Modernization as a Judicial Function in East Asia

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I. Foreword

Although the judiciary is dubbed the least dangerous branch,[1] scholars has already pointed out that the traditional prototype of court is not always

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1 *See* The Federalist No. 78 (Alexander Hamilton).

Online: http://publication.iias.sinica.edu.tw/21518012.pdf.

realistic and adjudication is by no means the only judicial function.[2] In fact, courts nowadays exercise not only the power of judicial review, but also a host of ancillary powers, such as the power to supervise elections, to impeach presidents, or to dissolve political parties.[3] Wielding so many powers, courts not only adjudicate, but also shoulder other functions, such as regime enforcement, social control, coordination, upholding democracy, reducing agency cost, and facilitating economic growth and foreign investment.[4] This is true even in authoritarian regimes where the judiciary is seen as impotent more often than not.[5] It is fair to say that the judiciary has become increasingly influential in an era of global judicialization of politics.[6]

Yet the list of judicial functions mentioned above is neither exhaustive nor universal. On the one hand, it is reasonable to assume that courts around the globe actually play distinct functions. Given the historical, economic, and cultural variances, there is no reason to believe that courts in nascent democracies play an identical role as their counterparts in fully-fledged ones, or that courts in developed states value economic growth as much as courts in developing countries. In a word, each court has its own agenda. On the other

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2 *See* MARTIN M. SHAPIRO, COURTS: A COMPARATIVE AND POLITICAL ANALYSIS 1-36 (1981).

3 *See* NUNO GAROUPA & TOM GINSBURG, JUDICIAL REPUTATION: A COMPARATIVE THEORY 75-97 (2015); Tom Ginsburg, *Beyond Judicial Review: Ancillary Powers of Constitutional Courts*, *in* INSTITUTIONS & PUBLIC LAW: COMPARATIVE APPROACHES 225, 230-39 (Tom Ginsburg & Robert A. Kagan eds., 2005); SAMUEL ISSACHAROFF, FRAGILE DEMOCRACIES: CONTESTED POWER IN THE ERA OF CONSTITUTIONAL COURTS 199-212 (2015).

4 KEITH E. WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY 105-60 (2007).

5 *See* Tamir Moustafa & Tom Ginsburg, *Introduction: The Functions of Courts in Authoritarian Politics*, *in* RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES 1, 4-11 (Tom Ginsburg & Tamir Moustafa eds., 2008); Kevin Y. L. Tan, *As Efficient as the Best Business: Singapore's Judicial System*, *in* ASIAN COURTS IN CONTEXT 228, 256-59 (Jiunn-Rong Yeh & Wen-Chen Chang eds., 2014).

6 *See generally* RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM (2004); C NEAL TATE & TORBJORN VALLINDER EDS , THE GLOBAL EXPANSION OF JUDICIAL POWER (1995).

hand, the judiciary may play disparate functions at different times even in the same country. This is particularly evident in countries that have experienced dramatic social and economic change in the past several decades, such as China.[7] All these suggest that judicial functions vary in divergent contexts.

From the perspective of East Asian jurisdictions, this paper suggests that modernization is one vital function of the judiciary in this region that had historically been plagued with colonialism and imperialism.[8] Before modernization, people here lived a traditional life in which customs or customary laws that were regarded from the Western viewpoints as "backward" or "brutal" govern. This led to a constellation of unequal treatments imposed by advanced countries, and, worse still, colonization. Facing this catastrophe, many East Asian countries chose to adopt Western legal systems in exchange for the repeal of unequal treaties or extraterritorial jurisdictions. Nonetheless, law does not speak for itself. During the process of decolonization and industrialization, the judiciary plays a critical role in stimulating, mirroring, and consolidating the achievement of modernization. And this function remains even to date.[9] The case of Taiwan vividly demonstrates the role of the judiciary during the process of modernization. Historically, Taiwan has been colonized by various powers, such as the Netherlands and Japan. At that time,

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7 *See* Chien-Chih Lin, *Constitutions and courts in Chinese authoritarian regimes: China and pre-democratic Taiwan in comparison*, 14 INT'L J. CONST. L. 351, 351-77 (2016).

8 For the purpose of this paper, legal modernization refers to legal Westernization that is rooted in enlightenment, rationalism, individualism, and so forth. *See* TAY-SHEN WANG, THE PROCESS OF LEGAL MODERNIZATION IN TAIWAN: FROM "THE EXTENSION OF MAINLAND" TO "INDEPENDENT RECEPTION" 9-10 (2015). The term "Westernization" is, of course, contentious and imprecise to some extent. Holning Lau, *The Language of Westernization in Legal Commentary*, 61 AM. J. COMP. L. 507 (2013).

9 To be sure, the debate on law and development, and its applicability in the context of Northeastern Asia is not beyond doubt. John K.M. Ohnesorge, *Law and Development Orthodoxies and the Northeast Asian Experience*, *in* LAW AND DEVELOPMENT IN ASIA 9, 9-25 (Gerald Paul McAlinn & Caslav Pejovic eds., 2012). Nonetheless, the idea of modernization involves not only legal and economic development, but also social and cultural change.

Taiwan was seen as either a trading post or an agricultural base for the interests of the colonizers. After the defeat of the Chinese Civil War, the Nationalist Party (KMT) fled to Taiwan, which has modernized economically,[10] politically, and constitutionally in the next several decades.[11] During the process, the Constitutional Court has used its ruling and reasoning to help modernize the former agricultural authoritarian regime imbued with Confucianism.

More importantly, modernization as a judicial function is not peculiar to Taiwan, but rather a common characteristic of the judiciary in East Asia. After World War II, many former colonies have declared independence and transformed from agricultural societies to industrial states. This change is usually attributed to the political branches, but the role of the judiciary should not be ignored. One former Justice of Japanese Supreme Court told that that the Supreme Court has a responsibility to adapt Japan to changing times, when the political branches fail to do so.[12] Indeed, due to the history of unequal treaties that had been imposed upon Japan and other Asian countries since the 19th century, many Asian courts have used their decisions to both convince foreigners that domestic legal system is not barbaric.[13] One telling example may be the *Otsu* incident of 1891 in which a Japanese policeman attempted to murder a Russian prince.[14] To further analyze this judicial function that has not received enough scholarly attention, the rest of this paper proceeds as follows: section II articulates the function of modernization from the three dimensions. In Section III, this paper suggests that this understanding of

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10 *See* Alice H. Amsden, *Taiwan's Economic History: A Case of Etatisme and a Challenge to Dependency Theory*, 5 MOD. CHINA 341 (1979).

11 *See* JIUNN-RONG YEH, THE CONSTITUTION OF TAIWAN: A CONTEXTUAL ANALYSIS (2016).

12 *See* Koji Miyakawa, *Inside the Supreme Court of Japan — From the Perspective of a Former Justice*, 15 ASIAN-PAC. L. & POL'Y J. 196, 208 (Mark A. Levin & Megumi Honami Lachapelle trans., 2014).

13 *See* Tom Ginsburg, *Studying Japanese Law Because It's There*, 58 AM. J. COMP. L. 15, 19-21 (2010); Moustafa & Ginsburg, *supra* note 5, at 6.

14 *See* Lynn Berat, *The Role of Conciliation in the Japanese Legal System*, 8 AM. U. J. INT'L L. REV. 125, 143 (1992).

modernization as a judicial function may shed new light on some old issues, such as living constitutionalism, constitutional engagement, and the rise and fall of judicial power. Section IV is the concluding remark.

II. Modernization as a Judicial Function

Conventional wisdom has long held that, with neither the purse nor the sword, the judiciary is unlikely to bring about social change unilaterally.[15] Cooperating with its coordinate branches, however, it may still facilitate if not precipitate modernization. Specifically, the function of modernization is most evident in three domains: 1) the establishment of special courts, including but not limited to constitutional courts and commercial courts; 2) the ruling of judicial decisions, in which the judiciary often seeks to strike a balance between law and custom; and 3) judicial borrowing, a process in which domestic judges engage with either foreign or international precedents and laws.

A. Establishment of Special Courts

Institutionally speaking, scholars in East Asia have pointed out that "[m]odernization in Asia has involved — to varying degrees — the adoption of Western legal and judicial systems."[16] To be sure, not every new court is created for the same reason, but the emergence of some special tribunals, such as constitutional courts and economic courts, usually demonstrate a country's decisiveness to transform itself from a primal state to a modernized country. This trend is increasingly clear with the spread of globalization, which contributes to the convergence of not only economic regulations but also constitutional frameworks.

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15 *See* GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (2d ed. 2008).

16 Jiunn-Rong Yeh & Wen-Chen Chang, *Introduction: Asian Courts in Context: Tradition, Transition and Globalization*, *in* ASIAN COURTS IN CONTEXT 1, 52 (Jiunn-Rong Yeh & Wen-Chen Chang eds., 2014).

1. Constitutional Courts

To begin with, democratization usually goes hand in hand with judicial reform around the globe. Many nascent democracies have established constitutional courts or human rights tribunals in order to demonstrate their willingness to break up with the past in two senses. First, these countries usually have horrible human rights records during the authoritarian periods in which innocent people are brutally silenced, oppressed, and slaughtered. After political liberation, new governments will often rewrite new constitutions in order to protect fundamental rights and seek justice. To achieve these goals, they will also establish constitutional tribunals as new guardians of the constitutions to convince both domestic supporters and foreign observers that the constitutions are not merely parchment barriers.[17] In fact, scholars have argued that constitutional courts are created in the period of transformation to signal and facilitate democratic transition.[18] Second, these constitutional tribunals are usually established outside the traditional judicial hierarchy since old courts are either impotent or untrustworthy to deal with politically sensitive issues, such as restorative justice. What is worse, old courts are claws of the dictators in the past more often than not.[19] Establishing a brand new constitutional court helps to rebuild people's confidence toward the judiciary and the governments. In addition to structural renovation, politicians usually appoint judges of constitutional courts through a variety of political mechanisms. This may guarantee that judges of constitutional tribunals embrace similar ideologies and visions with them.

The Constitutional Court of Korea is a good example here. Before 1987, it was either the Supreme Court or the Constitutional Committee that exercised

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17 *See* Andrew Harding et al., *Constitutional Courts: Forms, Functions and Practice in Comparative Perspective*, *in* CONSTITUTIONAL COURTS: A COMPARATIVE STUDY 1, 5 (Andrew Harding & Peter Leyland eds., 2009).

18 *See* Ruti Teitel, *Transitional Jurisprudence: The Role of Law in Political Transformation*, 106 YALE L.J. 2009, 2016, 2031-32 (2009).

19 Harding, *supra* note 17, at 13.

the power of judicial review in South Korea.[20] Both institutions, unsurprisingly, did not function actively in this regard. After democratization, therefore, Korean politicians establish the Constitutional Court of Korea to adjudicate human rights cases, and its performance has been highly acclaimed since inception. Another example is the creation of the Indonesian Ad Hoc Human Rights Court, which "is a direct consequence of events in East Timor in 1999."[21] From a global perspective, this happens not only in Asian countries; many Central and Eastern European countries have created constitutional courts and judicial review with an eye to "Westernize" their judicial system.[22] All these instances indicate that founding a constitutional court seems to be a common strategy to rebuild and modernize a country from the authoritarian ashes.

2. Economic Courts

As mentioned above, one critical function of the judiciary is to provide credible commitments in economic sphere. During the process of modernization, many countries face the challenge of economic transformation in addition to political liberation. Although not without controversy, law is seen as an instrument to stimulate development by facilitating innovation and private decision-making.[23] Moreover, regional and international legal frameworks have become increasingly influential in shaping a country's domestic legal order, notwithstanding some pushback.[24] Simply adopting foreign or

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20 TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES 210-13 (2003).

21 *See* Mark Cammack, *The Indonesian Human Rights Court*, *in* NEW COURTS IN ASIA 178, 179-82 (Andrew Harding & Penelope Nicholson eds., 2010).

22 *See* WOJCIECH SADURSKI, RIGHTS BEFORE COURTS: A STUDY OF CONSTITUTIONAL COURTS IN POSTCOMMUNIST STATES OF CENTRAL AND EASTERN EUROPE, at xi-xii (2d ed. 2014).

23 *See* David M. Trubek, *Introduction: Law and Development in the Twenty-first Century*, *in* LAW AND DEVELOPMENT IN ASIA 1, 2-3 (Gerald Paul McAlinn & Caslav Pejovic eds., 2012).

24 *See* John Gillespie & Randall Peerenboom, *Pushing Back on Globalization: An Introduction to Regulation in Aisa*, *in* REGULATION IN ASIA: PUSHING BACK ON GLOBALIZATION 1, 8-10 (John Gillespie & Randall Peerenboom eds., 2009).

international rules is not enough to guarantee economic growth, however. Some international organizations will require member states to establish judicial or quasi-judicial institutions. The trend of globalization and the need to participate in World Trade Organization (or its predecessor GATT) prompt many countries to implement judicial reforms. As a corollary, economic courts, including commercial courts and intellectual property courts are founded as part of the reform project to precipitate modernization by enhancing judicial efficiency and capability in the domain of economic affairs.

China is a lucid example of how a country modernize itself by establishing new courts. Since the reform and opening policy, China has made a great stride in economic growth. To comply with the Agreement on Trade-Related Aspects of Intellectual Property Rights, China has established three intellectual property courts in Beijing, Shanghai, and Guangzhou, making its promise to protect intellectual property and combat piracy more credible.[25] Similar development takes place in Thailand, where the Central Intellectual Property and International Trade Court is established based on exactly the same reason.[26] Furthermore, the 1998 Asian financial crisis further gave birth to some special courts in Asian countries under the pressure of International Monetary Fund (IMF) as an exchange for monetary support. Indonesian Commercial Court was created under the pressure of the IMF to solve the insolvency problems.[27] All three examples clearly demonstrate the impact of modernization and internationalization upon the founding of a new court.

Note that the courts mentioned above do not exhaust all the specialized

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25 *See* Connie Carter, *Specialized Intellectual Property Courts in the People's Republic of China: Myth or Reality?*, *in* NEW COURTS IN ASIA 101, 101-02 (Andrew Harding & Penelope Nicholson eds., 2010).

26 *See* Pawat Satayanurug & Nattaporn Nakornin, *Courts in Thailand: Progressive Development as the Country's Pillar of Justice*, *in* ASIAN COURTS IN CONTEXT 407, 419 (Jiunn-Rong Yeh & Wen-Chen Chang eds., 2014).

27 *See* David K. Linnan, *'Reading the Tea Leaves' in the Indonesian Commercial Court: A Cautionary Tale, but for Whom?*, *in* NEW COURTS IN ASIA 56, 56 (Andrew Harding & Penelope Nicholson eds., 2010).

courts founded in response to the need of modernization. The concept of modernization includes not only political liberation and economic development, but also societal transformation of customs and traditions. During the process of modernization, many old ideologies, such as patriarchy and patrilineage, have faced serious challenges. As a result, many countries have set up family or juvenile courts to tackle these issues. Moreover, economic development itself creates some new problems, such as environmental pollution, that need to be addressed. Bangladesh, for example, has established environmental courts to try environmental offenses.[28] More importantly, the founding of new courts is not the only dimension of modernization as a judicial function. Even for those countries that choose to tackle these issues in traditional civil or administrative courts, the contents of judicial decisions sometimes contribute to the modernization of a country more directly and clearly.

B. Contents of Judicial Decisions

In terms of the relationship between law and society, some suggest that law is "determined and shaped by current mores and opinions of society" and can "do nothing except codify custom."[29] Others argue that law is an instrument for social engineering and can induce social change.[30] Despite the two extreme views, many scholars agree that law is neither insulated from nor a perfect mirror of the society, but lies somewhere between the two poles.[31] It follows that "legal institutions are responsive to social change; moreover, they have a definite role… as instruments that set off, monitor, or otherwise regulate

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28 *See* Ridwanul Hoque, *Courts and the Adjudication System in Bangladesh: In Quest of Viable Reforms*, *in* ASIAN COURTS IN CONTEXT 447, 458 (Jiunn-Rong Yeh & Wen-Chen Chang eds., 2014).

29 STEVEN VAGO, LAW AND SOCIETY 310 (10th ed. 2012).

30 *Id*.

31 Brian Z. Tamanaha, *Battle Between Law and Society in Micronesia*, *in* SOCIAL AND POLITICAL FOUNDATIONS OF CONSTITUTIONS 584, 584-85 (Denis J. Galligan & Mila Versteeg eds., 2013).

the fact or pace of social change."[32]

Nevertheless, it is certainly possible that law will lag behind social change. Some archaic state laws or customary laws[33] persist during the process of modernization, and the legislature may not be able to respond in time. When this occurs, courts may fill the gap between law and society through their decisions. Namely, the judiciary fulfills the function of modernization by keeping the law in sync with society, a mission that is thornier in East Asia since "nations within the civil law tradition still commonly recognize a [] source of law, called custom."[34] Despite the difficulty, this function is extraordinarily crucial in many East Asian countries where Confucianism has permeated into every corner of the society, and many laws are reflective of this ancient ideology.[35] Generally speaking, Confucianism is a "system of social and political ethics that Confucius, Mencius, and their followers advocated to build a moral community… in which people can live a happy and worthy life."[36] To live a happy life, however, Confucianism stresses the principles of graded love, hierarchism, and filial piety.[37] Hence, it "is often viewed as running counter to the liberal principle of treating people equally and impartially."[38]

More fundamentally, the existence of judicial review itself is anti-

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32 Lawrence M. Friedman, *Legal Culture and Social Development*, 4 L. & SOC'Y REV. 29, 29 (1969).

33 Note that this paper does not distinguish custom from customary law for simplicity's sake.

34 JOHN H. MERRYMAN & ROGELIO PÉREZ-PERDOMO, THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF EUROPE AND LATIN AMERICA 24 (3d ed. 2007).

35 Among Asian countries, the influence of Confucianism over legal system may be most evident in South Korea and Taiwan, in which the constitutionalism are dubbed Confucian constitutionalism. Tom Ginsburg, *Confucian Constitutionalism? The Emergence of Constitutional Review in Korea and Taiwan*, 27 L. & SOC. INQUIRY 763 (2002).

36 DOH CHULL SHIN, CONFUCIANISM AND DEMOCRATIZATION IN EAST ASIA 74 (2011).

37 *Id*. at 180-82; WEIMING TU ET AL. EDS., THE CONFUCIAN WORLD OBSERVED: A CONTEMPORARY DISCUSSION OF CONFUCIAN HUMANISM IN EAST ASIA 55 (1992).

38 SHIN, *supra* note 36, at 183.

Confucian, or broadly speaking, unconventional in East Asian countries.[39] As a corollary, courts in these places frequently encounter the clash between constitutional mandate that demands equal protection and customary rules that can be traced back to the immemorial past. On the one hand, many customs are inconsistent with modern constitutionalism, and social activists require courts to demonstrate their willingness and capability to modernize the society by striking down impugned laws that are too archaic and wooded to sustain. On the other hand, courts need to face the resistance from traditional forces that ask courts to respect traditional, cultural, and religious variances. In sum, courts must walk a thin line between law and convention, and the dilemma is particularly evident in family cases, such as inheritance, parental rights, and property.[40]

1. Civil Code: Marriage and Parental Rights

To maintain an ordered and harmonious society, Confucianism emphasizes a hierarchical social structure. In practice, this attitude results in perennial gender discrimination deeply rooted in most if not all East Asian societies. In Korea, for example, custom was recognized as a source of law without much opposition after independence since it was "celebrated as the embodiment of collective national memory."[41] Furthermore, it is a constitutional mandate to sustain and enhance cultural heritage and national culture in Korea.[42] The definition of Korean custom, however, has never been clearly defined and is actually a complex amalgam of diverse sources, such as

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39 *See* Ginsburg, *supra* note 35, at 795. For more discussion on the relationship between Confucianism and constitutionalism, *see* BUI NGOC SON, CONFUCIAN CONSTITUTIONALISM IN EAST ASIA 11-18 (2016).

40 *See* Patricia Ebrey, *The Chinese Family and the Spread of Confucian Values*, *in* THE EAST ASIAN REGION: CONFUCIAN HERITAGE AND ITS MODERN ADAPTATION 45, 48-49 (Gilbert Rozman ed., 1991).

41 MARIE SEONG-HAK KIM, LAW AND CUSTOM IN KOREA: COMPARATIVE LEGAL HISTORY 270 (2012).

42 Art. 9 of CONSTITUTION OF THE REPUBLIC OF KOREA (1948).

traditional Korean culture, Japanese law, neo-Confucianism, and so forth. Among them, Confucianism has been hailed as state orthodoxy for more than five hundred years.[43] Some scholars have even suggested that "Confucianism in Korea was intensified and became more Confucian than Confucius."[44] Unsurprisingly, therefore, the Civil Code in Korea[45] was permeated with gender discrimination that have been challenged repeatedly after democratization.[46]

To begin with, the Korean Civil Code prescribed that people with the same surname that come from the same geographical location are prohibited to marry each other. The rationale behind this custom is to prevent incest, since these people may originate from the same family long time ago.[47] This custom existed in other Asian countries as well, but only Korea kept this law after democratization. Obviously, such regulation violates human dignity and the right to pursue happiness enshrined in the Constitution of Korea.[48] In 1997, the Constitutional Court of Korea declared related provisions unconstitutional in a 7-2 decision — a ruling that led to vociferous protest form Confucian traditionalists.[49]

The household headship (*hoju*) system is another paradigmatic example in which the judiciary strived to emancipate Korea from the tether of customary constraint. Like early Roman law in which "the father was monarch and the

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43 John Kie-Chiang Oh, *Adaptations in Korea: Confucianism, Democracy, and Economic Development*, *in* CONFUCIAN CULTURE AND DEMOCRACY 85, 89 (John Fuh-Sheng Hsieh ed., 2014); Ilhyung Lee, *Korean Perception(s) of Pyungdeung (Equality)*, *in* LAW AND SOCIETY IN KOREA 67, 71 (Hyunah Yang ed., 2013).

44 Lee, *supra* note 43, at 91-92.

45 CIVIL ACT (S. KOREA).

46 *See* Tae-Ung Baik, *Public Interest Litigation in South Korea*, *in* PUBLIC INTEREST LITIGATION IN ASIA 115, 123-24 (Po Jen Yap & Holning Lau eds., 2011).

47 *See* Chaihark Hahm, *Law, Culture, and the Politics of Confucianism*, 16 COLUM. J. ASIAN L. 253, 288 (2003).

48 CONSTITUTION OF THE REPUBLIC OF KOREA (1987).

49 *See* Ginsburg, *supra* note 35, at 787.

head of the family,"[50] the Confucian thinking underscores that the husband (i.e., male) is superior to the wife (female), and the son to the daughter in a family.[51] In the past, the head of family should be the eldest son when the father dies, even though the eldest son has other older sisters, a law that results from the eldest son's ritual position to offer decent sacrifices for the ancestors.[52] This system is built upon the concept of Confucian lineage revolving around male descent line.[53] Meanwhile, it was a legacy that was arguably imposed by Japanese, another country that is also influenced by Confucianism to some extent, during the period of colonialization.[54] Due to the position as head of the family, the eldest son controls a disproportionate amount of social and economic power over other family members. As a result, the household system undergirds the paternalism and aggravate gender discrimination in which female members subordinate to male. In 2000, social groups petitioned the Korean Constitutional Court, trying to abolish the household system. Again Confucian groups vehemently opposed the proposal of abolition and defended the system on traditional grounds.[55] Eventually, the Constitutional Court struck down the law in 2005 in spite of the acknowledgement that the system was indeed deeply rooted in the Korean history.

Similar to Korea, Confucianism has influenced Taiwan's legal culture to a considerable extent, even though its impact has declined in recent years.

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50 LAWRENCE M. FRIEDMAN, THE LEGAL SYSTEM: A SOCIAL SCIENCE PERSPECTIVE 280 (1975).

51 *See* John Fuh-Sheng Hsieh, *Introduction: Democracy, Confucian Style?*, *in* CONFUCIAN CULTURE AND DEMOCRACY 1, 6 (John Fuh-Sheng Hsieh ed., 2014).

52 *See* KIM, *supra* note 41, at 371.

53 Hahm Chaihark, *Negotiating Confucian Civility Through Constitutional Discourse*, *in* THE POLITICS OF AFFECTIVE RELATIONS: EAST ASIA AND BEYOND 277, 301 (Chaihark Hahm & Daniel A. Bell eds., 2004).

54 *See* Hyunah Yang, *Colonialism and Patriarchy: Where the Korean Family-head (hoju) System Had Been Located*, *in* LAW AND SOCIETY IN KOREA 45, 46 (Hyunah Yang ed., 2013); Jinsu Yune, *Tradition and the Constitution in the Context of the Korean Family Law*, 5 J. KOREAN L. 194, 205 (2005).

55 *See* Yang, *supra* note 54, at 53.

Confucius's birthday was once a national holiday and his teaching was once a designated reading in high schools. One Justice of the Constitutional Court in Taiwan even claimed that Confucianism should be responsible for the low popularity of the judiciary. Against this background, it should not be surprising that many provisions in Taiwan's Civil Code also mirrors Confucian thinking based on stereotypical gender discrimination. These laws soon became the targets of women's groups after democratization.[56] Before 1996, for example, Taiwan's Civil Code plainly stipulated the superiority of fatherhood[57] in the sense that the father has the final say over the mother whenever there is a disagreement in exercising parental rights. This structural patriarchy is derived from Confucian classics in which fathers have great legal authority over mothers and children.[58] In 1994, Taiwan's Constitutional Court ruled against the tradition but made a compromise, declaring that related Civil Code provision shall be void, not immediately, but within two years.[59]

Furthermore, male dominance in a household can also been seen from the husband-wife relationship. At one time, a wife's property belonged to her husband's unless she could prove the property was acquired before marriage. This clearly violated equal protection, and the Constitutional Court demanded statutory revision as soon as possible.[60]

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56 *See* Wen-Chen Chang, *Public Interest Litigation in Taiwan: Strategy for Law and Policy Changes in the Course of Democratization*, *in* PUBLIC INTEREST LITIGATION IN ASIA 136, 142-44 (Po Jen Yap & Holning Lau eds., 2011).

57 *See* Chao-Ju Chen, *Mothering Under the Shadow of Patriarchy: The Legal Regulation of Motherhood and Its Discontents in Taiwan*, 1 NAT'L TAIWAN U. L. REV. 47, 80-90 (2006); Chao-Ju Chen, *The Chorus of Formal Equality: Feminist Custody Law Reform and Fathers' Rights Advocacy in Taiwan*, 28 CANADIAN J. WOMEN & L. 116, 122-29 (2016).

58 *See* Ebrey, *supra* note 40.

59 Judicial Yuan, https://cons.judicial.gov.tw/jcc/en-us/jep03/show?expno=365 (last visited Sept. 2, 2021).

60 Judicial Yuan, https://cons.judicial.gov.tw/jcc/en-us/jep03/show?expno=410 (last visited Sept. 2, 2021).

2. Civil Code: Inheritance

Since ancestor veneration is one core family ritual in Confucianism, there are many conventional norms regulating related issues, such as the qualification of worshippers and the requirement of agnatic adoption. Part of the reasons is because the purpose of adoption in traditional Confucian thinking is for the continuity of the family, not the best interest of the children. After modernization, these customs result in many controversies between modern law and custom. Scholars have suggested that it is a "determining characteristic of Korean family tradition" that non-agnate child cannot take the adoptive father's family name.[61] Therefore, non-agnatic adoption before the revision of Civil Code of 1960 was not officially recognized until 1994 when the Supreme Court switched and recognized the validity of these adoptions. Another case relates to membership of ancestor worship. In the past, female family members were not seen as members of the clan (*chongchung* or *jongjung*) as a result of customary law in Korea.[62] In 2005, The Supreme Court of Korea unmistakably ruled that the legal order has changed and the foundation of male-only membership has been undermined to a considerable extent in modern society.[63] Hence, the customary law at issue lost binding force since the traditional family system dominated by Confucianism was repugnant to equal protection that are protected in the Constitution. Finally, the Supreme Court declared another customary law that involves both marriage and ancestor worship invalid. In Confucianism, the status of the son born out of wedlock is legally inferior to the son and the grandson born in a legitimate marriage. This attitude is reflected in the precedents of the Supreme Court in the past. In 2008, however, the Supreme Court overruled its precedents partly

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61 Marie Seong-Hak Kim, *In the Name of Custom, Culture, and the Constitution: Korean Customary Law in Flux Symposium*, 48 TEXAS INT'L L.J. 357, 370 (2013).

62 *See* Kim, *supra* note 61, at 367-68.

63 *See* Jinsu Yune, *Judicial Activism and the Constitutional Reasoning of the Korean Supreme Court in the Field of Civil Law*, *in* THE FUNCTIONAL TRANSFORMATION OF COURTS: TAIWAN AND KOREA IN COMPARISON 123, 128-29 (Jiunn-Rong Yeh ed., 2015).

on the ground of equal protection.[64]

Similar discriminatory provisions existed in other East Asian countries as well. In Taiwan, the Veterans Affairs Commission once proclaimed that only male descendants can inherit the state farmland distributed to veterans by the government. The rationale behind this regulation is because females are supposed to marry and can therefore rely on their husbands for the livelihood. Both assumptions are clearly grounded on paternalism. The Constitutional Court declared the regulation unconstitutional and, perhaps not coincidently, asked the authority to revise it within six months.[65]

3. Administrative Law

In addition to decisions with respect to civil code, administrative law cases also demonstrate how the judiciary helps modernize a country. In fact, "one of the things that distinguishes traditional East Asian law from modern law is precisely the absence of administrative law."[66] Similar to the revision of civil codes, some East Asian countries introduced administrative laws due to the desire to abolish unequal treaties or extraterritorial jurisdictions. For instance, the Westernization of administrative law in East Asia firstly took place in Japan through the Meiji Restoration in 1868.[67] Also, the Republic of China enacted Administrative Litigation Act in 1932 precisely because of the same reason.[68]

After exponential economic development for two decades or so, many Asian countries, including but not limited to Japan, Korea, Taiwan, and Singapore, have transformed themselves from developmental countries to

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64 Yune, *supra* note 63, at 130.

65 Judicial Yuan, https://cons.judicial.gov.tw/jcc/en-us/jep03/show?expno=457 (last visited Sept. 2, 2021).

66 John K.M. Ohnesorge, *Administrative Law in East Asia: A Comparative-Historical Analysis*, *in* COMPARATIVE ADMINISTRATIVE LAW 78, 79 (Susan Rose-Ackerman & Peter L. Lindseth eds., 2010).

67 *Id.* at 82.

68 *See* WANG, *supra* note 8, at 143-44.

regulatory states that stress not only efficiency but also transparency and even public participation.[69] During the process of transition, many administrative laws, such as Administrative Procedure Act or Information Disclosure Act, are enacted or renovated to rein in the executive. Moreover, the image of an obedient judiciary vis-à-vis a powerful bureaucracy gradually dissipates as a result of the judicialization of governance, which should be attributed to a number of economic, political, and international factors.[70] To specify, courts help to transform the old "administrative informalism and reciprocity-based political economy" into a transparent and legalistic one.[71] Furthermore, judicial oversight by specialized commercial courts also turn the domestic and sometimes discriminatory governmental practices into a more international and impartial regulatory regime.[72] All these demonstrate how the judiciary modernize a country in the sphere of administrative law.

In addition, economic miracle is not without cost. Problems such as corruption and pollution ensue. Economic growth is no longer the only, and may not even be the most important, goal of state policy. Instead, people are more aware of other values in addition to economic prosperity, such as environmental protection and sustainable development.[73] The dispute of

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69 *See, e.g.*, Daein Kim, *Korean Administrative Cases in 'Law and Development' Context*, *in* LITIGATION IN KOREA 199, 205-15 (Kuk Cho ed., 2010); Jongcheol Kim, *Government Reform, Judicialization, and the Development of Public Law in the Republic of Korea*, *in* ADMINISTRATIVE LAW AND GOVERNANCE IN ASIA: COMPARATIVE PERSPECTIVES 101, 109-12 (Tom Ginsburg & Albert H.Y. Chen eds., 2009); Jiunn-Rong Yeh, *Democracy-Driven Transformation to Regulatory State: The Case of Taiwan*, *in* ADMINISTRATIVE LAW AND GOVERNANCE IN ASIA: COMPARATIVE PERSPECTIVES 127, 128 (Tom Ginsburg & Albert H.Y. Chen eds., 2009).

70 *See* Tom Ginsburg, *The Judicialization of Administrative Governance: Causes, Consequences, and Limits*, *in* ADMINISTRATIVE LAW AND GOVERNANCE IN ASIA: COMPARATIVE PERSPECTIVES 1, 5-11 (Tom Ginsburg & Albert H.Y. Chen eds., 2009).

71 *Id*. at 5-6.

72 *Id*. at 9-10.

73 Ironically, these issues may be better solved by invoking customary law. Peter Ørebech & Fred Bosselman, *The Linkage Between Sustainable Development and Customary Law*, *in* THE ROLE OF CUSTOMARY LAW IN SUSTAINABLE DEVELOPMENT 12, 20-23 (Peter Ørebech et

environmental protection in Taiwan is a good example of how the judiciary rejects some government-approved construction projects that are allegedly beneficial to local economic development at the expense of environmental protection. In the past, the environment in Taiwan had been sacrificed for a number of goals, such as political needs and trade surplus,[74] and scholars have advocated that courts should heighten the scrutiny of judicial review due to political malfunction and minority bias during the process of environmental impact assessment.[75] Administrative courts in Taiwan did respond to this call and ruled against the executive in a series of cases involving environmental protection. Contributing to the transformation from a developmental state to a fledging regulatory state, these rulings function as a driver of modernization.

4. Criminal Code: Adultery

Reflecting Confucian values, adultery was punishable in some Asian countries, such as Indonesia, South Korea, and Taiwan, since the family "constitutes the most fundamental and pervasive unit of social life" and "virtues directing family life are considered the foundation of all other virtues, including loyalty to the ruler."[76] In a word, its importance can hardly be overemphasized. To maintain the integrity of family, countries influenced by Confucianism usually enacted penal code to deter adultery, which was considered as a breakdown and betrayal of family virtues. The constitutionality of such regulations usually face harsh critique because of two reasons. The first is about its efficacy in deterring adultery; the second about gender equality. Although these laws are ostensibly gender-neutral, most men, but not

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al. eds., 2005).

74 *See* Jiunn-Rong Yeh, *Institutional Capacity-Building toward Sustainable Development: Taiwan's Environmental Protection in the Climate of Economic Development and Political Liberalization*, 6 DUKE J. COMP. & INT'L L. 229, 250-54 (1997).

75 *See* Chung-Lin Chen, *Judicial Review of Environmental Impact Assessment*: *From the Perspective of Comparative Institutional Analysis*, 14 ACADEMIA SINICA L.J. 107, 142-56 (2014).

76 SHIN, *supra* note 36, at 181.

women, that committed adultery would be forgiven in practice. Namely, the prohibition has disproportionate impact upon people with different genders. Not surprisingly, these laws soon become the target of social movements. Some countries de-criminalized adultery through legislation, but in other countries it is the judiciary that pioneered the statutory change.

In South Korea, the Criminal Act that punished adultery had been challenged and upheld by the Constitutional Court in 1990. Although the political branches intended to repeal related provision, the proposal did not put into practice.[77] More than two decades later, nevertheless, the same court declared the same provision unconstitutional for infringing on the right to sexual self-discrimination and secrecy and freedom of privacy in 2015.[78]

5. Summary

These cases clearly demonstrate courts' contribution during the process of modernization, particularly when the law lags behind social change. In the domain of civil codes, patriarchy was deeply rooted in some societies where the father is superior to the mother, the husband to the wife, and the son to the daughter. In this regard, courts endeavor to limit the scope of customs or customary laws and only admit their validity under certain conditions. Furthermore, statutes mirroring customs should pass the gauntlet of judicial review. That is, "tradition in and of itself does not bestow constitutionality on an otherwise unconstitutional law"[79] In the field of administrative law, the judiciary in many countries has precipitated paradigm shift from developmental states to regulatory states. Sustainable development rather than economic growth has become the core goal of state policy. It is fair to say that creating a modern law system is perceived as a judicial mission by modern

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77 *See* James M. West & Dae-Kyu Yoon, *The Constitutional Court of the Republic of Korea: Transforming the Jurisprudence of the Vortex?*, 40 AM. J. COMP. L. 73, 111-12 (1992).

78 KCCR, 2009 HUN-BA17 (S. KOREA).

79 Yune, *supra* note 54, at 196.

jurisprudence.[80] This perception is reflected even in cases ostensibly irrelevant with modernization.

State-ordered apology is one good example. In 1988, one year after democratization, the Korean Constitutional Court encountered a case in which the issue was whether forced apology is constitutional in defamation cases. Ostensibly, it is a tug of war between freedom of speech and freedom of conscience, and the Constitutional Court ruled that related provisions in Civil Code was unconstitutional and void. From a cultural perspective, however, scholars have suggested that the conflict is "between preserving the culture… or changing the practice and transforming into a more democratic and advanced country,"[81] since forced apology has its cultural overtone in Asia.[82] Eventually, since "the Constitutional Court was part of the modernization plan and attempting to establish legitimacy through rule of law and constitutionalism,"[83] it chose to emphasize the rights discourse at the expense of the cultural meaning of apology.[84]

Nonetheless, although constitutional courts in some East Asian countries have successfully resisted the pressure from conservatives groups, discrimination based on custom does not completely disappear after these decisions. Indeed, courts sometimes will either uphold the custom-based statutes or even invoke custom to strike down laws. In Taiwan, Interpretation No. 728 is the most controversial case regarding gender discrimination in recent years. The issue involved the Statute Governing Ancestor Worship Guilds, which prescribes that the qualification of successors of a clan is

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80 KIM, *supra* note 41, at 284.

81 Jiunn-rong Yeh, *Court-ordered Apology: The Function of Courts in the Construction of Society, Culture and the Law*, *in* THE FUNCTIONAL TRANSFORMATION OF COURTS 21, 35 (Jiunn-Rong Yeh ed., 2015).

82 *See* Dai-Kwon Choi, *Freedom of Conscience and the Court-ordered Apology for Defamatory Remarks*, 8 CARDOZO J. INT'L & COMP. L. 205, 211 (2000); Chaihark, *supra* note 53, at 287.

83 Yeh, *supra* note 81, at 36.

84 *Id*.

determined by internal clan regulations. The statute itself is gender neutral, but traditionally most if not all internal clan regulations restrict succession to male offspring. Since a successor is entitled to dispose of huge amount of property, whether the statute violated substantive equal protection in essence is not without doubt. The case is very similar to the Korean one mentioned above. Both statutes are rooted in Confucianism and are ostensibly gender neutral regardless of *de facto* gender discrimination in practice. Perhaps coincidently, Taiwan's Constitutional Court, like its Korean counterpart, upheld the constitutionality of the statute in question on the ground of formal equality. Similar case took place in Korea as well. In a case concerning the inheritance of real property, article 1008-3 of the Korean Civil Code,[85] which grants certain amount of property to the presider of family memorial rituals, was challenged. Ostensibly, the provision itself is gender-neutral; the issue is that the presider is traditionally the eldest son or grandson, and thus may create *de facto* gender discrimination because male successors therefore inherit a larger share of legacy than females. The Korean Constitutional Court upheld the provision on the ground of equal protection, arguing that the law at issue was "rationally related to the goal of preserving the good custom."[86]

Another less typical but more politically salient case involves customary constitutional law. In 2003, former President Roh tried to move the capital from Seoul to other place to encourage development in a more geographically balanced way. Some citizens petitioned the Constitutional Court, arguing that the relocation violated the Korean Constitution, even though the location of the Korean capital is not plainly prescribed. The Constitutional Court ruled against the Roh administration, contending that "customary constitution" required Seoul to be the capital of Korea.[87] Only one justice issued her dissenting

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85 CIVIL ACT OF KOREA.

86 Kim, *supra* note 61, at 378.

87 *See* Jongcheol Kim & Jonghyun Park, *Causes and Conditions for Sustainable Judicialization of Politics in Korea*, *in* THE JUDICIALIZATION OF POLITICS IN ASIA 37, 40-42 (Björn Dressel ed., 2012).

opinion, refuting the idea of "customary constitution."

C. Judicial Engagement

The third approach with which the judiciary applies to modernize a state is through judicial reasoning. In an era of globalization, not only human capital and investment, but also institutions and ideas have travelled across national borders. With the wide spread of judicial review and constitutional courts, recent decades have witnessed the rise of transnational constitutionalism and the rampant growth of judicial engagement.[88] It follows that judicial borrowing has become increasingly frequent among courts and individual judges, particularly, but by no means exclusively, in the same legal family. Many other high courts have frequently cited precedents made by foreign or international courts, either in the majority or in separate opinions.

Much ink has been spoiled over this issue, striving to elucidate the reasons that contribute to this "new world order."[89] First, judicial engagement has been institutionalized to increase the cooperation and exchanges of information and experiences related to constitutional justice. In Asia, for instance, the Association of Asian Constitutional Courts and Equivalent Institutions,[90] currently comprised 16 constitutional adjudicative institutions, has been established in 2008. These associations have further facilitated judicial dialogue among different jurisdictions. As a corollary, judges have more opportunities to meet face to face,[91] and foreign decisions are more accessible these days. Both facilitate judicial dialogue more effectively and

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88 *See, e.g.*, VICKI JACKSON, CONSTITUTIONAL ENGAGEMENT IN A TRANSNATIONAL ERA 71-102 (2010); Cheryl Saunders, *Judicial Engagement with Comparative Law*, *in* COMPARATIVE CONSTITUTIONAL LAW 571 (Tom Ginsburg & Rosalind Dixon eds., 2011).

89 *See* ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER (2005).

90 AACCEI, http://www.aaccei.org/ccourt?act=index (last visited June 4, 2016). For more discussion, *see* Maartje De Visser, *We All Stand Together: The Role of the Association of Asian Constitutional Courts and Equivalent Institutions in Promoting Constitutionalism*, 3 ASIAN J.L. SOC'Y 105 (2016).

91 *See* SLAUGHTER, *supra* note 89, at 96-99.

efficiently. In addition, globalization of constitutional law, both through the top-down or bottom-up processes,[92] "increases the probability that courts in different contexts will indeed face common issues and a natural response is to see how other courts have handled similar questions."[93] Thirdly, from the perspective of cost-benefit analysis, consulting foreign jurisdictions may reduce decision cost and the possibility of adjudicative error.[94] Even if judges are not required to consult foreign precedents, they may do so out of diplomatic reasons — judges may cite foreign decisions in pursuit of policy goals or as a strategy to grapple with thorny issues.[95] Finally, the appearance of foreign precedents may enhance the credibility and cogency of domestic courts' decisions.[96] This often occurs in young jurisdictions, since courts in advanced countries are usually regarded as more authoritative even though the reasoning is not legally binding.

It is the last reason that involves modernization as a judicial function in East Asia. In fact, judicial borrowing is all the more remarkable given the diversity of legal systems in Asia and "distinctive space on the spectrum between universalism and particularism"[97] of Asian constitutionalism. "As constitutional developments of this region have been heavily influenced by the West, frequent references to foreign or international laws are expected — and indeed taking place — in many jurisdictions,"[98] such as Hong Kong,[99]

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92 *See* David S. Law, *Globalization and the Future of Constitutional Rights*, 102 NW. U. L. REV. 1277, 1299-1307 (2008); Mark Tushnet, *The Inevitable Globalization of Constitutional Law*, 49 VA. J. INT'L L. 985, 988-95 (2009).

93 GAROUPA & GINSBURG, *supra* note 3, at 170.

94 *See* Eric A. Posner & Cass R. Sunstein, *The Law of Other States*, 59 STAN. L. REV. 131, 178-79 (2006) (arguing that many courts are following an implicit Condorcetian logic).

95 *See* David S. Law, *Judicial Comparativism and Judicial Diplomacy*, 163 U. PA. L. REV. 927, 1003-09 (2015).

96 *See* Johanna Kalb, *The Judicial Role in New Democracies: A Strategic Account of Comparative Citation*, 38 YALE J. INT'L L. 423, 445-48 (2013).

97 Cheryl Saunders, *Judicial Engagement*, *in* COMPARATIVE CONSTITUTIONAL LAW IN ASIA 80, 82-83 (Rosalind Dixon & Tom Ginsburg eds., 2014).

98 WEN-CHEN CHANG ET AL., CONSTITUTIONALISM IN ASIA: CASES AND MATERIALS 431-32

Japan,[100] Malaysia,[101] South Korea, Taiwan,[102] either in the majority or in separate opinions. Judges in these jurisdictions use foreign precedents and doctrines, explicitly or implicitly,[103] to support their ruling, even if they are not required to do so.[104] In explaining judicial borrowing in East Asia, conventional wisdom mentioned in the previous paragraph is equally persuasive, but not enough. Taking Israel as an example, scholars have suggested that Israeli judges "prefer[] to look to 'the West' as a source of comparative and international law, and in doing so to affirm the state's desire to be included in the liberal-democratic club of nations."[105] In fact, similar psychological impetus can be found in other Asian countries. This can be evinced from the judicial choice of references jurisdictions, which usually vary from one jurisdiction to another, depending on legal tradition, geographical proximity, language, and judges' capability. Nevertheless, some apex courts in developed regions, such as the Federal Constitutional Court of Germany, the

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(2014).

99 *Id*. at 441.

100 *See* Akiko Ejima, *A Gap Between the Apparent and Hidden Attitudes of the Supreme Court of Japan Towards Foreign Precedents*, *in* THE USE OF FOREIGN PRECEDENTS BY CONSTITUTIONAL JUDGES 273, 283-90 (Tania Groppi & Marie-Claire Ponthoreau eds., 2013).

101 *See* Yeow Choy Choong, *Courts in Malaysia and Judicial Initiated Reforms*, *in* ASIAN COURTS IN CONTEXT 375, 385 (Jiunn-Rong Yeh & Wen-Chen Chang eds., 2014).

102 *See* David S. Law & Wen-Chen Chang, *The Limits of Global Judicial Dialogue*, 86 WASH. L. REV. 523 (2011).

103 On this point, *see* Tania Groppi & Marie-Claire Ponthoreau, *Introduction: The Methodology of the Research: How to Access the Reality of Transjudicial Communication?*, *in* THE USE OF FOREIGN PRECEDENTS BY CONSTITUTIONAL JUDGES 1, 5 (Tania Groppi & Marie-Claire Ponthoreau eds., 2013).

104 Of course there are some exceptions. Article 23 of the Constitution of Timor-Leste stipulates that "Fundamental rights… shall be interpreted in accordance with the Universal Declaration of Human Rights."

105 RAN HIRSCHL, COMPARATIVE MATTERS: THE RENAISSANCE OF COMPARATIVE CONSTITUTIONAL LAW 23 (2014); *see also* Frederick Schauer, *The Politics and Incentives of Legal Transplantation*, *in* GOVERNANCE IN A GLOBALIZING WORLD 253, 258-61 (Joseph S. Nye & John D. Donahue eds., 2000).

Supreme Court of the United States, and the European Court of Human Rights, are widely cited in many Asian countries despite the variances of legal tradition and other relevant factors mentioned above.[106] And the reason, this paper suggests, lies in part in the desire of the judiciary to modernize the state, consciously or unconsciously. This is particularly true given that many East Asian countries have just transformed from authoritarian regimes. Against this background, referring foreign or international law in judicial decisions may stir or accelerate social and political change, since they provide a minimum benchmark standard.[107] Namely, the judiciary may bring domestic governments in line with Western standards by strengthening its reasoning through foreign or international laws. Indeed, this strategy may work given that law in developing countries are usually influenced by, if not modeled on, similar laws in developed countries during the process of legislation. Against this background, courts also "assume the function of enabling international laws into the domestic context, thus diminishing the legitimacy problems of external norms"[108] through judicial borrowing. From this perspective, modernization as a judicial function contributes to the emergence of transnational constitutionalism, in which the boundary between national constitutions and legal families has been crossed.[109]

D. Objections of Modernization as a Judicial Function

The thesis of this paper, which advances that modernization is a judicial function in East Asia, faces two potential counterarguments that need to tackle with: the first predicates on empirical ground, the second normative. To begin

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[106] HIRSCHL, *supra* note 105, at 27.

[107] *See* Wen-Chen Chang, *An Isolated Nation with Global-minded Citizens: Bottom-up Transantional Constitutionalism in Taiwan*, 4 NAT'L TAIWAN U. L. REV. 203, 218 (2009); Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 GA. J. INT'L & COMP. L. 287, 292 (1996).

[108] Jiunn-Rong Yeh & Wen-Chen Chang, *The Emergence of Transnational Constitutionalism: Its Features, Challenges and Solutions*, 27 PENN ST. INT'L L. REV. 89, 107 (2008).

[109] Yeh & Chang, *supra* note 108, at 90-98.

with, some may suggest that modernization is a mission of judicial review even in advanced jurisdictions, such as the United States[110] — that is, there is nothing special of courts in East Asia. Focusing on judicial review in America, Professor Strauss proposes a modernization approach that urges judges to anticipate public sentiment and reconcile the tension between judicial review and democracy.[111] To be sure, modernization in this sense may be common to courts around the world, since public support is simultaneously a precious asset and a consequential constraint of the judicial branch[112] that has neither force nor will. Nonetheless, modernization, according to Strauss's argument, is merely an interpretive method of judicial review in the U.S., while modernization as judicial function is a more comprehensive state-building project in East Asia, since most countries in this region still stay at, if not just go through, the developing stage. The pivotal difference is reflected not only by the institutional renovation of the judiciary, but also by judicial borrowing embedded in the reasoning. This is in a stark contrast with the so-called American exceptionalism in the sphere of constitutional interpretation,[113] which will be further elaborated later. From this perspective, modernization as a judicial function in East Asia involves more than the modernizing mission of judicial review.

Based on normative ground, some may argue that modernization should not be a factor judges take into account because it is, strictly speaking, irrelevant to the case in question. Modernity is a multi-faceted concept and, opponents argue, acknowledging this function will implicitly recognize the

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110 *See* David A. Strauss, *The Modernizing Mission of Judicial Review*, 76 U. CHICAGO L. REV. 859 (2009).

111 *Id*. at 862-64.

112 *See* TOM S. CLARK, THE LIMITS OF JUDICIAL INDEPENDENCE 3-4 (2010); BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION 14-18 (2009).

113 *See* Lorraine E. Weinrib, *The Postwar Paradigm and American Exceptionalism*, *in* THE MIGRATION OF CONSTITUTIONAL IDEAS 84 (Sujit Choudhry ed., 2006).

policy-making power of the judiciary. At the extreme, it might suggest that the judiciary has the power to decide the future of a country, which is undoubtedly undemocratic. It follows that whether judges can legitimately do so remains an open question, as politicians are allegedly more representative and accountable. These critiques, albeit reasonable, overstate judicial discretion and underestimate judicial accountability. Judges do not predict and choose future trends entirely at their will; more often than not, their decisions mirror the trends that have already been endorsed by the society. Moreover, modernization does not necessarily mean that legal transplantation takes place without reconciliation with local custom. Contrarily, an institutional and jurisprudential hybridity that mixes foreign and domestic elements is usually the case. Indeed, the normative objection sheds new light on several old topics that is worth further elaborating.

III. Some Normative Implications

From the aforementioned discussion, modernization is evidently part of judicial functions in many East Asian jurisdictions. Indeed, this should not be surprising given the emergence of East Asian constitutionalism in which constitution-making is seen more as a tool for facilitating modernization than as a straitjacket upon government power.[114] If constitutions are designed to modernize developing states, little wonder that modernization will become one function of the courts that are responsible for interpreting constitutions. This is particularly true when Ease Asian constitutions are the products of negotiations among political elites rather than social contracts in Lockean sense.[115]

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[114] *See* Jiunn-Rong Yeh & Wen-Chen Chang, *The Emergence of East Asian Constitutionalism: Features in Comparison*, 59 AM. J. COMP. L. 805, 816-20 (2011).

[115] *See* Michael C. Davis, *Human Rights, Political Values, and Development in East Asia*, *in* HUMAN RIGHTS: NEW PERSPECTIVES, NEW REALITIES 139, 144-47 (Adamantia Pollis & Peter Schwab eds., 2000); *see also* Tom Ginsburg, *Constitutions as Contract, Constitutions as Charters*, *in* SOCIAL AND POLITICAL FOUNDATIONS OF CONSTITUTIONS 182, 185 (Denis J. Galligan & Mila Versteeg eds., 2013).

Through this lens, it is more understandable why this function is most evident in the realm of constitutional law. Understanding modernization as a judicial function may provide us with some new thoughts regarding old debates, such as legal transplantation, living constitutionalism, and judicial capability to bring about social change.

A. From Transplantation to Indigenization

Whether, or to what extent, legal transplantation can be successful has been an intriguing question for generations. Based on the experience of European countries, some scholars suggest that law is "at least sometimes, insulated from social and economic change."[116] Therefore, legal migration is not only possible, but the major way of legal development.[117] On the pessimistic end of the continuum, critics have long suggested that legal transfer does not occur within a political vacuum, and it will inevitably affect and interact with both state institutions and non-state actors.[118] In fact, legal transplantation usually fails because "foreign rules are irritants not only in relation to domestic legal discourse itself, but also in relation to the social discourse to which law is, under certain circumstances, closely coupled."[119] Although some legal institutions are more mechanical and thus more transferrable than others, "a [law] is necessarily an incorporative cultural form."[120] These arguments, albeit illuminating, are predicated predominantly

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116 William Ewald, *Comparative Jurisprudence (II): The Logic of Legal Transplants*, 43 AM. J. COMP. L. 489, 503 (1995).

117 *See* Alan Watson, *Aspects of Reception of Law*, 44 AM. J. COMP. L. 335, 335 (1996); ALAN WATSON, THE EVOLUTION OF WESTERN PRIVATE LAW (2001).

118 *See* John Gillespie & Pip Nicholson, *Taking the Interpretation of Legal Transfers Seriously*, *in* LAW AND DEVELOPMENT AND THE GLOBAL DISCOURSES OF LEGAL TRANSFERS 1, 9 (John Gillespie & Pip Nicholson eds., 2012).

119 Gunther Teubner, *Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences*, 61 MOD. L. REV. 11, 31-32 (1998); O. Kahn-Freund, *On Uses and Misuses of Comparative Law*, 37 MOD. L. REV. 1 (1974).

120 Pierre Legrand, *The Impossibility of 'Legal Transplant'*, 4 MAASTRICHT J. EUR. & COMP. L. 111, 116 (1997).

on the experience of continental Europe and British experience.

In East Asia, the clash between state law and custom is more intense than it is in Western societies where "capitalism, liberalism, and their legal systems collectively developed in sync with their own cultures and societies"[121] To fill the chasm resulted from legal pluralism, domestic courts function as a go-between through their decisions during the process of modernization, since they may be more familiar and thus trustworthy to local people, compared with foreign legal regimes. Nonetheless, it does not imply that domestic courts blindly import or transplant Western legal concepts on their soils without any reservation. Contrarily, modernization involves more than wholesale Westernization. Agents of modernization, including both politicians and judges, need to make modifications to accommodate local divergences. The resistance of religious groups mentioned above is one telling example. Furthermore, even though the imported legal materials sometimes remain ostensibly identical, the interpretation and application will be adjusted to tailor to local societal developments. The scenario is more complicated given that modernization often takes place during the authoritarian periods in East Asian countries. In addition to the conflict between modern and traditional values, the antagonism between democratic and autocratic ideologies, such as rule of law in a thick sense and Asian values, further increases the difficulty of reaching compromise. Therefore, indigenization to a certain extent is inevitable, and this has taken place in all three domains listed above.

For instance, although China established intellectual property courts as a result of globalization, it intentionally chooses not to mimic Western judicial system in general as a result of China's political structure and national conditions.[122] Another example may be the mushroom of constitutional courts

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[121] *See* Brian Z. Tamanaha, *The Rule of Law and Legal Pluralism in Development*, *in* LEGAL PLURALISM AND DEVELOPMENT: SCHOLARS AND PRACTITIONERS IN DIALOGUE 34, 45 (Brian Z. Tamanaha et al. eds., 2012).

[122] *See* Randall Peerenboom, *Between Global Norms and Domestic Realities*, *in* LAW AND DEVELOPMENT AND THE GLOBAL DISCOURSES OF LEGAL TRANSFERS 181, 191-93 (John

in East Asia. Given the spread of constitutional court around the globe, it seems to be a mechanic institution that can be transplanted relatively easily. Nonetheless, many new constitutional courts have some structural adjustments to reflect domestic situations. To illustrate, the standing rules vary from one jurisdiction to another, and some courts are more accessible and more responsive to the public. Also, they have been vested with divergent ancillary powers, depending on local needs. The Constitutional Court of Thailand, for instance, possessed the power to oversee corruption before 2006 "because of the overarching concern with corruption."[123]

In addition to institutional localization, judicial ruling has also faithfully mirrored the skirmishes between modernity and tradition in many societies. Decisions concerning gender equality are telling. On the one hand, courts endeavor to eradicate archaic and overbroad stereotype against the female; on the other, the judiciary occasionally succumb to the pressure of traditional interest groups. One intriguing contention is that traditional practices concerning the dead are more resilient than those regarding the living. Whether the line-drawing is precise is beyond the scope of this paper, but the inheritance of collective property does seem to be the last bastion of gender discrimination in the disguise of freedom of contract.

Finally, in terms of the indigenization of judicial reasoning, the doctrine of proportionality may be the best example in which methodological convergence and divergent application take place concomitantly. Originally a German legal concept, the doctrine has been exported to countless jurisdictions as the most common criteria to evaluate state actions.[124] Despite its nearly universal appearance, however, significant twists have been made according to domestic legal culture as a result of its flexibility and malleability. Since

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Gillespie & Pip Nicholson eds., 2012).

123 Tom Ginsburg, *Constitutional Courts in East Asia*, *in* COMPARATIVE CONSTITUTIONAL LAW IN ASIA 47, 61 (Rosalind Dixon & Tom Ginsburg eds., 2014).

124 *See* MOSHE COHEN-ELIYA & IDDO PORAT, PROPORTIONALITY AND CONSTITUTIONAL CULTURE 10-14 (2013).

proportionality analysis is essentially a balancing test that takes into account a raft of factors, it is natural that courts embedded in disparate social and political contexts will weight these factors differently. In Taiwan, for example, the Constitutional Court has explicitly based its ruling on the doctrine of proportionality in many decisions. Nevertheless, its understanding towards this doctrine is slightly different from the original.

These examples demonstrate that the judiciary does not blindly incorporate all foreign materials into domestic legal regimes when modernizing a developing state. Instead, courts have the agenda-setting power and determine which aspect they are willing to modernize (within the boundaries of public support). Adaption itself does not mean the failure or rejection of legal transplantation; rather, it evinces that courts have the capability to strike a balance between modernity and tradition. This judicial function may prevent the dead from governing the living and spur more cause lawyering.

B. Living Constitutionalism

One recurring debate in American constitutional jurisprudence is whether, and to what extent, the dead should govern the living? In the United States, the Supreme Court often justifies their decisions in hard cases by maintaining that certain practice is "deeply rooted in this Nation's history and tradition."[125] It implies that framers' intent matters to a considerable extent since it mirrored the history and tradition at the founding era. Hence, advocates of originalism insist that judges should be bound by framers' intent because it is a lesser evil, relatively speaking.[126] On the other hand, proponents of living constitutionalism maintain that constitutional meaning should evolve over time, just like what common law does.[127] To them, originalism is incoherent in theory and impractical

[125] *See, e.g.*, Washington v. Glucksberg, 521 U.S. 702 (1997), Lawrence v. Texas, 539 U.S. 558 (2003), McDonald v. City of Chicago, 561 U.S. 742 (2010).
[126] *See* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989).
[127] *See* DAVID A. STRAUSS, THE LIVING CONSTITUTION 33-46 (2010).

in reality, since many great decisions are iconic precisely because they dare to jettison unmistakable framers' intent. Although there are many intermediate theories,[128] the two stances basically represent two major camps of this issue.

Despite the contentious debate in the U.S., nevertheless, many scholars have pointed out that "originalism is primarily an American obsession"[129] in the sense that "recourse to originalism is virtually nonexistent."[130] This is not to say that judges never invoke original intent in other countries,[131] but "[o]riginalism, an extremely controversial question in the United States, is usually simply not the focus, or even a topic, of debate elsewhere."[132] In a word, it is "so little celebrated outside the United States" to the extent that it is almost globally rejected.[133]

Many reasons may elucidate why originalism is not particularly appealing outside the United States. In addition to conventional explanations, this paper suggests that modernization as a judicial function contributes to the unpopularity of originalism in East Asia. Instead, the thesis of this paper, which suggests that modernization is one vital function of the judiciary, is in harmony with living constitutionalism because it stresses that constitutional interpretation should reflect changing values.[134] To be more specific, constitutions are usually vague and succinct, relying on courts to fill in gaps and silences. Since courts shoulder the responsibility to keep the law in sync with

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128 *See, e.g.*, JACK M. BALKIN, LIVING ORIGINALISM 3 (2011).

129 Ozan O. Varol, *The Origins and Limits of Originalism: A Comparative Study*, 44 VAND. J. TRANSNAT'L L. 1239, 1242 (2011).

130 Michel Rosenfeld, *Constitutional Adjudication in Europe and the United States: Paradoxes and Contrasts*, 2 INT'L J. CONST. L. 633, 656 (2004).

131 *See* Yvonne Tew, *Originalism at Home and Abroad*, 52 COLUM. J. TRANSNAT'L L. 780 (2014).

132 Claire L'Heureux-Dubé, *The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court*, 34 TULSA L. REV.15, 33 (1998).

133 *See* Jamal Greene, *On the Origins of Originalism*, 88 TEX. L. REV. 1, 3 (2009); Jill Lepore, *The Commandments: The Constitution and Its Worshippers*, THE NEW YORKER (Jan. 9, 2011), http://www.newyorker.com/magazine/2011/01/17/the-commandments.

134 *See* BALKIN, *supra* note 128, at 334-35.

modernity, the meaning of constitutions will inevitably evolve over time when the judiciary imbues the constitutional provisions with modern values. As a corollary, original intent that is no longer suitable to contemporary world will not be respected. The changing understanding of equal protection may be illuminating: many conventions, such as primogeniture, were not branded as gender discrimination under the influence of patriarchy in the past, but this situation has changed considerably.

From the angle of constitutional endurance, moreover, it is more reasonable to disregard original intent in East Asia, given that the average lifespan of a constitution in this region[135] is longer than that of all countries.[136] Namely, it is more likely that the political, social, and economic environments have drastically changed, and the chasm between the framers' world and modern society is larger. The Constitution of Republic of China (Taiwan), one of the oldest constitutions in East Asia, may be the extreme example in this regard. It was enacted in mainland China for a geographically huge country with 40 million people at the very beginning, but its jurisdiction was quickly limited to a tiny island, i.e., Taiwan, after the Chinese Civil War. Given the cataclysm, it is understandable why the Constitutional Court in Taiwan seldom invokes originalism.

This is not to say that the judiciary will always keep up with times. In fact, political scientists have suggested that courts may act as conservators or enclaves of past elitist values and cultures,[137] particularly when judges are appointed by former ruling parties. In this circumstance, it is possible that courts may hamper the progress of social developments. Nonetheless, the judiciary cannot resist the pressure of mainstream society for a long period of time. If the society has sent out a clear message for social change, the judiciary will follow the current eventually. This relates to another heatedly debated

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135 *See* WEN-CHEN CHANG ET AL., *supra* note 98, at 221.
136 *See* ZACHERY ELKINS ET AL., THE ENDURANCE OF NATIONAL CONSTITUTIONS 2 (2009).
137 HIRSCHL, *supra* note 6, at 43-44.

issue: whether the judiciary can bring about social change? Whether there is any difference between the judiciary in developed countries and in developing ones in this regard?

C. Not a Hollow Hope?

Whether the judiciary can bring about social change is an contentious issue that puzzles scholars of law and society. Proponents of constrained court model argue that courts are unable to produce social change due to the nature of constitutional rights, the limits of judicial independence, and the lack of resources to implement judicial decisions.[138] By contrast, critics of such view believe that judicial decisions can serve as a catalyst if not a club to galvanize more social reforms.[139] More fundamentally, "the principal contribution of courts is the provision of a background of norms and procedures, against which negotiations and regulations in both private and governmental settings takes place."[140] Despite the heated debates in the U.S., scholars have maintained that "public interest litigation has become a significant driver of social change in Asia,"[141] and "courts often spearheaded [legislative revision] by forcing the legislature to act."[142] Insomuch as these statements are true, the question then becomes why courts in these countries seem to be less constrained by the institutional and political limitations identified above?

This paper suggests that this situation can be better appreciated through the prism of judicial functions, particularly the function of modernization. To be more specific, courts in Asian countries, most of which are developing states, are more likely to spur social reforms because these social reforms take

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138 *See* ROSENBERG, *supra* note 15, at 10-21.

139 *See* MICHAEL W. MCCANN, RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION 48-91, 138-79 (1994).

140 *Id*. at 178.

141 *See* Po Jen Yap & Holning Lau, *Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization*, *in* PUBLIC INTEREST LITIGATION IN ASIA 1, 1 (Po Jen Yap & Holning Lau eds., 2011).

142 KIM, *supra* note 41, at 292.

place with an eye to modernity. And the need of modernization helps to overcome some of the major constraints that thwart judicial efforts. To begin with, conventional wisdom has maintained that courts cannot produce social change without the support of either the executive or the legislative. This is also true even in developing countries where the judicial branch usually enjoys fewer resources than their counterparts in wealthy states. The relative lack of resources in developing states, however, renders modernization a common goal for both the political branches and the judiciary. This not only means that politicians have more incentive to induce compliance,[143] but also indicates a larger tolerance interval for the judiciary. In fact, social reforms involving modernization is often consistent with the interests of political and economic elites. The establishment of economic courts and the following financial and monetary reforms in some Asian countries are actually welcomed by many political and economic elites, let alone foreign investors. That is, the pressure from market will push for more social reforms and therefore free the judiciary from another constraint — the lack of tools to implement its decisions — even without government support.[144] Certainly, not every social reform is welcomed by all the people in a heterogeneous society. In the process of modernization, some social reforms face fierce opposition from conservative forces, such as some religious groups. Under this circumstance, social reforms are usually achieved not because of government policies, but because of judicial mandates at the beginning. The revision of family law in many East Asian countries is a good example. Politicians are willing to implement judicial decisions that serve as a shield to avoid blame.[145] In a word, social reforms which aim to modernization will not often encounter strong opposition from the political branches, to say the least.

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143 *See* ROSENBERG, *supra* note 15, at 33.
144 *Id*.
145 *See* WHITTINGTON, *supra* note 4, at 134-52.

Scholars have suggested that rights revolution through litigation in Asia should be attributed to democratization, globalization, and judicial self-perception.[146] In fact, the three factors are distinct facets of modernization in the Asian context. For starters, given the history of authoritarian rule in many East or Southeast Asian countries in the early twentieth century, transition from autocracy to democracy is certainly one facet of modernization. Moreover, many legal systems in Asian countries were originally transplanted from Western jurisdictions, and globalization that further facilitates legal imitation and judicial dialogue demonstrate the ongoing process of modernization. Aware of this trend, domestic judges will be more willing to consult foreign or international (case) laws in similar disputes that have already occurred in other places.

In sum, public-interest litigation in East Asia may be more fruitful not because judges are more powerful or authoritative, but because many social reforms involve modernization, a goal that is shared by both the judicial and political branches. This consonance helps the judiciary overcome many structural and institutional constraints that normally hobble the judiciary to bring about social change.

IV. Conclusion

In addition to traditional functions, such as dispute resolution, social control, and regime enforcement, modernization is also an important judicial function, particularly in East Asia. Through this lens, we may better understand why originalism is less influential in this region. Moreover, it also suggests that the judiciary is more likely to bring about social change, as these reforms usually pursue modernity that is consistent with the interests of politicians. Both may lend further support to the argument that the judiciary is not a

[146] *See* Yap & Lau, *supra* note 141, at 2-3.

counter-majoritarian institution; instead, it usually stands by mainstream society in developing countries. This is to say that modernization is completely not a judicial function in developed states. The difference is of course a matter of degree, not of kind.

References

Amsden, Alice H. 1979. Taiwan's Economic History: A Case of Etatisme and a Challenge to Dependency Theory. *Modern China* 5:341-379.

Baik, Tae-Ung. 2011. Public Interest Litigation in South Korea. Pp. 115-135 in *Public Interest Litigation in Asia*, edited by Po Jen Yap and Holning Lau. New York, NY: Routledge.

Balkin, Jack M. 2011. *Living Originalism*. Cambridge, MA: Belknap Press of Harvard University Press.

Berat, Lynn. 1992. The Role of Conciliation in the Japanese Legal System. *The American University Journal of International Law Review* 8:125-154.

Cammack, Mark. 2010. The Indonesian Human Rights Court. Pp. 178-206 in *New Courts in Asia*, edited by Andrew Harding and Penelope Nicholson. New York, NY: Routledge.

Carter, Connie. 2010. Specialized Intellectual Property Courts in the People's Republic of China: Myth or Reality?. Pp. 101-118 in *New Courts in Asia*, edited by Andrew Harding and Penelope Nicholson. New York, NY: Routledge.

Chaihark, Hahm. 2004. Negotiating Confucian Civility Through Constitutional Discourse. Pp. 277-308 in *The Politics of Affective Relations: East Asia and Beyond*, edited by Hahm Chaihark and Daniel A. Bell. Lanham, MD: Lexington Books.

Chang, Wen-Chen, Li-ann Thio, Kevin YL Tan, and Jiunn-Rong Yeh. 2014. *Constitutionalism in Asia: Cases and Materials*. Oxford: Hart Publishing.

Chang, Wen-Chen. 2009. An Isolated Nation with Global-minded Citizens: Bottom-up Transantional Constitutionalism in Taiwan. *National Taiwan University Law Review* 4:203-235.

———. 2011. Public Interest Litigation in Taiwan: Strategy for Law and Policy Changes in the Course of Democratization. Pp. 136-160 in *Public Interest Litigation in Asia*, edited by Po Jen Yap and Holning Lau. New

York, NY: Routledge.

Chen, Chao-Ju. 2006. Mothering Under the Shadow of Patriarchy: The Legal Regulation of Motherhood and Its Discontents in Taiwan. *National Taiwan University Law Review* 1:45-96.

———. 2016. The Chorus of Formal Equality: Feminist Custody Law Reform and Fathers' Rights Advocacy in Taiwan. *Canadian Journal of Women and the Law* 28:116-151.

Chen, Chung-Lin. 2014. Judicial Review of Environmental Impact Assessment: From the Perspective of Comparative Institutional Analysis. *Academia Sinica Law Journal* 14:107-168.

Choi, Dai-Kwon. 2000. Freedom of Conscience and the Court-ordered Apology for Defamatory Remarks. *Cardozo International & Comparative Law Review* 8:205-224.

Choong, Yeow Choy. 2014. Courts in Malaysia and Judicial Initiated Reforms. Pp. 375-406 in *Asian Courts in Context*, edited by Jiunn-Rong Yeh and Wen-Chen Chang. Cambridge: Cambridge University Press.

Clark, Tom S. 2010. *The Limits of Judicial Independence.* Cambridge: Cambridge University Press.

Cohen-Eliya, Moshe, and Iddo Porat. 2013. *Proportionality and Constitutional Culture*. Cambridge: Cambridge University Press.

Davis, Michael C. 2000. Human Rights, Political Values, and Development in East Asia. Pp. 139-162 in *Human Rights: New Perspectives, New Realities*, edited by Adamantia Pollis and Peter Schwab. Boulder, CO: Lynne Rienner Publishers.

Ebrey, Patricia. 1991. The Chinese Family and the Spread of Confucian Values. Pp. 45-83 in *The East Asian Region: Confucian Heritage and its Modern Adaptation*, edited by Gilbert Rozman. Princeton, NJ: Princeton University Press.

Ejima, Akiko. 2013. A Gap Between the Apparent and Hidden Attitudes of the Supreme Court of Japan Towards Foreign Precedents. Pp. 273-300 in *The*

Use of Foreign Precedents by Constitutional Judges, edited by Tania Groppi and Marie-Claire Ponthoreau. Oxford: Hart Publishing.

Elkins, Zachery, Tom Ginsburg, and James Melton. 2009. *The Endurance of National Constitutions*. Cambridge: Cambridge University Press.

Ewald, William. 1995. Comparative Jurisprudence (II): The Logic of Legal Transplants. *The American Journal of Comparative Law* 43:489-510.

Friedman, Barry. 2009. *The Will of the People: How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution*. New York, NY: Farrar, Straus & Giroux.

Friedman, Lawrence M. 1969. Legal Culture and Social Development. *Law & Society Review* 4:29-44.

———. 1975. *The Legal System: A Social Science Perspective*. New York, NY: Russell Sage Foundation.

Garoupa, Nuno, and Tom Ginsburg. 2015. *Judicial Reputation: A Comparative Theory*. Chicago, IL: The University of Chicago Press.

Gillespie, John, and Pip Nicholson. 2012. Taking the Interpretation of Legal Transfers Seriously. Pp. 1-26 in *Law and Development and the Global Discourses of Legal Transfers*, edited by John Gillespie and Pip Nicholson. New York, NY: Cambridge University Press.

Gillespie, John, and Randall Peerenboom. 2009. Pushing Back on Globalization: An Introduction to Regulation in Aisa. Pp. 1-23 in *Regulation in Asia: Pushing Back on Globalization*, edited by John Gillespie and Randall Peerenboom. New York, NY: Routledge.

Ginsburg, Tom. 2002. Confucian Constitutionalism? The Emergence of Constitutional Review in Korea and Taiwan. *Law & Social Inquiry* 27:763-799.

———. 2003. *Judicial Review in New Democracies: Constitutional Courts in Asian Cases*. Cambridge: Cambridge University Press.

———. 2005. Beyond Judicial Review: Ancillary Powers of Constitutional Courts. Pp. 225-274 in *Institutions & Public Law: Comparative*

Approaches, edited by Tom Ginsburg and Robert A. Kagan. New York, NY: Peter Lang Publishing.

———. 2009. The Judicialization of Administrative Governance: Causes, Consequences, and Limits. Pp. 1-20 in *Administrative Law and Governance in Asia: Comparative Perspectives*, edited by Tom Ginsburg and Albert H.Y. Chen. New York, NY: Routledge.

———. 2010. Studying Japanese Law Because It's There. *The American Journal of Comparative Law* 58:15-26.

———. 2014. Constitutional Courts in East Asia. Pp. 47-79 in *Comparative Constitutional Law in Asia*, edited by Rosalind Dixon and Tom Ginsburg. Northampton, MA: Edward Elgar.

———. 2013. Constitutions as Contract, Constitutions as Charters. Pp. 182-206 in *Social and Political Foundations of Constitutions*, edited by Denis J. Galligan and Mila Versteeg. New York, NY: Cambridge University Press.

Greene, Jamal. 2009. On the Origins of Originalism. *Texas Law Review* 88:1-78.

Groppi, Tania, and Marie-Claire Ponthoreau. 2013. Introduction: The Methodology of the Research: How to Access the Reality of Transjudicial Communication?. Pp. 1-10 in *The Use of Foreign Precedents by Constitutional Judges*, edited by Tania Groppi and Marie-Claire. Oxford: Hart Publishing.

Hahm, Chaihark. 2003. Law, Culture, and the Politics of Confucianism. *Columbia Journal of Asian Law* 16:253-296.

Hamilton, Alexander. 1788. *The Federalist* No. 78, edited by Alexander Hamilton, James Madison, and John Jay. New York, NY: J. & A. McLean.

Hannum, Hurst. 1996. The Status of the Universal Declaration of Human Rights in National and International Law. *Georgia Journal of International and Comparative Law* 25:287-397.

Harding, Andrew, Peter Leyland, and Tania Groppi. 2009. Constitutional Courts: Forms, Functions and Practice in Comparative Perspective. Pp. 1-30 in *Constitutional Courts: A Comparative Study*, edited by Andrew Harding and Peter Leyland. London: Wildy, Simmonds & Hill Publishing.

Hirschl, Ran. 2004. *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism*. Cambridge, MA: Harvard University Press.

———. 2014. *Comparative Matters: The Renaissance of Comparative Constitutional Law*. Oxford: Oxford University Press.

Hoque, Ridwanul. 2014. Courts and the Adjudication System in Bangladesh: In Quest of Viable Reforms. Pp. 447-486 in *Asian Courts in Context*, edited by Jiunn-Rong Yeh and Wen-Chen Chang. Cambridge: Cambridge University Press.

Hsieh, John Fuh-Sheng. 2014. Introduction: Democracy, Confucian Style?. Pp. 1-20 in *Confucian Culture and Democracy*, edited by John Fuh-Sheng Hsieh. Hackensack, NJ: World Scientific.

Issacharoff, Samuel. 2015. *Fragile Democracies: Contested Power in the Era of Constitutional Courts*. Cambridge: Cambridge University Press.

Jackson, Vicki. 2010. *Constitutional Engagement in a Transnational Era*. New York, NY: Oxford University Press.

Kahn-Freund, O. 1974. On Uses and Misuses of Comparative Law. *The Modern Law Review* 37:1-27.

Kalb, Johanna. 2013. The Judicial Role in New Democracies: A Strategic Account of Comparative Citation. *Yale Journal of International Law* 38:424-465.

Kim, Daein. 2010. Korean Administrative Cases in 'Law and Development' Context. Pp. 199-218 in *Litigation in Korea*, edited by Kuk Cho. Northampton, MA: Edward Elgar.

Kim, Jongcheol, and Jonghyun Park. 2012. Causes and Conditions for Sustainable Judicialization of Politics in Korea. Pp. 37-55 in *The Judicialization of Politics in Asia*, edited by Björn Dressel. New York,

NY: Routledge.

Kim, Jongcheol. 2009. Government Reform, Judicialization, and the Development of Public Law in the Republic of Korea. Pp. 101-126 in *Administrative Law and Governance in Asia: Comparative Perspectives*, edited by Tom Ginsburg and Albert H.Y. Chen. New York, NY: Routledge.

Kim, Marie Seong-Hak. 2012. *Law and Custom in Korea: Comparative Legal History*. Cambridge: Cambridge University Press.

———. 2013. In the Name of Custom, Culture, and the Constitution: Korean Customary Law in Flux Symposium. *Texas International Law Journal* 48:357-391.

Lau, Holning. 2013. The Language of Westernization in Legal Commentary. *The American Journal of Comparative Law* 61:507-538.

Law, David S. 2008. Globalization and the Future of Constitutional Rights. *Northwestern University Law Review* 102:1277-1350.

———. 2015. Judicial Comparativism and Judicial Diplomacy. *University of Pennsylvania Law Review* 163:927-1036.

Law, David S., and Wen-Chen Chang. 2011. The Limits of Global Judicial Dialogue. *Washington Law Review* 86:523-577.

Lee, Ilhyung. 2013. Korean Perception(s) of Pyungdeung (Equality). Pp. 67-92 in *Law and Society in Korea*, edited by Hyunah Yang. Northampton, MA: Edward Elgar.

Legrand, Pierre. 1997. The Impossibility of 'Legal Transplant'. *Maastricht Journal of European and Comparative Law* 4:111-124.

L'Heureux-Dubé, Claire. 1998. The Importance of Dialogue: Globalization and The International Impact of The Rehnquist Court. *Tulsa Law Review* 34:15-40.

Lin, Chien-Chih. 2016. Constitutions and courts in Chinese Authoritarian Regimes: China and pre-democratic Taiwan in comparison. *International Journal of Constitutional Law* 14:351-377.

Linnan, David K. 2010. 'Reading the Tea Leaves' in the Indonesian Commercial Court: A Cautionary Tale, but for Whom?. Pp. 56-80 in *New Courts in Asia*, edited by Andrew Harding and Penelope Nicholson. New York, NY: Routledge.

McCann, Michael W. 1994. *Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization*. Chicago, IL: University of Chicago Press.

Merryman, John H., and Rogelio Pérez-Perdomo. 2007. *The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin America*. 3d ed. Stanford, CA: Stanford University Press.

Miyakawa, Koji. 2014. Inside the Supreme Court of Japan — From the Perspective of a Former Justice, translated by Mark A. Levin and Megumi Honami Lachapelle. *Asian-Pacific Law & Policy Journal* 15:196-212.

Moustafa, Tamir, and Tom Ginsburg. 2008. Introduction: The Functions of Courts in Authoritarian Politics. Pp. 1-22 in *Rule by Law: The Politics of Courts in Authoritarian Regimes*, edited by Tom Ginsburg and Tamir Moustafa. Cambridge: Cambridge University Press.

Oh, John Kie-Chiang. 2014. Adaptations in Korea: Confucianism, Democracy, and Economic Development. Pp. 85-110 in *Confucian Culture and Democracy*, edited by John Fuh-Sheng Hsieh. Hackensack, NJ: World Scientific.

Ohnesorge, John K. M. 2012. Law and Development Orthodoxies and the Northeast Asian Experience. Pp. 9-42 in *Law and development in Asia*, edited by Gerald Paul McAlinn and Caslav Pejovic. New York, NY: Routledge.

———. 2010. Administrative Law in East Asia: A Comparative-Historical Analysis. Pp. 78-91 in *Comparative Administrative Law*, edited by Susan Rose-Ackerman and Peter L. Lindseth. Northampton, MA: Edward Elgar.

Ørebech, Peter, and Fred Bosselman. 2005. The Linkage between Sustainable Development and Customary Law. Pp. 12-42 in *The Role of Customary Law in Sustainable Development*, edited by Peter Ørebech, Fred

Bosselman, Jes Bjarup, David Callies, Martin Chanock and Hanne Petersen. Cambridge: Cambridge University Press.

Peerenboom, Randall. 2012. Between Global Norms and Domestic Realities. Pp. 181-201 in *Law and Development and the Global Discourses of Legal Transfers*, edited by John Gillespie and Pip Nicholson. Cambridge: Cambridge University Press.

Posner, Eric A., and Cass R. Sunstein. 2006. The Law of Other States. *Stanford Law Review* 59:131-180.

Rosenberg, Gerald N. 2008. *The Hollow Hope: Can Courts Bring About Social Change?*. 2d ed. Chicago, IL: University of Chicago Press.

Rosenfeld, Michel. 2004. Constitutional Adjudication in Europe and the United States: Paradoxes and Contrasts. *International Journal of Constitutional Law* 2:633-668.

Sadurski, Wojciech. 2014. *Rights Before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe*. 2d ed. Heidelberg: Springer.

Satayanurug, Pawat, and Nattaporn Nakornin. 2014. Courts in Thailand: Progressive Development as the Country's Pillar of Justice. Pp. 407-446 in *Asian Courts in Context*, edited by Jiunn-Rong Yeh and Wen-Chen Chang. Cambridge: Cambridge University Press.

Saunders, Cheryl. 2011. Judicial Engagement with Comparative Law. Pp. 571-598 in *Comparative Constitutional Law*, edited by Tom Ginsburg and Rosalind Dixon. Northampton, MA: Edward Elgar.

———. 2014. Judicial Engagement. Pp. 80-101 in *Comparative Constitutional Law in Asia*, edited by Rosalind Dixon and Tom Ginsburg. Northampton, MA: Edward Elgar.

Scalia, Antonin. 1989. Originalism: The Lesser Evil. *University of Cincinnati Law Review* 57:849-865.

Schauer, Frederick. 2000. The Politics and Incentives of Legal Transplantation. Pp. 253-268 in *Governance in a Globalizing World*, edited by Joseph S.

Nye and John D. Donahue. Washington, D.C.: Brookings Institution Press.

Shapiro, Martin M. 1981. *Courts: A Comparative and Political Analysis*. Chicago, IL: University of Chicago Press.

Shin, Doh Chull. 2011. *Confucianism and Democratization in East Asia*. Cambridge: Cambridge University Press.

Slaughter, Anne-Marie. 2005. *A New World Order*. Princeton, NJ: Princeton University Press.

Son, Bui Ngoc. 2016. *Confucian Constitutionalism in East Asia*. New York, NY: Routledge.

Strauss, David A. 2009. The Modernizing Mission of Judicial Review. *The University of Chicago Law Review* 76:859-908.

———. 2010. *The Living Constitution*. Oxford: Oxford University Press.

Tamanaha, Brian Z. 2012. The Rule of Law and Legal Pluralism in Development. Pp. 34-49 in *Legal Pluralism and Development: Scholars and Practitioners in Dialogue*, edited by Brian Z. Tamanaha, Caroline Sage and Michael Woolcock. New York, NY: Cambridge University Press.

———. 2013. Battle Between Law and Society in Micronesia. Pp. 584-610 in *Social and Political Foundations of Constitutions*, edited by Denis J. Galligan and Mila Versteeg. New York, NY: Cambridge University Press.

Tan, Kevin Y. 2014. As Efficient as the Best Business: Singapore's Judicial System. Pp. 228-266 in *Asian Courts in Context*, edited by Jiunn-Rong Yeh and Wen-Chen Chang. Cambridge: Cambridge University Press.

Tate, C. Neal, and Torbjörn Vallinder. 1995. *The Global Expansion of Judicial Power*. New York, NY: New York University Press.

Teitel, Ruti. 2009. Transitional Jurisprudence: The Role of Law in Political Transformation. *Yale Law Journal* 106:2009-2080.

Teubner, Gunther. 1998. Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences. *The Modern Law Review*

61:11-32.

Tew, Yvonne. 2014. Originalism at Home and Abroad. *Columbia Journal of Transnational Law* 52:780-895.

Trubek, David M. 2012. Introduction: Law and Development in the Twenty-first Century. Pp. 1-6 in *Law and Development in Asia*, edited by Gerald Paul McAlinn and Caslav Pejovic. New York, NY: Routledge.

Tu, Weiming, Milan Hejtmanek, and Alan Wachman. 1992. *The Confucian World Observed: A Contemporary Discussion of Confucian Humanism in East Asia*. Honolulu, Hawaii: University of Hawii Press.

Tushnet, Mark. 2009. The Inevitable Globalization of Constitutional Law. *Virginia Journal of International Law* 49:985-1006.

Vago, Steven. 2012. *Law and Society*. 10th ed. Upper Saddle River, NJ: Prentice Hall.

Varol, Ozan O. 2011. The Origins and Limits of Originalism: A Comparative Study. *Vanderbilt Journal of Transnational Law* 44:1239-1297.

Visser, Maartje De. 2016. We All Stand Together: The Role of the Association of Asian Constitutional Courts and Equivalent Institutions in Promoting Constitutionalism. *Asian Journal of Law and Society* 3:105-134.

Wang, Tay-Shen. 2015. *The Process of Legal Modernization in Taiwan: From* "*the Extension of Mainland*" *to* "*Independent Reception*". Taipei: Institute of Taiwan History, Academica Sinica.

Watson, Alan. 1996. Aspects of Reception of Law. *The American Journal of Comparative Law* 44:335-351.

———. 2001. *The Evolution of Western Private Law*. Baltimore, MD: Johns Hopkins University Press.

Weinrib, Lorraine E. 2006. The Postwar Paradigm and American Exceptionalism. Pp. 84-112 in *The Migration of Constitutional Ideas*, edited by Sujit Choudhry. Cambridge: Cambridge University Press.

West, James M., and Dae-Kyu Yoon. 1992. The Constitutional Court of the Republic of Korea: Transforming the Jurisprudence of the Vortex?. *The*

American Journal of Comparative Law 40:73-119.

Whittington, Keith E. 2007. *Political Foundations of Judicial Supremacy: The Presidency, the Supreme Court, and Constitutional Leadership in U.S. History*. Princeton, NJ: Princeton University Press.

Yang, Hyunah. 2013. Colonialism and Patriarchy: Where the Korean Family-Head (hoju) System Had Been Located. Pp. 45-66 in *Law and Society in Korea*, edited by Hyunah Yang. Northampton, MA: Edward Elgar.

Yap, Po Jen, and Holning Lau. 2011. Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization. Pp. 1-8 in *Public Interest Litigation in Asia*, edited by Po Jen Yap and Holning Lau. New York, NY: Routledge.

Yeh, Jiunn-rong. 1997. Institutional Capacity-Building Toward Sustainable Development: Taiwan's Environmental Protection in the Climate of Economic Development and Political Liberalization. *Duke Journal of Comparative & International Law* 6:229-272.

———. 2009. Democracy-Driven Transformation to Regulatory State: The Case of Taiwan. Pp. 127-142 in *Administrative Law and Governance in Asia: Comparative Perspectives*, edited by Tom Ginsburg and Albert H.Y. Chen. New York, NY: Routledge.

———. 2015. Court-ordered Apology: The Function of Courts in the Construction of Society, Culture and the Law. Pp. 21-38 in *The Functional Transformation of Courts: Taiwan and Korea in Comparison*, edited by Jiunn-Rong Yeh. Taipei: National Taiwan University Press.

———. 2016. *The Constitution of Taiwan: A Contextual Analysis*. Oxford: Hart Publishing.

Yeh, Jiunn-Rong, and Wen-Chen Chang. 2014. Introduction: Asian Courts in Context: Tradition, Transition and Globalization. Pp. 1-74 in *Asian Courts in Context*, edited by Jiunn-Rong Yeh and Wen-Chen Chang. Cambridge: Cambridge University Press.

———. 2008. The Emergence of Transnational Constitutionalism: Its Features, Challenges and Solutions. *Penn State International Law Review* 27:89-124.

———. 2011. The Emergence of East Asian Constitutionalism: Features in Comparison. *The American Journal of Comparative Law* 59:805-839.

Yune, Jinsu. 2005. Tradition and the Constitution in the Context of the Korean Family Law. *Journal of Korean Law* 5:194-212.

———. 2015. Judicial Activism and the Constitutional Reasoning of the Korean Supreme Court in the Field of Civil Law. Pp. 123-138 in *The Functional Transformation of Courts: Taiwan and Korea in Comparison*, edited by Jiunn-Rong Yeh. Taipei: National Taiwan University Press.