CONSTITUTIONAL CONVERGENCE IN EAST ASIA

This comparative study of the constitutional jurisprudence of three East Asian jurisdictions investigates how the rulings of the Constitutional Court of Taiwan, the Constitutional Court of Korea and the Hong Kong Court of Final Appeal have converged. The unique political contexts of all three jurisdictions have led to strong courts using the structured proportionality doctrine and innovative constitutional remedies to address human rights issues. Hong Kong, Taiwan, and South Korea have the only courts in Asia that regularly use a structured four-stage Proportionality Analysis to invalidate laws, and routinely apply innovative constitutional remedies such as Suspension Orders and Remedial Interpretation to rectify constitutionally flawed legislation. This volume explores how judges in these areas are affected by politics within their different constitutional systems. The latest developments in Asian constitutional law are covered, with detailed analysis of key cases.

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Constitutional Convergence in East Asia

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Comparative constitutional studies has become truly global in the last couple of decades, and there is no region of the world which has escaped scholarly purview. In East Asia, there is now a burgeoning scholarship focused on constitutional developments. This work has significantly enriched our understanding of the region, as well as its importance in the world.

In this insightful, carefully researched, and illuminating volume, two leading young scholars in Asia tackle a new question, namely that of constitutional convergence. Convergence has long fascinated scholars of comparative law and social science, for good reason. Similarity and difference are, of course, at the heart of any comparative enterprise: it is their observation that spurs inquiry into causes and consequences. The first task of the comparativist is descriptive: simply to document similarity and difference, and how they change over time. But the more challenging task is to develop explanation.

Convergence and divergence add temporal and relational dimensions: are the objects of study moving closer together over time, or are they instead moving away from each other? Explaining convergence and divergence is particularly tricky because, to put it simply, things are always in motion. One has to carefully select cases to examine, as well as a time period and scope of the research. Then one must weigh the various forces that cause change over time.

Professors Yap and Lin masterfully use this approach to ask why it is that high courts in some Asian jurisdictions have converged on jurisprudential techniques, while others have not. Their focus is on doctrine and remedy. Using well-selected case studies, they carefully work through the various caselaw to demonstrate a good deal of convergence among Hong Kong, Taiwan and Korea, three liberal jurisdictions in Asia. These are legally dynamic places, which have experienced broader changes in their political and social systems in recent decades. Yap and Lin’s framework is rigorous, and well-grounded in the existing literature, but also pushes it forward. The inclusion of a non-democratic case, Hong Kong, helps us see that the primary driving force is not the political character of the regime. Rather, the key
qualities seem to be a liberal grounding, along with judges who have the capacity and inclination to advance liberal values.

The result is a significant contribution to our understanding. The study enriches the literature on transnational judicial borrowing, which has been a major issue of debate in comparative constitutional studies. Many judges participate in a kind of transnational conversation in which they share approaches, read each other’s cases and wrestle with rationales from other jurisdictions. We have a good deal of normative work debating whether and when judges should look abroad. Some scholars actively advocate convergence as normatively desirable, a position which smacks of high modernism, as if law could be removed from its connection with a broader culture it inhabits. Against this view, some judges reject borrowing entirely, insisting on legally grounded norms that fit in a national context. ‘We must never forget’, Justice Scalia once wrote in a blistering dissent, ‘that it is the Constitution of the United States we are expounding’. Citing the jurisprudence of other countries’ courts was anathema to Scalia, and his position evokes the romanticism of the nation-state finding its expression in national law. Yet Scalia’s position is enduring, and indeed, in an era of rising nationalism and populism, it may be more powerful than ever.

Using the Asian materials, Yap and Lin demonstrate a kind of middle way between these two positions. Convergence can occur organically, without triggering nationalist backlash. The quality of the decision-making in the cases they study seems to be enriched by convergence, but they also point out its spatial and substantive limits. The result is a wonderful study of analytic approaches in an important part of the world.

Above all, this study marks the maturity of constitutional studies in East Asia. These three jurisdictions with powerful courts, regularly engaged in the issues of the day in their societies, are worthy of more attention outside the region. Scholars interested in convergence and borrowing will of course find much food for thought in this book. And the expertly-executed comparative approach will illuminate the jurisdictions they study, even for those who already know one or the other of them well.

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Abbreviations

BORO  Bill of Rights Ordinance
CCP  Chinese Communist Party
CEEO Chief Executive Election Ordinance
CRI Constitutional Research Institute
CSSA  Comprehensive Social Security Assistance Scheme
DJP Democratic Justice Party
DLP Democratic Liberal Party
DPJ Democratic Party of Japan
DPP Democratic Progressive Party
DUP Democratic United Party
ECICO Elections (Corrupt and Illegal Conduct) Ordinance
FC Functional Constituencies
GC Geographical Constituencies
GFCC German Federal Constitutional Court
GNP Grand National Party
HKCA Hong Kong Court of Appeal
HKCF A Hong Kong Court of Final Appeal
HKCFI Hong Kong Court of First Instance
HKSAR Hong Kong Special Administrative Region
ICCPR International Covenant on Civil and Political Rights
JFBA Japan Federation of Bar Association
JORC Judicial Officers Recommendation Commission
JSC Supreme Court of Japan
KCC Constitutional Court of Korea
KMT Kuomintang
LDP Liberal Democratic Party
LegCo Legislative Council
MDP Millennium Democratic Party
MMM Mixed Member Majoritarian
List of Abbreviations

NCNP  National Congress for New Politics
NKP   New Korea Party
NPCSC Standing Committee of the National People’s Congress
NPJ   Non-Permanent Judge
NSL   National Security Law
OWP   One Way Permit
PA    Proportionality Analysis
PFCR  Prohibition on Face Covering Regulation
PFP   People First Party
POO   Public Order Ordinance
PPD   Party for Peace and Democracy
RI    Remedial Interpretation
ROC   Republic of China
SJ    Secretary for Justice
SNTV  Single Non-transferrable Vote
SO    Suspension Order
SP    Structured Proportionality
TCC   Constitutional Court of Taiwan
UFP   United Future Party
UKSC  Supreme Court of the United Kingdom
UNDP  United New Democratic Party
UPP   United Progressive Party