

RESEARCH ARTICLE

# Global constitutionalism in Taiwan

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## Abstract

In contrast with the decline of liberal constitutionalism around the world, liberal constitutionalism seems to be resilient in Taiwan. Weaving together several threads of history, law and politics, this article first argues that foreign legal education and identity concerns explain why judicial review and constitutional development more broadly in Taiwan have not only flourished but mirrored both German and American constitutional jurisprudence. Second, it maintains that the case of Taiwan poses another challenge to the concept of global constitutionalism since the number of referenced jurisdictions is quite limited.

**Keywords:** global constitutionalism; judicial review; liberal constitutionalism; national identity; Taiwan Constitutional Court

## 1. Introduction

Recent years have witnessed the decline of liberal constitutionalism around the globe.<sup>1</sup> Nevertheless, Taiwan seems to be a counter-example: the freedom of the press is best protected in Taiwan among Asian countries,<sup>2</sup> and so is gender equality.<sup>3</sup> Not to mention that Taiwan became the first Asian country to legalize same-sex marriage in 2019. It seems plausible to suggest liberal constitutionalism<sup>4</sup> has taken root in this island state. Why does Taiwan not just embrace but also entrench the ideas and institutions of liberal constitutionalism instead of, say, Confucian constitutionalism<sup>5</sup> or authoritarian

<sup>1</sup>See, for example, Mark A Graber, Sanford Levinson and Mark Tushnet (eds), *Constitutional Democracy in Crisis?* (Oxford University Press, New York, 2018).

<sup>2</sup>See Reporters without Borders, 'Media Independence on Hold', available at <<https://rsf.org/en/taiwan>>.

<sup>3</sup>See World Bank, *Women, Business and the Law 2019*, available at <[https://openknowledge.worldbank.org/bitstream/handle/10986/31327/WBL2019.pdf?fbclid=IwAR0QXlhwhSy\\_AD1r\\_umEKupqZPgoQKGMWObiU\\_kxvKvn77GFy-b16rQCbGc](https://openknowledge.worldbank.org/bitstream/handle/10986/31327/WBL2019.pdf?fbclid=IwAR0QXlhwhSy_AD1r_umEKupqZPgoQKGMWObiU_kxvKvn77GFy-b16rQCbGc)>.

<sup>4</sup>The term 'global constitutionalism' is a multifaceted concept. In this article, I adopt the symposium's definition: 'the global influence of ideas and institutions of constitutionalism into nation-states throughout the globe'.

<sup>5</sup>Bui Ngoc Son, *Confucian Constitutionalism in East Asia* (Routledge, New York, 2016); Sungmoon Kim, *Public Reason Confucianism Democratic Perfectionism and Constitutionalism in East Asia* (Cambridge University Press, New York, 2016); Jiang Qing, *A Confucian Constitutional Order* (Princeton University Press, Princeton, NJ, 2013).

constitutionalism?<sup>6</sup> Through what mechanisms? To unpack these puzzles, we need to weave together several threads of history, law and politics.

Admittedly, the concept of global constitutionalism includes many dimensions. This article focuses on the spread of judicial review and certain constitutional ideas through the lens of the jurisprudence of Taiwan's Constitutional Court. I argue that both foreign legal education and identity concern explain why judicial review in Taiwan has not only flourished but, more specifically, mirrored both the German and American constitutional jurisprudences – two very different paradigms of constitutionalism and constitutional culture.<sup>7</sup> This may resonate with the theses of constitutional learning and constitutional conformity as two models of global constitutional evolution.<sup>8</sup> Note that Taiwan has never been a common law jurisdiction and, unlike Japan or the Philippines, has never been under the occupation or colonization of the United States. In addition, both the constitution in Taiwan (1947) and the Taiwan Constitutional Court came into existence before the German Basic Law (1949) and the German Federal Constitutional Court (GFCC), the exemplar of the continental model of constitutional review. Furthermore, language barriers exist between Taiwan and both Western countries. These facts do not weaken the influences of the United States and Germany; instead, they suggest that the case of Taiwan may enrich the discussion of constitutional migration.

This article unfolds as follows. Part II details how the institutional design that facilitates judicial review in Taiwan is affected mainly by the United States and Germany. These institutional arrangements appear in the written Constitution (officially known as the Constitution of the Republic of China, ROC Constitution), the constitutional amendments and other statutes that are closely related to the operation of judicial review. The article then articulates the migration of constitutional principles and constitutional culture through the decisions of the Taiwan Constitutional Court (TCC). It argues that legal education and identity concerns lead to constitutional migration in Taiwan. This does not imply that Taiwan simply transplants foreign constitutional law on domestic soil,<sup>9</sup> nor does it suggest that liberal constitutionalism does not encounter resistance in Taiwan. Nevertheless, unlike some CEE countries<sup>10</sup> Taiwan does not question or object the global spread of constitutionalism. Finally, the article questions the extent to which there is such a thing as global constitutionalism. The case of Taiwan shows that, at least

<sup>6</sup>Mark Tushnet, 'Authoritarian Constitutionalism' (2015) 100 *Cornell Law Review* 391.

<sup>7</sup>Moshe Cohen-Eliya and Iddo Porat, *Proportionality and Constitutional Culture* (Cambridge University Press, New York, 2013); Michaela Hailbronner, 'Transformative Constitutionalism: Not Only in the Global South' (2017) 65 *American Journal of Comparative Law* 527.

<sup>8</sup>David S Law and Mila Versteeg, 'The Evolution and Ideology of Global Constitutionalism' (2011) 99 *California Law Review* 1163, 1173–75, 1177–83.

<sup>9</sup>Admittedly, metaphors such as migration or transplantation are vague, and their meanings often overlap. Aware of the debates revolving around metaphors, this article uses transplantation to refer to more 'mechanical' use of foreign law and uses 'migration' to refer to less 'mechanical' use. For the battles of these metaphors, see Sujit Choudhry, 'Migration as a New Metaphor in Comparative Constitutional Law' in Sujit Choudhry (ed), *The Migration of Constitutional Ideas* (Cambridge University Press, New York, 2007) 1; Vlad Perju, 'Constitutional Transplants, Borrowing, and Migrations' in Michel Rosenfeld and Andrés Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, Oxford, 2012) 1304, 1306–08; Andrew Harding, 'The Legal Transplants Debate' in Vito Breda (ed), *Legal Transplants in East Asia and Oceania* (Cambridge University Press, Cambridge, 2019) 13, 26–27.

<sup>10</sup>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, 89–95.

from a court-centric perspective, the term ‘global constitutionalism’ may be somewhat misleading because the number of role models is limited.

## II. Foreign influence on the institutional design of judicial review

Legal reception is commonplace in Asia because most countries were colonies before World War II, and Taiwan is no exception. Being a civil law jurisdiction that had been colonized by Japan – another civil law jurisdiction – for half a century, Taiwan’s legal system has been deeply influenced by foreign jurisdictions, particularly Germany. At the risk of over-simplifying, Taiwan’s Civil Code was modelled on Germany and Switzerland’s civil codes; the Criminal Code was modelled on Japan’s code, which was in turn influenced by Germany; and the Administrative Procedure Act has been modelled mostly but not exclusively on the German and Austrian administrative laws.<sup>11</sup> This should not be surprising given the dominant status of German law in civil law systems.

Nevertheless, the drafting of Taiwan’s constitution, particularly the chapter on the judiciary, was influenced by the United States. To be more precise, the Taiwan Constitutional Court was modelled on the Supreme Court of the United States (SCOTUS) at the very beginning, although nowadays it functions like a typical European model of constitutional tribunal in the sense that it is a specialist court having only constitutional jurisdiction.<sup>12</sup> The original design should be attributed to three leading constitutional framers during that turbulent era: Wang Chung-hui, John Wu and Carsun Chang (Chang Chun-mai).

Having studied at both the University of California and Yale, Wang Chung-hui was the first Chinese to receive a doctorate from Yale Law School. In 1913, one year after the establishment of the Republic of China, he penned the draft constitution. Although it was not the first constitutional draft in China, his version had a much more comprehensive and lingering impact on the future constitution of the Republic of China.<sup>13</sup> Imitating the judicial review system in the United States, his draft clearly provided that courts should have the duty and power of judicial review,<sup>14</sup> which had not been provided for in the earlier drafts.<sup>15</sup> Indeed, he had noticed that courts in most European countries did not have the power of judicial review at that time, but maintained that the nascent Republic of China should follow the United States in this regard to safeguard the constitution and constitutionalism.<sup>16</sup> It is notable that he used the word ‘courts’ rather than ‘constitutional court’ or ‘supreme court’, meaning that the power of judicial review should be granted to each and every court rather than being monopolized by an apex court. This is typical of

<sup>11</sup>It is noteworthy that the Administrative Procedure Act also consulted the design of the Administrative Procedure Act of the United States and that of Japan during the drafting process. In the final version, the American influence is most obvious in the chapters regarding hearing proceedings and notice and comment. See Jiunn-rong Yeh, *When Taiwan Confronts Administrative Procedure Act* (Angle, Taipei, 2002) [in Chinese] 41–70, 320–21.

<sup>12</sup>Andrew Harding *et al.* ‘Constitutional Courts: Forms, Functions and Practice in Comparative Perspective’ in Andrew Harding and Peter Leyland (eds), *Constitutional Courts: A Comparative Study* (Wildy, Simmonds & Hill, London, 2009) 1, 3.

<sup>13</sup>Nigel NT Li, *Kuayueh Fahsi te Minkuo Fahsiao chia* (Wu-Nan, Taipei, 2015) [in Chinese].

<sup>14</sup>Chuan-Chi Miao, *Chungkuo Chihhsien shih Tzuliao Huipien* (Academia Historia, Taipei, 1989) [in Chinese].

<sup>15</sup>Ibid 85, 154.

<sup>16</sup>Wang Chung-hui, *Wang Chung-hui Fahsueh Wenchi* (Law Press China, Beijing, 2008) [in Chinese].

diffuse judicial review as practised in the United States and many other common law jurisdictions. Although the American model of judicial review was ultimately not implemented, as a result of vehement resistance from the then Supreme Court in China, he became the first president of the Judicial Yuan (the head of the judiciary in the Constitution) in 1948, which symbolized the strong American influence on Taiwan's constitutional culture.<sup>17</sup>

Furthermore, John Wu, the draftsman of another important draft constitution, had studied at the University of Michigan. He had been mentored by Harvard Law Professor Felix Frankfurter and was a friend of Justice Oliver Wendell Holmes of the US Supreme Court.<sup>18</sup> He had also studied in France and Germany and maintained a strong friendship with Roscoe Pound, dean of Harvard Law School, and Benjamin Cardozo, Associate Justice of the US Supreme Court. All these relationships and his training made Wu more liberal than most of his Kuomintang (KMT) comrades, which was reflected in the chapter on rights and duties in his draft constitution.<sup>19</sup> Moreover, Wu had researched many written constitutions in different jurisdictions, including the United States, Germany, France and Japan, before preparing for the draft constitution.<sup>20</sup> In particular, it has been pointed out by his contemporaries that the system of judicial review in his draft was modelled on that of the United States.<sup>21</sup>

Chang Chun-mai is another crucial figure, if not the most decisive one, in shaping the final version of the Constitution. Once affected by the Weimar Constitution and the Continental legal system, his original design for the judiciary was to set up a special court responsible for constitutional controversies.<sup>22</sup> Nonetheless, his thinking gradually changed and gravitated towards the unitary judicial system in which the Judicial Yuan was to play the same role as the SCOTUS.<sup>23</sup> Inspired by Alexander Hamilton and James Madison, he had published several essays that advocated and elaborated the elements of constitutional design in China before drafting the constitution.<sup>24</sup> These essays were collected and edited into *Ten Essays on the Chinese Democratic Constitution*, which he compared to *The Federalist Papers* in the prologue. At that time, Chang was a leader of a small political party. The Chinese Civil War between the Nationalist Party (the KMT) and the Chinese Communist Party had reached white heat and the Communists had boycotted the constitutional convention. Under this circumstance, to maintain the façade that the Constitution was enacted democratically instead of unilaterally by the KMT, the KMT negotiated with Chang and essentially adopted his version of draft constitution instead of the KMT's own version. Therefore, he became the major drafter of the

<sup>17</sup>Wen-Chen Chang and Jiunn-Rong Yeh, 'Judges as Discursive Agent' in Tania Groppi and Marie-Claire Ponthoreau (eds) *The Use of Foreign Precedents by Constitutional Judges* (Hart, Oxford, 2013) 373, 379.

<sup>18</sup>Note, 'Dr Wu's Constitution' (2019) 132 *Harvard Law Review* 2300; John CH Wu, *Beyond East and West* (Sheed and Ward, New York, 1969) 87–132.

<sup>19</sup>Thomas E Greiff, 'The Principle of Human Rights in Nationalist China: John CH Wu and the Ideological Origins of the 1946 Constitution' (1985) 104 *The China Quarterly* 441, 441–42; Charles Sumner Lobingier, 'The *Corpus Juris* of New China' (1944–45) 19 *Tulane Law Review* 512, 514–15.

<sup>20</sup>Xiaomeng Zhang, 'John C.H. Wu and His Comparative Law Pursuit' (2013) 41 *International Journal of Legal Information* 196, 215–216.

<sup>21</sup>Wang zilan, *zhongguo zhixian wenti* (China Press, Shanghai, 1946) 214; Chang Chun-mai, *Chunghua-minkuo Minchu Hsienfa Shihchiang* (Commercial Press, Taipei, 1971) 98.

<sup>22</sup>Hua-Yuan Hsueh, *Minchu Hsiencheng Yu Mintsuchui Te Piencheng Fachan – Chang Chunmai Ssuhsiang Yenchiu* (Rice, Taipei, 1993) 213.

<sup>23</sup>Ibid.

<sup>24</sup>See Chang (n 21) 97–98.

Constitution, in which the Judicial Yuan was to be accorded a role similar to that of the SCOTUS in China.

Based on this history, it is beyond doubt that the constitutional design of the Judicial Yuan chose the US model of judicial review.<sup>25</sup> As a result, immediately after the promulgation of the Constitution on January 1, 1947, the government enacted the Judicial Yuan Organization Act on March 31, in which the Judicial Yuan was to comprise nine justices (identical to that of the SCOTUS) who would have general jurisdiction over all civil, criminal, administrative and constitutional issues. Unfortunately, the Act provoked fervent criticism from the then Supreme Court and did not really take effect for long. On December 25, 1947, the government revised the Act and restored the old system that separated the constitutional tribunal from ordinary courts. Consequently, the TCC has had only the power of abstract review instead of concrete review since its inauguration. This conspicuous incompatibility between the framers' unquestionable intent and the actual institutional design has given birth to one constitutional court decision (officially known as an Interpretation) five decades later. In 2001, the TCC rendered Interpretation No. 530,<sup>26</sup> in which it maintained that the Judicial Yuan should be the highest generalist court with jurisdiction over all legal controversies, not only constitutional ones. The TCC invoked the framers' intent and required the government to impose the original design, namely the American model. Predictably, this decision again faced strong resistance from the Supreme Court, was ignored without implementation and would not be implemented in the foreseeable future. In a nutshell, the American impact on the institutional design of the judiciary in Taiwan has been vivid, notwithstanding domestic defiance.

The resistance from the Supreme Court reminds us that Taiwan is still a civil law jurisdiction, so legal transplantation out of context is unlikely to succeed. Perhaps because of this, later constitutional revision of the judiciary mirrored German legal thought. The codification of defensive democracy, which is often seen as a German concept,<sup>27</sup> is a good example. In the 1991 constitutional amendments, Section 2, Article 13 provided that the TCC should have the power to adjudicate cases regarding the dissolution of unconstitutional political parties. Section 3 further stated that, 'A political party shall be considered unconstitutional if its goals or activities endanger the existence of the Republic of China or the nation's free and democratic constitutional order.'<sup>28</sup> According to the record of the National Assembly, representatives of this proposal of constitutional amendment clearly invoked the German law to prove its necessity.

In addition to the Constitution and the constitutional amendments, other institutional design that facilitates judicial review also reflects the ubiquitous influence of German and American models of judicial review. Interpretation No. 371<sup>29</sup> is a case in point. Before this decision, only judges of the Supreme Court and the Supreme Administrative Court could suspend litigation and petition the TCC if they believed the laws under consideration in

<sup>25</sup>Tom Ginsburg, *Judicial Review in New Democracies* (Cambridge University Press, New York, 2003) 116; Wen-Chen Chang, 'Courts and Judicial Reform in Taiwan' in Jiunn-Rong Yeh and Wen-Chen Chang (eds), *Asian Courts in Context* (Cambridge University Press, Cambridge, 2015) 143, 146; Lawrence Shao-Liang Liu, 'Judicial Review and Emerging Constitutionalism: The Uneasy Case for the Republic of China on Taiwan' (1991) 39 *American Journal of Comparative Law* 509.

<sup>26</sup>See JY Interpretation No. 530 (2001) (Taiwan).

<sup>27</sup>Jan-Werner Müller, 'Militant Democracy and Constitutional Identity' in Gary Jacobsohn and Miguel Schor (eds), *Comparative Constitutional Theory* (Edward Elgar, Northampton, 2018) 415.

<sup>28</sup>See Article 13 of the Additional Articles of the Constitution of Republic of China (1991) (Taiwan).

<sup>29</sup>See JY Interpretation No. 371 (1995) (Taiwan).

their cases were constitutionally controversial. In this Interpretation, the TCC mimicked Article 100 of the German Basic Law and created ‘concrete review’ in Taiwan,<sup>30</sup> extending to all judges the power to petition the TCC. Moreover, the revision of the Constitutional Litigation Act in December 2018, which will dramatically remodel the power of the TCC after taking effect in 2022, may be the best example to testify to the hybridity of the judicial review system in Taiwan. On the one hand, the legislative purpose of Article 1 of the Act straightforwardly admitted that the newly introduced institution of constitutional compliant was modelled on the GFCC. On the other hand, Article 20 emulates and introduces the *amicus curiae* system used in the United States, allowing interest groups and other relevant institutions to submit their opinions. Similarly, the legislative purpose explained that it had referenced the Rules of the Supreme Court of the United States in this regard. Once again, the pendulum of the institutional design of judicial review has swung between the United States and Germany.

Finally, the categories of judicial remedies are also witness to the impact of the GFCC. To illustrate, while whether a law violates the constitution should be an either/or question in theory, it is very much a grey area in practice. Accordingly, the courts usually need to develop a raft of remedies to grade the different legal effects of decisions. Not all constitutionally problematic laws will be declared unconstitutional and void. The GFCC, for example, may ‘read in’ a law to uphold its constitutionality; it may also issue the so-called delayed declaration of invalidity (or suspension order), in which a law is declared unconstitutional but not nullified immediately.<sup>31</sup> Under this circumstance, the legislature will have some time to revise the impugned law before it ceases to take effect. Moreover, the GFCC also issues admonitory decisions that uphold a law while pointing out its constitutional deficiency.<sup>32</sup> All these judicial remedies have been imitated and adopted by the TCC over time.<sup>33</sup> These techniques allow the TCC to navigate across many political storms without a head-on clash with the political branches.

### III. Foreign influence on contents of judicial review

The notion of global constitutionalism is not simply used in a thin or formal sense, but emphasizes its thick or normative dimension.<sup>34</sup> This understanding behooves us to further probe the foreign impact on judicial decisions in addition to the institution of judicial review. Given the ubiquity of German and American impacts on the institutional

<sup>30</sup>Jiunn-rong Yeh and Wen-Chen Chang, ‘An Evolving Court with Changing Functions: The Constitutional Court and Judicial Review in Taiwan’ in Albert HY Chen and Andrew Harding (eds), *Constitutional Courts in Asia* (Cambridge University Press, Cambridge, 2018) 110, 114.

<sup>31</sup>Dieter Grimm, ‘Federal Constitutional Court of Germany (Bundesverfassungsgericht)’ in Rainer Grote, Frauke Lachenmann and Rüdiger Wolfrum (eds), *Max Planck Encyclopedia of Comparative Constitutional Law* (Oxford University Press, Oxford, 2015); Michaela Hailbronner and Stefan Martini, ‘The German Federal Constitutional Court’ in Andras Jakab, Arthur Dyevre and Giulio Itzcovich (eds), *Comparative Constitutional Reasoning* (Cambridge University Press, Cambridge, 2017) 356, 364; Donald P Kommers and Russell A. Miller, *The Constitutional Jurisprudence of the Federal Republic of Germany* (Duke University Press, Durham, NC, 2012) 36.

<sup>32</sup>See Kommers and Miller (n 31).

<sup>33</sup>Yueh-Sheng Weng, ‘Guardian of Constitution: Introspection and Anticipation’ (2009) 6 *Constitutional Interpretation: Theory and Practice* 1 [in Chinese].

<sup>34</sup>For the distinction between the thinness and thickness of a constitution, see Joseph Raz, ‘On the Authority and Interpretation of Constitutions’ in Larry Alexander (ed), *Constitutionalism: Philosophical Foundations* (Cambridge University Press, Cambridge, 1998) 152, 153–54.

design of judicial review, it should not be surprising that German and American case laws and doctrines have substantively affected the TCC's decisions. For decades, the secretariat of the TCC has regularly selected and translated some of the landmark decisions delivered by the GFCC and by the SCOTUS into Chinese for reference. Indeed, many of the TCC's decisions are reflective of the doctrines prevalent in these two jurisdictions. Notably, the existence of foreign impact does not necessarily require explicit judicial citation. Compared with the majority opinions, judges' separate opinions sometimes reveal more foreign impact behind the scene. Finally, along with the import of foreign constitutional doctrines, the constitutional culture has also changed gradually.

### Doctrines

Proportionality, developed first in the domain of Prussian administrative law,<sup>35</sup> may be the most paradigmatic example. Recent decades have witnessed the migration of the proportionality principle around the globe to the extent that it has become the most dominant interpretive weapon in the judicial arsenal in most countries. Taiwan is no exception. Nevertheless, the word 'proportionality' is not explicitly mentioned in the Constitution, in which Article 23 simply stipulates that, 'All the freedoms and rights ... shall not be restricted by law except such as may be *necessary* to prevent infringement upon the freedoms of other persons, to avert an imminent crisis, to maintain social order or to advance public welfare.'<sup>36</sup> Hence the TCC has used the word 'necessary' as the textual peg on which to hang the necessity test of proportionality for decades. It invoked proportionality in a constitutional controversy for the first time in 1996 and, as time has passed, its reliance on proportionality has gradually increased. Nowadays, it has invoked proportionality in roughly one-third of the cases.<sup>37</sup>

When applying proportionality, moreover, the TCC has distinguished different levels of scrutiny, which replicates the ruling of the GFCC in the *Pharmacy Case*.<sup>38</sup> For example, in Interpretation No. 584, a case concerning the freedom of occupation, the TCC argued that, 'The Constitution permits, however, different degrees of liberalness and strictness with respect to restraints to be imposed on the freedom of occupation, depending on the nature of the occupation in question.'<sup>39</sup> In addition to general restrictions on the freedom of occupation, such as time, place and manner, the TCC differentiated 'subjective restrictions' on choosing occupations from 'objective restrictions'.<sup>40</sup> Since this decision, the same reasoning has appeared time and again in a series of cases involving the freedom of occupation. Undoubtedly, the TCC has adopted this analytical framework developed by the GFCC in Taiwan's freedom of occupation cases. Another example relates to the *besonderes Gewaltverhältnis* (special relationship of subordination). This is a German

<sup>35</sup>Alec Stone Sweet and Jud Mathews, 'Proportionality Balancing and Global Constitutionalism' (2008) 47 *Columbia Journal of Transnational Law* 72, 97–111.

<sup>36</sup>Article 23 of the Constitution of the Republic of China (Taiwan) (1947). Emphasis added.

<sup>37</sup>Chien-Chih Lin, 'Proportionality in Taiwan: American-German Fusion' in Po Jen Yap (ed), *Proportionality in Asia* (Cambridge University Press, Cambridge, 2020).

<sup>38</sup>*Apotheken-Urteil* 7 BVerfGE 377 (1958).

<sup>39</sup>See JY Interpretation No. 584 (2004) (Taiwan).

<sup>40</sup>For the tiered review standards in the *Pharmacy case*, see Niels Petersen, 'The German Constitutional Court and Legislative Capture' (2014) 12 *International Journal of Constitutional Law* 650, 665. For the incorporation into the TCC's jurisprudence, see JY Interpretation No. 711 (2013) (Taiwan) (Tang J concurring).

legal concept in which some kinds of people, such as inmates, students, military servicemen and civil servants, do not enjoy the full protection of fundamental rights because of their relationship with the state.<sup>41</sup> Being a civil law country, Taiwan inherited this concept during the authoritarian period and imposed special limitations on these people's rights. For instance, their right to institute legal proceedings is still circumscribed after democratization. In fact, this idea vividly demonstrates how influential German jurisprudence is because in Taiwan there is no constitutional mandate that provides a legal basis for this idea. What is more telling is that, as this concept has gradually been discarded in Germany, the TCC has also followed step by step, dismantling this legal straitjacket in a constellation of decisions.

This by no means suggests that the TCC consults only German constitutional decisions. In some areas where American constitutional jurisprudence stands out, the TCC would turn its eyes to its American counterpart. Perhaps the best example is freedom of expression, which has migrated across national borders not only textually but also doctrinally.<sup>42</sup> The TCC has borrowed both the two-track theory<sup>43</sup> and the two-level theory<sup>44</sup> from the SCOTUS.

Roughly speaking, the two-track theory distinguishes content-based regulations of free speech from content-neutral ones, arguing that the former should be subject to stricter judicial scrutiny because they aim to exclude certain kinds of speech. By contrast, the latter do not impose a restriction on speech per se but only obstruct freedom of expression incidentally when the government pursues another public interest, such as tranquility in the night. Hence, the judiciary should be more deferential in this scenario. Although there are some criticisms of this distinction, the TCC nevertheless has adopted the two-track theory in Interpretation No. 445,<sup>45</sup> a case that involved the Assembly and Parade Act. In this decision, the TCC upheld some provisions that prohibit assemblies and parades without permission in certain areas, such as the Presidential Office, airports and military bases, arguing that they restrict only the time, place and manner of exercising the freedom of expression.<sup>46</sup> Since these regulations are neither viewpoint based nor content based, they do not violate the freedom of assembly. Furthermore, the TCC also incorporated the two-level theory of free speech, which suggests that some categories of speech, such as political speech or academic speech, are more valuable than others, such as commercial speech, and therefore deserve more protection.<sup>47</sup> The former category is dubbed high-level speech, while the latter is referred to as low-level speech. In Interpretation No. 414, a case involving prior restraint on the advertisement of medicine, the TCC articulated that:

The categories of speech protected under Articles 15 and 11 of the Constitution include political speech, academic speech, and commercial speech. The scope of protection and the level of restriction are different for the preceding three categories

<sup>41</sup>Tonio Klein, 'Who Amends the German Basic Law?' in Hermann-Josef Blanke et al. (eds), *Common European Legal Thinking* (Springer, Cham, 2015) 141, 144.

<sup>42</sup>Tom Ginsburg, 'Freedom of Expression Abroad' in Lee C Bollinger and Geoffrey R Stone (eds), *The Free Speech Century* (Oxford University Press, Oxford, 2019) 193, 198–203.

<sup>43</sup>Martin H Redish, 'The Content Distinction in First Amendment Analysis' (1981) 34 *Stanford Law Review* 113.

<sup>44</sup>See *Chaplinsky v New Hampshire*, 315 U.S. 568 (1942). See Martin H Redish, 'The Value of Free Speech' (1982) 130 *University of Pennsylvania Law Review* 591, 625.

<sup>45</sup>Tzu -Yi Lin, 'Introduction to Free Speech' in Maw-In Tsai et al. (eds), *The Anatomy of Taiwan Constitution* (Angel, Taipei, 2002) 103, 159–60 [in Chinese].

<sup>46</sup>See JY Interpretation No. 445 (1998) (Taiwan).

<sup>47</sup>See Lin (n 45) 155.



of speeches according to their characteristics. Being irrelevant to the formation of public opinion, fact-finding, or the expression of beliefs, commercial speech does not enjoy the high degree of protection afforded to the other categories of speeches.<sup>48</sup>

As a result, the TCC held the disputed law constitutional because medical advertisements belonged to commercial speech and merited less protection.

Moreover, the TCC also adopted the ‘clear and present danger’ test, which was introduced by Justice Oliver Wendell Holmes in a series of cases in the early twentieth century. The famous ‘shouting fire in a crowded theatre’ metaphor vividly epitomizes this doctrine. In Interpretation No. 445, the TCC explicitly invoked this doctrine to strike down another provision that prohibited assemblies or parades if there was a likelihood that public safety or freedom would be jeopardized, or there would be serious damage to property. The mere ‘likelihood’, the TCC insisted, could not justify the limitation on the freedom of assembly because there was no ‘clear and present danger’.<sup>49</sup>

Finally, the TCC has also recognized the actual malice test, which appeared in the landmark US Supreme Court decision *New York Times v Sullivan*.<sup>50</sup> The SCOTUS ruled in this case that a public official was prohibited from ‘recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with “actual malice” – that is, with knowledge that it was false or with reckless disregard of whether it was false or not’.<sup>51</sup> In Interpretation No. 509, a defamation case, the TCC opined that, ‘To the extent that the accused fails to demonstrate that the defamatory statement is true, as long as the accused has reasonable grounds to believe that the statement was true when disseminated and has proffered evidence to support the belief, the accused must be found not guilty of criminal defamation.’<sup>52</sup> Thus, the accused will be guilty only when they have no reasonable ground to support their claim, and this decision has been seen as the embodiment of the principle of actual malice.<sup>53</sup>

### Constitutional culture

German and American constitutional jurisprudence also affect the constitutional culture in Taiwan, which includes but is not limited to the norms and practices developed when different branches interact with one another. One example is the interaction between coordinate branches.<sup>54</sup> Compared with the constitutional culture of the United States, the

<sup>48</sup>See JY Interpretation No. 414 (1996) (Taiwan).

<sup>49</sup>See JY Interpretation No. 445 (1998) (Taiwan).

<sup>50</sup>*New York Times v Sullivan* 376 U.S. 254 (1964).

<sup>51</sup>*Ibid.*

<sup>52</sup>See JY Interpretation No. 509 (2000) (Taiwan).

<sup>53</sup>Fa Jyh-pin, ‘Comments on Judicial Yuan Interpretation No. 509’ (2000) 65 *Taiwan Law Review* 148, 152 [in Chinese].

<sup>54</sup>This does not suggest that constitutional culture is the only, or even the most pivotal, factor that affects the attitude of the judiciary when confronting the political branches. In fact, institutional design may affect the interaction between coordinate branches as well. For example, Alec Stone Sweet maintains that, other things being equal, ‘concrete review is ... less politically provocative’ than abstract review. See Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford University Press, Oxford, 2000) 51. Nonetheless, the extent to which the variance of institutional design also affects how the judiciary interacts with the political branches is unclear, because other things are never equal. Indeed, even if institutional design affects the attitude of the judiciary, it does not exclude the possibility that constitutional culture functions in some manner as well.

German constitutional culture places more stress on cooperation than on mutual supervision between different branches. Hence, scholars have suggested that in Germany the state 'is constructed on a premise of reciprocal cooperation and trust among all state organs'.<sup>55</sup> Likewise, the TCC also repeatedly emphasizes the coordination and interdependence between different branches in a series of decisions, such as Interpretation Nos. 3, 175, 461, 682 and 750.<sup>56</sup> This does not mean the TCC neglects checks and balances at all; to the contrary, it has ruled against the government in roughly 40 per cent of cases in recent years. This paradoxical coexistence reveals two things: first, there is a compromise among Justices with various backgrounds. Despite the rise of American constitutional influence, the impact of German constitutional culture still persists. Second, the constitutional culture in Taiwan does not remain static. This should not be surprising since constitutional culture, like any other culture, is constantly evolving and the dynamics between law and politics in Taiwan have dramatically changed over the past three decades.

That being said, Taiwan does not transplant foreign constitutional jurisprudence unconditionally for two reasons. First, there is still some resistance, both institutional and ideational, that rejects the 'imposition' of Western ideas. The death penalty is a case in point. The death penalty is still overwhelmingly supported by the Taiwanese people. Even the same-sex marriage decision has aroused a backlash that forced the political branches to adopt a narrow reading of the judicial mandate. Second, the TCC actually indigenized these foreign concepts to some extent after incorporation. The evolution of proportionality in Taiwan is a case in point. The TCC does not simply copy/paste the German version of proportionality; in contrast, it first developed its own version of proportionality and then fused American tiered review standards with proportionality.<sup>57</sup>

#### IV. Determining factors

In Taiwan, as articulated above, liberal constitutionalism through constitutional migration is well accepted not only by political elites but also legal professions. Both the German and the American constitutional jurisprudence have fundamentally permeated the capital-C Constitution and the small-c constitutional norms. The success of constitutional migration results from two factors: the educational background of the legal elites and identity concern. It is noteworthy that, albeit conceptually distinguishable, these two

<sup>55</sup>Moshe Cohen-Eliya and Iddo Porat, *Proportionality and Constitutional Culture* (Cambridge University Press, New York, 2013) 47.

<sup>56</sup>Conceptually, a court can certainly invoke a foreign legal doctrine without being influenced by the constitutional culture of that foreign jurisdiction. Nonetheless, it is difficult to say for certain whether the TCC is influenced by German constitutional doctrines or by its constitutional culture in any single case because the TCC is affected by both in general. Also, the TCC's choice of adopting a German legal doctrine itself may demonstrate the impact of German constitutional culture. In these decisions, the TCC did not mention any specific legal doctrine but emphasized the spirit of the Constitution. From this perspective, it seems plausible to suggest that the TCC is at least also influenced by German constitutional culture, in addition to its doctrines. Admittedly, the impact of German constitutional culture should not be overstated in this regard for two reasons. First, constitutional culture is dynamic and the TCC has become more assertive in recent years. Second, Sun Yat-Sen, the founding father of the ROC, also emphasized coordination and cooperation among the five branches in his political theory, which is explicitly mentioned in JY Interpretation No. 3 (1952) (Taiwan).

<sup>57</sup>Jau-Yuan Hwang, 'Development of Standards of Review by the Constitutional Court from 1996 to 2011: Reception and Localization of the Proportionality Principle' (2013) 42 *National Taiwan University Law Journal* 215, 239 [in Chinese].

factors do not necessarily function independently when they induce the spread of constitutionalism in Taiwan. On the one hand, this is because one does not decide whether and where to study abroad at random. It is plausible that Taiwanese legal elites choose to study in either Germany or the United States precisely because these two countries are Western liberal democracies. On the other hand, studying in German or American law may largely decide which jurisdictions they pay attention to. After all, Western liberal democracies are by no means limited to the United States or Germany. In a word, both factors work.

### *Educational backgrounds of legal elites*

To begin with, Taiwan is not a common law country and has never been occupied by the United States. Nevertheless, the impact of American constitutional jurisprudence is part and parcel of constitutional development in Taiwan. One crucial factor is the education of legal elites.<sup>58</sup> Here, foreign legal education should be defined broadly. It is not limited to those who formally receive foreign legal degrees but includes those who are exposed to foreign legal education frequently and systematically. For example, both of the key figures of the drafting of the constitution, Wang Chung-hui and John Wu, were knowledgeable about the American legal system. The impact of foreign legal education on TCC Justices is even more evident. Generally speaking, the TCC is mainly composed of career judges and public law professors, with perhaps one or two prosecutors and attorneys. Nearly all former academics have foreign doctoral degrees from either Germany or the United States. In fact, many career judges have Masters degrees from the United States as well. Taking the sitting fifteen Justices as examples, eight Justices have foreign doctorates (one from the United States, six from Germany and one from Australia). This does not even include those who have studied in the United States and Germany but did not receive formal degrees or received only Masters degrees. Moreover, even though some of the Justices do not have foreign degrees, their clerks do.<sup>59</sup>

Furthermore, the educational backgrounds of law professors in elite law schools also affect constitutional development in Taiwan considerably for three reasons: (1) some of these professors are very likely to serve in the TCC in the future; (2) for those who fail to be nominated or confirmed, their works will affect their former colleagues who work on the bench; and (3) some of their students will serve on the bench in the future. In practice, about half of the Justices will be selected from academia, particularly the National Taiwan University College of Law, the best law school in Taiwan. In this light, their educational backgrounds surely matter. Unsurprisingly, almost all professors at the National Taiwan University College of Law receive their doctorates in foreign countries, mostly Germany and the United States.

Granted, legal elites in many Asian jurisdictions have received foreign legal education. Nevertheless, the impact of foreign legal education is more crucial in Taiwan for several reasons. First, there were neither foreign consultants during the process of constitution

<sup>58</sup>Lai In-jaw, 'Judicial Yuan Interpretations and Foreign Law', in Daniel P Yu (eds), *Evolving Concept of the Rule of Law and Development of the Cross-Strait Legal Systems During the Last Four Decades* (Angle, Taipei, 2020) 196–97 [in Chinese]; David S Law and Wen-Chen Chang, 'The Limits of Global Judicial Dialogue' (2011) 86 *Washington Law Review* 523, 557–62, 575–77.

<sup>59</sup>Hong-Cheng Chang, 'The Sorcerers' Apprentices: A Comparative Study on Law Clerks at the U.S. Supreme Court and Taiwan Constitutional Court' (2016) 45 *National Taiwan University Law Journal* 501, 553, 579–83 [in Chinese]; see Law and Chang, (n 58) 553.

making – at least not for Chang’s version – nor foreign judges, such as the non-permanent judges in Hong Kong, sitting on the bench. Also, given Taiwan’s marginalized diplomatic status, there is not much room for face-to-face contact that occurs elsewhere<sup>60</sup> between TCC Justices and their foreign counterparts. Taiwanese judges have frequently been denied access to associations or conferences as a result of China’s boycott.<sup>61</sup> One telling example is the Asian Association of Constitutional Courts and Equivalent Institutions, which aims ‘to promote the development of democracy, rule of law and fundamental rights in Asia by increasing the exchanges of information and experiences related to constitutional justice and enhancing cooperation and friendship between institutions exercising constitutional jurisdiction’.<sup>62</sup> Ironically, the TCC is not a member despite its endurance and remarkable achievements in the field of human rights.

### *Identity concern*

Legal education alone cannot fully explain the success of global constitutionalism in Taiwan, however. The concern for national identity – that is, what kind of country the ROC (Taiwan) is and should be – has always been a driving force for the spread of liberal constitutionalism. In parallel with the dramatic change in international politics, the identity concern can be divided into two parts – the desire for modernization/Westernization and the desire to distinguish Taiwan from the People’s Republic of China (PRC) – in which the ROC (Taiwan) pursues different dimensions of national identity. Notably, the two parts are not mutually exclusive. Indeed, they sometimes overlap now that China has become a superpower that threatens to eliminate and reclaim Taiwan.

For a start, the desire for modernization/Westernization, which is closely intertwined with the anxiety of identity concern, explains the popularity of global constitutionalism. Before modernization, the legal systems in most Asian countries were regarded from Western viewpoints as backward or brutally governed. This led to a constellation of unequal treatments imposed by advanced countries and, worse still, colonization. Facing this catastrophe, many East Asian countries chose to adopt Western legal systems in exchange for the repeal of unequal treaties or extraterritorial jurisdictions. As a corollary, ‘All of East Asia’s traditional states were undermined, altered, and replaced in the process of confrontation with the West’ and ‘almost all the recent examples of successful authoritarian modernization cluster in East Asia’.<sup>63</sup> Japan and its Meiji Restoration provide the earliest example.<sup>64</sup>

Post-World War II China is no exception. Scholars have argued the constitution-making of the Republic of China ‘was largely undertaken as a part of modernization’<sup>65</sup> and

<sup>60</sup>Anne-Marie Slaughter, *A New World Order* (Princeton University Press, Princeton, NJ, 2004) 96–103.

<sup>61</sup>See Law and Chang (n 58) 548–57.

<sup>62</sup>See Association of Asian Constitutional Courts & Equivalent Institutions (AACC), available at <<http://www.kehakiman.gov.my/en/about-us/international-judicial-relations/association-asian-constitutional-courts-equivalent>>.

<sup>63</sup>Francis Fukuyama, ‘The Patterns of History’ in Larry Diamond *et al.* (eds) *Democracy in East Asia: A New Century* (Johns Hopkins University Press, Baltimore, MD, 2013) 3, 4–5.

<sup>64</sup>Edwin O Reichauer and Marius B Jansen, *The Japanese Today: Change and Continuity* (Belknap Press, Cambridge, MA, 1995).

<sup>65</sup>Jiunn-Rong Yeh and Wen-Chen Chang, ‘The Emergence of East Asian Constitutionalism: Features in Comparison’ (2011) 59 *American Journal of Comparative Law* 805, 817.

‘constitutional development began as a tool for facilitating modernization’.<sup>66</sup> Specifically, the KMT established the Republic of China in 1912 by overturning the Qing Dynasty, upon which was imposed a series of unequal treatments. Eager to prove to the West that the nascent China was no longer a monarchical dictatorship, the KMT launched its constitution-making project and Wang proposed his version in 1913, as discussed above. The constitution-making project, however, was severely postponed due to a series of civil wars between the KMT and local warlords from the 1920s to 1930s and the second Sino-Japanese war in 1937, which heralded the start of World War II. It was not until the end of World War II that the KMT successfully passed the Constitution.

Among its constitutional clauses, the chapter on the Judiciary plays an important role because Chinese law was labelled as the rule of men rather than the rule of law, which is one marker of modernization.<sup>67</sup> In this regard, Tom Ginsburg has opined that ‘the inclusion of judicial review [in the ROC Constitution] was also, in part, a product of the ideology of modernization that underpinned the desire to rule through a constitution in the first place’.<sup>68</sup> Instead of a symbol for rights protection, the institution of judicial review is more like a script of modernization at the beginning. To put it more bluntly, ‘Judicial review ... is one element of a package of modernizing reforms that are adopted because of their very western-ness’.<sup>69</sup> In a nutshell, with a constitution that protects human rights and establishes the separation of powers, including judicial review, the ROC could more persuasively claim that it had transformed from an absolute monarchy to a modern republic that deserved the respect of Western powers.

The pursuit of modernization and the identity concern not only propel the enactment of the Constitution and the establishment of judicial review, but also affect constitutional jurisprudence in Taiwan. This should not be surprising given that judges will project their imagination and expectation of their ideal countries through their decisions.<sup>70</sup> Therefore, the judiciary can play a critical role in stimulating, mirroring and consolidating the achievement of modernization because law in books may be different from law in action. It is possible, for example, that an ostensibly modernized constitutional provision, such as gender equality, has a very archaic interpretation and implementation. In Taiwan, the impact on the TCC’s decisions also mirrors the Justices’ desire to render Taiwan a more modernized state. Take the aforementioned Interpretation No. 371 for example. In this vital decision, the TCC discussed the judicial review system in the United States, Germany and Japan, among others. These references not only confirm that constitutional jurisprudence in Taiwan retains both German and American influences, but also echo the modernization thesis: the TCC chose these countries because of their modernization.<sup>71</sup>

After the severance of diplomatic relation with the United States and the United Nations General Assembly Resolution 2758, which recognized the People’s Republic of China (PRC) as the only legitimate Chinese government, another dimension of identity concern has gradually emerged: the desire to distinguish the ROC (Taiwan) from the PRC, which has adamantly rejected the concept of global constitutionalism.<sup>72</sup> Specifically,

<sup>66</sup>Ibid 834.

<sup>67</sup>Teemu Ruskola, *Legal Orientalism* (Harvard University Press, Cambridge, MA, 2013) 6–14.

<sup>68</sup>See Ginsburg (n 25) 115.

<sup>69</sup>Ibid 257.

<sup>70</sup>Ran Hirschl, *Comparative Matters* (Oxford University Press, Oxford, 2014) 22–23.

<sup>71</sup>See Ginsburg (n 25) 139.

<sup>72</sup>Bin Li, ‘China’s Socialist Rule of Law and Global Constitutionalism’ in Takao Suami et al (eds), *Global Constitutionalism from European and East Asian Perspectives* (Cambridge University Press, Cambridge, 2018) 58.

because Taiwan lost all Western allies diplomatically, embracing global constitutionalism – which is in essence Western liberal constitutionalism – became one of its strategies to maintain substantive ties with the Western countries. This strategy is nothing new, but had also been applied in other countries, such as Turkey when facing the threat from the former Soviet Union.<sup>73</sup> The acceptance of global constitutionalism by both the political and judicial elites in Taiwan may therefore be seen as a means to build substantive (judicial) diplomacy.<sup>74</sup> Interpretation No. 748, which rendered Taiwan the first Asian country to legalize same-sex marriage, is a case in point. In this decision, the TCC invoked only the *Obergefell*<sup>75</sup> decision of the SCOTUS to sanction same-sex marriage,<sup>76</sup> despite the fact that its ruling is almost identical to that of the Constitutional Court of South Africa in *Minister of Home Affairs v. Fourie*.<sup>77</sup> The same rationale can explain why the TCC mostly seeks intellectual assistance from the German and American constitutional jurisprudence but not others: these two regimes are regarded as two of the most advanced constitutional democracies.

Finally, it is worth mentioning that the TCC rarely invokes international human rights laws even though it is strongly influenced by German and American (case) laws.<sup>78</sup> In fact, the TCC is ‘strongly criticized for seldom applying international human rights treaties’,<sup>79</sup> notwithstanding that doing so could further distinguish Taiwan from China. This might relate to the fact that although the Taiwan government voluntarily ratified several covenants, the request to deposit was rejected by the United Nations because of Taiwan’s controversial legal status.<sup>80</sup> Still, these international rights conventions have domestic legal status because the government has enacted many enforcement Acts to implement these international treaties.

## V. Conclusion

In an age of globalization, the spread of ideas and institutions of constitutionalism seems to be an ever-accelerating enterprise. The success of global constitutionalism in Taiwan, a story mixed with learning and acculturation,<sup>81</sup> vividly testifies to this point. Nonetheless, this concept remains contested and has encountered several theoretical and practical

<sup>73</sup>See Benedikt Goderis and Mila Versteeg, ‘Transnational Constitutionalism’ in Denis J Galligan and Mila Versteeg (eds), *Social and Political Foundations of Constitutions* (Cambridge University Press, Cambridge, 2015) 103, 108.

<sup>74</sup>David Law, ‘Judicial Comparativism and Judicial Diplomacy’ (2015) 163 *University of Pennsylvania Law Review* 927, 976–86.

<sup>75</sup>*Obergefell v Hodges* 576 U.S. 644 (2015).

<sup>76</sup>See JY Interpretation No. 748 (2017) (Taiwan).

<sup>77</sup>*Minister of Home Affairs and Another v Fourie and Another* (CCT 60/04) [2005] (South Africa).

<sup>78</sup>Wen-Chen Chang, ‘An Isolated Nation with Global-minded Citizens: Bottom-up Transnational Constitutionalism in Taiwan’ (2009) 4(3) *National Taiwan University Law Review* 204, 212–20.

<sup>79</sup>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) 1166, 1174. It is worth noting that NGOs and citizens in Taiwan have endeavoured to ‘mediate the interfaces of both international human rights laws and domestic constitutional/legal rights protections’. See Chang (n 78) 212–20.

<sup>80</sup>See Chang (n 78) 226.

<sup>81</sup>Benedikt Goderis and Mila Versteeg, ‘Transnational Constitutionalism’ in Denis J Galligan and Mila Versteeg (eds), *Social and Political Foundations of Constitutions* (Cambridge University Press, Cambridge, 2015) 103, 115–22.

challenges. Studies have mapped the ideological evolution of global constitutionalism along a single ideological dimension between libertarianism and statist.<sup>82</sup> ‘Within each cluster, constitutions are becoming increasingly similar to each other, but the clusters themselves are becoming more distinct from one another.’<sup>83</sup> Perhaps because of this, the development of global constitutionalism has gravitated towards bipolar extremes: those that embrace global constitutionalism and those that espouse parochialism.<sup>84</sup> The latter is resonant with the observation of the third-wave judicial review or reversal of global constitutionalism mentioned above.

The case of Taiwan further casts doubt on the concept of global constitutionalism from a third perspective: the jurisdictions that are referred to are focused on a small number of Western states. To be sure, the TCC does not look only at German and American constitutional jurisprudence, but also to other jurisdictions, such as Japan and Italy. There is no denying, however, that the latter two countries’ impact upon Taiwan is trivial. More importantly, Taiwan does not seem to be alone: most countries influenced by foreign constitutional jurisprudence centre on a handful of jurisdictions such as the United States (worldwide), Germany (for the civil law countries) and the United Kingdom/Canada (common law countries).<sup>85</sup> From this perspective, although it is good to see the spread of liberal constitutionalism, the concept of global constitutionalism is more aspirational than real because it is essentially Euro-American centric.

<sup>82</sup>See Law and Versteeg (n 8) 1163.

<sup>83</sup>Ibid 1171.

<sup>84</sup>See Chang and Yeh (n 79) 1176–79.

<sup>85</sup>Tania Groppi and Marie-Claire Ponthoreau, ‘The Use of Foreign Precedents by Constitutional Judges: A Limited Practice, An Uncertain Future’ in Tania Groppi and Marie-Claire Ponthoreau (eds), *The Use of Foreign Precedents by Constitutional Judges* (Hart, Oxford, 2013) 418–19.