

Judicature Act 1908

New Zealand Bill of Rights Act 1990

Senior Courts Act 2016

Papua New Guinea

Constitution of the Independent State of Papua New Guinea 1975 (‘*Constitution of Papua New Guinea 1975’*)

Lawyers Act 1986

Lawyers (Examination) Regulation 1992

National Court Act 1975 c 38

Organic Law on the Terms and Conditions of Employment of Judges

Village Courts Act 1989

Samoa

Constitution of the Independent State of Samoa 1960 (‘*Constitution of Samoa 1960’*)

Land and Titles Act 1981

Village Fono Act 1990

Solomon Islands

Constitution (Amendment) Act 2009

Constitutional Offices (Terms and Conditions of Service) Act c 84

Constitution of Solomon Islands 1978, schedule to the *Solomon Islands Independence Order 1978* (Imp) (‘*Constitution of Solomon Islands 1978’*)

Court of Appeal Act c 6

Land and Titles Act c 133

Local Courts Act c 9

Official Oaths Act 1978

Tonga

Act of Constitution of Tonga 1875 (‘*Constitution of Tonga 1875’*)
Act of Constitution of Tonga (Amendment) (No 3) Act 2010
Court of Appeal Act c 9
Judicial Code of Conduct Rules 2010
Land Act c 132
Supreme Court Act c 10

Tuvalu

Constitution of Tuvalu 1978, schedule to the *Tuvalu Independence Order 1978* (Imp)
Constitution of Tuvalu 1986
Constitution (Recognition of Traditional Standards, Values and Practices) Amendment Act 2010
Island Courts Act c 7.32
Native Lands Act c 46.20
Oaths and Statutory Declarations Act c 7.48
Superior Courts Act 1987 c 7.68

United Kingdom

Constitutional Reform Act 2005
Human Rights Act 1998

Vanuatu

Constitution of the Republic of Vanuatu 1980 (‘*Constitution of Vanuatu 1980*’)
Customary Land Tribunal Act 2001
Island Courts Act 1983 c 167
Judicial Services and Courts Act 2003 c 270
Legal Practitioners (Qualifications) Regulations Act 1996
Oaths Act c 37

APPENDIX A LIST OF FOREIGN JUDGES SERVING ON PACIFIC COURTS OF CONSTITUTIONAL JURISDICITON, 2000-2015

This Appendix lists the foreign judges who served on courts of constitutional jurisdiction in Fiji, Kiribati, Nauru, Papua New Guinea, Samoa, Solomon Islands, Tonga, Tuvalu and Vanuatu in the 16 years between 2000 and 2015. The methods and sources used to compile this data are set out in Chapter 2, Part II.

There is a separate table for each court of constitutional jurisdiction in each of the nine states. In some states, judges from a lower court, such as the Supreme Court, are also ex officio members of a higher court, such as the Court of Appeal.[1] Where this is the case, judges are listed in the table for the lower court, as the court to which they were primarily appointed. Judges are listed in chronological order, with those appointed at the earliest date listed first. Sometimes the date of appointment precedes 2000, the first year of the case study period.

The 'term of appointment' column refers to the judge's tenure, as set out in the instrument of appointment or the judge's contract for service. Because of limited access to official records and contracts, it has not been possible to obtain this information for each judge. The information is included where it is known through publicly available sources, such as gazetted instruments of appointment or media reports, or where provided to me by judges, courts or government agencies in Pacific states.

The 'period of service' column indicates the years in which the judge issued judgements, as recorded in Paclii[2] and verified where possible by biographical information. A date followed by a dash, eg '2014-' indicates that the judge's appointment continued beyond 2015, the final year of the case study period.

The judge's 'home country' refers to the country in which the foreign judge's education and professional experience predominantly occurred. It is generally the judge's country of citizenship, although details about an individual's citizenship status is not always publicly available.

[1] *Constitution of Fiji 2013* s 98(2), 99(2); *Constitution of Fiji 1997* ss 127, 128; *Constitution of Kiribati 1979* s 91(1)(a); *Constitution of Papua New Guinea 1975* s 161(1); *Constitution of Samoa 1960* s 75(2)(a); *Constitution of Solomon Islands 1978* s 85(1)(b); *Superior Courts Act* c 7.68 (Tuvalu) s 7; *Constitution of Vanuatu 1980* s 50.
[2] *Pacific Islands Legal Information Institute* <www.paclii.org>.

The 'position in home country' column indicates the professional position the person held at the time of his or her appointment to the Pacific court. As a result of this coding decision, this table does not record changes in a judge's position in his or her home country that occurred while serving on a Pacific court. For example, if a person was appointed to a Pacific court while serving as a judge in his or her home country, his or her professional background is coded as a 'sitting judge', even where he or she continued to serve on the Pacific court following retirement at home. In order to simplify the coding, professional positions were limited to four main categories: sitting judge, retired judge, lawyer and government. Unless otherwise stated, this is a position in the judge's home country. Where it is a position in another country, this is indicated in parenthesis, eg 'Government (Nauru)'.

Fiji

Fiji Supreme Court

Name	Term of appointment	Period of service	Home country	Position in home country
Arnold Amet	One sitting	2002	PNG	Sitting judge
Patu Falefatu Maka Sapolu	One sitting	2002	Samoa	Sitting judge
Bryan Beaumont	One sitting, then 3 years	2002-2003	Australia	Sitting judge
Sian Elias	One case	2002	NZ	Sitting judge
Kenneth Handley	3 years renewed	2003-2009	Australia	Sitting judge
Peter Blanchard	One sitting	2003	NZ	Sitting judge
James Spigelman	One case	2003	Australia	Sitting judge
Thomas Gault		2003-2005	NZ	Sitting judge
Mark Weinberg	3 years renewed	2003-2008	Australia	Sitting judge
Robert French	3 years renewed	2003-2008	Australia	Sitting judge
Keith Mason	3 years renewed	2003-2008	Australia	Sitting judge
David Malcolm		2004	Australia	Sitting judge
John von Doussa	3 years renewed	2003-2006	Australia	Sitting judge
David Andrew Ipp	3 years	2006, 2009	Australia	Sitting judge
Ronald Sackville	3 years	2008-2009	Australia	Sitting judge
Saleem Marsoof	3 years	2011-	Sri Lanka	Sitting judge
Chandra Ekanayake		2012-2015	Sri Lanka	Sitting judge
Buwaneka Aluwihare		2015-	Sri Lanka	Sitting judge
Priyasath Gerard Dep		2015	Sri Lanka	Sitting judge
Brian Keith		2015-	UK	Retired judge

Fiji Court of Appeal

Name	Term of appointment	Period of service	Home country	Position in home country
Mari Kapi		1992-2005	PNG	Sitting judge
Gordon Ward	3 years renewed	1992-2007	UK	Sitting judge (Pacific)
Ian Thompson		1994-2000	Australia	Retired judge
Maurice Casey		1995-2001	NZ	Retired judge
Kenneth Handley	3 years renewed	1996-2003	Australia	Sitting judge
Ian Sheppard		1997-2004	Australia	Retired judge
Ian Barker		1997-2007	NZ	Retired judge
David Tompkins		1998-2006	NZ	
Thomas Eichelbaum		1999-2007	NZ	Retired judge
Rodney Gallen		2000-2006	NZ	Retired judge
Robert Smellie		2000-2007	NZ	Retired judge
John Steele Henry		2001-2007	NZ	Sitting judge
Daryl Davies		2002-2003	Australia	Retired judge
Kenneth Keith		2002-2004	NZ	Sitting judge
Anthony Ellis		2002-2007	NZ	Retired judge
Peter Penlington		2002-2007	NZ	Retired judge
James Wood		2004-2006	Australia	Sitting judge
Michael Scott		2004-2007	UK	Sitting judge (Pacific)
Anthony Ford		2005-2007	NZ	Sitting judge (Pacific)
Bruce McPherson		2005-2007	Australia	Retired judge
Paul Stein		2006	Australia	Retired judge
Randall Powell	3 years	2008-2009	Australia	Lawyer
Ian Lloyd		2008-2009	Australia	Lawyer
Francis Douglas		2009	Australia	Lawyer
William Marshall	2 years	2010-2012	UK	Lawyer
William Calanchini		2009-	Australian	Government (Fiji)
Kankani Chitrasiri		2010-2013	Sri Lanka	Sitting judge
Presanna Nimal Wikramanayake	2 years	2011	Australia	Lawyer
Sundaram Sriskandarajah		2011-2012	Sri Lanka	Sitting judge
Sathyaa Hettige	3 years	2011-	Sri Lanka	Sitting judge
Suresh Chandra		2011-	Sri Lanka	Retired judge
Eric Basnayake		2012-	Sri Lanka	Sitting judge
Susantha Lekamwasam		2013-	Sri Lanka	Lawyer
Vijith Kumara Malalgoda		2014	Sri Lanka	Lawyer
Suhada Gamalath	3 years	2014-2015	Sri Lanka	Lawyer
Kapila Waidyaratne		2014-2015	Sri Lanka	Lawyer
Jayantha de Almeida Guneratne	3 years	2014-	Sri Lanka	Lawyer
Shavindra Fernando		2015-	Sri Lanka	Lawyer
Jayantha Jayasuriya		2015	Sri Lanka	Lawyer
Anthony Fernando		2015-	Seychelles (formerly Sri Lanka)	Sitting judge (Seychelles)
Chandana Prematilaka		2015-	Sri Lanka	Lawyer

High Court of Fiji

Name	Term of appointment	Period of service	Home country	Position in home country
John E Byrne		1989-2002; 2007-2012	Australia	
Michael Scott		1990-2004	UK	Sitting judge (Pacific)
Peter Surman		1997-2002	UK	Sitting judge (Hong Kong)
Anthony HC Gates		1999-	UK/Australia	Lawyer (Fiji)
Andrew Wilson		2002-2006	Australia	Retired judge
John Connors		2003-2007	Australia	Lawyer
Gerard Winter	4 years	2004-2007	NZ	Lawyer
DD Finnigan		2005-2008	NZ	Retired judge
Roger Coventry	4 years	2005-2009	UK	Sitting judge (Pacific)
Jocelynne Scutt		2007-2009	Australia	Lawyer
Andrew Bruce		2007-2009	Australia	Lawyer (Hong Kong)
Anthony James Sherry		2008	Australia	Lawyer (Hong Kong)
Thomas Hickie		2008-2009	Australia	Lawyer
Chandra Datt		2008-2009	Australia	Lawyer
Yohan Fernando		2009-2012	Sri Lanka	Lawyer
Kilivitige Priyantha Fernando	3 years renewed	2009-	Sri Lanka	Magistrate (Fiji)
Grahame Cottle		2010	UK	Sitting judge
Pradeep Hettiarachchi		2010-2012	Sri Lanka	Sitting judge
Don Priyantha Nawana		2010-2012	Sri Lanka	Lawyer
Dias Wickramasinghe		2010-2012	Sri Lanka	Lawyer
Sithambrampillai Thurairaja		2010-2013	Sri Lanka	Lawyer
Paul Madigan		2010-	NZ	Lawyer (Fiji)
Ariam Brito-Mutunayagam		2010-	Sri Lanka	
Chandrasiri Kotigalage		2011-2015	Sri Lanka	Lawyer
Susantha Balapatabendi		2012-2013	Sri Lanka	Lawyer
Prabaharan Kumararatnam		2012-2015	Sri Lanka	Lawyer
Janaka Bandara		2013	Sri Lanka	Magistrate (Fiji)
Weeratnemulla Gamage Sanath Weeratne		2013	Australia	Lawyer
Mayadunne Corea		2013-2014	Sri Lanka	Lawyer
Sudharshana De Silva		2013-2015		Lawyer
Deepthi Amaratunga		2013-	Sri Lanka	Lawyer
Lal Sirimevan Abeygunaratne		2013-	Sri Lanka	Sitting judge
Kamal Kumar		2013-	Sri Lanka	Lawyer (Fiji)
RSS Sapuvida		2014-	Sri Lanka	Sitting judge

Name	Term of appointment	Period of service	Home country	Position in home country
RDR Thushara Rajasinghe		2014-	Sri Lanka	Magistrate (Fiji)
David Alfred		2015-	UK	Lawyer (Malaysia)
Lyone Seneviratne		2015-	Sri Lanka	Sitting judge
Riyaz Hamza		2015-	Sri Lanka	Lawyer
Aruna Aluthge		2015-	Sri Lanka	Sitting judge
Achala Wengappuli		2015-	Sri Lanka	Sitting judge
Vincent Shashikalum Perera		2015-	Sri Lanka	Lawyer (Fiji)

Kiribati

Court of Appeal

Name	Term of appointment	Period of service	Home country	Position in home country
Gordon Ellis Bisson	None specified	2000-2001	NZ	Retired judge
Maurice Casey		2000-2003	NZ	Retired judge
David Tompkins		2000-2010	NZ	
Michael Hardie-Boyes		2002-2007; 2009	NZ	Retired judge
Peter Penlington		2003	NZ	Retired judge
Robert Fisher		2004-2006; 2008-2010	NZ	Retired judge
Robert Smellie		2006	NZ	Retired judge
Barry Paterson	3 years	2007; 2011-2015	NZ	Retired judge
HC Williams		2010-2013	Australia	Retired judge
Ian Barker		2011-2012	NZ	Retired judge
Peter Blanchard	3 years	2013-	NZ	Retired judge
Kenneth Handley	3 years	2013-	Australia	Retired judge

High Court

Name	Term of appointment	Period of service	Home country	Position in home country
Robin Millhouse	2 years renewed	2000-2011	Australia	Retired judge
John Baptist Muria	2 years renewed	2011-	Solomon Islands	Retired judge
Vincent Zehurikize	3 years	2014-2017	Uganda	Retired judge

Nauru

Supreme Court

Name	Term of appointment	Period of service	Home country	Position in home country
Gaven Donne	None specified	1985-2001	NZ	Sitting judge (Pacific)
Barry Connell	5 years	2001-2006	Australia	Government (Nauru)
Robin Millhouse	2 months, 4 years	2001, 2006-2010	Australia	Retired judge
John von Doussa	3 years	2010-2013	Australia	Retired judge

Name	Term of appointment	Period of service	Home country	Position in home country
Geoffrey Eames	None specified	2010-2014	Australia	Retired judge
Joni Madraiwiwi		2014-2016	Fiji	Former judge
Elizabeth Crulci		2014 -	Australia	Lawyer (Pacific)

Papua New Guinea

National and Supreme Courts

Name	Term of appointment	Period of service	Home country	Position in home country
Timothy Hinchliffe		1987-2007	Australia	Magistrate
Maurice Sheehan		1989-2002	NZ	
Graham Ellis		1990-1992; 2009-2010	Australia	Lawyer (PNG)
David Cannings	3 years renewed	2004-	Australia	Lawyer (PNG)
Derek Hartshorn	3 years renewed	2006-	UK/NZ	Lawyer
Berna Collier	3 years renewed	2011-	Australia	Sitting judge
John Logan	3 years renewed	2011-	Australia	Sitting judge
Goodwin Poole	12 months	2013-2015	Australia	Lawyer (PNG)
Terrence Higgins		2015-	Australia	Retired judge

Samoa

Court of Appeal

Name	Term of appointment	Period of service	Home country	Position in home country
Lord Cooke of Thorndon	None specified	1982-2004	NZ	Sitting judge
Gordon Ellis Bisson		1994-2005	NZ	Retired judge
Maurice Casey		1995-2004	NZ	Retired judge
Ian Barker		2001	NZ	Retired judge
Ian McKay		2001	NZ	Retired judge
Bruce Robertson	None specified	2001	NZ	Sitting judge
Anthony Ellis		2003, 2006	NZ	Retired judge
Rodney Gallen		2006	NZ	Retired judge
Peter Salmon	None specified	2006, 2007, 2012	NZ	Retired judge
David Baragwanath		2007-2012	NZ	Sitting judge
Barry Paterson		2007	NZ	Retired judge
Robert Fisher	None specified	2008-	NZ	Retired judge
John Hansen		2009, 2013-	NZ	Retired judge
Grant Hammond	None specified	2011-2014	NZ	Sitting judge
Alan Galbraith		2012	NZ	Lawyer
Peter Blanchard		2013-	NZ	Retired judge
Graham Panckhurst		2015-	NZ	Retired judge

Supreme Court

Name	Term of appointment	Period of service	Home country	Position in home country
Andrew Wilson		1999-2000	Australia	Retired judge
Michael Lance	3 months	2002	NZ	Sitting judge
PW Cooper	3 months	2002	NZ	Sitting judge
Colin Doherty		2003	NZ	Sitting judge
AE Gaskell		2004	NZ	Sitting judge
David Carruthers		2004	NZ	Sitting judge
Pierre Slicer	One matter (2006); none specified (2010)	2006; 2010-2014	Australia	Sitting judge (2006); Retired judge (2010)
Tom Sheperdson	One matter	2006	Australia	Retired judge
Murray Kellam		2009	Australia	Retired judge
Ida Malosi		2013-2014	NZ	Sitting judge
Elizabeth Aitken	1 year	2015	NZ	Sitting judge

Solomon Islands

Court of Appeal

Name	Term of appointment	Period of service	Home country	Position in home country
Bruce McPherson	2 years (2006); 5 years (2010)	1990-2011	Australia	Sitting judge
Kubulan Los		1992-2001	PNG	Sitting judge
Glen Williams	2 years (2006); 5 years (2011)	1993-2014	Australia	Sitting judge
Lord Slynn of Hadley	2 years (2006)	2001-2007	UK	Sitting judge
Michael Adams	5 years	2005-2008, 2012	Australia	Sitting judge
Stuart Moris	5 years	2006-2007	NZ	Retired judge
Peter Salmon	5 years	2007	NZ	Retired judge
Gordon Ward	2 years (2006); 5 years (2011), 2 years (2015)	2001-2007, 2011-	UK	Sitting judge (Pacific)
Robin Auld	1 year renewed	2009-2012	UK	Retired judge
John Hansen	5 years	2009-2014	NZ	Retired judge
Edwin Goldsbrough	2 years renewed	2013-	UK	Pacific Judge
Margaret Wilson	5 years	2014-	Australia	Retired judge
Vincent Lunabek		2015	Vanuatu	Sitting judge

High Court

Name	Term of appointment	Period of service	Home country	Position in home country
Sam Lungole-Awich		1996-2001	Uganda	Lawyer
John Brown	1 year	2002-2007	Australia	
Sekove Naqiolevu	5 years	2005-2010	Fiji	Magistrate
Edwin Goldsbrough	1 year	2005-2011	UK	Sitting judge (Pacific)
David Cameron		2007-2010	NZ	Lawyer
Nkemdilim Izuako		2008-2009	The Gambia	Sitting judge
David Chetwynd	None specified	2010-2012	UK	Magistrate (Pacific)
Stephen Pallaras	None specified	2012-2014	Australia	Lawyer

Tonga

Court of Appeal

Name	Term of appointment	Period of service	Home country	Position in home country
James Burchett		1994-2012	Australia	Sitting judge
David Tompkins		1996-2005	NZ	
Bryan Beaumont		1998-2003	Australia	Sitting judge
Jeffrey Spender		2001	Australia	Sitting judge
Peter Salmon		2004-2015	NZ	Retired judge
Michael Moore	None specified	2006-2012, 2015-	Australia	Sitting judge
Kenneth Handley		2012-2014	Australia	Retired judge
Peter Blanchard	For one sittings then 3 years	2013-	NZ	Retired judge
Rodney Hansen		2014-	NZ	Retired judge
Gordon Ward		2014 -	UK	Sitting judge (Pacific)

Supreme Court

Name	Term of appointment	Period of service	Home country	Position in home country
Daniel Finnigan		1997-2000	NZ	Retired judge
Gordon Ward	5 years renewed	1998-2004	UK	Sitting judge (Pacific)
Anthony Ford	2 years renewed	2000-2010	NZ	Lawyer
Robin Webster		2004-2006	UK	Sitting judge
FWM McElrea	3 months	2004	NZ	Sitting judge
Ian Thomas		2005	NZ	Sitting judge
John Laurenson	3 months	2007-2010	NZ	Retired judge
Warwick Andrew	2 years, renewed for 1 year	2007-2010	Australia	Sitting judge
Robert Shuster	2 years, renewed	2008-2012	UK	Sitting judge (Sierra Leone)
Michael Scott		2010-	UK	Pacific judge
Charles Cato	5 years	2012-	NZ	Lawyer
Owen Paulsen		2015-	NZ	Lawyer

Tuvalu

Court of Appeal

Name	Term of appointment	Period of service	Home country	Position in home country
Robert Fisher	None specified	2009	NZ	Retired judge
David Tompkins	None specified	2009, 2014	NZ	Retired judge
Barry Paterson	None specified	2009, 2014	NZ	Retired judge
Judith Potter		2014	NZ	Retired judge

High Court

Name	Term of appointment	Period of service	Home country	Position in home country
Gaven Donne	2 years, renewed	1986-2001	NZ	Sitting judge (Pacific)
Gordon Ward		2002-2013	UK	Sitting judge (Pacific)
Robin Millhouse	For particular sittings	2011, 2014-2015	Australia	Retired judge

Vanuatu

Court of Appeal

Name	Term of appointment	Period of service	Home country	Position in home country
Bruce Robertson	None specified	1996-	NZ	Sitting judge
John von Doussa	None specified	1993, 1998-	Australia	Sitting judge
Daniel Fatiaki		1998-2006	Fiji	Sitting judge
Ronald Young	2 weeks	2007-	NZ	Sitting judge
John Mansfield	2 weeks	2007-	Australia	Sitting judge
Edwin Goldsbrough	2 weeks	2007, 2010	UK	Sitting judge (Pacific)
Mark O'Regan	2 weeks	2008, 2009	NZ	Sitting judge
Paul Heath	2 weeks	9-23 July 2011	NZ	Sitting judge
Raynor Asher		2011, 2013-	NZ	Sitting judge

Supreme Court

Name	Term of appointment	Period of service	Home country	Position in home country
Reggett Maram		1997-2002	PNG	Sitting judge
Roger Coventry	None specified	2000-2003	UK	
David James Carruthers	3 weeks	23 July – 9 August 2003	NZ	Sitting judge
Patrick Treston	1 year renewed twice	2003-2006	NZ	Sitting judge
Christopher Tuohy	2 years	2006-2008	NZ	Sitting judge
Nevin Dawson	2 years, extended 4 months	2008-2010	NZ	Sitting judge
Daniel Fatiaki	2 years renewed	2009-	Fiji	Former judge
Peter Butler	3 months	1 April-1 July 2009	NZ	Sitting judge
John Clapham	3 months	1 August-1 November 2009	NZ	Sitting judge
John MacDonald	3 months	19 July-22 October 2010	NZ	Sitting judge
James Weir	3 months	April-July 2011	NZ	Sitting judge
Robert Spear	2 years	2011-2013	NZ	Sitting judge
Mary Sey	2 years renewed	2012-	Gambia	Former judge
Stephen Harrop	2 years	2014-2016	NZ	Sitting judge
David Chetwynd		2015-	UK	Lawyer