

ARTICLE

# Foreign Judges and Foreign Case Citations: A Study of the Hong Kong Court of Final Appeal

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(Received 26 July 2023; Revised 21 May 2024; Accepted 18 November 2024)

## Abstract

We study the value of foreign judges and foreign case citations for emerging courts in postcolonial democracies, with a specific focus on the Hong Kong Court of Final Appeals (HKCFA). The HKCFA, Hong Kong's highest appellate court since the transfer of its sovereignty to China, features foreign judges as full members of the court. Using a novel dataset of all publicly available HKCFA decisions from 1997 to 2020, we show that there is a significantly higher number of foreign case citations in cases where foreign judges have participated. Further analyses show that this correlation is stronger where the Hong Kong government is a disputing party, and more specifically, where the court rules in favor of the Hong Kong government. The findings are consistent with the possibility that foreign judges' expertise in foreign case law is relevant for upholding the perception of the court's independence from the executive branch. This explanation is in line with existing theories on the role of foreign judges on domestic courts.

**Keywords:** Foreign Judges; Citation; Foreign Cases; Hong Kong; Judicial Independence

## Introduction

An increasing number of jurisdictions around the world have the practice of including foreign judges on their domestic courts. Among other rationales, foreign judges are considered to enhance the reputation and independence of the local judiciary (Dziedzic 2024). At the same time, courts increasingly turn their attention to the decisions of courts in other countries. While this practice is controversial in the US context, in postcolonial courts of new democracies, citations to foreign cases could provide credibility to a new legal system in the eyes of the international community (Dorsen 2005; Kalb 2013).

In this article, we study the value of foreign judges and foreign case citations for emerging courts in postcolonial democracies, with a focus on the Hong Kong Court of Final Appeals (HKCFA), established in 1997 upon Hong Kong's handover to the People's Republic of China. The unique composition of the HKCFA contributes to judicial independence in Hong Kong as well as the court's ability to reference

foreign law (Kwan 2023). From the outset, in preparing for the transfer of Hong Kong's sovereignty from the United Kingdom (UK) to China, both sides have pledged to preserve Hong Kong's autonomy and an independent judiciary, under the "one country, two systems" model. This commitment is mirrored in the design of the HKCFA, featuring foreign judges from the UK and other common law jurisdictions. These judges function as full members of the court, adjudicating substantive appeal cases during scheduled periods each year (Young and Da Roza 2013b). The presence of these foreign judges is considered a symbolic assurance of Hong Kong's judicial independence, signifying a clear distinction between Hong Kong's courts and those in mainland China (Tam 2014; Hargreaves 2021).<sup>1</sup> Their role, perceived as less susceptible to local political pressures, aids in securing the judiciary's independence from the executive branch – a factor of crucial importance to Hong Kong's business community (Ghai 1999; Dixon and Jackson 2019; Kwan 2020).<sup>2</sup>

The distinctive role of foreign judges on the HKCFA may be manifested in citation patterns. Judges, naturally drawing upon their prior knowledge while adjudicating cases, are inclined to reference the case law of their respective legal systems (Smith 2013; Fok 2024). Scholars have suggested that in new democracies, citing foreign court decisions can reinforce the legitimacy of rulings and the independence of the judiciary, especially in the face of domestic and international pressures (Dorsen 2005; Kalb 2013). This may be particularly relevant in the context of Hong Kong, where judicial review is deemed crucial for keeping the government in check, and the authority of the Hong Kong judiciary to make continuing use of foreign and international law is considered an important ingredient of Hong Kong's autonomy under the "one country, two systems" model (Law 2015).

Given the English case law foundation of Hong Kong's common law system and Hong Kong's history as a former British colony, all judges may be inclined to cite UK cases (Young 2011; Law 2015; Kwan 2022b). The Basic Law explicitly guarantees the continuity of the English legal legacy in Hong Kong notwithstanding the resumption of Chinese sovereignty.<sup>3</sup> As one prominent foreign judge on the HKCFA noted,

...courts of the HKSAR look mainly to English jurisprudence. Hong Kong has a heritage of English law, consisting of both common law and statute law based on English models. In addition, Article 8 of the Basic Law reinforces the connection with the English common law by giving it constitutional force, ... with the consequence that it is evolving as the common law of Hong Kong. (Mason 2007, 307)

By contrast, cases from non-UK common law jurisdictions are generally not considered part of Hong Kong's legal heritage (Ng and Jacobson 2017).<sup>4</sup> Hence, citations

<sup>1</sup>Tam argues that "[a]ctive participation of foreign legal practitioners in the judiciary enhances judicial independence under an authoritarian regime. The presence of a large number of foreign judges, who have a strong belief in the rule of law and/or linkage with prestigious judicial institutions in liberal democracies, has made it more difficult for Beijing to control the judiciary."

<sup>2</sup>See, e.g., "Hong Kong: China Interferes in Judiciary's Independence," Human Rights Watch, November 4, 2016, <https://www.hrw.org/news/2016/11/04/hong-kong-china-interferes-judiciarys-independence>.

<sup>3</sup>Articles 8 and 87 of the Basic Law.

<sup>4</sup>Article 84 provides that Hong Kong courts, including the HKCFA, shall adjudicate cases in accordance with the laws applicable in the Region as prescribed in the Basic Law "and may refer to precedents of other common law jurisdictions."

to non-UK foreign cases are more likely to reflect the influence of foreign judges who draw on legal expertise from their home jurisdictions. As one permanent judge on the HKCFA commented:

By dint of their backgrounds, the overseas non-permanent judges bring enormous judicial experience and wisdom to the Court. ... Having experienced judges from some of those jurisdictions to whose precedents reference is made is an obvious and practical advantage... there are occasions when the [HKCFA] has benefitted from the presence of an Australian non-permanent judge when considering references to particular precedents from that jurisdiction. (Fok 2016, 8, 10)

Hence, in our analysis, when referring to foreign judges and foreign case citations, we focus on non-UK judges and citations to non-UK cases.<sup>5</sup>

Using a dataset of all publicly available decisions by the HKCFA from 1997 to 2020, we examine the correlation between having foreign judges on a panel and the panel's citation patterns. We find that the presence of foreign judges on the panel is associated with a significantly higher number of citations to foreign cases in the court's opinion. However, this association appears to be driven by cases in which the Hong Kong government is a disputing party. In civil or commercial cases between two private parties, cases heard by panels with foreign judges do not cite more foreign cases than those without. Further cross-sectional analysis by case outcome reveals a stronger correlation between the presence of foreign judges and foreign case citations in cases where the Hong Kong government prevails, compared to cases where the Hong Kong government loses. This is consistent with the possibility that the expertise of these foreign judges in foreign case law is more relevant in supporting the court's reasoning and decision when ruling in favor of the Hong Kong government. The findings provide empirical insights into the value that foreign judges bring to the HKCFA, contributing to the ongoing discussion regarding the continued relevance of this institution.

The remainder of the paper proceeds as follows. We provide a literature review in the next section. We then discuss the institutional background of the HKCFA in the "Institutional Background" section. The data is introduced in the "Data" section. Our findings are explained and discussed in the "Results" section, followed by the "Conclusion."

## Literature review

This article contributes to different veins of legal scholarship. First, the article adds to a burgeoning literature on foreign judges on domestic courts and provides empirical insights into the value of the institution of foreign judges for the HKCFA. Second, the article contributes to the empirical literature on court citations. Focusing on a context other than an established democracy such as the United States (US), the article reveals the association between judges' legal background and their citation behavior. Third, this article contributes to the study of courts in new democracies and postcolonial societies, engaging with the extensive legal pluralism scholarship. It confirms that the

<sup>5</sup>Prior studies on Hong Kong courts have made the same distinction between citations to UK cases and citations to non-UK foreign cases. See Ng and Jacobson (2017); and Young (2011).

case of Hong Kong does not reflect a general rejection of the legal system of the colonial power.<sup>6</sup>

### *Literature review on foreign judges on domestic courts*

The presence of foreign judges on domestic courts has garnered increasing scholarly interest.<sup>7</sup> Scholars have examined this phenomenon across courts in Africa, the Caribbean, the Pacific, Asia, the Middle East, and Europe (Dixon and Jackson 2019; Dziedzic 2021; Hargreaves 2021; King and Bookman 2022; Young 2024). Various institutional rationales explain the inclusion of foreign judges on domestic courts. One rationale is that foreign judges bring legal expertise. This is often relevant for smaller jurisdictions, such as those in the Caribbean or Pacific, where there is a lack of local legal expertise (Dziedzic 2024). It also applies to cases where the expertise of a foreign judge in their home jurisdictions is beneficial for a new jurisdiction developing its jurisprudence (Bußjäger 2024; Reyes 2024). Another rationale is institution building, where foreign judges contribute to rebuilding and strengthening judicial institutions in post-conflict states or developing countries (Shaila 2024; Villagran 2024). Additionally, foreign judges are thought to reinforce judicial independence, as their distance from local politics lends them greater impartiality (Black 2024). Finally, foreign judges are often seen as enhancing the reputation of domestic courts, instilling confidence, and boosting the judiciary's international image (Fok 2016; Black 2024).

In the case of the HKCFA, it has been argued that the presence of foreign judges helps maintain a high standard of adjudication and reassures the business community that Hong Kong retains a strong rule of law after the handover to the People's Republic of China (Young 2024). Additionally, the institution of foreign judges serves as a symbolic assurance of Hong Kong's judicial independence, highlighting a distinction between Hong Kong's courts and those in mainland China (Tam 2014; Hargreaves 2021). Fok (2024) demonstrated how foreign judges on the HKCFA contribute their knowledge from other common law countries to aid in the development of common law in Hong Kong. However, as reviewed by Young (2024), the institution of foreign judges has faced increasing criticism in recent years, with many questioning its continued relevance and the value these foreign judges bring amid Hong Kong's changing political climate.

### *Literature review on studies of court citations*

There is by now voluminous empirical literature on citation patterns in American courts.<sup>8</sup> Three lines of explanations (ideological, social, and institutional) account for the quantitative and qualitative choice of citation patterns by judges.

<sup>6</sup>In that respect, the article provides additional evidence that judges and courts operate under complex and multifaceted institutions, in line with the studies of Wang (2015) and Gallagher (2017) concerning the rise and expansion of the rule of law in China.

<sup>7</sup>The literature on the relevance of foreign judges in domestic courts suggests mixed empirical results. For an optimistic view, see Dziedzic (2021), while for a more pessimistic view, see Garoupa (2018).

<sup>8</sup>See, among others, Landes et al. (1998); Landes and Posner (2000); Posner (2000); Choi and Gulati (2007, 2008a, 2008b); Choi et al. (2012); Cross et al. (2010); Hirschl (2014); Lupu and Fowler (2013); Niblett and

Ideological explanations relate to how judges select previous cases or authors to cite, based on their dispositions and goals. The driving factor might be mere philosophical alignment due to similar preferences. It could be a mechanism to signal to different audiences a particular political viewpoint (for example, citing conservative opinions might be a signal to please a conservative audience for future promotions). It could also be part of strategic behavior to influence courts and other judges in shaping precedents or legal policies.

In the US, where a large body of empirical literature exists, citations seem to be related to judicial disagreement. Judges seem to lean toward citing precedents that are ideologically similar to their own preferences. This applies both to the majority opinion and to dissents as it pertains to Supreme Court and Courts of Appeal precedents (Niblett and Yoon 2015). At the same time, the production of citations at the Supreme Court also seems to be explained by strategic aspects: majority opinions are more likely to rely on precedent when they are accompanied by separate opinions. Diversity of opinion and citations seem to be statistically related (Lupu and Fowler 2013).

Social explanations look for possible attributes such as background, age, gender, individual psychology (such as seeking fame and prestige), and others to explain why some judges cite more than others or why they select certain patterns of citation (Landes et al. 1998). For example, it could be that law professors are more accustomed to working with citations than lawyers or prosecutors. Hence, we might expect former law professors on the bench to cite more often than former lawyers or prosecutors. A different angle could be that selection of citations is gender- or age-based because of varying sensibilities or training in, for example, web access.

Finally, institutional explanations refer to capacity (in the case of foreign law, the ability to access decisions and translate them), legal education, the legal system (demand and supply of citations), and the availability of clerks and other court support (Law and Chang 2011). All these variables determine the legal and institutional environment that shapes citation behavior. Some legal traditions (common law jurisdictions) promote more citations while other legal traditions (French civil law jurisdictions) are less enthusiastic about courts or judges making use of citations (Gelter and Siems 2012, 94). These traditions inevitably affect citation patterns inasmuch as they impact judicial styles.

### *Literature review on studies of foreign citations*

Policymakers, judges, and academics have debated the extent to which national laws should be influenced by foreign practices and interpretations.<sup>9</sup> Critics argue that laws reflect specific preferences and, consequently, that foreign preferences should not interfere with local law (Rubinfeld 2004, 1999–2021; Alford 2006, 659–661).

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Yoon (2015). On some other countries, see, for example, Flanagan and Ahern (2011); Lupu and Voeten (2011); Mak (2011); Kalb (2013); Law (2015); Pin (2016); Frankenreiter (2017).

<sup>9</sup>There is a vast literature on this subject. See, among others, Fontana (2001); Gardbaum (2001, 2008); Slaughter (2000, 2003); Baudenbacher (2003); Childress (2003); Alford (2004, 2008); Larsen (2004); Posner (2004); Canale (2015); Sanchez (2005); Calabresi (2006); Krotoszynski (2006, 2014); Markesinis (2006); McGinnis (2006); Posner and Sunstein (2006); Frank (2007); Parrish (2007); Zubaty (2007); Benvenisti (2008); Benvenuto (2006); Bell (2012); Graziano (2013); Volokh (2014); Sandholtz (2015).

Moreover, a more advanced legal system, such as that of the US, has nothing to gain from less advanced ones (Posner 2004). On the other hand, proponents of using foreign law argue that learning from foreign jurisdictions provides valuable insights into solving legal issues that usually transcend national borders. Justice Breyer famously noted that because foreign courts “have considered roughly comparable questions under roughly comparable legal standards,” their views “are useful.”<sup>10</sup> Citing foreign decisions not only promotes a dialogue among courts but also enhances the quality of judgments, rendering the judicial reasoning process more transparent.<sup>11</sup>

Another strain of the literature that looks at determinants of foreign law citations is more positive in nature.<sup>12</sup> Concerning general statistics, Zhou (2014) finds that the US Supreme Court has cited foreign law in 7.2% of the cases for the period 1984–1990, 5.6% for the period 1990–1999, and 3.5% for the period 2000–2008. Scholars found that institutional factors, such as the nationality and educational background of judges and their clerks, help explain why courts cite foreign decisions (Law and Chang 2011; Frankenreiter 2017). Others found that foreign case citations are largely determined by language and legal tradition – judges are more likely to cite cases from jurisdictions that bear legal similarity to theirs (Gelter and Siems 2012, 2013, 2014) or that use a familiar language (Siems 2023). De Witte et al. (2024) found that courts in common law countries more frequently cite older foreign case law and engage with it more deeply than courts from civil law countries.

In the specific case of Hong Kong, a study of court cases between 2006 and 2008 found that 62.6% of the studied cases cited foreign cases, including 3.1% of cases citing European Court of Human Rights (ECtHR) cases (which appears to be the only international court being considered in this study) (Ng and Jacobson 2017). Another study of constitutional rights cases heard by the HKCFA from 1999 to 2009 found that of the 1,064 citations to case authorities, 8% are citations to decisions made by international courts and tribunals, whereas over 66% are citations to decisions made by foreign courts (of which 48% are citations to UK court decisions) (Young 2011).

### *Literature review on legal pluralism in Hong Kong*

The literature on postcolonialism and legal pluralism suggests that the legal system imposed by the colonial power lacks legitimacy and tends to merge with local traditions or fade away (Schmidhauser 1992). The common law in Hong Kong had a different path. Rather than losing influence or fading away, the legal system imposed by the colonial power evolved into a strong postcolonial legal culture. Rule of law, procedural justice, strong property and contractual rights, and protection of human rights are associated with public trust in the common law in Hong Kong (Cheng 2018).

In a series of articles, Sin Wai Man and Chu Yiu Wai provided important insights on this issue from the early days. Man and Wai (1998) observed that the rule of law

<sup>10</sup>Knight v. Florida, 528 U.S. 990, 993 (1999) (Breyer, J., dissenting).

<sup>11</sup>See, among others, Dorsen (2005); Benvenisti (2008); Gelter and Siems (2014); Breyer (2015); More explicitly, and contrary, see Jackson (2004); Posner (2004).

<sup>12</sup>See, among others, Zaring (2006); Barak-Erez (2011); Bobek (2013); Groppi and Ponthoreau (2013); Wendel (2013); Zhou (2014); de Búrca (2015).

was imposed by the colonizers, marginizing the traditional legal culture embodied by the Chinese *qing*. However, postcolonialism was unlikely to emphasize *qing* over the rule of law. In their later article, Man and Wai (2000) argued that postcolonialism in Hong Kong reinforced the rule of law and the distinctive common law due to the perceived role of Hong Kong in the global economy. These goals prevailed over a local legal culture that was not completely favorable to common law. Man (2003) went further and suggested that the preponderance of common law serves as a symbol of political and legal autonomy as well as a mechanism for attracting foreign investment. The emphasis on human rights and legality, they argued, provided legitimacy to courts. Man (2006) proposed that the independence of the judiciary and the integrity of the common law have come to symbolize Hong Kong's autonomy under the "one country, two systems" framework. In sum, within the literature on post-colonialism, the colonial legal tradition has assumed a distinct role in Hong Kong.

Other scholars echoed similar views. Cheng (2018) emphasized that the common law is a colonially transplanted legal system. Therefore, it inevitably raises questions of local legitimacy. The author suggests that postcolonial public perceptions of legitimacy were asserted by procedural justice and trust in courts, not just by the common law itself. In the same vein, Yam (2021) observed that Hong Kong courts balance excessive activism, which risks backlash from the executive, and excessive deference, which undermines public trust. This balance is achieved through a differential treatment of cases based on their political salience, the effective use of comparative jurisprudence, consistency within the common law, and a strong commitment to procedural justice.

## Institutional background

The HKCFA was established on July 1, 1997, as stipulated by the Hong Kong Court of Final Appeal Ordinance. It replaced the Judicial Committee of the Privy Council as Hong Kong's highest appellate court. The HKCFA hears civil and criminal appeals involving important questions of law.<sup>13</sup> The HKCFA is composed of the Chief Justice, three permanent judges – who are permanent members of the court and hold tenure until retirement – and a panel of non-permanent judges.<sup>14</sup> Non-permanent judges sit only on panels hearing substantive appeals, which typically includes the Chief Justice and the three permanent judges, with the variation coming from the selection of a non-permanent judge from the panel of non-permanent judges (known as the "4+1" model).<sup>15</sup>

A non-permanent judge can either be a currently serving or retired judge from Hong Kong, or a prominent judge from other common law jurisdictions (commonly referred to as an overseas non-permanent judge). Article 82 of the Basic Law provides

<sup>13</sup>A Solicitor v. The Law Society of Hong Kong [2003] HKCFA 14.

<sup>14</sup><https://www.hkcfa.hk/en/about/who/index.html>.

<sup>15</sup>In some cases, more than one non-permanent judge has served on the five-member panel hearing a substantive appeal. For example, if the Chief Justice is unable to preside over an appeal, a permanent judge will be designated to take the Chief Justice's place and preside at the hearing. In that event, the other two permanent judges will be joined by an overseas non-permanent judge and also one Hong Kong non-permanent judge. Similarly, if a permanent judge cannot sit on an appeal, a Hong Kong non-permanent judge will take the place of the absent permanent judge. See <https://www.hkcfa.hk/en/documents/court/index.html>.



that “[t]he power of final adjudication of the Hong Kong Special Administrative Region shall be vested in the Court of Final Appeal of the Region, which may as required invite judges from other common law jurisdictions to sit on the Court of Final Appeal.” This article provides the statutory basis for inviting overseas non-permanent judges to serve on the court.

Overseas non-permanent judges are appointed by the Chief Executive based on the recommendation of the Judicial Officers Recommendation Commission, which is chaired by the Chief Justice of the HKCFA. To be eligible for appointment as an overseas non-permanent judge on the HKCFA, one must be (i) a judge or retired judge of a court of unlimited jurisdiction in either civil or criminal matters in another common law jurisdiction; (ii) a person who is ordinarily a resident outside Hong Kong; and (iii) a person who has never been a judge of the High Court, a District Judge or a permanent magistrate, in Hong Kong.<sup>16</sup> Overseas non-permanent judges are appointed for three-year terms, which may be extended by the Chief Executive on the recommendation of the Chief Justice.<sup>17</sup>

Overseas non-permanent judges are not randomly assigned to individual cases but are selected by the Chief Justice. The criteria for selection are not publicly disclosed, though specialized expertise and scheduling availability are known to factor into such decisions (Fok 2016). Instead of serving on the court throughout the year, overseas non-permanent judges travel to Hong Kong for a four-week stint. During this period, they hear appeals in the first two weeks, leaving the remaining two weeks for the writing of judgments (Fok 2016).

The inclusion of overseas non-permanent judges on the HKCFA is widely regarded as a symbol of judicial independence and rule of law in Hong Kong (Tam 2014; Hargreaves 2021). Over the years, the HKCFA and the judiciary have earned a reputation for independence, having demonstrated their willingness to stand up to the executive branch on numerous occasions (Ghai 2013, 68; Ip 2016; Chan 2022). The HKCFA has repeatedly underscored its commitment to this principle in its decisions, stressing that Hong Kong is “a society with a strong commitment to the rule of law and its concomitants of an independent judiciary and respect for the separation of powers” and that the court’s role is to serve as “a constitutional check on the executive and legislative branches of government,” so as “to ensure that they act in accordance with the Basic Law” (Ip 2016). Overseas non-permanent judges are considered to enhance the court’s reputation of judicial independence because they are seen as less vulnerable to local political influence and an external validation of Hong Kong’s legal system (Ghai 1999; Dixon and Jackson 2019; Kwan 2020). However, following the passing of the National Security Law in 2020, eight overseas non-permanent judges have since resigned from their positions on the HKCFA, many citing concerns over the threat to judicial independence in Hong Kong.<sup>18</sup>

<sup>16</sup>The Judicial Officers Recommendation Commission Ordinance (Cap. 484), Section 12(4).

<sup>17</sup>The Judicial Officers Recommendation Commission Ordinance (Cap. 484), Section 14(4).

<sup>18</sup>Haroon Siddique and Helen Davidson, “UK Judges Withdraw from Hong Kong’s Court of Final Appeal,” *The Guardian*, March 30, 2022, <https://www.theguardian.com/world/2022/mar/30/uk-judges-withdraw-from-hong-kong-court-of-final-appeal>; Helen Davidson, “British Judge Nicolas Phillips Steps Down from Hong Kong Court,” *The Guardian*, September 30, 2024, <https://www.theguardian.com/world/2024/sep/30/nicholas-phillips-british-hong-kong-court-judge-steps-down-personal-reasons>.



## Data

For this project, we have compiled an original dataset consisting of 693 substantive appeals opinions issued by the HKCFA from 1997 to 2020. These opinions are published on the website of the Hong Kong Legal Information Institute. We collected basic case information such as the parties to the dispute, the case outcome, and substantive issues. Figure 1 plots the cumulative number of substantive appeals heard by the HKCFA over time. Here we distinguish between public law cases and private law cases based on whether the Hong Kong government is a party to the dispute.<sup>19</sup> As Figure 1 shows, the number of public law and private law cases per year was fairly balanced until around 2015. After 2015, however, the number of private law cases started to trail behind that of public law cases. Figure 2 plots changes in the government's winning rate in public law cases over time. While the government winning rate has fluctuated between 20% and 70%, it has remained fairly steady at around 60% since 2015, with one exception. Table 1 presents summary statistics on the substantive issues involved in these cases. Following Young and Da Roza (2013a), we categorize the cases into eight substantive issues: administrative law, civil procedure, commercial law, constitutional law, criminal law and procedure, land law, other, and tort law. Criminal law and procedure cases (32.8%) is the most common category in the data, followed by commercial law cases (17.9%) and land law cases (17.6%).

For each opinion, we code the type and frequency of *unique* cases cited in the opinion.<sup>20</sup> Specifically, we distinguish between citations to foreign cases, UK cases, Hong Kong cases, and cases issued by international tribunals. Notably, during the time span covered by our data, the HKCFA has never cited a single case issued by courts in mainland China.

Table 2 provides summary statistics on the average number of citations to unique cases. On average, the HKCFA cites UK cases most frequently, reflecting Hong Kong's English legal heritage. In comparison, the HKCFA cites, on average, only 1.49 foreign cases, which is only slightly more frequent than its citations to international cases. When dividing up the sample by public law and private law cases, on average, the HKCFA cites a higher number of foreign cases, Hong Kong cases, and international cases in public law cases than in private law cases.<sup>21</sup> UK cases, however, are an outlier, having a more profound influence on private law cases than on public law cases. We further divide up the public law case sample by case outcome (i.e., whether the Hong Kong government prevails or loses a case). On average, the HKCFA cites more in all four categories of cases when ruling in favor of the Hong Kong government than when ruling against it.<sup>22</sup>

<sup>19</sup>Of the 372 cases where the Hong Kong government is a disputing party, it has been the appellate in 50 cases; it has been the respondent in 322 cases.

<sup>20</sup>In the Appendix, we present alternative estimations with different dependent variables: the number of unique citations to each type of cases as a percentage of total unique citations (Tables A1 to A3) and the number of citations (not limited to unique citations) to each type of cases (Tables A4 to A6). Tables A1 to A3 report results similar to those in our main tables, Tables 3 to 5. The results in Tables A4 to A6 are not statistically significant across all specifications. We believe that the number of unique citations is a more accurate measure of the intensity of foreign case law usage. This approach accounts for instances where courts may repetitively cite the same case for purposes unrelated to a judge's legal expertise, such as legal drafting or rhetorical emphasis.

<sup>21</sup>A two-sided t-test shows that the difference in foreign case citations, Hong Kong case citations are statistically significant at the 5% and 1% level, respectively.

<sup>22</sup>A two-sided t-test shows that the difference in UK case citations and international case citations is statistically significant at the 10% level.

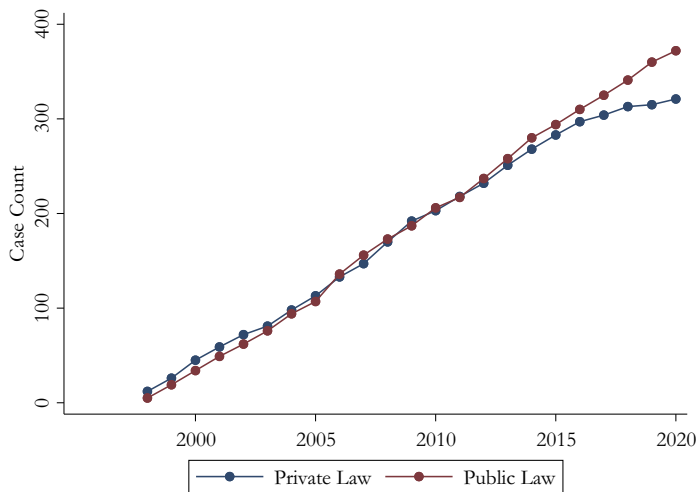


Figure 1. Public Law and Private Law Cases over Time.

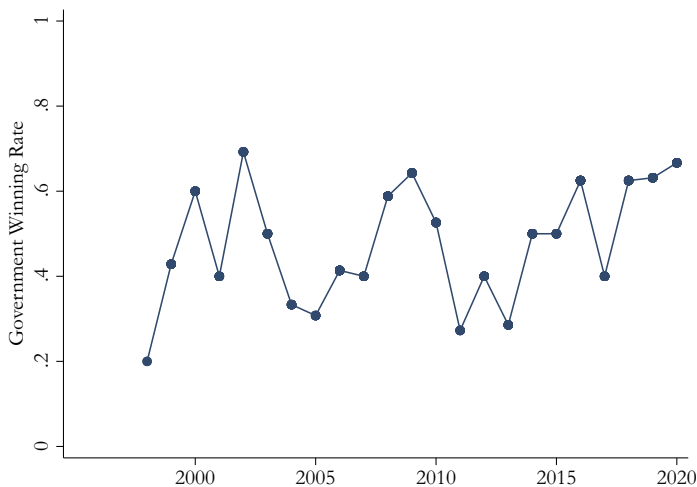


Figure 2. Government Winning Rate over Time.

Table 1. Substantive Issues

Issue	Frequency	Percentage
Criminal law and procedure	227	32.8%
Commercial law	124	17.9%
Land law	122	17.6%
Civil procedure	78	11.3%
Administrative law	65	9.4%
Constitutional law	44	6.3%
Other	17	2.5%
Tort Law	16	2.3%
Total	693	100%

**Table 2.** Average Case Citations

	All cases	Public law	Private law	Government wins	Government loses
Foreign	1.49	1.70	1.24	1.75	1.66
UK	5.76	5.26	6.33	5.96	4.62
HK	3.11	3.78	2.34	3.80	3.76
International	0.28	0.41	0.12	0.58	0.25
All	10.64	11.16	10.04	12.10	10.29
Observations	693	372	321	178	194

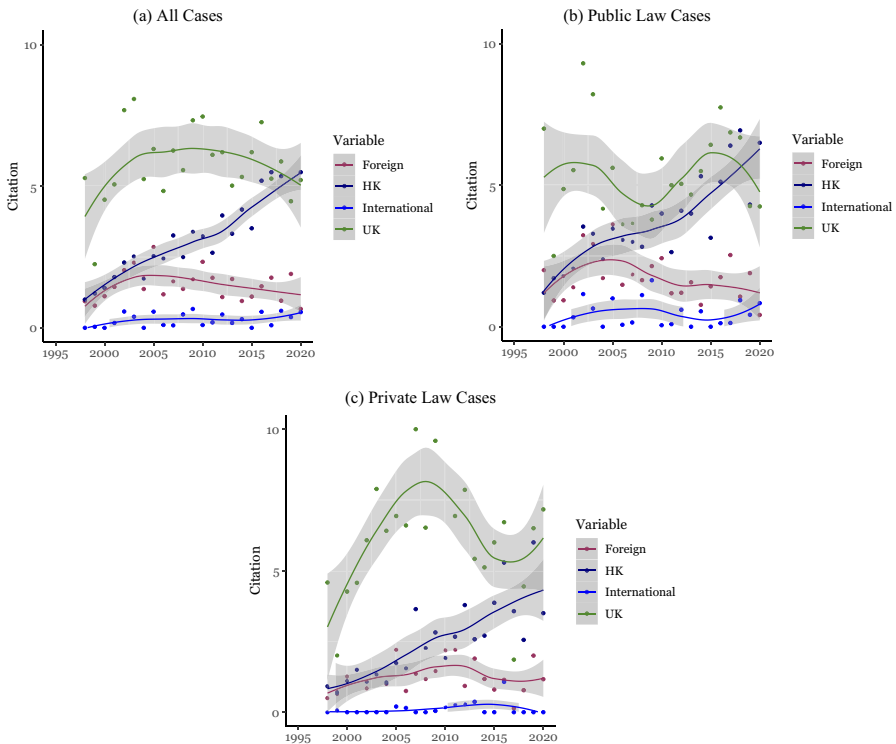
**Figure 3.** Case Citation over Time.

Figure 3(a) plots the time trends of the average number of citations for each type over time.<sup>23</sup> Prior studies have underscored the prevalence of HKCFA citations to UK cases and the less common citations to Hong Kong's own jurisprudence (Young 2011). With more updated data, Figure 3(a) reveals a concave shape of citations to UK cases, with moderate decline in recent years. In contrast, citations to Hong Kong cases show a consistent increase, nearly surpassing citations to UK cases in recent years. The number of citations to foreign cases and international cases has remained relatively stable over the years. Overall, the time trends in Figure 3(a) seem to suggest that as a nascent court in postcolonial Hong Kong, the HKCFA relied heavily on

<sup>23</sup>To plot a smoothed line that depicts changes in average number of case citations, we used a locally estimated scatterplot smoothing (LOESS) regression. The gray ribbon displays a 90% confidence interval.

English law in its early days. As the court matured, the HKCFA reduced its reliance on English law, instead fortifying its own legal identity by citing Hong Kong cases more frequently. Figures 3(b) and 3(c) plot the time trends of the average number of citations for each type in public law cases and private law cases, respectively. The fading influence of UK cases is particularly evident for private law cases. The increasing influence of Hong Kong cases appears to be more prominent for public law cases.

Finally, we collected demographic information on the overseas non-permanent judges on the panel for each case, including their nationality, prior occupations, and educational backgrounds. In our data, among the 26 overseas non-permanent judges who have heard cases as of 2020, twelve are UK judges and fourteen are foreign (non-UK) judges, including eight from Australia, five from New Zealand, and one from Canada.

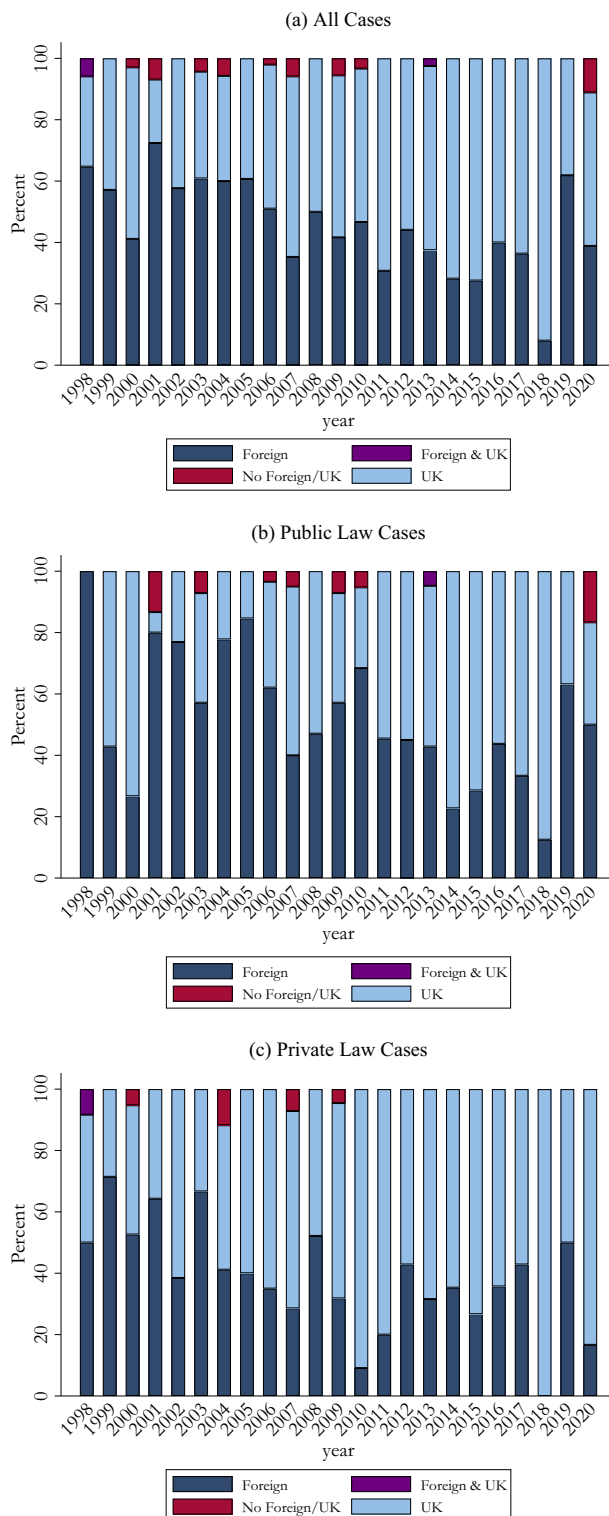
Figure 4 plots the changes in the composition of panels hearing substantive appeals over time. Recall that under the “4+1” model, the other four members of the panel are typically fixed, consisting of all permanent judges (including the Chief Justice) of the court, with the variation being the identity of the non-permanent judge, who may be a local, UK, or foreign judge. As Figure 4 shows, only a very small proportion of cases were heard by panels that included a local non-permanent judge. The vast majority of cases were heard by panels that included either a UK or a foreign judge. We observe a decrease in the proportion of cases heard by panels with foreign judges and an increase in the proportion of cases heard by panels with UK judges. Overall, a larger proportion of private law cases are heard by panels with UK judges, highlighting the greater UK influence in private law.

## Results

In all analyses, we assume that the final opinion and its citations reflect the collective work of all judges on the panel hearing a case, rather than that of a single judge. While some earlier cases identify the judge or judges who wrote the opinion, most recent cases attribute the opinions to the court without an identifiable author (Hargreaves 2021). Even in cases where authors of the opinion are identified, it is widely recognized that the HKCFA operates as a “collegiate” institution, wherein all judges on the panel discuss the cases before them together (Young and Da Roza 2013b; Young 2008). As one permanent judge recalls, “this involves extensive discussion of a case before, during and after a hearing amongst the participating judges. Even if they are not writing, the non-permanent judges all contribute to a greater or lesser extent in each appeal.” (Fok 2016). Furthermore, most cases are unanimous and non-permanent judges write a significant portion of opinions according to a recent empirical study (Kwan 2020).

Given Hong Kong’s legal heritage rooted in English law, we assume that all panels, including the permanent judges, generally tend to cite UK cases. In other words, having UK judges on a panel may not make a distinct difference on the panel’s inclination to cite UK cases, as these are already integral to Hong Kong’s legal tradition. However, we expect that cases heard by panels with foreign judges are likely to cite more foreign cases, as these judges are better able to leverage their expertise in the case law in their home jurisdictions. To examine this hypothesis, we employ the following specification:

$$\text{Cite}_c = \alpha + \beta \text{Foreign}_c + \psi \text{Doctorate}_c + \eta \text{Professor}_c + \varphi_i + \eta_t + \varepsilon_c$$



**Figure 4.** Foreign Judges over Time.

The dependent variable is the number of citations to unique foreign cases, UK cases, Hong Kong cases, international cases, and the total number of citations in each case. The independent variable of interest is whether the case is heard by a panel with foreign judge(s). To account for factors unrelated to a judge's jurisdictional background but that may otherwise influence the judge's citation behavior, in alternative specifications, we add controls for whether the panel has a non-permanent judge with a doctorate degree or with prior professional experience as a professor.<sup>24</sup> Because anecdotal evidence suggests that sometimes overseas non-permanent judges are assigned to cases for which they are considered to possess specialty expertise, we add fixed effects for the substantive issue in a case (Young and Da Roza 2013b; Fok 2016). Finally, we include year fixed effects  $\eta_t$  to account for variation across time. In all specifications, standard errors are clustered at the panel level to account for serial correlation within panels.

### *Foreign judges and foreign case citations*

Table 3 reports the results estimating the relationship between the presence of foreign judge(s) on the panel and the number of citations to unique foreign, UK, Hong Kong, and international cases, as well as the total number of citations. For each set of regressions, the first column includes no controls other than the year fixed effects. The second column adds controls for judge characteristics, specifically whether the judge has a doctorate degree or has prior professional experience as a professor. The third column adds fixed effects for the substantive issue in a case. As Table 3 shows, we find a positive and statistically significant correlation between the presence of foreign judge(s) on the panel and the number of citations to foreign cases. Our most conservative specification suggests that on average, opinions issued by panels with foreign judge(s) are associated with citations to approximately 0.8 more foreign cases. Since the average foreign case citation is 1.49, this represents a 54% increase in foreign case citations. Interestingly, panels with foreign judge(s) also tend to cite more Hong Kong cases. There is no evidence of any correlation between the inclusion of foreign judges on a panel and citations to UK cases, confirming our assumption about the court's general tendency to cite to UK cases due to its English legal heritage. Overall, the findings indicate that foreign judges bring their foreign law expertise to the court, which is reflected in the higher number of citations to foreign cases in cases where these judges have participated.

We did not find a statistically significant correlation between the judge's educational or professional backgrounds and foreign case citations. In fact, there appears to be a negative relationship between having professorship experience and the number of foreign case citations.

### *Public law vs. private law cases*

We next divide up the sample by public law and private law cases. If the patterns observed in Table 2 merely reflect the influence of a judge's background on their citation patterns, there should not be a difference in such influence between public law and private law cases. Table 4 presents the results. We only observe a positive and

<sup>24</sup> Professors are considered to have more exposure to foreign law and therefore more likely to cite foreign law (Law 2015).

Table 3. Citation and Foreign Judges (All Cases)

	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)	(12)	(13)	(14)	(15)
	Foreign	Foreign	Foreign	UK	UK	UK	HK	HK	HK	Int'l	Int'l	Int'l	All	All	All
Foreign judge	0.932*** (0.281)	0.906*** (0.293)	0.849*** (0.285)	0.335 (0.670)	0.296 (0.702)	0.736 (0.673)	0.867** (0.384)	0.831** (0.346)	0.524* (0.299)	0.045 (0.138)	0.008 (0.126)	−0.110 (0.122)	1.870* (0.951)	1.671* (0.933)	1.536* (0.852)
Doctorate degree		0.220 (0.304)	0.265 (0.305)		−0.714 (0.756)	−0.586 (0.829)		0.844** (0.371)	0.790** (0.329)		0.222 (0.148)	0.100 (0.139)		0.852 (0.971)	0.815 (1.024)
Professor		−0.059 (0.536)	−0.192 (0.598)		1.405 (1.307)	0.597 (1.382)		−0.853 (0.869)	−0.479 (0.821)		0.040 (0.322)	0.317 (0.311)		0.679 (1.335)	0.544 (1.419)
N	581	581	581	581	581	581	581	581	581	581	581	581	693	693	693
Year	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Substantive issue			✓			✓		✓	✓	✓		✓			✓

Notes: The dependent variable in columns (1)–(3) is the number of unique foreign case citations. The dependent variable in columns (4)–(6) is the number of unique UK case citations. The dependent variable in columns (7)–(9) is the number of unique Hong Kong case citations. The dependent variable in columns (10)–(12) is the number of unique international case citations. The dependent variable in columns (13)–(15) is the number of unique case citations for all case types. “Foreign judge” denotes whether the case is heard by a panel that includes a foreign (non-UK) non-permanent judge. “Doctorate degree” denotes whether the non-permanent judge has a doctorate degree. “Professor” denotes whether the non-permanent judge has been a professor. Standard errors are clustered by panel in parentheses. All regressions are estimated using OLS models. The constant is omitted from the table. \*\*\* < .01; \*\* < .05; \* < .1



**Table 4.** Citation and Foreign Judges (Public vs. Private Law Cases)

	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)	(12)	(13)	(14)	(15)
	Foreign	Foreign	Foreign	UK	UK	UK	HK	HK	HK	Int'l	Int'l	Int'l	All	All	All
<b>Panel A: Public Law Cases</b>															
Foreign judge	1.250*** (0.347)	1.201*** (0.402)	1.246*** (0.416)	1.297 (0.810)	0.903 (0.808)	1.450* (0.779)	0.850** (0.416)	0.737* (0.379)	0.583 (0.394)	0.061 (0.203)	−0.027 (0.202)	−0.145 (0.214)	2.759** (1.150)	2.142* (1.173)	2.374** (1.193)
Doctorate degree		0.184 (0.506)	0.375 (0.554)		1.148 (0.930)	1.559 (1.044)		0.905* (0.471)	0.905* (0.516)		0.340 (0.232)	0.109 (0.251)		2.016 (1.475)	2.337 (1.692)
Professor		0.155 (0.749)	−0.130 (0.860)		1.840 (1.622)	0.481 (1.552)		−0.517 (1.085)	−0.312 (1.087)		0.253 (0.488)	0.646 (0.471)		2.650* (1.386)	1.915 (1.625)
N	321	321	321	321	321	321	321	321	321	321	321	321	372	372	372
<b>Panel B: Private Law Cases</b>															
Foreign judge	0.447 (0.427)	0.477 (0.455)	0.452 (0.439)	0.391 (1.026)	0.466 (1.079)	0.507 (1.059)	0.549 (0.418)	0.626 (0.429)	0.525 (0.378)	−0.120 (0.127)	−0.108 (0.112)	−0.145 (0.117)	1.126 (1.257)	1.218 (1.295)	1.201 (1.259)
Doctorate degree		0.189 (0.375)	0.114 (0.353)		−1.945* (1.157)	−2.011* (1.155)		0.938** (0.453)	0.853** (0.403)		0.058 (0.095)	0.022 (0.092)		0.491 (1.312)	0.116 (1.283)
Professor		−0.404 (0.677)	−0.222 (0.688)		0.565 (1.679)	0.860 (1.826)		−1.340 (1.033)	−0.823 (1.084)		−0.152 (0.284)	−0.066 (0.325)		−1.268 (1.892)	−0.124 (2.070)
N	260	260	258	260	260	258	260	260	258	260	260	258	321	321	319
Year	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Substantive issue			✓			✓			✓			✓			✓

Notes: The dependent variable in columns (1)–(3) is the number of unique foreign case citations. The dependent variable in columns (4)–(6) is the number of unique UK case citations. The dependent variable in columns (7)–(9) is the number of unique Hong Kong case citations. The dependent variable in columns (10)–(12) is the number of unique international case citations. The dependent variable in columns (13)–(15) is the number of unique case citations for all case types. “Foreign judge” denotes whether the case is heard by a panel that includes a foreign (non-UK) non-permanent judge. “Doctorate degree” denotes whether the non-permanent judge has a doctorate degree. “Professor” denotes whether the non-permanent judge has been a professor. Standard errors are clustered by panel in parentheses. All regressions are estimated using OLS models. The constant is omitted from the table. \*\*\* < .01; \*\* < .05; \* < .1

Table 5. Citation and Foreign Judges (Government Wins vs. Government Loses)

	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)	(12)	(13)	(14)	(15)
	Foreign	Foreign	Foreign	UK	UK	UK	HK	HK	HK	Int'l	Int'l	Int'l	All	All	All
<b>Panel A: Government Loses</b>															
Foreign judge	0.987* (0.573)	0.850 (0.628)	0.876 (0.654)	1.613 (1.229)	1.054 (1.196)	1.255 (1.234)	1.004 (0.671)	0.960 (0.678)	0.713 (0.711)	−0.269 (0.387)	−0.355 (0.409)	−0.465 (0.443)	2.118 (1.768)	1.484 (1.828)	0.932 (1.854)
Doctorate degree		0.561 (0.744)	0.671 (0.818)		1.672 (1.144)	1.749 (1.258)		0.041 (0.650)	0.099 (0.649)		0.102 (0.134)	−0.097 (0.135)		1.807 (1.955)	2.093 (2.117)
Professor		0.310 (0.911)	0.217 (1.053)		3.277 (3.164)	3.036 (3.385)		0.558 (3.237)	1.240 (2.849)		1.013 (1.270)	1.320 (1.193)		3.573 (3.105)	3.861 (3.733)
N	163	163	163	163	163	163	163	163	163	163	163	163	194	194	194
<b>Panel B: Government Wins</b>															
Foreign judge	1.736*** (0.563)	1.745*** (0.630)	1.760*** (0.646)	0.839 (1.287)	0.786 (1.350)	1.245 (1.302)	0.813 (0.605)	0.748 (0.584)	0.524 (0.629)	0.259 (0.396)	−0.108 (0.112)	0.033 (0.380)	3.515 (2.263)	3.214 (2.351)	3.330 (2.439)
Doctorate degree		−0.330 (0.800)	−0.061 (0.923)		−0.331 (1.644)	1.079 (1.828)		1.518** (0.662)	1.617** (0.806)		0.058 (0.095)	0.069 (0.532)		0.982 (2.776)	1.398 (3.386)
Professor		0.251 (1.150)	−0.002 (1.408)		0.757 (1.548)	−0.553 (1.775)		−0.971 (0.885)	−0.865 (0.940)		−0.152 (0.284)	0.141 (0.291)		1.521 (2.261)	0.941 (2.673)
N	157	157	157	157	157	157	157	157	157	157	260	157	177	177	176
Year	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Substantive issue			✓			✓			✓			✓			✓

Notes: The dependent variable in columns (1)–(3) is the number of unique foreign case citations. The dependent variable in columns (4)–(6) is the number of unique UK case citations. The dependent variable in columns (7)–(9) is the number of unique Hong Kong case citations. The dependent variable in columns (10)–(12) is the number of unique international case citations. The dependent variable in columns (13)–(15) is the number of unique case citations for all case types. “Foreign judge” denotes whether the case is heard by a panel that includes a foreign (non-UK) non-permanent judge. “Doctorate degree” denotes whether the non-permanent judge has a doctorate degree. “Professor” denotes whether the non-permanent judge has been a professor. Standard errors are clustered by panel in parentheses. All regressions are estimated using OLS models. The constant is omitted from the table. \*\*\* < .01; \*\* < .05; \* < .1

statistically significant correlation between the presence of foreign judges and the number of foreign case citations in public law cases. Our most conservative specification suggests that in public law cases, opinions issued by panels with foreign judge(s) are associated with citations to approximately 1.2 more foreign cases. Since the average foreign case citation in public law cases is 1.70, this represents a 71% increase in foreign case citations. The coefficients for “Foreign judge” in private law cases are smaller in magnitude and statistically insignificant. In either public law or private law cases, there is no consistent evidence suggesting the presence of foreign judges is correlated with the number of citations to the other types of cases. Taken together, the results suggest that foreign judges’ expertise in foreign law is particularly valuable in public law cases where the Hong Kong government is a disputing party.

#### *Government wins vs. government loses*

Finally, we explore, within public law cases, whether the patterns we observe differ depending on the case outcome, that is, whether the Hong Kong government prevails or not. Table 5 presents the results. We only observe a positive and statistically significant correlation between the presence of foreign judges and the number of foreign case citations in cases where the government prevails. Our most conservative specification suggests that in cases where the government prevails, opinions issued by panels with foreign judge(s) are associated with citations to approximately 1.7 more foreign cases. Since the average foreign case citation in government winning cases is 1.75, this represents a 97% increase in foreign case citations. In most specifications, the coefficients for “Foreign judges” are smaller in magnitude and statistically insignificant in cases where the government loses. Regardless of case outcomes, there is no consistent evidence suggesting the presence of foreign judges is correlated with the number of citations to the other types of cases.

### Discussion

Our findings indicate a correlation between the presence of foreign judges and foreign case citations by the HKCFA. They reveal that this correlation is driven by public law litigation (cases directly involving the Hong Kong government), and more specifically, within public law litigation, it is driven by cases won by the government. Because foreign judges are not randomly assigned to panels, our findings are correlational and descriptive in nature. However, these correlations can still provide valuable insights into the role of foreign judges and the contributions they make within the political context of the HKCFA.

First, our findings suggest that foreign judges bring legal expertise to the HKCFA, which is consistent with their institutional function as discussed in the literature. Second, our findings suggest that foreign judges’ legal expertise is particularly relevant in public law cases when the court rules in favor of the Hong Kong government. This is consistent with the value of foreign judges in adding credibility and enhancing reputation of nascent courts within a weak democracy. In public law cases, where the government is a party to the dispute, the case can be more sensitive and subject to higher public scrutiny. Showing that the decision and reasoning aligns with comparable jurisdictions is therefore crucial for insulating judges from potential criticisms of case rulings (Yam 2021). Foreign judges’ legal expertise in foreign case law can therefore be particularly relevant in such cases. Further, in the particular

context of Hong Kong, the public, including those in the legal profession and the international community, place high value on judicial independence. Cases that rule in favor of the government may give rise to suspicions of bias, prompting the court to feel a greater need to reinforce the soundness of its reasoning in the eyes of the public (Young and Da Roza 2013b). Citing foreign cases and showing that courts in other jurisdictions have arrived at similar reasoning or conclusions on comparable issues can lend legitimacy to the court's decisions and signify its independence from the government.

At a broad level, these findings are consistent with a political economy story that views citations to foreign sources by foreign judges as part of an effort to lend postcolonial credibility to a new legal system within a weak democracy. This approach involves signaling judicial independence, building reputation and confidence, and enhancing court legitimacy (Garoupa and Ginsburg 2015). This explanation suggests that judicial behavior at the HKCFA is shaped by incentives rooted in the political context. Citations to foreign law and the participation of foreign judges strengthen the court's legitimacy and reputation, especially in cases where the court sides with the government, which could otherwise be perceived as subservient (Dziedzic 2024). These features serve as mechanisms to protect judicial independence from executive interference and reinforce public trust in the court when the government prevails.

Examples of foreign case citations in the HKCFA jurisprudence provide support for this political economy explanation. For example, in *Oei Hengky Wiryo v. HKSAR*, where the court ruled in favor of the Hong Kong government and dismissed Oei's appeal, Justice Michael McHugh, a retired judge from the Australia High Court, extensively cited Australian case law to support the court's finding that the out-of-court statements obtained by the prosecutors were admissible as evidence for the charge of conspiracy to commit bookmaking under the Gambling Ordinance.<sup>25</sup> Justice McHugh is known for his belief in the application of precedents to promote the legitimacy of decisions and public confidence in the court (Carroll 2013). Similarly, in *Leung Kwok Hung v. President of the Legislative Council*, in deciding not to intervene with the legislature's internal proceedings, the panel, which includes Australian Justice Anthony Mason, extensively cited cases from Australia, Canada, New Zealand, and the Privy Council to show that the principle of nonintervention reflects the consensus of the common law world (Yam 2021).<sup>26</sup> In another more recent example, *HKSAR v. Kwan Tat Lee*, concerning a potential omission by the trial judge in reference to evidence in a criminal case, the HKCFA discussed the Australian *Liberato* doctrine with far-reaching details.<sup>27</sup> Justice Murray Gleeson, a former Chief Justice of Australia, summarized how *Liberato* developed in Australia since the 1980s up to 2019. He also explained how *Liberato* should be applied under Hong Kong criminal procedure. The broader citation to Australian law is used to justify the decision to dismiss the appeal by a criminal defendant against the Hong Kong government.

By associating itself with reputable courts in other common law jurisdictions within established democracies, by referencing their jurisprudence, the HKCFA

<sup>25</sup>Oei Hengky Wiryo v HKSAR [2007] HKCFA 8.

<sup>26</sup>Leung Kwok Hung v President of the Legislative Council [2014] HKCFA 17.

<sup>27</sup>HKSAR v Kwan Tat Yee [2023] HKCFA 10.

sustains public confidence in its adherence to the rule of law and its independence from the government (Law 2015). Although not immune to criticism and substantial objections (Kwan 2023, Young 2024), the inclusion of foreign judges with legal expertise from other common law jurisdictions is valuable in this regard (Fok 2024).<sup>28</sup>

Before concluding, three caveats are due in course. First, obviously, our statistical findings do not indicate that citations to foreign law are used exclusively when the government wins. For example, in a criminal case involving student leaders of the umbrella movement, the HKCFA ruled against the government and discussed Australian case law to support the appellants' appeal to quash the prison sentences imposed by the lower court.<sup>29</sup>

Second, there are other potential concurrent explanations for our findings. The role of lawyers as a source of foreign citations can be an important factor (Kwan 2023). Since Hong Kong judges lack extensive support from clerks, they rely upon the parties to provide research and identify relevant legal materials. Lawyers may seek foreign case citations to appeal to foreign judges hearing the case. It is also possible that permanent judges give extra consideration to foreign cases when sitting with foreign judges from those jurisdictions, as a matter of professional courtesy. Since most HKCFA decisions are unanimous and foreign judges contribute significantly to opinion writing (Kwan 2020), foreign case citations may reflect collegial norms within the HKCFA. However, these demographic explanations alone do not fully explain the differences between public and private law cases or between cases where the government wins versus those where it loses.

Another set of possible concurring trends centers on the accumulation of local legal knowledge and precedent, which enhances the quality of adjudication. This relates to the importance of expertise and the need for human capital, a concept fundamentally tied to the idea of legal expertise in the literature on foreign judges (Dziedzic 2024). As the HKCFA builds a robust body of local case law, the reliance on foreign judges to cite foreign cases diminishes – a reasoning consistent with the standard postcolonial narrative of emerging legal regimes, as reflected in the criticism reviewed by Young (2024). However, while this explanation is possible, further clarification is needed to explain why, for instance, the accumulation of relevant local precedents is slower in public law than in private law, thus creating a greater demand for foreign case law. From a practical and qualitative perspective, there is no clear evidence indicating that the pool of potential Hong Kong legal precedents is smaller in public law than in private law (Kwan 2022a). Additionally, absent political factors, it remains unclear why local case law appears more useful when the government loses but less so when the government wins.

Third, by foreign judges and foreign case citations, our study focuses on non-UK judges and non-UK case citations. This is largely necessitated by Hong Kong's status as a former British colony with a legal system rooted in English law. However, this does not imply that UK judges play a minor role in contributing legal expertise or enhancing the reputation of the HKCFA. For example, in a more recent decision favoring the government regarding freedom of assembly, the HKCFA scrutinized and

<sup>28</sup>Young (2024) discussed lack of knowledge of domestic law, conflicts of interest concerning vital interests such as national security laws, and unnecessary expertise after a long transition.

<sup>29</sup>Secretary for Justice v. Wong Chi Fung, Law Kwun Chung, Chow Yong Kang Alex [2018] HKCFA 4.

distinguished relevant UK case law. This decision received endorsement from Lord David Neuberger, former President of the UK Supreme Court, who sat on the case as a non-permanent judge.<sup>30</sup> However, given the particular context of the HKCFA, it is challenging to quantitatively assess UK judges' contributions using our empirical design.

## Conclusion

Using the HKCFA as a case study, we examine the value of foreign judges and foreign case citations for emerging courts in postcolonial democracies. As a postcolonial democracy (or semi-democracy) under the “one country, two systems” model, Hong Kong places particular importance on upholding its tradition of judicial independence and rule of law. The HKCFA, the highest appellate court established upon the transfer of Hong Kong's sovereignty to China, features foreign judges which supposedly provide symbolic assurance for Hong Kong's judicial independence. The foreign judges possess expertise in foreign law that could serve as a tool to enhance the court's legitimacy and independence from the government.

We provide evidence that underscores the role of foreign judges in this process. Foreign judges bring their foreign law expertise to the court, which is reflected in the higher number of foreign case citations in cases where they have participated. We find that this correlation is driven by cases where the Hong Kong government is a disputing party, and more specifically, where the court rules in favor of the Hong Kong government.

One plausible explanation for these findings is that foreign judges may leverage their expertise in foreign case law to enhance the legitimacy of the court's decisions and reinforce the perception of judicial independence from the Hong Kong government. While alternative explanations are also plausible and may coexist alongside this political economy explanation, none of these alternatives appear to fully account for the observed differences between public and private law cases, nor the variation between cases in which the government prevails and those in which it loses.

In this regard, in recent years, there have been growing concerns about judicial independence in Hong Kong, particularly after the enactment of the National Security Law in 2020. Since then, eight non-permanent judges have resigned from the HKCFA. Commentators have noted the diminishing relevance of the institution of foreign judges, with some advocating for its abolition.<sup>31</sup> The findings in this article offer evidence of the value foreign judges bring, which can be even more pertinent in Hong Kong's complex political environment today.

**Supplementary material.** The supplementary material for this article can be found at <http://doi.org/10.1017/jlc.2024.26>.

**Data availability statement.** All replication materials are available on the *Journal of Law and Courts* Dataverse archive.

**Acknowledgments.** For helpful feedback, we thank the editor, Tom Clark, and three anonymous referees, Yutian An, Yun-chien Chang, TJ Chiang, Adam Chilton, James Cooper, Christoph Engel, Eric Ip, David Law, Yijia Lu, Erin E. Meyers, Sean O'Connor, Jin Sun, Simon NM Young, Eleanor Wilking, and participants at the

<sup>30</sup>HKSAR v Ng Noi Yee Marget and others [2024] HKCFA 24.

<sup>31</sup>See discussion in Hargreaves (2021) and Young (2024).

Conference on Empirical Legal Studies at the University of Chicago Law School, Clarke Conference on Empirical Legal Studies in the Sinophone Region at Cornell Law School, Levy workshop at the Antonin Scalia Law School, Conference on Law, Courts, and Judges in Comparative Perspective, University of Hong Kong, the Annual Conference of American Society of Comparative Law, and the Comparative Law Workshop at the Baltimore Law School. We thank Madeline C. Hodges, Jacob Hopkins, Robert Putka, and Chenyun Sun for their excellent research assistance. We thank Julius Yam, whose loss we deeply mourn, for insightful conversations on the institutional background of the HKCFA when we first began this project in 2020.

**Financial support.** No funding was received for this project.

**Competing interest.** Authors declare no conflicts of interest.

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