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Introduction

With the advent of globalization and the ubiquity of modern technology, the world has become highly-networked, increasingly interdependent, and a seamless transnational flow of commodities and capital is gradually erasing national boundaries.[1] These technological, economic and political developments have also generated endogenous and exogenous changes in domestic legal orders, such that independent states are slowly but inexorably converging on a swathe of rules, which regularly include policies on trade, labour, the environment and consumer safety standards.[2]

Constitutional ideas are not immune from this globalizing force. Mark Tushnet has projected that constitutional systems all over the world would 'inevitably' converge 'in their structures and in their protections of fundamental human rights'.[3] There are multiple pathways to such constitutional convergence. The changes can arise exogenously, for example when new constitutions are imposed by foreign powers on domestic states,[4] or when countries are coerced into accepting constitutional change in exchange for economic or military aid.[5] Other changes can be

[1] Robert O. Keohane, *Power and Governance in a Partially Globalized World* (Routledge 2002); Manfred Steger, 'Political Ideologies in the Age of Globalization' in Michael Freeden, Lyman Tower Sargent, and Marc Stears (eds), *The Oxford Handbook of Political Ideologies* (Oxford University Press 2013) 214–231.

[2] Daniel W. Drezner, 'Globalization and Policy Convergence' (2001) 3 *International Studies Review* 53, 53; Beth A. Simmons and Zachary Elkins, 'The Globalization of Liberalization: Policy Diffusion in the International Political Economy' (2004) 98 *American Political Science Review* 171, 171–172.

[3] Mark Tushnet, 'The Inevitable Globalization of Constitutional Law' (2009) 49 *Virginia Journal of International Law* 985, 987. See also Cheryl Saunders, 'Transplants in Public Law' in Mark Elliott, Jason N. E. Varubas and Shona Wilson Stark (eds), *The Unity of Public Law?* (Hart 2018); Wen-Chen Chang and Jiunn-Rong Yeh, 'Internationalization of Constitutional Law' in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012).

[4] Richard Albert, Xenophon Contiades and Alkmene Fotiadou (eds), *The Law and Legitimacy of Imposed Constitutions* (Routledge 2018).

[5] Ryan Goodman and Derek Jinks, 'How to Influence States: Socialization and International Human Rights Law' (2004) 54 *Duke Law Journal* 621; Rosalind Dixon and Eric A. Posner, 'The Limits of Constitutional Convergence' (2011) 11 *Chicago Journal of International Law* 399, 414–417; Benedict Goderis and Mila Versteeg, 'Transnational Constitutionalism: A Conceptual Framework' in Denis

endogenous. David Law has contended that global investment and migratory patterns can positively impact human rights insofar as states intentionally 'race to the top' in the protection of property and human rights, so as to attract the best talents and businesses from around the world to relocate to their shores.[6] Even as states converge as they compete for financial and human capital, states also converge as they borrow constitutional materials from one another.[7] While constitutional borrowing does not preclude the possibility of local adaption and adjustment, Sujit Choudhry is right to recast this 'borrowing' phenomenon as a migration of constitutional ideas, as this 'migration' metaphor explicitly welcomes a wider range of uses for comparative materials and encompasses a broader range of relationships that arise between the movement of constitutional ideas and recipient jurisdictions.[8] Specifically, this migration-driven constitutional convergence can result from the political branches of government relying on foreign materials when they entrench[9] or amend[10] a constitution. But convergence may also occur as a result of domestic judges consulting and incorporating comparative legal materials when they interpret their local constitutions.[11]

It is this latter type of migration-driven constitutional convergence that this book will examine closely. Specifically, we will explain and explore how the constitutional jurisprudence in three East Asian democracies – Taiwan, South Korea and Hong Kong – are aligning as a consequence of domestic judicial construction and practice.

Vicki Jackson has argued that courts can converge on both outcomes and judicial methodology.[12] As we will argue in this book, both forms of constitutional convergence are indeed occurring in Taiwan, South Korea and Hong Kong. Convergence, of course, does not mean complete coincidence or uniformity.[13] But it is striking that within Asia, these three jurisdictions have the most liberal courts that have in recent

J. Galligan and Mila Versteeg (eds), *Social and Political Functions of Constitutions* (Cambridge University Press 2013) 106–112.

6 David S. Law, 'Globalization and the Future of Constitutional Rights' (2008) 102 *Northwestern University Law Review* 1277; David S. Law and Mila Versteeg, 'The Evolution and Ideology of Global Constitutionalism' (2011) 99 *California Law Review* 1163, 1175–1176.

7 See D.M. Davis, 'Constitutional Borrowing: The Influence of Legal Culture and Local History in the Recognition of Comparative Influence' (2003) 1 *International Journal of Constitutional Law* 181, 189–194.

8 See Sujit Choudhry, 'Migration as a New Metaphor in Comparative Constitutional Law' in Sujit Choudhry (ed.), *The Migration of Constitutional Ideas* (Cambridge University Press 2009) 21.

9 Gregory Shaffer, Tom Ginsburg and Terence C. Halliday (eds), *Constitution-Making and Transnational Legal Order* (Cambridge University Press 2019).

10 Richard Albert, *Constitutional Amendments: Making, Breaking, and Changing Constitutions* (Oxford University Press 2019).

11 Mark Tushnet, 'The Possibilities of Comparative Constitutional Law' (1999) 108 *Yale Law Journal* 1225; Sujit Choudhry, 'Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation' (1999) 74 *Indiana Law Journal* 819.

12 Vicki Jackson, *Constitutional Engagement in a Transnational Era* (Oxford University Press 2010) 42.

13 Tushnet (n. 3) 987.

years ruled in favour of progressive causes, for example gay marriage,[14] transsexual marriage[15] and abortion rights.[16]

What is equally significant, in our view, is not just the convergence on constitutional outcomes, but also how the courts of final resort in all three jurisdictions have achieved 'methodological convergence'.[17] The Constitutional Court of Taiwan (TCC), the Constitutional Court of Korea (KCC), and the Hong Kong Court of Final Appeal (HKCFA) have converged on the use of Structured Proportionality[18] (SP) in rights-adjudication, and they have also converged on the use of innovative judge-made constitutional remedies,[19] which either delay or expedite the legal consequences that generally follow from the judicial declaration of an unconstitutional practice. It bears emphasizing that the judiciaries in Taiwan, South Korea and Hong Kong are the *only* Asian courts that apply Structured Proportionality regularly and reason through this structured, judge-made doctrinal framework sequentially.[20] Notably, they are also the only courts in Asia that routinely apply both Suspension Orders to delay the invalidation of an unconstitutional practice and Remedial Interpretation to rewrite an otherwise unconstitutional law.[21]

[14] J.Y. Interpretation No. 748 (2017) (Constitutional Court of Taiwan), available at http://cons.judicial.gov.tw/jcc/en-us/jep03/show?expno=748, accessed 8 May 2021.

[15] *W* v. *Registrar of Marriages* [2013] 16 HKCFAR 112 (Hong Kong Court of Final Appeal).

[16] *Case on the Crime of Abortion*, 2017Hun-Ba127 (11 April 2019) (Constitutional Court of Korea).

[17] Jackson (n. 12) 42.

[18] See Chapter 3, this volume.

[19] See Chapter 4, this volume.

[20] In *Navtej Singh Johar* v. *Union of India 2018 Indlaw SC 786* the Supreme Court of India on 6 September 2018 relied on the Proportionality Analysis (PA) to invalidate an archaic statutory provision that criminalized same-sex consensual intercourse. While the Court did not explicitly reference a structured and sequential PA, different judges relied on different sub-limbs of PA for their decisions. A few weeks later, the Supreme Court for the first time in *Justice K. S. Puttaswamy (Retired)* v. *Union of India 2018 Indlaw SC 898* formulated a structured four-stage SP in the following terms: '1. A law interfering with fundamental rights must be in pursuance of a legitimate state aim; 2. The justification for rights-infringing measures that interfere with or limit the exercise of fundamental rights and liberties must be based on the existence of a rational connection between those measures, the situation in fact and the object sought to be achieved; 3. The measures must be necessary to achieve the object and must not infringe rights to an extent greater than is necessary to fulfil the aim; 4. Restrictions must not only serve a legitimate purposes; they must also be necessary to protect them.' In that case, the Indian Supreme Court invalidated various governmental rules, which mandated that every bank account in India had to be linked to the individual's unique digital identification number or the account would be frozen, on the basis that the measures were a disproportionate violation of the person's constitutional right to property. This four-stage SP has not been cited by subsequent panels of the Indian Supreme Court and it is thus unclear whether this case marked the dawn of SP in India or was merely an anomaly.

[21] The Constitutional Court of Indonesia used to apply both constitutional remedies too, but Suspension Orders have fallen out of favour with the Court, as the government routinely dragged its feet on complying with a delayed remedy. The Court now prefers to apply a Remedial Interpretation of an impugned law that provides the assurance of an immediate remedy that comes into effect when the judicial declaration is made. See Fritz Edward Siregar, 'Pragmatism and the Use of Suspension Orders by Indonesia's Constitutional Court' in Po Jen Yap (ed.) *Constitutional Remedies in Asia* (Routledge 2019) 73–74.

REASONS FOR CONVERGENCE

We should stress at the outset that the TCC, the KCC, and the HKCFA are not *deliberately* converging their constitutional jurisprudence with one another. The three courts seldom look to – let alone explicitly cite – one another's precedents. For the TCC and the KCC, German law is the most persuasive foreign legal source;[22] for the HKCFA, Anglo-Canadian constitutional precedents are the overseas caselaw that are most routinely referenced and endorsed.[23] But insofar as Germany and Canada/United Kingdom have converged on Structured Proportionality[24] and these novel constitutional remedies,[25] and so far as the TCC or the KCC adopts German jurisprudence (explicitly or covertly) and the HKCFA endorses Anglo-Canadian precedents, the three Asian jurisdictions are *indirectly* converging on liberal Western constitutional norms. Moreover, the three East Asian courts are converging on these liberal Western constitutional practices by overturning domestic laws and imposing independent constraint on state power.

There are two inter-related institutional reasons for this 'judicialization'[26] of public law norms, which promotes this constitutional convergence within East Asia. First, judicialization in East Asia is fostered by a fragmentation of power within the political branches of government,[27] which hampers the ability of the government of the day to pursue a unified legislative agenda efficaciously. Taiwan and South Korea are classic Asian paradigms of dynamic democracies.[28] In a dynamic democracy, the ruling party's control of state affairs is temporary, as competing parties regularly take turn in office. With the absence of a semi-permanent government, the judiciary enjoys more space to determine policy outcomes, as rival factions in the political branches are less likely to collaborate actively to overrule

[22] David S. Law, 'Judicial Comparativism and Judicial Diplomacy' (2015) 163 *University of Pennsylvania Law Review* 927, 963 and 979.

[23] Ibid. 989.

[24] BVerfGE 7, 377 (1958) (German Federal Constitutional Court); *R* v. *Oakes* [1986] 1 SCR 103 (Supreme Court of Canada); *De Freitas* v. *Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69 (Privy Council).

[25] For examples on Remedial Interpretation of legislation, see *Ghaidan* v. *Godin-Mendoza* [2004] 2 AC 557 (UK House of Lords); *Schachter* v. *Canada* [1992] 2 SCR 679, 93 DLR (4th) 1 (Supreme Court of Canada); BVerfGE 2, 266 (1953) (German Federal Constitutional Court). For examples on Suspension Orders, see BVerfGE 33, 303 (1972) (German Federal Constitutional Court) and *Reference Re Manitoba Language Rights* [1985] 1 S.C.R. 721 (Supreme Court of Canada).

[26] C. Neal Tate and Torbjorn Vallinder (eds), *The Global Expansion of Judicial Power* (New York University Press 1997); Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford University Press 2000) 12–20; Ran Hirschl, *Towards Juristocracy* (Harvard University Press 2004) 211; Doreen Lustig and J. H. H. Weiler, 'Judicial Review in the Contemporary World – Retrospective and Prospective' (2018) 16 *International Journal of Constitutional* Law 315.

[27] C. Neal Tate, 'Why the Expansion of Judicial Power' in C. Neal Tate and Torbjorn Vallinder (eds) *The Global Expansion of Judicial Power* (New York University Press 1995) 30; John Ferejohn, 'Judicializing Politics, Politicizing Law' (2002) 65 *Law & Contemporary Problems* 41, 59.

[28] Po Jen Yap, *Courts and Democracies in Asia* (Cambridge University Press 2017) 94–124.

or punish the courts – especially since constitutional review by an independent branch of government provides a form of insurance for political parties when fortunes turn.[29] Insulated from political backlash, these courts have more opportunities and policy space to independently adopt Western constitutional practices that are inconsistent with the legislative/ regulatory status quo.

While political power is most fragmented in a competitive democracy, this fragmentation can even occur in some authoritarian democracies. Hong Kong is one such example. Notably, the Chief Executive – head of the Hong Kong Special Administrative Region (HKSAR) government – is not drawn from any political party, and there has never been a dominant political party in control of the Legislative Council since the establishment of the HKSAR in 1997. Therefore, the Chief Executive has to regularly rely on the legislative support of multiple political parties, independents and corporate representatives before any legislation in Hong Kong can be passed.[30] While the government can easily whip up support for laws that China considers imperative, pro-Beijing lawmakers are frequently not on the same page vis-à-vis socio-political or economic reforms that are not core concerns of the communist regime.[31] In such circumstances, the local lawmakers would break ranks with the HKSAR government to cater to their own constituents. In essence, the absence of a unitary government in Hong Kong provides the courts with the policy space to determine substantive outcomes in a range of constitutional issues where the pro-Beijing parties themselves are divided, and the transaction costs for overriding the courts are simply too prohibitive.[32]

Second, judicialization is facilitated by an independent judiciary.[33] Judges are empowered and protected when their ex ante and ex post autonomy are secured

[29] Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (Cambridge University Press 2003) 25.

[30] Brian Fong, 'Executive-Legislative Disconnection in Post-colonial Hong Kong' (2014) 1 *China Perspectives* 5, 12.

[31] The now-aborted extradition bill is a prime example. In 2019, the Hong Kong Chief Executive attempted to pass a deeply unpopular law that would have allowed the local government to extradite persons in Hong Kong to Mainland China to face trial for crimes allegedly committed in the latter territory. Notably, this controversial bill was conceived by the Chief Executive alone and was not a directive from China. Beijing-friendly lawmakers in Hong Kong who represented the business sectors had deep reservations about the law as the business sectors had significant financial dealings in the Mainland, and many Beijing-friendly lawmakers even publicly opposed its passage. The bill was eventually suspended after over a million people took to the streets to voice their disapproval, and the bill was eventually formally withdrawn. Tony Cheung and Joyce Ng, 'Extradition Bill Protests: Why Have Hong Kong's Business Elite and Tycoons Abandoned Carrie Lam?' (*South China Morning Post*, 23 July 2019), available at www.scmp.com/news/hong-kong/politics/article/3019441/extradition-bill-protests-why-have-hong-kongs-business, accessed 8 May 2021.

[32] Eric C. Ip, *Hybrid Constitutionalism: The Politics of Constitutional Review in the Chinese Special Administrative Regions* (Cambridge University Press–2019) 175–192.

[33] 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) 831–858.

from a singular dominant external actor.[34] Where politicians have a significant role in the judicial appointment process, they will always seek to elevate judicial candidates who reflect their political views.[35] But in a dynamic democracy where political power routinely rotates between rivalling parties, different legislative factions will have their turn in picking judges, which will lead to ideological diversity on the bench. And the judges elevated to their courts of final resort will not be beholden or accountable to one political party. This is so in Taiwan and South Korea. But ex ante judicial autonomy can also be established in authoritarian democracies where politicians do not have a *de facto* major role in the appointment of judges. In Hong Kong, judges are in substance selected[36] by the nine-member Judicial Officers Recommendation Commission (JORC) chaired by the Chief Justice, and the JORC primarily comprises judges and lawyers. And it is the Chief Justice – and not politicians – who shapes the membership of his HKCFA and even the specific panels that hear the appeals. Furthermore, in Taiwan, South Korea and Hong Kong, ex post judicial autonomy is also secured insofar as the judges on their courts of final resort are protected from arbitrary removal while they hold office.[37] It is important to note that none of the top judges in any of the three jurisdictions has ever been impeached, nor has any top judge been compelled to resign. Ex ante and ex post judicial autonomy are interdependent and conjunctively enhance judicial power.

Aside from these institutional variables that facilitate the rise of a strong judiciary, for a liberal court to be established, liberal judges must have the opportunity to get appointed, and they must *desire* liberal outcomes and *choose* to pursue them.[38] Judges cherish their reputation.[39] But in autocratic regimes, courts can only please their primary audience – the ruling government – for their institutional survival

[34] Daniel M. Brinks and Abby Blass, 'Rethinking Judicial Empowerment: The New Foundations of Constitutional Justice' (2017) 15 *International Journal of Constitutional Law* 296, 299. See also Mark Tushnet, 'Preserving Judicial Independence in Dominant Party States' (2015) 60 *New York School Law Review* 107, 111–114.

[35] Robert Dahl, 'Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker' (1957) 6 *Journal of Public Law* 279; Jeffrey A. Segal and Harold J. Spaeth, *The Supreme Court and the Attitudinal Model Revisited* (Cambridge University Press 2002); Benjamin Alarie and Andrew J. Green, *Commitment and Cooperation in High Courts: A Cross Country Examination of Institutional Constraints on Judges* (Oxford University Press 2017) 83.

[36] Formally, all judges in Hong Kong are appointed by the Chief Executive of the HKSAR on the recommendation of the JORC. Judicial appointments to the HKCFA, in addition, must be endorsed by the Legislative Council. See Articles 88 and 90 of the Hong Kong Basic Law. But, in practice, the Chief Executive has appointed every JORC recommendation and the Legislative Council has endorsed every HKCFA appointment. See Chapter 2 for a full discussion.

[37] Article 81 of the Constitution of the Republic of China (Taiwan); Article 8 of the Constitutional Court Act (Korea); Article 89 of the Hong Kong Basic Law.

[38] Lee Epstein and Jack Knight, *The Choices Justices Make* (CQ Press 1998) 22–36.

[39] Nuno Garoupa and Tom Ginsburg, *Judicial Reputation: A Comparative Theory* (University of Chicago Press, 2015).

hinges on this.[40] On the other hand, where the government is divided, and judges are protected from political reprisal, they can 'engage in self presentation to other audiences whose esteem is important to them',[41] for example the public, lawyers, academia, the international community and luminary judges from other leading courts of final resort. Hong Kong, Taiwan and South Korea have the most liberal courts in Asia precisely because of the political fragmentation in their constitutional systems, and the insulation of their judges from the control of one dominant party in government, which allow for independent liberal judges to be regularly appointed to the highest court. And these liberal judges in turn can hand down liberal rulings when they have a majority. Such independent liberal judges in East Asia can therefore forge a 'constitutional identity'[42] for their jurisdiction that deviates from the status quo imposed by their governments.[43] For Hong Kong, liberal-minded judges would turn to human rights standards established in England and Canada to advance their progressive causes, while the Korean and Taiwanese Constitutional Courts would seek assistance from German law. The judicial endorsement of foreign precedents from 'high prestige courts and countries'[44] that have deep historical legal ties[45] to their jurisdictions in fact bolsters the legitimacy of the Courts' use of these decisions. In this way, the judges can parry off insinuations that they are merely foisting their own personal vision upon society, but are instead converging their Asian practices with the established norms of exalted, modern states in the West that their own legal systems are modelled after.

[40] Tamir Moustafa and Tom Ginsburg, 'Introduction: The Functions of Courts in Authoritarian Politics' in Tom Ginsburg and Tamir Moustafa (eds), *Rule by Law* (Cambridge University Press 2008) 14–21.

[41] Lawrence Baum, *Judges and Their Audiences: A Perspective on Judicial Behaviour* (Princeton University Press 2008) 4.

[42] Gary Jeffrey Jacobsohn, *Constitutional Identity* (Harvard University Press 2010); See also Ran Hirschl, *Comparative Law Matters: The Renaissance of Comparative Constitutional Law* (Oxford University Press 2014) 41–43.

[43] Lustig and Weiler (n. 26) 365–369.

[44] Law (n. 22) 1000. See also Cheryl Saunders, 'Judicial Engagement' in Rosalind Dixon and Tom Ginsburg (eds), *Comparative Constitutional Law in Asia* (Edward Elgar 2012) 80, 87.

[45] In Taiwan, core legislation such as the Civil Code and the Criminal Code was based on the German equivalent when the Republic of China was established in 1911 and German law remains influential in Taiwan today. See Chang-fa Lo, 'Taiwan: External Influences mixed with Traditional Elements to Form Its Unique Legal System' in E. Ann Black and Gary F. Bell (eds), *Law and Legal Institutions of Asia* (Cambridge University Press 2011). Similarly, when the Republic of Korea was founded in 1948, its Civil Code and Criminal Code were modelled after the German equivalents and the current Korean Constitutional Court is also modelled after the German Federal Constitutional Court. See Chongko Choi, 'On the Reception of Western Law in Korea' (1981) 9 *Korean Journal of Comparative Law* 141, 164–165; Paul Kichyun Ryu, 'The New Korean Criminal Code of October 3, 1953. An Analysis of Ideologies Embedded in It' (1957) 48 *Journal of Criminal Law, Criminology, and Police Science* 275. China only regained sovereignty over Hong Kong from the British in 1997 and the operative Hong Kong Basic Law (Articles 8 and 84) expressly authorizes the continued application of the common law within the territory.

CONVERGENCE ON STRUCTURED PROPORTIONALITY

In the aftermath of the Second World War, a 'post-war paradigm'[46] of domestic constitutional law emerged, with legislatures around the world adopting a domestic charter of rights and empowering their courts to independently determine whether state limitations on these rights are demonstrably justified, and to invalidate those laws that are not.[47] The Proportionality Analysis (PA) – in its various forms and configurations – developed as the umbrella term used to reference the different ways judges weight the relative importance of state interests and evaluate the extent to which this conflict can be minimized by a more careful choice of legislative means that is less injurious to the individual.[48]

While PA may have originated from Germany,[49] it has not remained a European product. PA has been locally transplanted across Anglophone nations (for example, Canada and New Zealand), mixed legal systems that are rooted in the common law (for example, Israel and South Africa) and even parts of Latin America and Asia.[50] In view of PA's ubiquity, it is now widely viewed as a 'general principle of constitutional governance',[51] an embodiment of 'generic constitutional law'[52] and even celebrated as the 'ultimate rule of law'.[53]

Strong courts around the world generally apply a more structured version of PA.[54] Typically, this Structured Proportionality (SP) has four cumulative steps. When applying SP, the courts would ensure that (i) the state is pursuing a legitimate aim; (ii) the governmental measure undertaken is rationally connected to the stated policy objectives; (iii) the right-derogation is no more than necessary to achieve those stated goals and (iv) the regulatory measure is proportionate *stricto sensu*; that is, there is a fair balance struck between the rights of the individual and the interests

[46] Lorraine E. Weinrib, 'The Post-War Paradigm and American Exceptionalism' in Sujit Choudhry (ed.), *The Migration of Constitutional Ideas* (Cambridge University Press 2006) 84.

[47] See Alec Stone Sweet and Jud Mathews, 'Proportionality Balancing and Global Constitutionalism' (2008) 47 *Columbia Journal of Transnational Law* 72.

[48] David S. Law, 'Generic Constitutional Law' (2005) 89 *Minnesota Law Review* 652, 702; Alec Stone Sweet and Jud Mathews, *Proportionality Balancing and Constitutional Governance* (Oxford University Press 2019).

[49] Dieter Grimm, 'Proportionality in Canadian and German Constitutional Jurisprudence' (2007) 57 *University of Toronto Law Journal* 383, 384–385; Andrej Lang, 'Proportionality Analysis by the German Federal Constitutional Court' in Mordechai Kremnitzer, Talya Steiner and Andrej Lang (eds), *Proportionality in Action: Comparative and Empirical Perspectives on the Judicial Practice* (Cambridge University Press 2020) 22, 23.

[50] Po Jen Yap (ed), *Proportionality in Asia* (Cambridge University Press 2020) 3.

[51] Stone Sweet and Mathews (n. 47) 194.

[52] Law (n. 48).

[53] David Beatty, *The Ultimate Rule of Law* (Oxford University Press 2005).

[54] The Supreme Court of the United States of America and the High Court of Australia are notable courts that do not apply SP. See Vicki Jackson, 'Constitutional Law in an Age of Proportionality' (2015) 124 *Yale Law Journal* 3094; Jeremy Kirk, 'Constitutional Guarantees, Characterization and the Concept of Proportionality' (1997) 21 *Melbourne University Law Review* 1, 63.

of the community such that the consequences of the law are not unacceptably harsh on the individual.

Within Asia, Taiwan, South Korea and Hong Kong are exceptional insofar as their courts are the *only* ones that have converged on the use of SP. Their judges reason through the four SP stages sequentially and harness SP to overturn state action regularly.

Notably, SP is a judicial construct in all three East Asian democracies. The Hong Kong Basic Law does not even include a general limitation clause for rights. While the Constitutions of Taiwan[55] and South Korea[56] both have one, many of the doctrinal SP steps their Constitutional Courts apply are not found in these clauses, and the relevant clauses also do not give any guidance on the standard of review judges should adopt, let alone authorize judges to *re-balance* legislative policy determinations. Notably, in Hong Kong, when the four-stage SP was first endorsed, the HKCFA not only relied on caselaw from Canada and the United Kingdom, it also referenced the writings of Dieter Grimm and Aharon Barak.[57] The KCC has also consulted German precedent when it applied the balancing test of SP.[58]

In its early permutations, PA in each jurisdiction was unstructured and was deployed only to uphold state action.[59] But as power fragmented across the political branches of government, and/or courts gained confidence over time, the judges inserted more structure into PA, gravitated toward a 'highly intrusive standard of review',[60] and began using SP to void legislation. The fragmentation of power within the political branches of government and the protection of courts from punishment is central to the rise of SP.

For all three courts, Stage 1 of SP – the legitimacy test – is rarely deployed to void legislation. But where it is, the laws void under Stage 1 usually pertain to

[55] Article 23 of the Constitution of the Republic of China reads: 'All the freedoms and rights enumerated . . . shall not be restricted by law except such as may be necessary to prevent infringement upon the freedoms of other persons, to avert an imminent crisis, to maintain social order or to advance public welfare.'

[56] Article 37(2) of the Constitution of the Republic of Korea reads: 'The freedoms and rights of citizens may be restricted by Act only when necessary for national security, the maintenance of law and order or for public welfare. Even when such restriction is imposed, no essential aspect of the freedom or right shall be violated.'

[57] *Hysan Development* v. *Town Planning Board* [2016] 19 HKCFAR 372 (Hong Kong Court of Final Appeal).

[58] *Cumulative Taxation of Income from Assets of Spouses Case*, 2001Hun-Ba82 (29 August 2002) (Constitutional Court of Korea). See also Yoon Jin Shin, 'Proportionality in South Korea' in Po Jen Yap (ed), *Proportionality in Asia* (Cambridge University Press 2020) 83 (arguing that SP in South Korea 'was imported from Germany').

[59] J.Y. Interpretation No. 414 (1996) (Constitutional Court of Taiwan), available at http://cons.judicial.gov.tw/jcc/en-us/jep03/show?expno=414, accessed 8 May 2021; *Case on Constitutional Complaint for Judicial Scrivener Law*, 88Hun-Ma1 (17 March 1989) (Constitutional Court of Korea); *HKSAR* v. *Ng Kung Siu* [1999] 2 HKCFAR 442 (Hong Kong Court of Final Appeal).

[60] Stone Sweet and Mathews (n. 47) 4.

anachronistic legislation that is patriarchal[61] or heterosexist.[62] Therefore, Stage 1 of SP provides judges in all three courts with the opportunity to reshape the jurisdiction's constitutional culture, pursue progressive causes and make society more inclusive. Stage 2 of SP requires the governmental measure to have a 'rational connection'[63] to the legislative aims or for the means chosen to be 'appropriate'.[64] Usually a low threshold for the government to overcome, in exceptional circumstances, Stage 2 has extraordinary bite. Hong Kong rules limiting social welfare payments to its Permanent Residents,[65] Taiwan legislation imposing interest payments on penalty surcharges for unpaid taxes,[66] and South Korean anti-trust regulations on news conglomerates[67] were all void for failing Stage 2, even though these invalidated rules all concern socio-economic policies that traditionally attract judicial deference. Furthermore, Stage 2 has been deployed in pursuit of progressive human rights causes opposed by their governments: ending indefinite detention of undocumented migrants in Taiwan,[68] decriminalizing adultery in South Korea,[69] and granting expatriates in same-sex marriages the same right to spousal visas as heterosexual married couples in Hong Kong.[70] The Courts most frequently use Stage 3 of SP – the necessity test – to overturn the legislative status quo, as it allows the judiciary to point to reasonable but unexplored policy alternatives that would have been just as effective. Recently, the KCC deployed Stage 3 to invalidate the virtually blanket ban on abortions in South Korea.[71] With this progressive ruling, South Korean women, vis-à-vis their counterparts in Taiwan[72] and Hong Kong,[73] will be able to exercise a comparable right to their bodily autonomy. Stage 4 of SP requires courts to openly re-calibrate the legislative balance struck by the government, and all three courts have sparingly invalidated laws on this ground, but it is

61 *Case on Same Surname-Same Origin Marriage Ban*, 95Hun-Ka6 (16 July 1997) (Constitutional Court of Korea); *Case on House Hold Head System*, 2001Hun-Ka9 (3 February 2005) (Constitutional Court of Korea); *Case on Sexual Intercourse under Pretense of Marriage Case*, 2008Hun-Ba58, 2009Hun-Ba191 (consolidated) (26 November 2009) (Constitutional Court of Korea).

62 *Secretary for Justice* v. *Yau Yuk Lung* [2007] 10 HKCFAR 335 (Hong Kong Court of Final Appeal).

63 *Hysan Development* v. *Town Planning Board* [2016] 19 HKCFAR 372 (Hong Kong Court of Final Appeal). J.Y. Interpretation No. 746 (Taiwan) (2017) (Constitutional Court of Taiwan), available at http://cons.judicial.gov.tw/jcc/en-us/jep03/show?expno=746, accessed 8 May 2021.

64 *Case on School Site Acquisition Charge*, 2003Hun-Ka20 (31 March 2005) (Constitutional Court of Korea).

65 *Kong Yunming* v. *Director of Social Welfare* [2013] 16 HKCFAR 950 (Hong Kong Court of Final Appeal).

66 J.Y. Interpretation No. 746 (Taiwan) (2017) (Constitutional Court of Taiwan), available at http://cons.judicial.gov.tw/jcc/en-us/jep03/show?expno=746, accessed 8 May 2021.

67 *The Newspaper Act Case*, 2005Hun-Ma165 (26 July 2006) (Constitutional Court of Korea).

68 J.Y. Interpretation No. 710 (Taiwan) (2013) (Constitutional Court of Taiwan), at [3], available at http://cons.judicial.gov.tw/jcc/en-us/jep03/show?expno=710, accessed 8 May 2021.

69 *Adultery Case*, 2009Hun-Ba17 (26 February 2015) (Constitutional Court of Korea).

70 *QT* v. *Director of Immigration* [2018] HKCFA 28 (Hong Kong Court of Final Appeal).

71 *Case on the Crime of Abortion*, 2017Hun-Ba127 (11 April 2019) (Constitutional Court of Korea).

72 Paragraph 1, Article 9 of the Genetic Health Act (Taiwan).

73 Section 47A of the Offences against the Person Ordinance (Cap 212).