

Foreign Judges on Constitutional Courts?

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Rosalind Dixon & Vicki Jackson, [Hybrid Constitutional Courts: Foreign Judges on National Constitutional Courts](#) 57 *Colum. J. Transnat'l L.* 283 (2019).

Imagine a famous foreign jurist—say [Richard Goldstone](#) or [Claire L'Heureux-Dubé](#)—appointed to the [U.S. Supreme Court](#), instead of (U.S. citizen) [Samuel Alito](#), when popular criticism of citation of foreign law was at a fever pitch in the U.S. The outcry would have been swift and incendiary. Indeed, [Ruth Bader Ginsburg](#) and [Sandra Day O'Connor](#) received death threats for engaging with foreign law as they did. Yet for at least 21 jurisdictions (nearly all of them member states of the [United Nations](#)), foreign judges sit alongside citizen judges, helping to ensure the vibrancy of (sometimes recently established) democratic institutions, building confidence in the rule of law, and playing specific roles in ensuring judicial impartiality.

In *Hybrid Constitutional Courts: Foreign Judges on National Constitutional Courts*, [Rosalind Dixon](#) and [Vicki Jackson](#) analyze the historical and functional reasons that these arrangements have arisen. With a focus on the democratic legitimacy of the practice, Dixon and Jackson concentrate on three jurisdictions—[Hong Kong](#), [Fiji](#), and [Bosnia-Herzegovina](#)—as they analyze the advantages, disadvantages, and factors that lead to relative success or failure of hybrid court efforts. Dixon and Jackson are attentive to the relevance of their subject, not only for the potential expansion of hybridization, but also for the legitimacy of comparative constitutional engagement generally (the article builds on their [previous work on interpretive outsiders](#)), even when all judges are citizens of a country's constitutional court.

Their contribution is one I like a lot, and it will certainly shape important debates among comparative constitutional law scholars worldwide. For readers of Jotwell's International and Comparative Law section, it is Dixon's and Jackson's analysis of the particulars of judicial selection—the who, how, and why—that may be of most interest. They argue the following are likely to foster more, rather than less, advantageous hybridization: the necessity of participation of foreign judges for legitimacy (real or perceived); extensive judicial experience and reputation; and domestic, rather than foreign, processes leading to selection. With respect to the latter, the relative number and influence of foreign jurists also plays a role.

Their case studies are detailed and illuminating. In Hong Kong, for example, the appointment of foreign judges helped assure commercial confidence in the city through the handover to [People's Republic of China](#) rule, and their continuing presence has “maintain[ed] Hong Kong as a leading center for commercial dispute resolution, with all attendant economic benefits that can bring.” (P. 334.) Foreign judges are selected through appointment by the [Chief Executive of Hong Kong](#) on the recommendation of an independent commission composed of local judges, lawyers, and community members. In Fiji, “there is a need for foreign judges to serve on the country's highest courts,” given that nearly all local lawyers have close links to the country's (divided) political elite. Judges there are appointed by the President, on the recommendation of the Judicial Services Commission, following consultation with the Minister and Sector Standing Committee of the House of Representatives because they oversee matters related to the administration of justice.

In the [Constitutional Courts of Bosnia-Herzegovina](#), by contrast, the President of the [European Court of Human Rights](#) appoints three foreign judges “after consultation with the presidency of B-H,” (P. 338.) Correspondingly, there has been greater internal resistance to the role of foreign judges there, especially by Serbian elites.

Composition matters too. A panel of three Australian judges determined that a 2006 seizure of power in Fiji was unlawful; they—along with the entire judiciary—were [dismissed](#). In Hong Kong, foreign judicial participation is typically limited to one member of a five-member bench. On the Constitutional Courts of Bosnia-Herzegovina, foreign judges comprise three of the nine total members of the court. “All other things being equal,” the authors note, “a mix of local and foreign judges is likely to face lower legitimacy concern than an all-foreign bench.” (P. 341.)

While the article is primarily aimed at structural factors (selection, composition, and foreign influence), Dixon and Jackson are clearly aware that personality and temperament matter. Even foreign judges may be more or less willing to engage the local bar, undertake study, or share aspects of common constitutional traditions. If foreign judges undertake their responsibilities “with wisdom and sensitivity to local facts and circumstances (including socio-political context), they may have a better chance to increase the effectiveness and perceived impartiality of judicial decisions, whereas if they are insensitive to this broader context, or conversely too consistently deferential to local judges’ factual and legal judgments, they may undermine the knowledge and legitimacy benefits of having foreign judges.” (P. 343.) These idiosyncratic traits and behaviors are the most difficult to measure, and they appear to be a promising starting point for Dixon and Jackson’s next study.

Hybrid Constitutional Courts is a valuable contribution, not only for the comparative constitutional law literature, where it is likely to be situated, but also for scholars of constitutional design and judicial behavior. The authors clearly have some of the latter research in mind, and I expect that Dixon and Jackson will use their framework to design more extensive interview-based research on attitudes and behaviors of foreign judges participating in these hybrid roles. I look forward to it.

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