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Democracy, courts and proportionality analysis in Asia

PO JEN YAP
Faculty of Law, University of Hong Kong, Hong Kong

Email: pjyap@hku.hk

Abstract: While proportionality analysis (PA) may have originated from Germany, it has not remained a European product. PA has been locally transplanted across Anglophone nations, found in mixed legal systems that are rooted in the common law and even adapted in parts of Latin America and Asia. This article explains why PA is flourishing in parts of Asia – for example, South Korea and Taiwan – and why it is faltering in other countries, such as Singapore and China, where the absence of PA can be attributed to the non-fulfilment of Kant's first prerequisite for perpetual peace: a republican government (liberal democracy).

Keywords: Asia; constitutional review; courts; democracy; Kant; proportionality analysis

I. Introduction

We live in an age of balancing[1] – an era where national courts around the world are empowered to independently determine whether their legislatures' limitations on rights are *proportionate*, and to invalidate those laws that are not.[2]

Typically, this proportionality analysis (PA) involves four steps. When applying PA, the judiciary would ensure that (1) the state is pursuing a legitimate objective; (2) the governmental measure undertaken is rationally connected to the stated policy objective; (3) the right-derogation is no more than necessary to achieve those stated goals; and (4) the regulatory measure

[1] V Jackson, 'Constitutional Law in an Age of Balancing' (2015) *124 Yale Law Journal* 3094.
[2] See A Stone Sweet and J Mathews, 'Proportionality Balancing and Global Constitutionalism' (2008) *47 Columbia Journal of Transnational Law* 72; A Stone Sweet and J Mathews, *Proportionality Balancing and Constitutional Governance* (Oxford University Press, Oxford, 2019).

is proportionate *stricto sensu* – that is, there is a fair balance struck between the rights of the individual and the interests of the community, such that the consequences of the law are not unacceptably harsh on the individual.

In their elegant and concise new book, *A Cosmopolitan Legal Order*,[3] Alec Stone Sweet and Clare Ryan have offered readers an original perspective on this ubiquitous PA doctrine. They convincingly connect Immanuel Kant's three preconditions for perpetual peace among nation-states – a republican government (liberal democracy), a commitment to international organization and the display of hospitality to non-citizens – to Europe's contemporary constitutional practice,[4] and they argue that PA lies at the heart of 'a Kantian system of constitutional justice'.[5] As Stone Sweet and Ryan succinctly reason, PA is 'Kantian congruent' because PA authorizes judges to 'give broad scope to any qualified right',[6] commits judges to the systematic evaluation of the government's justification for burdening the claimant and gives 'procedural structure to the right to justification'.[7]

While PA may have originated from Germany, it has not remained a solely European product. This is important to note, since Stone Sweet and Ryan's book responds to the criticism that PA, and by extension the European Convention on Human Rights (ECHR), is merely a regional and European construct carved from a particular history and legal tradition. This criticism has been debunked since PA has been locally transplanted across Anglophone nations (e.g. Canada and New Zealand), found in mixed legal systems that are rooted in the common law (e.g. Israel and South Africa) and even adapted in parts of Latin America and Asia.[8] In this contribution, I focus on Asia, looking particularly at why PA is flourishing in parts of Asia – for example, South Korea and Taiwan – but faltering in others, such as Singapore and China. With regard to these latter countries, I will attribute the absence of PA to the non-fulfilment of Kant's first prerequisite for perpetual peace: a republican government (liberal democracy). In so doing, my contribution illustrates both the prospects and challenges of extending this cosmopolitan order of which Stone Sweet and Ryan speak beyond Europe, while reaffirming Kant's precondition that 'if the principle of outer freedom limited by law is lacking [at any level of his legal tripartite of public

[3] A Stone Sweet and C Ryan, *A Cosmopolitan Legal Order: Kant, Constitutional Justice, and the European Convention on Human Rights* (Oxford University Press, Oxford, 2018).
[4] See (n 3) Ch 2.
[5] See (n 3) 55.
[6] See (n 3) 55.
[7] See (n 3) 56.
[8] See (n 2).

right] … then framework of all the others is unavoidably undermined and must finally collapse'.[9]

II. Liberal democracies in Asia

South Korea

The Constitutional Court of Korea (KCC) was established by the 1987 Constitution,[10] which expressly repudiated autocratic politics and introduced into South Korea a system of open elections and accountable leadership. The KCC is a classic Asian example of what Stone Sweet has termed a 'trustee court' – the people have placed their freedoms upon judges in trust as stewards of a rights-based regime.[11] With weak political parties as a cardinal feature of the country's modern electoral scene – political parties are largely instruments of their powerful leaders with strong regional appeal, and these parties continuously split, merge or reconfigure as their party bosses leave the political stage[12] – the KCC was able to assert its authority swiftly, and has ushered into South Korea an even more liberal model of democratic diversity.[13]

Since the four-step PA was established in 1989,[14] the KCC has imposed tangible costs on the government of the day and introduced significant socio-political reforms. In 2005, the Court upended a patriarchal law that subordinated a woman to her father, husband (if she was married) or son (if her husband was deceased).[15] Remarkably, the KCC did this on the basis that the preservation of patriarchy as 'tradition' was simply not a legitimate aim, and the law failed step 1 of PA.[16] More recently, in 2018, the KCC required the government to provide conscientious objectors to the nation's compulsory military service with an alternative to combat service, in lieu of imprisonment,

[9] I Kant, *The Metaphysics of Morals*, trans M. Gregor (Cambridge University Press, Cambridge, 1996 [1797]) 89 [6:311].

[10] Constitution of the Republic of Korea, 12 July 1948, revised 1987, available at: <https://www.wipo.int/edocs/lexdocs/laws/en/kr/kr061en.pdf>.

[11] See A Stone Sweet, 'Constitutional Courts and Parliamentary Democracy' (2002) *25 West European Politics*77.

[12] Byung-Kook Kim, 'Party Politics in South Korea's Democracy: The Crisis of Success' in L Diamond and Byung-Kook Kim (eds), *Consolidating Democracy in South Korea* (Lynne Rienner, Boulder, CO, 2000) 53–60.

[13] Po Jen Yap, *Courts and Democracies in Asia* (Cambridge University Press, Cambridge, 2017) Ch 7.

[14] *Land Transaction Licensing Case*, Korean Constitutional Court, 88Hun-Ka13, 22 December 1989.

[15] *Case on the House Head System*, Korean Constitutional Court, 2001Hun-Ka9, 3 February 2005.

[16] Ibid.

as incarcerating believers was not the least restrictive means of securing the combat-readiness of South Korea's troops (step 3 of PA) and the penal consequences were seen as unduly harsh on the individuals (step 4 of PA).[17]

Even more extraordinarily, the KCC has deployed PA in the impeachment proceedings of South Korean Presidents.[18] In the 2004 impeachment case of President Roh Moo-hyun, the KCC actually agreed that Roh had violated the law in three instances.[19] First, President Roh had violated a statutory mandate on public officials to remain politically neutral[20] when he publicly expressed support for the Uri Party at a press conference. Second, the President had violated his duty to abide by and protect the Constitution[21] when he criticized the National Election Commission for chastising him for his abovementioned partisan act. Finally, the Court concluded that the President had abused his authority by suggesting that a national referendum[22] be called to assess the public's opinion of his job performance as this constitutional mechanism could not be used for political grandstanding. Notwithstanding the violations, the Constitutional Court stated that it should not remove a President simply when there was a valid ground[23] for impeachment. Instead, the Court declared that an implied limitation must be read into the law: 'the principle of proportionality'[24] would require the judges to give due regard to the 'gravity of [the] illegality'.[25] Extrapolating from this *implied* proportionality constraint, the Court opined that a President could only be removed from office if he had committed an act that 'threatened the basic order of free democracy'[26] or betrayed the 'public's trust'.[27] Therefore,

[17] *Case on Conscientious Objectors*, Korean Constitutional Court, 2011Hun-Ba379, 28 June 2018.

[18] Article 111(1) (See No 10) of the Constitution expressly provides that the KCC has jurisdiction over impeachment proceedings.

[19] *Impeachment of the President (Roh Moo-hyun) Case*, 16-1 KCCR 609, 2004Hun-Na1, 14 May 2004.

[20] See Article 9(1) of the *Public Official Election Act*, available at: <http://www.nec.go.kr/engvote_2013/05_resourcecenter/02_01.jsp>.

[21] Article 66(2) of the Constitution of the Republic of Korea reads: 'The President shall have the responsibility and duty to safeguard the independence, territorial integrity and continuity of the State and the Constitution.'

[22] Article 72 of the Constitution of the Republic of Korea reads: 'The President may submit important policies relating to diplomacy, national defence, unification and other matters relating to the national destiny to a national referendum if he deems it necessary.'

[23] Article 53(1) of the Constitutional Court Act reads: 'Where a request for an impeachment is well-grounded, the Constitutional Court shall pronounce a decision that the respondent shall be removed from the relevant public office.'

[24] See (n 19).

[25] See (n 19).

[26] See (n 19).

[27] See (n 19).

the Court concluded that President Roh's misconduct, while illegal, was not sufficiently grave to justify his removal from office.

In contrast, the KCC in 2017 unanimously removed President Park Geun-hye from office.[28] The Court determined that Park had illegally allowed Choi Soon-sil, a close confidant but non-government official, to secretly gain access to classified information and interfere in state governance over the course of three years. The KCC held that such acts were sufficiently grave and 'overwhelmingly outweigh the national loss that would be incurred by the removal of the President'.[29] One must also note that Park's approval ratings were in single digits when she was removed – the lowest for any sitting President in South Korea[30] – and the Court was merely reflecting public opinion when it chose to unseat a deeply unpopular President.

Taiwan

Taiwan's Council of Grand Justices – or, as it is more commonly known today, the Constitutional Court of Taiwan (TCC) – was established in 1948 by the Guomindang (GMD) in mainland China pursuant to the Republic of China 1947 Constitution, as war waged on between the GMD and the Chinese Communists.[31] Following the defeat of the GMD on the mainland, the Council relocated to Taiwan when President Chiang Kai-shek's regime retreated in December 1949.

While Taiwan remained under martial law, the Council was largely a handmaiden of the GMD regime. Even though the Council was not conceived as a trustee court, it became one when the nation democratized.[32] With the lifting of martial law in 1987, the introduction of democratic legislative elections in 1992 and the inauguration of a President elected by universal suffrage in 1996, political power across the different branches of government fragmented. In turn, the TCC gained 'policy' space to assert itself against the ruling administration. A three-step PA was formulated in Judicial Interpretation 476[33] (1999), but oddly Taiwan's three-step variation then did not include step 2 of the traditional PA

[28] *Case on the Impeachment of the President (Park Geun-hye)*, KCCR, 2016 Hun-Na1, 10 March 2017.

[29] See (n 28).

[30] Geun-hye Park, 'Choi-gate: South Korean President's Approval Rating Tanks at 4%', *The Guardian*, 25 November 2016, available at: <https://www.theguardian.com/world/2016/nov/25/choi-gate-south-korean-presidents-approval-rating-tanks-at-4>.

[31] See Jiunn-rong Yeh, *The Constitution of Taiwan: A Contextual Analysis* (Hart, Oxford, 2016).

[32] See (n 13) Ch 6.

[33] See J.Y. Interpretation No. 476 (Taiwan, 1999), available at: <https://www.judicial.gov.tw/constitutionalcourt/EN/p03_01.asp?expno=476>.

analysis: there must be a rational relationship between the government measures and the legislative ends. Not long after, in Judicial Interpretation 542 (2002),[34] this step 2 sub-test was inserted into the TCC's PA and the four-step test was complete. It is noteworthy that this doctrinal shift occurred after the GMD – the dominant party that ruled the island without interruption since fleeing from the mainland in 1949 – lost the presidency for the first time in 2001.

Like its South Korean contemporary, the TCC has deployed PA to initiate major socio-political changes. Two notable PA examples shall be mentioned. In view of cross-Straits tensions, and national security concerns, the Taiwanese government was legislatively empowered to detain and deport persons from the mainland who had entered Taiwan illegally. As this law did not specify a permissible time frame for the detention, however, the TCC in Judicial Interpretation 710 (2013) declared that the impugned law did not serve the legislative goal of repatriating detainees speedily.[35] In short, the impugned law failed step 2 of PA. For similar national security reasons, the Taiwanese legislature had prohibited parents from adopting any children from the mainland, but in 2013 the TCC declared that the law, insofar as it prohibited persons from adopting mainland-based children of their own spouses, was a disproportionate – step 3 of PA – violation of their constitutional right to raise a family.[36]

III. Authoritarian regimes in Asia

Singapore

Since gaining independence in 1965, Singapore has been governed by the same ruling party, the People's Action Party (PAP). In fact, the PAP has controlled 90 per cent of the elected seats in Parliament since 1968. The state practises a variant of 'authoritarian constitutionalism',[37] whereby the semi-permanent party consolidates both legislative and executive power, and makes all relevant public policy decisions in the country.

Singapore's electoral system is unique insofar as it provides for both single-member constituencies and multi-member group constituencies in parliamentary general elections that have to be held at least every five

[34] See J.Y. Interpretation No. 542 (Taiwan, 2002), available at: <https://www.judicial.gov.tw/constitutionalcourt/EN/p03_01.asp?expno=542>.

[35] J.Y. Interpretation No. 710 (Taiwan, 2013), available at: <https://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=710>

[36] J.Y. Interpretation No. 712 (Taiwan, 2013), available at: <https://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=712>

[37] M Tushnet, 'Authoritarian Constitutionalism' (2015) 100 *Cornell Law Review* 391.

years.[38] Such multi-member group constituencies are known as Group Representative Constituencies (GRCs), and each GRC is formed by merging several single wards into one mega-constituency. The GRC system is widely perceived to be an electoral mechanism for the ruling PAP to ensure the election of new, promising but unknown candidates with ministerial potential by fielding them in GRC teams alongside party stalwarts with mass electoral appeal. To further cement its political advantage, the ruling PAP regime strategically skews the political competition in its favour by redrawing pre-existing electoral boundaries before *every* general election.[39]

The government also exercises extraordinary control over the citizenry's public discourse. The *Newspaper and Printing Presses Act* requires a person to first obtain a licence before they can print, publish or circulate a newspaper in Singapore and this licence can be refused or withdrawn by the Minister of Communications and Information at their discretion.[40] The *Public Order Act* requires an organiser of a public assembly, even if it is a demonstration by just *one* person,[41] to first obtain a permit from the Commissioner of Police, and licences for outdoor political protests are not granted in practice. Only outdoor demonstrations organised by Singapore citizens in Speaker's Corner – a small park – are exempted from these licensing requirements.

In view of the PAP's overwhelming power, the Singapore courts have shied away from the constitutional invalidation of *legislation* and engage only in 'retail rule of law, insuring that government obeys its own laws until it changes them'.[42] Notably, when the government lost in a constitutional decision before the Court of Appeal in 1988 for the first and last time, the government swiftly overturned that decision within a month of the judgment. In that seminal decision of *Chng Suan Tze v Minister of Home Affairs* (1988),[43] the Court of Appeal quashed the preventive detention orders issued under the *Internal Security Act* (ISA) against alleged Marxist conspirators on a technicality[44] and also concluded in obiter that the ministerial discretion to detain personnel under the ISA would be subject to an

[38] Article 65(4) of the Singapore Constitution; *Constitution of the Republic of Singapore*, 9 August 1965, available at: <https://www.refworld.org/docid/3ae6b5054.html>

[39] See (n 13) 26–27.

[40] *Newspaper and Printing Presses Act* (Cap 206, 1975, rev 2002), ss 21, 22, available at: <https://sso.agc.gov.sg/Act/NPPA1974#pr22->.

[41] *Public Order Act* (Cap 257A, 2009, rev 2012), s 2(1), available at: <https://sso.agc.gov.sg/Act/POA2009>.

[42] M Shapiro and A Stone Sweet, *On Law, Politics, and Judicialisation* New York: Oxford University Press, 2002) 166.

[43] *Chng Suan Tze v Minister of Home Affairs,* SGCA, 2 SLR(R) 525, 1988.

[44] This case primarily turned on the Court's interpretation of Section 8(1) of the ISA, which authorized the Minister of Home Affairs to issue a detention order if the President of Singapore

'objective' review by the courts. This decision proved to be sufficiently disquieting to the government, and subsequent statutory and constitutional amendments restricted judicial review in ISA cases to only narrow procedural grounds.

Since the government's swift rebuke of the Singapore Court of Appeal's perceived judicial overreach in *Chng Suan Tze*, the nation's highest court has abstained from invalidating any legislation that comes its way: the imposition of a mandatory death sentence on drug traffickers,[45] judicial caning[46] and the criminalization of consensual sex between men.[47] PA, which would introduce a 'highly intrusive standard of judicial review',[48] is rejected in all forms.[49] The Court's most progressive constitutional decision since *Chng Suan Tze* may have been when it determined that the Prime Minister had a constitutional duty to call for a by-election within a '*reasonable* time'[50] when a casual vacancy arose. Unfortunately, the Court reduced the force of this decision by conceding that 'it is impossible to lay down the specific considerations or factors which would have a bearing on the question as to whether the Prime Minister had acted unreasonably for not … calling for a by-election'.[51]

China

The People's Republic of China (PRC) currently operates under the 1982 Constitution. In 2018, presidential term-limits were removed from the Constitution such that President Xi Jinping can now rule beyond his second term and possibly for life.

The Chinese Communist Party (CCP) is not conferred specific constitutional powers, although the 2018 constitutional revisions expressly provide that the defining feature of socialism with Chinese characteristics, as

was satisfied that this was necessary to prevent that person from acting in any manner prejudicial to the security of Singapore. On the facts, the detention orders were signed only by the Permanent Secretary of Home Affairs and the affidavit he signed merely testified to the fact that the government was satisfied that the detention orders were necessary. The Court held unanimously that this recital was insufficient. Instead, the Court opined that, in the absence of direct evidence from the President, the Cabinet or the authorized Minister must provide evidence that the Cabinet (or the authorized Minister) and the President, after receiving the government's advice, were satisfied that these measures were necessary.

[45] *Yong Vui Kong v PP*, SGCA 20 at [59], 2010.

[46] *Yong Vui Kong v PP*, SGCA 11 at [64], 2015.

[47] *Lim Meng Suang v AG*, SGCA 53 at [77], 2014.

[48] A Stone Sweet and J Mathews, 'Proportionality and Rights Protection in Asia: Hong Kong Malaysia, South Korea, Taiwan – Whither Singapore?' (2017) 29 *Singapore Academy of Law Journal* 774 at 775.

[49] *Chee Siok Chin v Minister for Home Affairs*, SGHC, 1 SLR(R) 582, 2006, at [88].

[50] *Vellama v Attorney General*, SGCA, 4 SLR 698, 2013, at [84].

[51] See (n 50): [85].

practised in China, is the leadership of the CCP.[52] The CCP's influence pervades every facet of China's public life and the Party's top leadership is effectively China's living Constitution.[53]

Deputies of the national legislature – the National People's Congress (NPC) – are elected from the provinces, autonomous regions, municipalities and Special Administrative Regions (SARs) within China.[54] Deputies to the people's congresses of these provinces/municipalities are elected by the respective people's congresses below in the hierarchy;[55] deputies to the people's congresses of counties and townships are elected directly by their constituents.[56] But all these elections are a sham. The deputies to the national/provincial/municipality levels would be instructed by their respective CCP leadership to abide by party discipline and elect pre-ordained candidates.[57] For lower-level county and township elections, which are open to the public, the candidates allowed on the ballot paper are pre-vetted by the CCP.[58]

While the 2004 round of constitutional amendments formally enshrines a constitutional duty on the state to respect and preserve human rights,[59] this beneficent gesture is merely window-dressing. Under President Xi, crackdowns on dissidents and civil society have intensified. In July 2015, over 300 lawyers and human rights advocates were detained and publicly pilloried in a media spectacle.[60] The Great Firewall of China has been buttressed further: virtual private networks (VPN) services now need government approval to operate and the country's top three internet service providers – China Mobile, China Unicom and China Telecom – no longer allow VPNs to access their networks, thereby closing off the remaining loopholes for the citizenry to access Google, Facebook, YouTube and the *New York Times*.[61]

[52] Article 1 of the 1982 Chinese Constitution, revised in 2018.

[53] He Xin, 'The Party's Leadership as a Living Constitution in China' in T Ginsburg and A Simpser (eds), *Constitutions in Authoritarian Regimes* (Cambridge University Press, Cambridge, 2013) 245–60.

[54] Article 59 Constitution of the People's Republic of China (Chinese Constitution) 4 December 1982, available at: <https://www.refworld.org/docid/4c31ea082.htm>.

[55] Article 97 of the 1982 Chinese Constitution.

[56] Article 97 of the 1982 Chinese Constitution.

[57] See (n 53) 246.

[58] Article 31 of the Electoral Law of the National People's Congress and Local People's Congresses of the People's Republic of China.

[59] Article 33 of the 1982 Chinese Constitution, revised in 2004.

[60] E Pils, 'The Party and the Law', in Willy Wo-lap Lam (ed), *Routledge Handbook of the Chinese Communist Party* (Routledge, New York, 2018) 258.

[61] Minxin Pei, 'China in 2017: Back to Strongman Rule' (2018) *58 Asian Survey* 21, 26.

Chinese courts are 'deeply embedded institutions'.[62] While the Constitution prohibits any administrative organ, public organization or individual from interfering with the judiciary,[63] it is silent when it comes to the CCP. (It is noteworthy that the CCP and its satellite parties are not even formally registered in China.)[64] The Presidents and Vice Presidents at every court level are CCP or CCP affiliated cadre members.[65] Furthermore, the CCP top leadership regulates judicial affairs through the Party's Central Political-Legal Committee (PLC), and there are local PLCs replicated in every province and county;[66] the Central PLC in turn reports to the Central Committee of the CCP, the party's highest organ of authority led by the CCP's General Secretary, President Xi. While there will not be party-sanctioned interference with run-of-the-mill commercial or criminal cases, 'complicated' cases would be handled by an Adjudication Committee chaired by the President of that particular court level[67] and these cases will be decided in consultation with the relevant PLCs.[68] Chinese courts are not even vested with any power of constitutional interpretation –this authority lies with (although it is never exercised by) the Standing Committee of the NPC.[69] Without the power of constitutional review, the absence of PA in Chinese courts is a foregone conclusion. Judicial activism that crosses the 'tolerance interval'[70] of the Party leadership also does not go unpunished. One panel of the SPC broke new ground when it declared that the plaintiff Qi Yuling's constitutional right to education was infringed when her classmate stole her identity to gain entry into business school. This *Qi Yuling* SPC decision handed down in 2001 has been hyperbolically termed the *Marbury v Madison*[71] of China.[72] Unlike *Marbury*, however, no legislation (or regulation) was invalidated herein, for *Qi Yuling* pertained only to the *horizontal* effects of the Chinese

[62] Kwai Hang Ng and Xin He, *Embedded Courts: Judicial Decision-Making in China* (Cambridge University Press, Cambridge, 2017) 15.

[63] Article 126 of the 1982 Chinese Constitution.

[64] Qianfan Zhang, *The Constitution of China: A Contextual Analysis* (Hart, Oxford, 2012) 99.

[65] See (n 64) 194.

[66] Ling Li, 'The Chinese Communist Party and People's Courts: Judicial Dependence in China' (2016) *64 American Journal of Comparative Law* 37, 57.

[67] See Supreme People's Court, 2016 White Paper on Judicial Reform of Chinese Courts Part IV, available at: <http://english.court.gov.cn/2016-03/03/content_23724636.htm>.

[68] R Peerenboom, 'Judicial Independence in China: Common Myths and Assumptions' in R Peerenboom (ed), *Judicial Independence in China: Lessons for Global Rule of Law Promotion* (Cambridge University Press, Cambridge, 2010) 80.

[69] Article 67 of the 1982 Chinese Constitution.

[70] L Epstein, O Shvetsova and J Knight, 'The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government' (2001) *35 Law and Society Review* 117, 128.

[71] *Marbury v Madison*, 5 U.S. 137, 1803.

[72] See (n 64) 174.

Constitution. Unsurprisingly, the SPC judge responsible for this decision was removed from office in 2008 on grounds of corruption, and the SPC subsequently announced that same year that this *Qi Yuling* interpretation 'no longer applied',[73] with no further explanations.

IV. The universality of proportionality and the cosmopolitan legal order

This article makes two points. First, it demonstrates that a 'Kantian congruent' PA can be adopted beyond Europe and, more importantly, accepted within an Asian context as a foundational legal principle of 'self-lawgiving' (a crucial Kantian point – see the Introduction to this symposium). This demonstration is fundamental as it refutes those who may critique Stone Sweet and Ryan's PA-based cosmopolitan legal order as Eurocentric, imperialistic or representative of a regional experiment without credible universal appeal. As the use of PA in Asia shows, the opposite is possible, in that PA can and has been adopted willingly, and diffused contextually.

Second, as PA is reliant on domestic judicial construction and governmental acquiescence, universal adoption remains elusive in the short term. A central concern explored here is the fundamental role that democracy – a pillar of Kant's legal tripartite – plays in fulfilling his cosmopolitan vision. The key implication, at least in the short term, is that this foundational element is very much still in 'transition', an observation made by the editors of this symposium as well as by many of its contributors.[74] However, two responses remain, which should temper long-term pessimism regarding the causal links between democracy, PA and its universality. First, the expectation that a cosmopolitan order can be established in the near future is not a prediction that *A Cosmopolitan Legal Order*, Kant or any the contributors to this symposium are guilty of peddling. In fact, what is presented by Stone Sweet and Ryan is far more humble and longitudinal, as they present a set of foundational moral, institutional and legal prerequisites for a Kantian legal order. Viewed in this light, the spread of democracy represents one important foundational stepping-stone for the success of a larger cosmopolitan legal project. Therefore, while it is true that the world is not currently made up of democracies, there is enough evidence to suggest that democratization over time is possible. Hence, the link Kant makes between a domestic right (democracies) and a cosmopolitan right (PA in relation to the rights of all within a legal order) is logically consistent and unsurprising, since the primacy of human dignity and external freedom is the explicit ground for

[73] The 7th Decision of the Supreme People's Court to Repeal Relevant Judicial Interpretations Released before 2007, 18 December 2008.

[74] See also Corradetti's contribution in this issue.

a system of rights. In other words, these are principles of institutional practice that distinctively make a legal system cosmopolitan in nature. This finding, in and of itself, is heuristically valuable.

In terms of how PA plays out in Asia, for both the TCC and the KCC, German law is the most considered foreign legal source.[75] It is therefore unsurprising that within Asia, PA thrives best in jurisdictions where constitutional transplants from Anglo-European states are ubiquitous and well received. Furthermore, Taiwan and South Korea are dynamic democracies.[76] In such liberal democracies, where political power regularly rotates between competing political parties, the courts have more political space to use PA to subvert the legislative status quo, as active cooperation between rival factions in the legislature to overrule the judiciary occurs less frequently – especially since constitutional review by an independent branch of government provides a form of insurance for political parties when fortunes turn.[77] In contrast, Singapore and China are deeply suspicious of Western values that are inimical to their nativist authoritarian impulses. Furthermore, in dominant-party illiberal systems where elections do not lead to a change in government, judges who deploy PA to subvert the semi-permanent regime's legislative agenda can easily be overruled or removed.

While we may be centuries away from the establishment of a *universal* world order, *A Cosmopolitan Legal Order* has cast light on how this global infrastructure would slowly take shape – not in a top-down way with an international government imposing transnational norms (as Kant warned against), but in a bottom-up manner, with a polyarchy of independent trustee courts adopting PA as a general approach to rights-adjudication, treating one another's precedents with mutual respect and rendering cosmopolitan justice in the absence of a global state.[78] For that, Stone Sweet and Ryan will be remembered by history as one of the earliest prophets heralding the dawn of this new constitutional age.

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[75] DS Law, 'Judicial Comparativism and Judicial Diplomacy' (2015) *163* University of Pennsylvania Law Review 927, 979 and 963.

[76] See (n 13).

[77] T Ginsburg, *Judicial Review of New Democracies: Constitutional Courts in Asian Cases* (Cambridge University Press, Cambridge, 2003).

[78] See (n 3) 258.