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NOTES AND COMMENTS

Introduction: Judicial Constitutional Engagement with International Law in Asia

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Abstract

The interaction between international law and constitutional law has been increasingly recognized as salient to understanding the functioning of both and hence as worthy of academic attention. This Introduction to a special issue on how a selection of five Asian courts engage with international law when adjudicating constitutional cases explains the significance of studying such judicial behaviours, outlines the conceptual framework to be used in this regard, and identifies and reflects on some of the key findings from the case studies, including by highlighting domestic constitutional factors that help account for observed divergencies in judicial approach. This contribution also points to the value of examining courts' attitudes towards international law for a variety of scholarly debates.

Keywords: Constitutional courts; judicial engagement; comparative international law; ambivalent engagement with international law; domestic constitutional factors

I. Importance

The interaction between international law and constitutional law has been increasingly recognized as salient to understanding the functioning of both and hence as worthy of academic attention.[1] National constitutions often authorize the State to participate in international organizations, which may even extend to the conferral of sovereign powers to such organizations.[2] Many constitutions also contain provisions that regulate how States can enter into treaties as well as the legal status of such treaties or other forms of international law within the domestic order. Moreover, international law can be integrated into constitutional law, as is most notably the case with (portions of) human rights treaties.[3] By

[1] See e.g., Charles FOMBAD, "Internationalization of Constitutional Law and Constitutionalism in Africa" (2012) 60 The American Journal of Comparative Law 439; Armin VON BOGDANDY and René URUEÑA, "International Transformative Constitutionalism in Latin America" (2020) 114 American Journal of International Law 403; Anne PETERS, "Supremacy Lost: International Law Meets Domestic Constitutional Law" (2009) 3 Vienna Online Journal on International Constitutional Law 170.

[2] For an example focusing on the European experience, see Monica CLAES, "Constitutionalizing Europe at its Source: The 'European Clauses' in the National Constitutions: Evolution and Typology" (2005) 24 Yearbook of European Law 81.

[3] On this practice, see e.g., Mary HEALY, "Constitutional Incorporation of International Human Rights Standards: An Effective Legal Mechanism?" (2023) Chicago Journal of International Law Online Comment 115; Mila VERSTEEG,

way of example, Article 31 of the Cambodian Constitution commits the Kingdom to recognize and respect "human rights as stipulated in the United Nations Charter, the Universal Declaration of Human Rights and the covenants and conventions related to human rights, women's rights and children's rights". In a related vein, the Timor Leste Constitution insists, in its Article 23, that the fundamental rights enshrined in that text "shall be interpreted in accordance with the Universal Declaration of Human Rights". Clauses along those lines envisage the realization of some degree of convergence between international and national constitutional law as far as the scope and meaning of rights are concerned. In this regard, courts typically play a starring role as authoritative interpreters of the constitution. Chang and Yeh have pointed out that "[c]ourts may reference international human rights on their own assertion with or without any clear constitutional or legislative mandate".[4] We would add that such a judicial practice may also extend beyond the realm of rights to, for instance, cases involving international economic law.

It is axiomatic that the judicial engagement with international law can shape the effectiveness of such law within States, especially when this is done through the medium of constitutional interpretation given the constitution's superior legal status vis-à-vis other norms of domestic law. It can also contribute to the constitutional development and practice of the practice of international law. In brief, an analysis of judicial consideration of international rules in constitutional cases allows us to obtain a more complete understanding of the extent to which a national legal order is receptive to norms that emanate "from the outside" and how judicial attitudes towards the same influence processes of constitutional interpretation. The study of judicial engagement is further instrumental to understanding whether and how international law is implemented and perceived within national legal systems.

II. Gap

Global scholarship exploring the interaction between international law and domestic constitutional law has rarely featured experiences from Asia. This may be due to the perception that Asian constitutional polities are resistant to international influences on account of their history of colonization and consequent emphasis on sovereignty and non-interference following independence,[5] coupled with older debates on moral relativism as far as rights were concerned.[6] Arguably, constitutional law in Asia has tended to develop domestically rather than through engagement with international legal norms. A closer look, however, would reveal that Asia is no exception to the internationalization of constitutional law. Indeed, the last decades have witnessed the increasing engagement with international law by different courts in the region. While there is an emerging body of scholarship that studies Asia's engagement with international law, particularly through treaty

"Laws versus Norms: The Impact of Human Rights Treaties on National Bills of Rights" (2015) 171 Journal of International & Theoretical Economics 87.

[4] 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: Oxford University Press, 2012), 1168.

[5] See e.g., Tom GINSBURG, "The State of Sovereignty in Southeast Asia" in *Proceedings of the ASIL Annual Meeting vol 99* (Cambridge: Cambridge University Press, 2005), 419. This has been notably evident in the guiding principles of ASEAN, on which see e.g., Sanae SUZUKI, "Why is ASEAN Not Intrusive? Non-Interference Meets State Strength" (2019) 8 Journal of Contemporary East Asia Studies 157; Hiro KATSUMATA, "Reconstruction of Diplomatic Norms in Southeast Asia: The Case for Strict Adherence to the 'ASEAN Way'" (2003) 25 Contemporary Southeast Asia 104.

[6] See generally Michael DAVIS, "Constitutionalism and Political Culture: The Debate over Human Rights and Asian Values" (1998) 11 Harvard Human Rights Journal 109; Anthony J. LANGLOIS, *The Politics of Justice and Human Rights: Southeast Asia and Universalist Theory* (Cambridge: Cambridge University Press, 2014).

participation,[7] the discourse has remained largely silent on how constitutional engagement through the courts can reveal Asia polities' attitudes, perceptions, and practices of international law.[8]

III. Aim

To fill the gap just identified, this special issue includes a set of articles exploring how the highest courts in five Asian polities (namely Hong Kong, Indonesia, the Philippines, Singapore, and Taiwan) engage with international law when adjudicating constitutional cases. These articles were presented and discussed during a workshop jointly organized by the Oxford Programme in Asian Laws and Singapore Management University Yong Pung How School of Law, at St Hugh's College, Oxford, on 15 March 2024. As editors, we requested authors to:

- Provide an overview of the constitutional background of the polity in question, including a discussion of the provision(s), if any that regulate the relationship between international law and domestic law as well as offer a brief background to the court competent to deal with constitutional questions in final instance (hereafter: the constitutional court);
- Examine the kind of treaties that the country has ratified and that could be the object of constitutional litigation;
- Describe the number and kind of constitutional cases in which international law is used;
- Critically analyze the engagement with international law by the court in constitutional cases, including a discussion of the judicial practice, notably as regards the function of the citation of international instruments; the institutional environment in which the court has recourse to such instruments and conditions that are conducive to the use of international citations; and the reactions, if any, by academics and other state institutions to the court's practice.

IV. Conceptual Framework: Comparative International Law

The questions just set out are framed with reference to conceptual insights drawn from both comparative and international law. This reflects recent efforts to marry the two fields to create a new area of academic inquiry called comparative international law, which "entails identifying, analysing, and explaining similarities and differences in how actors in different legal systems understand, interpret, apply and approach international law".[9] We posit that a country's constitutional law and related institutional framework has a formative impact on how such understandings, interpretations, applications, and approaches come about and manifest. As alluded to earlier, the constitution is commonly seen as the supreme law of the land – with several texts explicitly declaring this to be so – and its provisions accordingly

[7] See particularly Simon CHESTERMAN, "Asia's Ambivalence about International Law and Institutions: Past, Present and Futures" (2016) 27 European Journal of International Law 945; Simon CHESTERMAN, Hisashi OWADA and Ben SAUL, eds., *The Oxford Handbook of International Law in Asia and the Pacific* (Oxford: Oxford University Press, 2019).

[8] For a few recent exceptions, see I Dewa Gede PALGUNA and Agung WARDANA, "Pragmatic Monism: The Practice of the Indonesian Constitutional Court in Engaging with International Law" (2024) 14 Asian Journal of International Law 404; Melissa LOJA, "Recent Engagement with International Human Rights Norms by the Courts of Singapore, Malaysia, And Philippines" (2021) 19 International Journal of Constitutional Law 98.

[9] Anthea ROBERTS *et al.*, "Conceptualizing Comparative International Law" in Anthea ROBERTS *et al.*, eds., *Comparative International Law* (Oxford: Oxford University Press, 2018) 6.

determine the room for manoeuvre for State institutions, including as far as decisions relating to international law and the operation of international regimes are concerned. In most constitutional democracies, it falls to the courts to ultimately assess whether the behaviour of the executive and the legislature passes constitutional muster. This explains why courts are seen as critical actors in the constitutional domain whose rulings warrant close examination. Drawing on findings in the comparative constitutional discourse, the environment in which courts exercize their functions, notably including holding the political branches to constitutional account, has become transnational in character.[10] This also applies to Asia. We know, from an international legal perspective, that countries have different attitudes toward international law. We contend that such attitudes are manifested not only in a country's decisions on whether and how to participate in international legal regimes but also in the way its domestic institutions, such as courts, consider international legal instruments.

V. Findings

The five articles in this Special Issue suggest that judicial engagement with international law during constitutional adjudicatory processes in Asia is not unequivocal. This reflects a broader pattern of Asia's ambivalent engagement with international law as identified by Chesterman.[11] The case studies reveal that the courts have adopted an inconsistent, and at times internally contradictory attitude, toward international law. Carole J. Petersen demonstrates that the Hong Kong courts have extensively used the International Covenant on Civil and Political Rights (ICCPR) in their decisions, but the judicial engagement with this instrument has recently been undermined by the National Security Law.[12] However, she demonstrates that in areas of law that appear to be of less concern for Beijing, such as gender equality and the rights of the LGBT community, international law is still relied on as a tool to promote human rights in Hong Kong. Thus, it could be said that international law is used in a pragmatic fashion that does not, however, result a coherent doctrinal approach. In the same vein, and adopting a longitudinal perspective, Melissa Loja demonstrates that the Philippine Supreme Court has exhibited arbitrariness in the identification and application of the international law norms in its case law, which she considers to be problematic for both the normativity of the norms in question as well as the legitimacy of the court's practice in relying on external rules. In their examination of the Indonesian Constitutional Court, Simon Butt, Bisariyadi and Fritz Edward Siregar find that this institution has similarly failed to clarify why or how it uses international law, and that a review of its practice reveals a fourfold typology of use, which interestingly includes the category of the misconstruction of international law to reach a preferred outcome. Yu-Jie Chen advocates that in studying the international law citations by Taiwan's Constitutional Court, a distinction must be maintained between legal effect thereof as either advisory or authoritative and their impact level, with a notable evolution in relation to the treatment of human rights treaties that sees this Court giving greater weight to such treaties. More generally, she notes that the attitude of Taiwan's Constitutional Court is marked by both openness and reservations vis-à-vis international law. For his part, Benjamin Joshua Ong argues that Singapore government consistently affirms the value of international law for this small island state,

[10] See e.g., Vicki C. JACKSON, *Constitutional Engagement in a Transnational Era* (Oxford: Oxford University Press, 2010); Rosalind DIXON and David LANDAU, "Transnational Constitutionalism and a Limited Doctrine of Unconstitutional Constitutional Amendment" (2015) 13 International Journal of Constitutional Law 606; David S. LAW and Mila VERSTEEG, "The Evolution and Ideology of Global Constitutionalism" (2011) 99 California Law Review 1163.

[11] Chesterman, *supra* note 7.

[12] On this law, see e.g., Cora CHAN and Fiona DE LONDRAS, eds., *China's National Security Law—Endangering Hong Kong's Rule of Law?* (Oxford: Hart Publishing, 2020).

but that its courts have not been very receptive to such law in settling constitutional issues brought before them, although there is a greater level of judicial engagement when it comes to deciding other types of issues.

In making sense of the observed ambivalence, various reasons can play a part. The absence of a judicial pre-commitment – in the form of a clear statement by the court on whether and how it will engage with international law – means that the court preserves its flexibility to vary its approach across types of cases and/or over time. This may be deemed desirable. Courts may prefer to retain as much discretion as possible a general matter of judicial policy. More specifically, judicial discretion enables them to adapt their practice not only in relation to the nature of the issue at stake and its domestic salience, but also in relation to wider political or social dynamics and related perceptions on the perceived appropriateness or otherwise for the court to consider international law arguments. Further, underlying push- and pull-factors need not work in tandem. On the one hand, engagement with international law norms may be considered appealing because it can allow a court to buttress the persuasiveness of its reasoning by leveraging the legitimacy of such norms, especially those that are widely endorsed by the community of States, such as human rights treaties.[13] On the other hand, courts may also be mindful of the assumed autochthonous character of constitutions[14] and the need to ensure that the interpretation thereof is attentive to domestic concerns and constituencies. References to international law may not sit well with such an outlook. Depending on which of those considerations takes precedence at a given moment may accordingly influence the attitude adopted in a particular (set of) case(s) and thus give rise to ambivalence. Finally, courts will experience changes in the justices who sit on the bench or in the supporting personnel, and with such changes may come shifts in ideological conviction pertaining to the relationship between international and constitutional law that too can result in vacillation regarding the mode and intensity with which the court engages with international law.

The five articles also demonstrate that there exists divergence among the Asian courts studied. The courts in Indonesia, Taiwan, and Hong Kong more actively engage with international law than do their counterparts in Singapore and the Philippines. In this regard, domestic constitutional factors appear to have significant explanatory potential.

First, a country's form of constitutionalism can shape judicial propensities to engage with international law. Courts in liberal-democratic constitutional settings would seem to be more inclined to consider modern international law, which has been shaped by liberal democratic commitments,[15] to develop their constitutional jurisprudence. The convergence in underlying values can help create incentives for courts to engage with international law to advance their case law in a pro-liberal democratic direction that would not be present, or at least not to the same extent, in polities that adhere to illiberal constitutionalism, where the courts would otherwise have to grapple with a dissonance in the underlying philosophy of constitutional respective international (human rights) law.

Second, and in a related vein, the formulation and ideology of human rights. When the textual expression and normative underpinnings of the constitutional bill of rights are aligned with those found in international human rights instruments, judicial engagement

[13] It could also help strengthen the position of the courts vis-à-vis the political branches, cf. Eyal BENVENISTI, "Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts" (2008) 102 American Journal of International Law 241.

[14] See e.g., Mark TUSHNET, "Constitution" in Michel ROSENFELD and András SAJÓ, eds., *The Oxford Handbook of Comparative Constitutional Law* (Oxford: Oxford University Press, 2012), 218–221.

[15] See e.g., Jonas TALBERG *et al.*, "Why International Organizations Commit to Liberal Norms" (2020) 64 International Studies Quarterly 626; Gregory H. FOX and Brad R. ROTH, "Introduction: The Spread of Liberal Democracy and Its Implications for International Law" in Gregory H. FOX and Brad R. ROTH, eds., *Democratic Governance and International Law* (Cambridge: Cambridge University Press, 2010).

between both sets of law becomes easier as well as more attractive. For example, the Second Amendment of the Indonesian Constitution, passed in 2000, dramatically expanded the list of rights and liberties for citizens, drawing substantially on the Universal Declaration of Human Rights (UDHR) in doing so. The concordance between the domestic bill of rights and the UDHR has facilitated the Indonesian Constitutional Court's engagement with the latter. In contrast, when the phrasing and interpretation of the domestic bill of rights reflects a communitarian ideology that prioritizes collective interests and social duties over individual entitlements, as in Singapore,[16] the corollary is likely a more limited engagement with international rights instruments given the difference in the respective normative tenets.

Third, the propensity with which the court exercises constitutional review. Judiciaries that regularly use their powers to assess the work of the other branches tend to engage more with international law than those that do with a lower frequency. The courts in Hong Kong, Indonesia, and Taiwan often review legislation for its constitutional conformity, and their judicial practice in this regard creates opportunities for the judges, counsel, and litigants to formulate and consider arguments drawn from international law to develop the case law. In contrast, there are relatively fewer constitutional challenges brought in Singapore, which means that there are concomitantly fewer occasions to engage with international law.

Fourth, the amount and kind of legal material that a court has to work with. In some instances, the constitution explicitly identifies certain categories or rules of international law as part of domestic law, thereby providing a clear point of reference for the court to apply the former in the exercise of its functions. For instance, the current Philippine Constitution, enacted in 1987, contains a commitment to the incorporation of "generally accepted principles of international law" as "the law of the land" in its Article II, Section 2. In a similar vein, the Hong Kong courts are effectively enjoined by the Basic Law to give effect to the two leading human rights conventions (the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights) by way of a constitutional directive. In contrast, the Singapore Constitution is entirely silent in this regard, with the government moreover having decided not to become a party to all the core human rights treaties. The corollary is that the country's Supreme Court has fewer international instruments at its disposal than its counterparts can engage with, especially since it has, understandably, heeded the political call and has refrained from making judicial reference to unincorporated international treaties.

VI. Further Implications

As this Introduction has sought to emphasize, courts can perform a critical function in shaping the real effect that international law norms are given in a certain legal order, in light of their capacity as the ultimate guardian of the domestic constitutional order and their concomitant ability to steer the behaviour of other State institutions. Their judicial practice in this regard is however severely understudied, in general and in Asia in particular. At its most fundamental, this Special Issue can thus help close a knowledge gap about how Asian courts understand and approach norms that emanate from outside the national order as well as shed light on the factors that may account for their conduct.

An exploration of the attitude of Asian courts towards international law can further contribute to several scholarly debates, viz. the discourse regarding the extent, direction, and

[16] Cf. Li-ann THIO, "Varieties of Constitutionalism in Asia" (2021) 16 Asian Journal of Comparative Law 285.

desirability of the internationalization of constitutional law and the prospect of convergence beyond written texts as a matter of the 'law in action';[17] and the discussion about the enduring accuracy of the traditional doctrinal paradigms of monism (acceptance) and dualism (rejection) to analyze judicial behaviours towards international law.[18]

The five articles also contribute to debates in comparative international law. They suggest that despite ambivalence and divergence, courts in Asia have engaged with international law. Particularly, in some settings, such as Hong Kong, Taiwan, and Indonesia, the engagement is even quite extensive. International law is an important source for these courts to develop their constitutional doctrines and case law, even as there may be differences in how they go about the discharge of this responsibility. As such, there are good reasons to systematically incorporate Asian jurisdictions in the global scholarship in comparative international law. A study of how institutional actors, such as courts, in those jurisdictions reference and apply international law would contribute to the development of comparative international law in Asia and beyond.

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[17] See e.g., Cheryl SAUNDERS, "The Impact of Internationalisation on National Constitutions" in Albert H.Y. CHEN, ed., *Constitutionalism in Asia in the Early Twenty-First Century* (Cambridge: Cambridge University Press, 2014); Sergio BARTOLE, *The Internationalisation of Constitutional Law – A View from the Venice Commission* (Oxford: Hart Publishing, 2022); David DYZENHAUS, "A Monist Approach to the Internationalization of Constitutional Law" in Iulia MOTOC *et al.*, eds., *New Developments in Constitutional Law: Essays in Honour of Andras Sajo* (The Hague: Eleven International Publishing, 2018).

[18] Cf. André NOLLKAEMPER *et al.*, "Engagement of Domestic Courts with International Law: Principled or Unprincipled?" in André NOLLKAEMPER *et al.*, eds., *The Engagement of Domestic Courts with International Law: Comparative Perspectives* (Oxford: Oxford University Press, 2024). The Study Group whose work culminated in this volume analyzed domestic courts in general–not constitutional courts specifically–and that its coverage of Asia was confined to Sri Lanka and China, which should not be taken as representative for that region as a whole.

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