Editiorial

Developing the Rule of Law in East Asia

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This special issue results from a conference called 'The State in Asia', which was held in Leiden from 17-19 December 2012.[1] The overall theme of the conference was the development of modern states in Asia, conceptualised as 'ongoing projects informed by a quest for cultural, religious and political identities that are new and modern, yet simultaneously rooted in indigenous culture and tradition'. The formation and the functioning of Asia's systems of law and governance reflect strong developmental ambitions as well as deep heterogeneity and insecurity. In the East Asian context Japan, Singapore, and South Korea now serve as models of successful nation-states that other states in the region aspire to emulate, but in most countries in the region endemic corruption and factionalism make rule anything but stable and predictable.

The panel on 'Developing the Rule of Law' looked at the attempts to realise different aspects or elements of the rule of law in East Asia.[2] In this effort East Asian states have borrowed paradigms, ideas and laws from elsewhere which may take on quite different meanings in their new surroundings. Regional models, have become more important than they were in the past, but ideas are adopted from all over the world. The rise of 'alternative' global and regional legal regimes has reinforced this process and led to a situation where states may choose to model their laws and legal institutions from a much broader range of examples than in the past.

Much scholarly work has been produced over the past few years that relates to this topic. The standard book on the subject still is Randall Peerenboom's volume 'Asian Discourses of Rule of Law' of 2004. It outlines the main characteristics of the rule of law in twelve Asian states and looks beyond them into their ideological

[1] The conference was organised and sponsored by the Asian Modernities and Traditions cluster of Leiden University.

[2] Here including South East Asia.

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underpinnings.[3] There are a few other works that discuss Asian law and aspects of rule of law in a comparative, organised way, but not that many.[4] Most other works dealing with law in (East) Asia hold valuable material that can be used for this purpose, but lack a rigorous framework for comparison.[5] The articles selected for this special issue fall in the latter category. They constitute a diverse collection in of countries and topics, but yet have some aspects in common that link them together in a meaningful way.

First, they provide insight into the range of internal and external constraints which limit states in their options and choices for rule of law development. These are quite variable in nature and range from the domestic and international legitimacy of the regime (Tran, Crouch) to the domestic legitimacy of the judiciary (Kim, Chisholm), and from strategies of donors (Nicholson and Hinderling) to the state of legal scholarship (Bedner). These constraints are not specific to Asia as a region, but rather depend on specific constellations of knowledge and power in the countries concerned.

Second, the articles show the diversity of mechanisms of diffusion of law and legal institutions. Here too we find a remarkable variety, from adopting UN-promoted models (Crouch) to contextualised donor policies (Nicholson and Hinderling), and from pragmatic adjustment to international standards (Tran) to introducing new ideas acquired through legal education abroad (Chisholm). They show how an array of mechanisms may be interlocking and as a result produce outcomes that are more complex, but sometimes more encouraging than the rather negative picture the literature on rule of law promotion usually presents. Rule of law promotion by donors may not produce the results desired, but it may influence or even spark other processes that lead to improvement. And in any case, they indicate that building the rule of law is a process that will not stop if donors end their activities. Regional processes of diffusion are quickly gaining ground and most Asian states will continue to look for ideas from elsewhere.

[3] Randall Peerenboom (ed.), *Asian Discourses of Rule of Law: Theories and Implementation of Rule of Law in Twelve Asian Countries, France and the U.S.* 2004.

[4] Randall Peerenboom et al. (eds.), *Human Rights in Asia: A Comparative Legal Study of Twelve Asian Jurisdictions, France and the USA* 2013; Tom Ginsburg and Albert Chen (eds.), *Administrative Law and Governance in Asia: Comparative Perspectives* 2008; Björn Dressel (ed.) *The Judicialization of Politics in Asia* 2012, Po Jen Yap and Holning Lau (eds.), *Public Interest Litigation in Asia* 2010; Michael Charles Pryles (ed.), *Dispute Resolution in Asia* 2006; Andrew Harding and Pip Nicholson (eds.), *New Courts in Asia* 2009.

[5] Some examples are Pip Nicholson and Sarah Biddulph (eds.), *Examining Practice, Interrogating Theory: Comparative Legal Studies in Asia*, 2008; Tania Groppi et al. (eds.), *Asian Constitutionalism in Transition: A Comparative Perspective* 2008; John Gillespie and Randall Peerenboom (eds.), *Regulation in Asia: Pushing Back on Globalization* 2009; E. Ann Black and Gary F. Bell (eds.), *Law and Legal Institutions of Asia: Traditions, Adaptations and Innovations* 2011.

It is on this issue that the present set of articles taken together has more to say about East Asia as a region. They indicate that there is a tendency of *regional* adaptation and borrowing of laws and institutions that circulate globally, sometimes originating from an international institution, usually from a specific country. The best-known examples are Constitutional Courts. The basic model is from Austria in the 1920s, which in Asia was first adopted (and adapted) in South Korea. This particular model was then followed in Thailand and Indonesia. South Korea is now addressing the issue of transitional justice and the delineation of authority between the Constitutional and the Supreme Court, which is very likely to also occur at some point in time in Thailand and Indonesia. A similar development of regional adoption of an 'international' mechanism is taking place in the field of National Human Rights Institutions. This tendency of regionalisation is supported in the case of Asia by the availability of a 'donor country' in the region, Japan, whose expenditures on rule of law promotion are considerable and whose approach tends to be better contextualised than that of many western donor countries. Asia's growth in wealth is likely to further promote such processes, as is already shown by Indonesia's support to Myanmar in setting up its National Human Rights Commission (NHRC). In the broadest terms it therefore seems that we can speak of a convergence of East Asian legal systems in important respects.

On the other hand, the countries concerned have their own legal histories and political dynamics, which may produce very different outcomes in terms of rule of law. The degree of influence of the world outside Asia on individual countries is large, certainly because many jurists are educated abroad. But even more importantly, the way in which outside influences are processed and translated is bound to differ from one country to the other and similar incentives may lead to altogether different results.

The main outlines of the individual articles are as follows. Tran Thi Lien's article on freedom of religion in Vietnam demonstrates how ideological preferences of the ruling Communist party have been trumped by considerations to maintain national unity, but also by the need for Vietnam to be integrated into global regimes of economic governance. While after the victory in the Vietnam War in 1975 it looked as if the state could finally opt for its preferred anti-religious model, the Vietnamese regime soon found out that this policy led to serious resistance from the international community. Preferring economic prosperity over ideological principle, Vietnam has since walked a tightrope between controlling religion and respecting the freedom of its citizens to freely practise it.

A similar scenario emerges from the article by Melissa Crouch on the Human Rights Commissions of Myanmar and Indonesia. Both countries adopted their NHRCs in response to criticism of their human rights records. In both cases it

seems that external legitimacy counted for more than domestic considerations – a finding they have in common with Tran's Vietnamese case. Crouch demonstrates how the difference in time between the establishment of these NHRCs – the Indonesian Commission dates from 1994 and its Myanmar counterpart from 2012 – is a determining factor of the trajectories of these institutions. While Indonesia was a pioneer in South East Asia in establishing its NHRC, Myanmar had several examples in the region to choose from. The main difference, however, is that Myanmar is subjected to far more scrutiny from its ASEAN-counterparts than Indonesia was. In a process of mutual reinforcement, these NHRCs and the nascent ASEAN-human rights framework may lead to a degree of convergence of South East Asian legal systems, at least where it concerns human rights. Crouch furthermore points at a new development in such convergence, which is the rise of regional models of NHRCs as part of global diffusion. This may well apply to other legal institutions as well.

Nicholson and Hinderling point at an interesting aspect of legal transplantation, which is the involvement of Japan in rule of law development in the region. Comparing Japan to Western donors, they record some important difference. The main ones are that Japan is more context-oriented, is less inclined to only promote its own laws and institutional models, is more sensitive to political and legal context, and pays generally more attention to the wishes of the recipient country. In short, the process of assistance is essentially demand-driven. The reasons for this approach lie in Japan's post-war experience, its belief in an alternative East Asian economic development model, as well as in its own history of legal development. The question is whether the two new rising donors in the region, China and South Korea, will follow in Japan's footsteps, or be more inclined to impose their own models. However, in either case it is clear that regional legal transplantation is becoming more important.

The relation between external and internal factors is different in the article by Neil Chisholm, which points at yet another mechanism of legal transplantation that is on the rise. In his case about judicial independence in South Korea and Taiwan external legitimacy hardly plays a role in the debates on this issue. Yet, they revolve around foreign models: on the one hand the appointment, training and career system both countries via Japan adopted from Germany and on the other an Anglo-American model where judges are selected from the Bar. The article demonstrates how transplantation can be driven by actors other than the state and how in East Asia legal transplantation can be a fully 'internal' process: no foreign donors were involved, but young South Korean and Taiwanese lawyers who received their education in US law schools. As the US Model squares with their interest of making judges more independent *internally* in the courts on which they serve rather than *vis-à-vis* the state, the driver of change is moreover not the legal profession versus the executive, but a younger versus an older generation within the

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legal profession. Chisholm demonstrates how political configurations and coincidence have led to different outcomes in these cases, with South Korea radically replacing its model and Taiwan arriving at a compromise.

The case of South Korea's struggle with its judicial past under the authoritarian Yusin constitution takes us towards the internal politics of transitional justice. Marie Kim's article describes how judges find themselves under fire from several sides in dealing with cases where victims from the Park Chung Hee regime demand rehabilitation. This involves a careful weighing of legal and moral questions, where it is very difficult to strike a balance between them. The matter is further complicated because both the Supreme Court and the Constitutional Court have been involved in such cases and inevitably enter into a contestation of authority when it comes to constitutional interpretation. Kim demonstrates how both the Constitutional Court and the Supreme Court have been willing to sacrifice notions of legal certainty to popular ideas justice, which may very well create new problems.

This debate is relevant for several East Asian countries, notably for Thailand, Taiwan and Indonesia. As already mentioned, these have all adopted the South Korean model of a Constitutional Court and they all have to deal with the delineation of jurisdiction between their Constitutional and their Supreme Court. All of them have moreover histories of authoritarian rule that at some point are bound to become the object of questions regarding transitional justice.

Bedner, finally, looks at another internal factor influencing legal transplantation that he thinks gets insufficient attention. Much of the theory on legal transplants assumes that the deeper lying legal epistemological structures will shape the way in which transplanted rules and institutions acquire new meaning. Taking Indonesia as an example, he demonstrates how over time structural problems in Indonesia's legal system aggravated to the extent that legal scholarship and jurisprudence can seldom effectively produce the coherent legal theories required for effective reception of foreign law and legal institutions. Only with particular conditions in place – the occurrence of public debate on an issue, the establishment of a separate legal institution promoting the legal debate internal to a sub-discipline, and the influence of a transnational or international debate – will legal development still be possible.

While thus covering only a limited number of relevant subjects and countries, the articles in this volume show how rewarding it is to look at East Asia in considering efforts to develop the rule of law. In fact most of the topics discussed above would be worth of a carefully considered and uniform analysis. Our hope is that even if that will not be forthcoming, they will provide inspiration for those working on questions of comparative rule of law and regionalization.

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