

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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Foreword

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
HKCFA	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

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