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RESEARCH ARTICLE

# Global constitutionalism: Asia-Pacific perspectives

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**Abstract**

This special issue of *Global Constitutionalism* discusses how global constitutionalism influences Asia-Pacific jurisdictions and how they respond. This introductory article presents the theme and structure of this issue, explains the Asia-Pacific's unique contribution to global constitutionalism and offers a synthetic argument. It conceptualizes global constitutionalism as the global diffusion of common constitutional ideas, institutions and doctrines rooted in comparative constitutional law and public international law. On that base, it argues that constitutional design, adjudication and discourse in many Asia-Pacific jurisdictions are influenced by global constitutionalism. The influence results in not only convergence but also resistance to global constitutionalism in the regions. The regional experience presents critical challenges for global constitutionalism, and hence its effective operation significantly depends on its situation within the region's axiological, institutional and social contexts.

**Keywords:** Asia-Pacific; comparative constitutional law; constitutional convergence; constitutional resistance; global constitutionalism

## I. Introduction

Constitutionalism has arguably gone global in two ways: the global expansion of ideas and institutions of modern constitutionalism (particularly the trinity of human rights, democracy, and the rule of law)[1] into nation-states; and the application of constitutional norms to the global order beyond nation-states.[2] Focusing on the former aspect,[3] this special issue discusses how global constitutionalism influences Asia-Pacific jurisdictions

[1]Antje Wiener et al., 'Editorial: Global Constitutionalism: Human Rights, Democracy and the Rule of Law' (2012) 1(1) *Global Constitutionalism* 1.

[2]Michel Rosenfeld, 'Is Global Constitutionalism Meaningful or Desirable?' (2014) 25 *European Journal of International Law* 177.

[3]For the global diffusion of constitutionalism, including to Asia and the Pacific, see Albert HY Chen, 'Constitutions, Constitutional Practice and Constitutionalism in East Asia' in Christoph Antons (ed), *Routledge Handbook of Asian Law* (Routledge, London, 2016) 75–93; Jiunn-Rong Yeh and Wen-Chen Chang, 'The Changing Landscape of Modern Constitutionalism: Transitional Perspective' (2009) 4 (1) *National Taiwan University Law Review* 145; Venkat Iyer, 'Restoration Constitutionalism in the South Pacific' (2006) 15(1) *Pacific Rim Law & Policy Journal* 39; Bruce Ackerman, 'The Rise of World Constitutionalism' (1997) 83(4) *Virginia Law Review* 771.

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and how they respond. It seeks to locate these regions within the growing scholarship on global constitutionalism. Global constitutionalism has been studied from different angles: law, politics, international relations, philosophy and history.[4] This special issue focuses more on the legal aspects of global constitutionalism, although interdisciplinary materials and a reflection from the perspective of international relations are included. This introductory article presents the theme and structure of this issue, explains the Asia-Pacific's unique contribution to global constitutionalism and offers a synthetic argument.

Drawing on the case-studies, this article offers a synthetic argument integrating conceptual, analytical, critical and normative perspectives. It conceptualizes global constitutionalism as the global diffusion of common constitutional ideas, institutions and doctrines rooted in comparative constitutional law and public international law. On that basis, it argues that constitutional design, adjudication and discourse in many Asia-Pacific jurisdictions are influenced by global constitutionalism. The influence results in not only convergence but also resistance to global constitutionalism in the regions. Due to various mechanisms (such as imposition, conformity, uncertainty and normative appeal), many jurisdictions in the regions have shared convergent elements, including a written constitution, constitutional review and several judicial doctrines (such as unconstitutional constitutional amendments and proportionality). At the same time, the regions have witnessed the resistance to the very idea of 'constitutionalism', a constitutional court and liberal rights discourse in several authoritarian and semi-authoritarian regimes, which stems from political interests and exceptionalism, among other factors. The regional experience posts critical challenges to global constitutionalism: sometimes constitutional convergence occurs at the textual level but not in reality, and is not really global but limited to Asian constitutional engagement with a few Western jurisdictions. Normatively speaking, the effective operation of global constitutionalism significantly depends on it being situated within the region's axiological, institutional and social contexts.

Part I presents an overview of the special issue. Parts II, III, IV and V deal with conceptual, analytical, critical and normative aspects of global constitutionalism with reference to the case studies and other contributions to the issue. Part VI concludes the article.

## II. Overview

### *Contributions*

This special issue aims to make four contributions to the growing body of scholarship on the global expansion of constitutionalism.[5] These are characterized here as jurisdictional, methodological, epistemological and substantial.

First, jurisdictions in Asia-Pacific have been under-explored in the current scholarship on global constitutionalism. As Cheryl Saunders says, Asia and the Pacific are large and significant regions, but 'are regularly omitted from analyses on which generalizations about global constitutionalism are based. If claims about globalization do not hold true in

[4]See generally, Anthony F Lang Jr and Antje Wiener (eds), *Handbook on Global Constitutionalism* (Edward Elgar, Cheltenham, 2017).

[5]See, for example, some recent collections: Shinar Adam (ed), Special Issue: 'The Ideologies of Global Constitutionalism' (2019) 8(1) *Global Constitutionalism* 12; Iddo Porat and Gila Stopler (eds), Special Issue: 'Global Constitutionalism and Human Rights' (2018) 12(1) *Law & Ethics of Human Rights* 1.

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Asia and the Pacific they do not reflect genuinely global phenomena at all, significant though they may be in particular parts of the world.'[6] The Asian region has already been discussed in global constitutionalism scholarship to some extent. For example, in 2009 the *National Taiwan University Law Review* published a special issue on Asian constitutionalism which includes several contributions exploring its global aspects.[7] In addition, a recent volume canvasses global constitutionalism with reference to East Asia, particularly China and Japan.[8] Several contributors of the above two collections also feature in the current special issue. In comparison with previous publications, this project includes more diverse perspectives, focuses more on the national various reactions to global constitutionalism and incorporates more jurisdictions, particularly in South Asia and the Pacific.

Second, the current literature on global constitutionalism, particularly in global comparative constitutional law, has been influenced by a quantitative method. Scholars have coded the constitutional texts to verify the global proliferation of constitutionalist ideas and institutions.[9] Given the global scale of the inquiry, the employment of the quantitative method to identify global constitutional trends is understandable. This special issue, however, aims to contribute to constitutional methodology by offering qualitative investigations of the actual reaction to global constitutionalism, taking into account both texts and socio-political contexts. The Asia-Pacific region offers a particularly germane context for qualitative studies of global constitutionalism as the constitutional systems in the region are particularly interconnected with the social and political surroundings.[10] In addition, given the regional focus and case studies, the use of the qualitative method is appropriate.

Third, the epistemological assumption widely shared among the current accounts of global constitutionalism is positive global constitutional convergence: countries adopt similar constitutional ideas and institutions, and hence constitutions around the world look alike.[11] This special issue opens itself to a range of both positive and negative responses to global constitutionalism. The positive responses include these constitutional

[6]See Cheryl Saunders' article in this issue.

[7]Cheryl Saunders, 'Towards a Global Constitutional Gene Pool' (2009) 4(3) *National Taiwan University Law Review* 1; Wen-Chen Chang, 'An Isolated Nation with Global-Minded Citizens: Bottom-up Transnational Constitutionalism in Taiwan' (2009) 4(3) *National Taiwan University Law Review* 203; Albert HY Chen, 'International Human Rights Law and Domestic Constitutional Law: Internationalisation of Constitutional Law in Hong Kong' (2009) 4(3) *National Taiwan University Law Review* 237; Li-Ann Thio, 'Reception and Resistance: Globalisation, International Law and the Singapore Constitution' (2009) 4(3) *National Taiwan University Law Review* 335.

[8]Takao Suami, Anne Peters, Dimitri Vanoverbeke and Mattias Kumm (eds), *Global Constitutionalism from European and East Asian Perspectives* (Cambridge University Press, Cambridge, 2018).

[9]See, for example, David Law and Mila Versteeg, 'The Evolution and Ideology of Global Constitutionalism' (2011) 99 *California Law Review* 1163.

[10]See generally Wen-Chen Chang, Li-ann Thio, Kevin YL Tan, Jiunn-rong Yeh, Constitutionalism in Asia: Cases and Materials (Hart, Oxford, 2014); Graham Hassall and Cheryl Saunders, *Asia-Pacific Constitutional Systems* (Cambridge University Press, Cambridge, 2012).

[11]Wen-Chen Chang and Jiunn-Rong Yeh, 'Internationalization of Constitutional Law' in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, Oxford, 2012) 1169; Zachary Elkins, Tom Ginsburg and Beth Simmons, 'Getting to Rights: Treaty Ratification, Constitutional Convergence, and Human Rights Practice' (2013) 54(1) *Harvard International Law Journal* 61; Mark Tushnet, 'The Inevitable Globalization of Constitutional Law' (2009) 49(4) *Virginia Journal of International Law* 985. For critical discussions, see Rosalind Dixon and Eric Posner, 'The Limits of Constitutional Convergence' (2011) 11(2) *Chicago Journal of International Law* 399.

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ideas 'taken entire, reverently accepted, reinvented through bricolage, mistranslated, misunderstood, and mangled'.[12] The negative responses include these constitutional ideas 'refused, rejected, buried, and maligned'.[13] Ideas of modern constitutionalism have been both achieved[14] and resisted[15] in Asia.

Fourth, substantially, the global constitutionalism scholarship tends to focus on the global diffusion of human rights and judicial review.[16] This special issue examines a range of other procedural, ideational, structural and doctrinal issues, such as international involvement in constitution-making, constituent power, the separation of powers and the doctrines of unconstitutional constitutional amendment and proportionality. In particular, many Asian states have recently conducted, or been in the process of, constitution-making, which creates the space for both local and global influence.[17]

## Structure

In addition to this introductory article, this special issue comprises a theoretical article, six case studies and a concluding reflection. This issue in general, and the case-studies in particular, make unique contributions to global constitutionalism by engaging the Asia-Pacific jurisdictions, offering qualitative inquiries into the reality of positive and negative reaction to global constitutionalism in the regions in various venues.

It draws on a small, limited number of case-studies[18] to generate some observations and positions that may be used in other comparable cases. These cases present different polities across the Asia-Pacific region. These polities have different regime types and different legal origins, but they are all influenced by global constitutionalism in some way.

Cheryl Saunders' theoretical article, which is drawn from her keynote speech in the symposium, asks whether the very concept of constitution is changing under the conditions of globalization with reference to the Asia-Pacific region. She first considers whether there is a globally shared feature of a generic constitution before exploring phenomena associated with globalization that may suggest a constitution transformation: a degree of constitutional convergence, international engagement in national constitution-making and external monitoring of the operation of constitutions. Drawing on extensive consideration of evidence, belief and effectiveness, Saunders concludes that despite the extraordinary change in the global context under which national constitution operates, the concept of a constitution retains its defining features. She acknowledges that globalization

[12]Kim Lane Scheppele, 'Aspirational and Aversive Constitutionalism: The Case for Studying Cross-constitutional Influence Through Negative Models' (2003) 1(2) *International Journal of Constitutional Law* 297.

[13]Ibid.

[14]Albert HY Chen, 'The Achievement of Constitutionalism in Asia' in Albert HY Chen (ed) *Constitutionalism in Asia in the Early Twenty-First Century* (Cambridge University Press, Cambridge, 2014) 1–31.

[15]See, for example, Rogier Creemers, 'China's Constitutionalism Debate: Content, Context and Implications' (2015) 74 *The China Journal* 91.

[16]Benedikt Goderis and Mila Versteeg, 'The Diffusion of Constitutional Rights' (2014) 39 *International Review of Law & Economics* 1; Tom Ginsburg and Mila Versteeg, 'Why Do Countries Adopt Constitutional Review?' (2014) 30(3) *The Journal of Law, Economics, & Organization* 587.

[17]De Visser Maartje And Son Bui Ngoc, 'Glocalised Constitution-Making in the Twenty-First Century: Evidence from Asia' (2019) 8 *Global Constitutionalism* 297.

[18]For small-N case studies, see Ran Hirschl, *Comparative Matters: The Renaissance of Comparative Constitutional Law* (Oxford University Press, Oxford, 2014) 244–45.

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presents a series of changes to national constitutions and believes that responding to them might be an exercise in global constitutionalism.

The first three case-studies explore global constitutionalism in an East Asian context. Yoon Jin Shin explores the dynamics of global constitutionalism in South Korea in terms of constitutional adjudication. She explores the diverse underlying factors that shape the *transnational engagement* of South Korea's Constitutional Court and the multiple orientations (e.g. nationalist and cosmopolitan) within that engagement. Chien-Chih Lin canvasses the success of global constitutionalism in Taiwan (particularly in the area of judicial review) as opposed to the recent arguably global decline of constitutional democracy. His contribution focuses on the transnational (particularly German and American) influences on the design and practice of Taiwan's Constitutional Court. He argues that, among other things, the Taiwan story casts doubt on the concept of global constitutionalism as the jurisdictions referred to are limited to a small number of Western countries. Samuli Seppänen explores a unique feature of the Chinese socialist constitutional governance: the oscillation between legal formalism and anti-formalism in Chinese Communist Party ideology. The former supports the resort to the Party's internal regulations, including its constitution conceived as a part of the broader living constitutional order in China,[19] while the latter illustrates illiberal resistance to formal legal processes, including liberal constitutionalism.

The next three articles investigate cases in Southeast Asia, South Asia and the Pacific. Surabhi Chopra locates the Philippines' constitutional design and adjudication in the transnational discourse of transformative constitutionalism. In term of design, she finds that the social and economic rights and welfare provisions of the country's 1987 Constitution were influenced by the International Covenant of Economic, Social and Cultural Rights, and were strongly aspirational but weakly transformative. She argues that the Supreme Court of the Philippines had considerable room to effect these constitutional rights, but failed to do so due to the textual constitutional ambiguity and the court's legacy of jurisprudential conservatism.

Rehan Abeyratne turns to three cases in South Asia. Focusing on two areas (unconstitutional constitutional amendments and public-interest litigation), he examines the existence of a model of regional constitutionalism in South Asia in which the Indian Supreme Court translated global constitutional norms for the use by its neighbours: Bangladesh and Sri Lanka. He further demonstrates the Bangladeshi and Sri Lankan judiciaries' distinct approaches to the Indian jurisprudence: convergence and engagement respectively. Anna Dziedzic investigates how foreign judges can operate as the agents of global constitutionalism in nine states in the Pacific: Fiji, Kiribati, Nauru, Papua New Guinea (PNG), Samoa, the Solomon Islands, Tonga, Tuvalu and Vanuatu. She identifies three senses in which foreign judges in these states can do so: they might be mechanisms for the diffusion of constitutional ideas; they are expressive of global constitutionalism; and they are objects of global constitutionalism.

In his concluding reflection, Anthony F Lang Jr draws on the examples in the above case-studies to articulate the concept of 'practical global constitutionalism', which denotes the idea that global constitutional ideals (rule of law, democracy and human rights) only work when they are integrated into existing social and economic systems.

[19]Larry Cata Backer, 'Party, People, Government and State: On Constitutional Values and the Legitimacy of the Chinese State-Party Rule of Law System' 30(2) (2012) *Boston University International Law Journal* 343. For the constitutional role of the party, see also Xin He, 'The Party's Leadership as a Living Constitution in China' (2012) 42(1) *Hong Kong Law Journal* 73.

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He argues that contestation is the means by which global constitutional norms are integrated, adapted and adjusted in the regional and national contexts.

## III. Conceptual global constitutionalism

Conceptual global constitutionalism articulates the concept of global constitutionalism. There is no unanimous definition of global constitutionalism. In an editorial, the editors of the journal *Global Constitutionalism* define the concept:

> Global constitutionalism refers to the global field of diverse, formal and informal assemblages of laws and governance, norms and actors that exhibit *constitutional qualities*. Although they are contested, constitutional qualities include features such as: the distribution and separation of powers, responsibilities, rights and offices; secondary rules that constitute and limit primary rules, courts and governments; bindingness and compliance mechanisms; degrees and types of institutionalisation; intergenerational persistence; publicity, non-arbitrariness and contestedness; and widely accepted norms of legitimation.[20]

Global constitutionalism is an interdisciplinary global phenomenon and is reasonably subjected to different conceptualizations from different perspectives. From a legal perspective, global constitutionalism can be conceptualized as the global diffusion of common constitutional ideas, institutions and doctrines rooted in comparative constitutional law and public international law. The common constitutional qualities may be general constitutional ideas (such as human rights) or specific institutions and doctrines (such as constitutional review and proportionality). The first source of these constitutional qualities is found in comparative constitutional law, broadly defined as including both national constitutions and their interpretations. Some constitutionalist ideas and doctrines were originally articulated in a limited number of constitutional texts and decisions but have been adopted in a large number of constitutional texts and decisions around the world. The second source of constitutional ideals is public international law, especially international human rights law. The international human rights instruments are incorporated into or inform national constitutional design and constitutional review around the world. The consequence is the diffusion of some common constitutional qualities in a large number of polities in different parts of the globe.

Under this conception, global constitutionalism emphasizes the global diffusion of common constitutional qualities. The globally diffused constitutional ideas, institutions and doctrines can address not only international activities and questions, but also purely national ones.[21] For example, the Korean Constitutional Court's 2018 decision on the unconstitutionality of the Military Act, discussed in Shin's contribution, dealt with a purely national issue but was informed by the international human rights norms on

[20]James Tully, Jeffrey L Dunoff, Anthony F Lang Jr, Mattias Kumm and Antje Wiener, 'Introducing Global Integral Constitutionalism' (2016) 5(1) *Global Constitutionalism* 2 (italics in original).

[21]This view is drawn on Gregory Shaffer's concept of transnational law, which 'focuses on the transnational production of legal norms and institutional forms and their migration across borders, regardless of whether they address transnational activities or purely national ones'. Gregory Shaffer, 'Transnational Legal Process and State Change' (2012) 37(2) *Law & Social Inquiry* 234.

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conscientious objection. Global constitutionalism can therefore be discussed in national contexts.

Global constitutionalism can be also understood in a scholarly sense: an academic inquiry into the phenomenon of global constitutionalism. As an area of academic study, global constitutionalism can be conceptual, analytical, critical and normative. The next three parts will focus on the analytical, critical and normative aspects.

## IV. Analytical global constitutionalism

Analytical global constitutionalism explores and explains how and why common constitutional ideas, institutions and doctrines have diffused globally, and how and why polities around the world respond to global constitutional diffusion in different ways. Two major tendencies in the response to global constitutionalism in the Asia-Pacific can be identified: convergence and resistance.

### *Convergence*

Convergence refers to the tendency of countries around the world to adopt common features of modern constitutionalism. Due to globalization, some degree in global constitutional convergence is observable – albeit contestable. Constitutional convergence can be discussed with reference to three categories: substances, forms and mechanisms.

First, let us consider the substances. Traditional and new constitutional substances have become the convergent qualities codified in written charters. Wen-Chen Chang and Jiunn-Rong Yeh point out that:

> Aside from traditional arrangements such as a bill of rights, and the separation of powers, new institutions particularly responsible for guarding constitutions such as constitutional courts, human rights commissions and independent auditors, have all become common features of new constitutions.[22]

In particular, constitutional review – either in the form of ordinary courts or specialist constitutional courts, or similar bodies – has become a virtually global structural constitutional quality.[23] Related to this, the doctrine of unconstitutional constitutional amendments has been widely diffused globally as part of constitutional design and review.[24] Moreover, in the twenty-first century, the doctrine of proportionality has globally spread as a new feature of global constitutionalism.[25]

[22]Jiunn-Rong Yeh and Wen-Chen Chang, 'The Emergence of Transnational Constitutionalism: Its Features, Challenges and Solutions' (2008) 27(1) *Penn State International Law Review* 97.

[23]Albert Chen, 'The Global Expansion of Constitutional Judicial Review: Some Historical and Comparative Perspectives', in *Festschrift in Honor of Professor Satoru Osanai* (Chuo University, Tokyo, 2013) 3–25; Tom Ginsburg, 'The Global Spread of Constitutional Review' in Keith Whittington and Daniel Keleman (eds), *Oxford Handbook of Law and Politics* (Oxford University Press, Oxford, 2008) 81–98.

[24]David E Landau, Rosalind Dixon and Yaniv Roznai, 'From an Unconstitutional Constitutional Amendment to an Unconstitutional Constitution? Lessons from Honduras' (2019) 8(1) *Global Constitutionalism* 40; Yaniv Roznai, 'Unconstitutional Constitutional Amendments: The Migration and Success of a Constitutional Idea' (2013) 61(3) *American Journal of Comparative Law* 657.

[25]Alec Stone Sweet and Jud Mathews, 'Proportionality Balancing and Global Constitutionalism' (2008) 47(1) *Columbia Journal of Transnational Law* 72.

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Such constitutional convergence resonates in Asia and the Pacific. All jurisdictions discussed in this special issue have written constitutions,[26] which codify fundamental rights and some forms of separation of powers. Some qualifications related to China should be noted.[27] Despite its strong resistance to constitutionalism, its 1982 Constitution already includes a bill of rights. The country's constitution stipulates the principle of democratic centralism, a Leninist antithesis to separationism a la Montesquieu, but it also distributes powers among the three branches of state.[28]

Constitutional review is also a common feature in the Asia-Pacific. Specialist constitutional courts have been created in civil law jurisdictions in South Korea, Taiwan, Mongolia, Indonesia, Thailand, Tajikistan and Uzbekistan. In particular, the constitutional courts in South Korea and Taiwan have been the success stories of constitutionalism in East Asia, as indicated in the two contributions by Shin and Lin. Similar specialist bodies (variously called a constitutional council or tribunal) were created in Cambodia, Myanmar and Kazakhstan. Due to US influence after War World II, Japan adopts constitutional review by the ordinary judiciary (particularly the Supreme Court).[29]

Largely as a result of the colonial legacy, many other common law jurisdictions in Asia adopt the constitutional review by ordinary courts, as shown in the cases of the Philippines, India, Bangladesh and Sri Lanka discussed by Chopra and Abeyratne. For the same colonial reason, the common law jurisdictions in the Pacific adopt a similar constitutional review model. As Dziedzic indicates, seventeen courts across the nine states in the region exercise constitutional jurisdiction: Fiji – High Court, Court of Appeal, Supreme Court; Kiribati, Solomon Islands and Tuvalu – High Court and Court of Appeal; Papua New Guinea – National Court and Supreme Court; Samoa, Tonga and Vanuatu – Supreme Court and Court of Appeal; Nauru – Supreme Court.

Several global judicial doctrines have spread to Asia. For example, the doctrine of unconstitutional constitutional amendment has been adopted by the courts in Taiwan, Malaysia, India, Bangladesh and Sri Lanka.[30] The doctrine of proportionality has also been adopted by the courts in Japan, South Korea, Taiwan, Hong Kong, Malaysia, the Philippines, India and Bangladesh.[31]

[26]See articles in this issue.

[27]For discussions on China in the context of global constitutionalism, see Maria Adele Carrai, 'Global Constitutionalism and Chinese Exceptionalism' (2016) 21 *European University Institute Working Papers* 95; Haig Patapan, 'Towards a Cosmopolitan Constitutionalism: On Universalism and Particularism in Chinese Constitutionalism' (2015) 3(1) *The Chinese Journal of Comparative Law* 78.

[28]NW Barrber, *The Principles of Constitutionalism* (Oxford University Press, Oxford, 2018) 77.

[29]For recent accounts of constitutional review in East Asia and Southeast Asia, see Albert HY Chen and Andrew Harding (eds), *Constitutional Courts in Asia: A Comparative Perspective* (Cambridge University Press, Cambridge, 2018).

[30]See Abeyratne's article in this issue. See also David K Huang and Nigel N Li, 'Unconstitutional Constitutional Amendment in Taiwan: A Retrospective Analysis of Judicial Yuan Interpretation' (2020) 499(2000) *University of Pennsylvania Asian Law Review* 421; Low Hong Ping, 'The Doctrine of Unconstitutional Constitutional Amendments in Malaysia' (2019) 45(2) *Journal of Malaysian and Comparative Law* 53; Jaclyn L Neo, 'A Contextual Approach to Unconstitutional Constitutional Amendments: Judicial Power and the Basic Structure Doctrine in Malaysia' (2020) 15(1) *Asian Journal of Comparative Law* 69–94; Md Ariful Islam Siddiquee, Unconstitutional Constitutional Amendments in South Asia: A Study of Constitutional Limits on Parliaments' Amending Power' (2015) 35 *Journal of Law, Policy and Globalization* 64.

[31]See Lin's Article in this issue. See also Alec Stone Sweet and Jud Mathews, 'Proportionality and Rights Protection in Asia: Hong Kong, Malaysia, South Korea, Taiwan – Whither Singapore?' (2017)

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Let us now turn to the forms of constitutional convergence. Constitutional convergence has been manifested in three forms: constitutional design, review and discourse. In the first instance, constitution-making and constitutional amendments are the formal process through which common constitutional qualities are incorporated into the national constitutions. Chopra's contribution illustrates the way the Philippines adopted international human rights norms through constitution-making. China also adopted the notion of human rights in its 2004 constitutional amendment.[32]

The second form to express convergent constitutional norms is judicial. Through their exercise of constitutional review powers, courts adopt and consolidate some common constitutional qualities (such as human rights) and global judicial doctrines (unconstitutional constitutional amendments and proportionality) in their judgments. The contributions to this issue discussing judicial review in South Korea, Taiwan, India and Bangladesh illustrate this aspect. For example, as Shin indicates, a decision by the Constitutional Court of South Korea in 2018 upheld the right to conscientious objection as an international human rights norm, supported by reference to a range of international documents.

Finally, constitutional convergence is expressed in discursive form. New institutionalism suggests that ideas and discourses that convey ideas can play a powerful role in shaping institutional design.[33] Constitutional discourse can be popular, scholarly or governmental. Popular constitutional discourse happens in popular platform (e.g. mass media); scholarly constitutional discourse occurs in academic venues; governmental constitutional discourse is carried out on official platforms (e.g. in executive meetings or legislative sessions). Constitutional discourse may express and spread common constitutional ideals, which may influence their textual and judicial embodiment. One good example is from Lin's contribution: Chang Chun-mai, a public intellectual and political figure, published several essays in the spirit of the *Federalist Papers* advocating for constitutional design in China, which shaped the final version of the 1946 Constitution of the Republic of China in which the Judicial Yuan was vested with review power similar to that of the US Supreme Court. Chang's *Ten Essays on the Chinese Democratic Constitution* can be considered a discursive form of constitutional ideals.

How does constitutional convergence occur? A classical account of global neo-institutionalism in sociology identifies three mechanisms of institutional isomorphism: coercive, mimetic and normative.[34] Coercive isomorphism is due to external formal and informal pressures on conformity; mimetic isomorphism responds to uncertainty; and normative isomorphism stems from professionalization. These resonate somewhat in accounts of global constitutional diffusion, particularly in the area of rights.[35] To adapt the accounts of institutional isomorphism in global constitutionalism, three corresponding mechanisms of constitutional convergence can be identified. The first mechanism is

29 (Special Issue) *Singapore Academy of Law Journal* 774; Po Jen Yap (ed) *Proportionality in Asia* (Cambridge University Press, Cambridge, 2020).

[32]Constitution of the People's Republic of China (amended through 2018), Article 33.

[33]Vivien A Schmidt, 'Discursive Institutionalism: The Explanatory Power of Ideas and Discourse' (2008) 11(1) *Annual Review of Political Science* 303.

[34]Paul J DiMaggio and Walter W Powell, 'The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields' (1983) 48(2) *American Sociological Review* 147.

[35]For example, Goderis and Versteeg (n 16) 2 draw on diffusion literature in political science, economics, sociology and geography to identify four mechanisms of diffusions of constitutional rights: coercion, competition, learning and acculturation.

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*coercive constitutional convergence.* It can take two forms: explicit constitutional imposition and implicit constitutional conformity. In the first instance, external actors impose constitutional standards upon internal constitutional design, which leads to constitutional isomorphism or the similarities in the substantive contents of national constitutions. The story of imposed post-war 1946 Constitution in Japan provides a textbook example of this.[36] Constitutional conformity can also stem from implicit pressures, which may be associated with internal expectations of legitimacy. A polity may be internally committed to some common constitutional qualities to gain support from the global community. This is particularly relevant to the polities that significantly attach their legitimacy to international recognition. Apart from internal expectation of legitimacy, implicit pressures may be due to the external involvement of the international community in domestic constitution-making through various forms, such as financial aids and constitutional advice.[37] The implicit pressures may result in the countries' adaption of common constitutional standards, at least at the formal, textual level.

The second mechanism is *mimetic constitutional convergence.* Countries may adopt some common constitutional standards without explicit imposition and implicit pressures, but as a modelling response to uncertainty. Organizational theorists suggest that, 'Uncertainty is also a powerful force that encourages imitation. When organizational technologies are poorly understood, when goals are ambiguous, or when the environment creates symbolic uncertainty, organizations may model themselves on other organizations.'[38] Constitution-makers may deliberately learn from the available constitutional models of other countries for the same reason of uncertainty. As Kim Lane Scheppele notes, 'Constitutions tend to be written at momentous turning points in a country's history. A war is lost; an empire is vanquished; an old order is overturned; a dictator dies; an authoritarian government is forced to step aside; a mass public seizes the reins of power from the few who guided the state.'[39] In such tumultuous moments, constitution-makers may be confronted with great uncertainties and ambiguities regarding the goals and constitutional paths of their countries. In response, they may look back to the available sources in the national constitutional history[40] and/or they may model their constitution after the available constitutional models that are well established and successful in other countries. In the same vain, the original constitutional design of Judicial Yuan in Taiwan was modelled after the American model of judicial review, as discussed in Chin's contribution to this issue. The mimetic logic can also explain the judicial review by ordinary courts in the common law jurisdictions in Asia and the Pacific. Maintaining constitutional continuity by retaining the common law judicial review models of the former master countries is a response to uncertainty during the process of decolonization.

[36]For imposed constitutions generally, see Richard Albert, Xenophon Contiades and Alkmene Fotiadou (eds), *The Law and Legitimacy of Imposed Constitutions* (Routledge, London, 2018).

[37]See Saunders's article in this issue. For her particular study on this topic, see Cheryl Saunders, 'International Involvement in Constitution Making' in David Landau and Hanna Lerner (eds), *Comparative Constitution Making* (Edward Elgar, Cheltenham, 2019) 59–89.

[38]DiMaggio and Powell (n 34) 151 (internal citation omitted).

[39]Kim Lane Scheppele, 'A Constitution Between Past and Future' (2008) 49(4) *William and Mary Law Review* 1377 (internal citations omitted).

[40]See generally William Partlett, 'Restoration Constitution-Making' (2015) 9(4) *Vienna Journal on International Constitutional Law* 514.

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The third mechanism is *normative constitutional convergence*. Countries adopt similar constitutional ideals due to their normative weight. Vicki C Jackson states that 'aspirations towards convergence or harmonization of national constitutions with the protection of basic human rights reflect the influence of international human rights instruments, including the Universal Declaration of Human Rights, and their normative underpinnings – including a commitment to universal human dignity and to the use of law to prevent the grotesque barbarities of which modern history shows governments are capable'.[41] The constitutional adoption of international human rights norms in the Philippines, as discussed in Chopra's contribution, can be explained by the same normative logic.

Organizational theorists emphasize the role of professionalization as the source of normative isomorphism.[42] Normative constitutional convergence is also driven by constitutional professionalization. Normative constitutional values are promoted by foreign constitutional advisers through their engagement in domestic constitution-making. In addition, through their engagement in domestic constitutional adjudication, foreign legal and constitutional professionals (judges) are a mechanism of normative constitutional convergence, as illustrated in the contributions on the Pacific in this issue. Normative constitutional convergence has been also promoted by professional constitutional networks such as the Association of Asian Constitutional Courts and Equivalent Institutions,[43] created in July 2010, which aims 'to promote the development of democracy, rule of law and fundamental rights' in the region.[44] Its goals resonate with the normative trinity of global constitutionalism.

These three mechanisms of constitutional convergence are not exclusive. Constitutional convergence can the mixed result of coercive, mimetic and normative influences; however, some mechanisms may be prominent in certain cases. For example, the coercive mechanism is particularly salient in the case of Japan's postwar constitution.

## Resistance

Ideas and institutions of modern constitutionalism have not merely been adopted, they have also been resisted in different corners of the globe. Constitutional democracies around the world are now resisting ideals of global constitutionalism in different forms, such as neo-secessionism, nullification and deference to local authority, as Ran Hirschl points out.[45] However, the stability of constitutionalist polities in East Asia (Japan, Korea and Taiwan) seems to counter that resistant trend. Lin indicates that, in opposition to the decline of constitutional democracy around the world, constitutionalism is particularly resilient in Taiwan. The same can be said of constitutionalism in South Korea: in particular, the Candlelight Movement and the Constitutional Court's upholding of President Park Geun-hye's impeachment provide examples of how a constitutional

[41]Vicki C Jackson, 'Transnational Challenges to Constitutional Law: Convergence, Resistance, Engagement' (2007) 35(2) *Federal Law Review* 166.

[42]DiMaggio and Powell (n 34) 152.

[43]See Shin's article in this issue. See also Maartje De Visser, 'We All Stand Together: The Role of the Association of Asian Constitutional Courts and Equivalent Institutions in Promoting Constitutionalism' (2016) 3(1) *Asian Journal of Law and Society* 105.

[44]See <http://aacc-asia.org/en/1/1/profile.aacc>.

[45]Ran Hirschl, 'Opting Out of "Global Constitutionalism"' (2018) 12(1) *Law & Ethics of Human Rights* 1.

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democracy can be saved.[46] In Japan, the failure of the government's attempt to amend the Constitution's Article 9 committing the government to international peace can be attributed to the resilience of constitutionalism in the country, which enables the society to defend constitutional pacifism.[47]

The editors of *Global Constitutionalism* identify three powers/ideologies resistant to constitutionalism: Islamic fundamentalism; nationalist populist nationalist authoritarian movements; and the combination of authoritarianism and nationalism with meritocracy.[48] The last of these resonates in Asia, with resistance to global constitutionalism evident in several authoritarian and semi-authoritarian settings in the region.[49] Seppänen mentions that even the term 'constitutionalism' is a political taboo in mainland China. In other cases, constitutional resistance tends focus on structural issues, particularly democratic institutions and constitutional review. Different from the amorphic language of rights, which is one of the reasons for the formal constitutional convergence in this area, structural issues are more vulnerable to resistance because they apparently require concrete institutional design and practice. To illustrate, in Vietnam's 2013 constitution-making, while the convergent trend towards human rights is notable, the resistance to judicial constitutional review is evident.[50] Constitutional resistance in judicial review practice is also salient in Singapore. For example, 'while Singapore courts do engage with foreign decisions, they have rejected rights-expansive cases contrary to their protection of communitarian values'.[51]

Why do countries resist global constitutionalism? Jackson identifies several sources for constitutional resistance to citing transnational sources in judicial review, including the understanding of the constitution as self-constituting and self-expressive, the understanding of law as autochthonous identity, several interpretative theories (such as originalism, contractarianism, popular sovereignty and majoritarianism) and political resistance (nation-building, Western dominance and cultural exceptionalism).[52] These sources are not limited to resistance in constitutional adjudication: they can explain resistance to global constitutionalism in constitutional design and constitutional discourse as well. In addition to the above sources, two more should be underlined: political interests and constitutional exceptionalism. For example, Vietnam resisted the design of a constitutional court in its 2013 constitution, as this institution was seen to have the

[46]Yascha Mounk, *The People vs. Democracy: Why Our Freedom is in Danger and How to Save It* (Harvard University Press, Cambridge, MA, 2019) 184–85.

[47]See, for example, an account on the social movements mobilizing for protection of Article 9. Daiki Shibuichi, 'The Article 9 Association, Leftist Elites, and the Movement to Save Article 9 of Japan's Postwar Constitution' (2017) 34 *East Asia* 147.

[48]Mattias Kumm et al., 'Editorial: The End of "the West" and the Future of Global Constitutionalism' (2017) 6(1) *Global Constitutionalism* 4.

[49]For efforts to create 'indigenous' models of constitutionalism in Asia (particularly, China, Indonesia, Malaysia, Singapore), see Pranoto Iskandar, 'Indigenizing Constitutionalism: A Critical Reading of Asian Constitutionalism' (2018) 5(1) *Indonesian Journal of International & Comparative Law* 3. For comparative experiences in Europe, see Konrad Lachmayer, 'Counter-developments to Global Constitutionalism' in Martin Belov (ed), *Global Constitutionalism and Its Challenges to Westphalian Constitutional Law* (Hart, Oxford, 2018) 81–102.

[50]Bui Ngoc Son, 'The Discourse of Constitutional Review in Vietnam' (2014) 9(2) *Journal of Comparative Law* 191.

[51]Thio (n 7) 335.

[52]For more details, see Vicki C Jackson, *Constitutional Engagement in A Transnational Era* (Oxford University Press, New York, 2010) 19–30.

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potential to challenge the power of political elite. China's constitutional discourse is resistant to constitutionalist ideas (such as judicial independence),[53] which stems from the aspiration to constitutional exceptionalism: the party-state's confident attitude to develop a Chinese distinctive constitutional model as an alternative to Western models of constitutionalism.

## V. Critical global constitutionalism

The idea of global constitutionalism has been subject to different strands of criticism.[54] The accounts of the regional experience in this special issue question the substance, practice and scope of global constitutionalism.

One critical strand focuses on the Western liberal roots of constitutional qualities: if the substances of global constitutionalism only derive from Western constitutional models, to what extent can constitutionalism claim to be global?[55] That critical view is a part of broader debates on the connection between global constitutionalism and Western liberal constitutionalism, particularly to 'constitutionalist ideas connected to the French and American Revolutions in the eighteenth century'.[56] Lang's thoughtful contribution, however, reveals that global constitutionalism is not just liberal universalism. Constitutional rights are not only about civil and political rights as the normative ideals promoted by liberalism. Furthermore, constitutionalist ideas of separation of powers and constituent power are not always embraced by liberalism. Consequently, global constitutionalism is more than global expansion of liberal constitutional ideals. Lang states that this distinction explains how Asian polities are constitutional but not necessarily liberal.

Global constitutional ideals have some connections with liberal constitutional ideals, but have moved well beyond them. Constitutional courts, welfare constitutional rights, constitutionalized global concerns – for example, climate change[57] and progressive development[58] – have been well developed since classical liberalism and have broader normative concerns beyond individual autonomy. In fact, global constitutional ideals are now not limited to Western liberal constitutionalism, but have plural sources in comparative constitutional law and international law.

Another strand of critical global constitutionalism focuses on the limit of convergence. Saunders argues that 'convergence in form does not necessarily mean convergence in understanding, in values and priorities, or in the operation of constitutional arrangements in practice in the face of a plethora of local contextual factors'.[59] Chopra indicates that, due to historical reasons, the Supreme Court in the Philippines failed to materialize the social economic rights promised by the Constitution. In such cases, constitutional convergence occurred mainly at the textual level.

Another strand of critical global constitutionalism is more concerned with its scope: has constitutionalism really gone global? Saunders demonstrates the empirical limits of

[53]See Seppänen's article in this issue.

[54]See, for example, Jaakko Husa, 'Global Constitutionalism: Some Critical Remarks' (2017) 47(1) *Hong Kong Law Journal* 77 (offering 'substantive related and methodological critiques' of global constitutionalism).

[55]See Lin's and Shin's articles in this issue.

[56]Mattias Kumm et al. (n 47) 6.

[57]See generally James R May and Erin Daly, *Global Environmental Constitutionalism* (Cambridge University Press, Cambridge, 2014).

[58]James Tully et al., 'Introducing Global Integral Constitutionalism' (2016) 5(1) *Global Constitutionalism* 2.

[59]Saunders (n 7) 12.

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constitutional convergence: not all states incorporate international norms into their constitutions in the same way, not all states conduct constitution-making in the same manner, and not all states accept international involvement in domestic constitution-making. Other contributions suggest that the sources of transnational constitutional influence are limited to a few Western countries. In constitutional review, as Lin discusses, the jurisdictions to which Taiwan's Constitutional Court refers are limited to a small number of Western states, especially the United States and Germany.

Possible responses to critical global constitutionalism can be empirical and conceptual. The first stems from the mixed empirical evidence. Not all countries in the regions focus their transnational engagement to a few Western jurisdictions; the case of South Korea provides a more cosmopolitan turn in both constitutional design and review despite nationalist drives. As Shin demonstrates, treaties concluded and promulgated under the constitution are a part of domestic law. The country's Constitutional Court refers to a wide range of jurisdictions and actively engages in global professional constitutional forums. In the Pacific, as Dziedzic indicates, the sources of foreign judicial citations span Asia, the Pacific, Africa, Europe, the Caribbean and North America. Another way to respond to critical global constitutionalism is conceptual. Global constitutionalism does not mean identical harmonization of common constitutional qualities in every polity; it only refers to the expansion of common constitutional qualities in a large number of polities worldwide.

## VI. Normative global constitutionalism

Normative global constitutionalism finds the solutions to make global constitutionalism really global in its substance and its application. In terms of substance, the editors of the journal *Global Constitutionalism* suggest moving beyond the constitutionalist trinity (human rights, democracy and the rule of law) to include other normative grounds: norms of state sovereignty, national identity, national will, ethnic or tribal traditions, and divine imperatives.[60]

While there may be different strands of normative accounts of global constitutionalism, two strands emerge from the contributions in this special issue and the discourse elsewhere on constitutionalism in the regions: normative cosmopolitanism and contextualism. Normative cosmopolitanism proposes how constitutional design and adjudication should deal with transnational constitutional issues by looking broadly to the outside world. On constitutional design, Saunders suggests that the enterprise of global constitutionalism should deal with the external functions of the constitutions under the condition of globalization: how constitutions should structure the exercise of internal and external sovereignty. Shin proposes contextualization of transnational constitutional engagement as the way to extend the cosmopolitan visions of South Korea's Constitutional Court.

Normative contextualism refers to the approach that supports the effectuation of global constitutional ideals by taking contextual factors into account.[61] The underpinning

[60]Mattias Kumm et al., 'How Large is the World of Global Constitutionalism?' (2014) 3(1) *Global Constitutionalism* 5.

[61]This is different from analytical contextualism. On the latter, see the volumes in Hart's series on Constitutional Systems of the World, available at <https://www.bloomsburyprofessional.com/series/constitutional-systems-of-the-world>.

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assumption behind this contextual thinking is that constitutionalism can also be successful in a particular local condition when it is integrated into and adjusted to the local environment. Three sub-strands of normative contextualism can be identified: axiological, institutional and social.

The axiological approach supports the integration of global constitutional ideals with regional and local ideas, ideals and values. This approach draws on some degree of existing axiological integration and suggest a further move. Hassall and Saunders argue in the context of constitutional systems in the Asia-Pacific region that 'failure to identify the values that accompany a set of laws renders those laws ineffective', and further point out that 'in Asia Pacific, legal systems continue to draw on the other religious traditions, notably Hindu, Buddhist and Islamic, and similarly, the Chinese legal system continue to reflect the ethical systems of Confucian thought'.[62] More specifically, Kim Sungmon calls for a model of 'public reason Confucian constitutionalism' defined by 'its dual perfectionist commitments to, on the one hand, liberal constitutional principles, which most East Asian countries formally uphold, though in varying degrees, and Confucian values on the other'.[63] Institutional contextualism aims to situate institutions of global constitutionalism within regional, local institutional settings. For example, Larry Cata Backer proposes the creation of a constitutional court for China within the Chinese Communist Party.[64] Finally, social contextualism proposes locating global constitutionalism within regional and local social, economic and political surroundings. Lang's contribution suggests the adaption of global constitutionalism in local social conditions, particularly through contestation. In short, the effective operation of global constitutionalism in the Asia-Pacific region significantly depends on its integration with regional ideas, institutions and social conditions.

## VII. Conclusion

Ideas, institutions and doctrines of constitutionalism have spread globally. Many jurisdictions in the Asia-Pacific are influenced by the global expansion of constitutionalism in different ways and in diverse venues, such as constitution-making, judicial review and public constitutional debates. The influence does not merely induce the regions' convergence with global constitutionalism; the resistance to global constitutionalism is also evident in the regions.

This special issue is one effort to locate Asia and the Pacific within global debates on global constitutionalism. The regional experience provides a basis for diverse perspectives on this convoluted phenomenon and concept. The regional experience also provides the empirical foundation for critical reflections on the expansion and limits of global constitutionalism. It is hoped that these diverse views, drawing on the rich constitutional experience in Asia and the Pacific, can further global debates on global constitutionalism.

[62]Hassall and Saunders (n 10) 42–43.

[63]Kim Sungmoon, *Public Reason Confucianism: Democratic Perfectionism and Constitutionalism in East Asia* (Cambridge University Press, Cambridge, 2016) 26.

[64]Larry Cata Backer, 'A Constitutional Court for China within the Chinese Communist Party: Scientific Development and a Reconsideration of the Institutional Role of the CCP' (2010) 43(3) *Suffolk University Law Review* 593.

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