

Economics, Law, and Institutions in Asia Pacific

Chang-fa Lo  
Nigel N.T. Li  
Tsai-yu Lin *Editors*

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# Legal Thoughts between the East and the West in the Multilevel Legal Order

A Liber Amicorum in Honour of Professor  
Herbert Han-Pao Ma



Springer

# Economics, Law, and Institutions in Asia Pacific

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Chang-fa Lo • Nigel N.T. Li • Tsai-yu Lin  
Editors

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A Liber Amicorum in Honour  
of Professor Herbert Han-Pao Ma

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# Preface

Professor Herbert Han-Pao Ma is a towering figure in legal philosophy and legal education, who is as admired and revered in Europe and America as he is in Taiwan. He taught at National Taiwan University (NTU) College of Law as a full-time and part-time professor for more than 50 years, illuminating constitutional law, legal philosophy, private international law, and law and social change with his brilliance. Having grown up in a family of intellectuals in the 1940s in Shanghai, which was heavily Westernized owing to the presence of the foreign concessions, Professor Ma was steeped in classical Chinese education while simultaneously exposed to Western thoughts. It was at that time that he began an enduring friendship with Roscoe Pound, the internationally known American legal philosopher and educator, who no doubt had a great influence on the professor as a young man and law student.

The profound understanding of both Chinese and Western legal philosophies made Professor Ma highly sought after not only in Taiwan but also in East Asia and other regions. Because of his rare ability to elucidate traditional Chinese legal philosophy in English and compare it with Western legal philosophies, he was invited to teach at fabled universities throughout the world: Harvard University, Washington University in St. Louis, Columbia University, University of British Columbia, College de France, University of Hong Kong, University of Vienna, University of Washington in Seattle, and Peking University.

Many Western scholars teaching or researching Chinese or Asian law were once Professor Ma's students and consider him a mentor. Some have become close life-long friends. They have been inspired and guided by Professor Ma's perspicacity in interpreting legal philosophy, his righteousness in treating legal issues, and his Confucian principle of never discriminating among those whom he taught.

His reflections on the developments of Chinese law and morality are widely known. For instance, he observed in 1971: "The traditional Chinese conception of law was predominantly molded by the moral teachings of Confucius and the traditional Chinese legal system was highly ethical in its contents. As a practical result, law was traditionally regarded as an instrument for enforcing Confucian morals. These legal and moral traditions still affect many aspects of the life in the Chinese society in Taiwan, despite the existence and application of the Westernized law and

legal system.”<sup>1</sup> The observation about law being highly ethical and instrumental is the most concise and powerful explanation of traditional Chinese law and still rings true in today’s Taiwan, which is even more remarkable considering that Western legal principles underpin modern Taiwanese law.

In addition to his academic accomplishments, Professor Ma has also distinguished himself in public service. He was a Justice of the Constitutional Court of Taiwan, ROC, during which time he practiced his constitutional teachings. He was one of the exponents of the Institute of European and American Studies, originally called the Institute of American Culture, at Academia Sinica. Professor Ma even used his personal funds to establish “Ma Foundation for High Purpose,” which created Herbert Han-Pao Ma Distinguished Lectureship awards to be granted to exceptional local and international legal scholars each year. The award is recognized as a great honor and signifies high academic achievements.

We conceived of this *Festschrift* out of our love and admiration for Professor Ma, who set the bar forever high for legal professionals. This book is to celebrate Professor Ma’s achievements and his 90th birthday. The book is also to continue his efforts in bridging the Eastern and the Western legal thoughts and systems.

We sounded a clarion call to preeminent experts, practitioners, and scholars across generations and from different jurisdictions specializing in various fields of law and working at different levels of legal order, including Asian legal studies, constitutional law, public international law, international economic law, private law, public law, and dispute settlement mechanism. It is our sincere wish to honor the lifelong work of the professor by inviting these prominent thinkers to revisit the East-West interaction and hopefully uncover fresh perspectives for the contemporary multilevel legal orders. They rose to the challenge of responding to our question: whether, in their fields, there are interactive aspects between the East and the West that illustrate their mutual or one-way influences. We have been warmed and astonished by the enthusiastic response and the variety of perspectives and insights submitted, which make the book unique and worthy of reading. The contributors are the real heroes behind this book.

Last but not least, we would like to thank our editorial assistants, led by Mr. Mao-wei Lo. Mao-wei invested himself completely in coordinating and communicating with the contributors and in directing a small but dedicated group of assistants to check footnotes, references, and format. They are Jung-Jung Fan, Mengke Cheng, Hui-Heng Hong, Yi-Nung Liao, Yan-Di Shih, Thai Ngoc Phuong Minh, Yun-Hsin (Cindy) Chen, Jia-Lin Lu, Yi-Hsin Chen, Chia-ju Kuo, and Tzu-Fan Chang. We are deeply indebted to them.

Taipei, Taiwan

Chang-fa Lo  
Nigel N.T. Li  
Tsai-yu Lin

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<sup>1</sup>Herbert H. P. Ma (1971), *Law and Morality: Some Reflections on the Chinese Experience Past and Present*, *Philosophy East and West*. Symposium on Law and Morality: East and West. 21(4): pp. 443–460.

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## Herbert Han-Pao Ma



**Herbert Han-Pao Ma** has been a prominent figure in Chinese Legal Affairs throughout the latter part of the twentieth century and the earlier part of the twenty-first century. Born in Hankou, Hubei, China, in 1926, Professor Ma was educated at Fudan University, National Taiwan University, and Harvard University. He had taught at National Taiwan University as a law professor for more than fifty years and also served as a visiting professor in the law faculties of Columbia University, the University of Hong Kong, the University of British Columbia, the University of Vienna, and the University of Washington. From 1982 to 1996, he served his country with distinction, first as Justice (1982–1994) and then as Justice Senior Status (1994–1996) of the Constitutional Court of the Republic of China. As the recipient of many honors, Professor Ma is the author of numerous books and articles in both Chinese and English and a mentor to scholars around the world.

## About the Authors

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**John Owen Haley** is a leading comparative law scholar, best known for his research on Japanese law. Professor Haley served as the Garvey, Schubert, and Barer professor of law and international studies at the University of Washington in Seattle, where he taught from 1974 to 2000. In 2000, he joined the Washington University in St. Louis Law Faculty, where he held two chairs, first as the Wiley B. Rutledge professor of law and subsequently the William R. Ortwein Distinguished professor of law. From 2002 to 2007, he served as the director of the Whitney R. Harris Institute for Global Legal Studies. From 2010 to 2015, he was a professor of law at Vanderbilt University. He recently returned to the University of Washington as a visiting professor of law. He also has taught and lectured internationally in Australia, China, Colombia, Japan, Germany, Korea, Singapore, and Thailand. In



November 2011, he was honored by the National Taiwan University College of Law as the fourth Herbert Han-Pao Ma distinguished lecturer. His numerous publications related to Japan and comparative law more generally cover issues ranging from litigation to legal history. His 1991 book, *Authority without Power: Law and the Japanese Paradox*, and his 1978 article, “The Myth of the Reluctant Litigant,” are considered leading works in the field. His most recent publications include *Law’s Political Foundations: Rivers, Rifles, Rice, and Religion* (Edward Elgar Pub. Co., 2016) and *Legal Innovations in Asia: Judicial Lawmaking and the Influence of Comparative Law* (Edward Elgar Pub. Co., 2014), edited with Toshiko Takenaka, to which he contributed two essays, “Asian Law Center: The First Decades, 1961–2000” and “Judicial Lawmaking and the Creation of Legal Norms in Japan: A Dialogue,” with Daniel H. Foote. He is also the author or coauthor of two case-books, now in their second editions: *Fundamentals of Transnational Litigation: The United States, Canada, Japan, and the European Union* (New Providence, NJ: LexisNexis, 2014) and John Henry Merryman, David S. Clark, and John O. Haley eds., *The Contemporary Civil Law Tradition: Europe, Latin America, and East Asia* (2nd ed., LexisNexis, 2015) with its companion volume, published in 2010, *Comparative Law: Historical Development of the Civil Law Tradition in Europe, Latin America, and East Asia*.

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**Chang-fa Lo** is a Justice of the Constitutional Court of Taiwan, ROC, and a part-time professor of National Taiwan University College of Law (NTU Law). He is also the chairman of the Asia WTO Research Network (AWRN). Prior to his current judicial position, he was a Chair Professor and Lifetime Distinguished Professor at NTU; dean of NTU Law; director of Asian Center for WTO and International Health Law and Policy (ACWH) of NTU College of Law; director of Center for Ethics, Law, and Society in Biomedicine and Technology of NTU; commissioner of Taiwan's Fair Trade Commission; commissioner of Taiwan's International Trade Commission; and legal advisor for Taiwan's GATT/WTO accession negotiations. In his capacity as the director of ACWH, Professor Lo launched two English journals, namely, *Asian Journal of WTO and International Health Law and Policy* and *Contemporary Asia Arbitration Journal* (CAA) in 2006 and 2008, respectively. In his capacity as dean of NTU Law, he also launched an English journal *NTU Law Review*. Prior to his teaching career, he practiced law in Taipei. He received his SJD degree from Harvard Law School in 1989. He was appointed by WTO as panelist for the cases of *Brazil, Retreaded Tyres*, in 2006 and *Ukraine, Definitive Safeguard Measures*, in 2014 and as a member of the Permanent Group of Experts under the ASCM in 2008. He is an author of 12 books, editor of 4 books, and author of about 100 journal papers.

**Winnie Jo-Mei Ma** has taught at Bond University Faculty of Law conflict of laws (private international law) and property law and equity since September 2000, after being admitted as a solicitor of the Queensland Supreme Court through articulated clerkship with Allens Linklaters in Brisbane. She has also taught international commercial arbitration, dispute resolution, and legal English in both English and Chinese at National Taiwan University and Soochow University in Taiwan since 2012. Winnie has authored book chapters and articles on international commercial arbitration and mediation (such as public policy, parallel proceedings, arbitrator challenges, enforceability of arbitral awards, and mediated settlement agreements), as well as private international law (specifically Australian legislation concerning personal property securities, competition, and consumer law). Her SJD thesis, "Public Policy in the Enforcement of Arbitral Awards: Lessons for and from Australia," has achieved more than 9900 full-text downloads since November 2006. Currently based in Taiwan, Winnie is a member of National Taiwan University's Asian Center for WTO and International Health Law and Policy, as well as the Arbitration Association of the Republic of China. She serves on the editorial boards of *Contemporary Asia Arbitration Journal* and Chinese (Taiwan) Yearbook of International Law and Affairs. Winnie was the bilingual emcee for the 2013

ILA-ASIL Asia-Pacific Research Forum, in which the President of the Republic of China (Ying-jeou Ma) was the keynote speaker.

**Serge Martinez** joined the faculty of the University of New Mexico School of Law in 2014. He teaches in the law school's clinical program, where he directs the Business and Tax Clinic. Professor Martinez received a JD from the Yale Law School in 1999. Following law school, he clerked for Justice Peter Heerey of the Federal Court of Australia in Melbourne. He has worked in the New York office of Simpson Thacher & Bartlett, where he was an associate in the tax department working on corporate tax matters, and with the Community Development Project of the Urban Justice Center, where he represented community-based organizations in the South Bronx. In 2006, Professor Martinez joined the faculty of Hofstra Law School to create and supervise the Community and Economic Development Clinic, which he directed until 2014. He was the recipient of a Fulbright Grant to spend a year teaching lawyering skills at National Taiwan University in Taipei, Taiwan, following which he received funding from the National Science Council of Taiwan to continue his teaching and to create Taiwan's first clinical legal program, which began serving clients in February 2013.

**John Ohnesorge** joined the faculty of the University of Wisconsin Law School in 2001, where he teaches Business Organizations and Administrative Law, as well as seminars in Chinese law and in law and economic development in developing countries. He is the former associate director and then director of the law school's East Asian Legal Studies Center (2001–2014) and former Chair of the Wisconsin China Initiative (2008–2012). A Minnesota native, Professor Ohnesorge received his BA degree from St. Olaf College (1985), his JD from the University of Minnesota Law School (1989), and his SJD from Harvard Law School (2002). He has spent several years in East Asia, first as a teacher and law student in Shanghai in the 1980s and then as a lawyer in private practice in Seoul in the 1990s. During the course of his SJD studies, Professor Ohnesorge spent a year as a visiting scholar at the Max Planck Institute for Comparative Public Law and Public International Law in Heidelberg, Germany, and in 2000, he served as a lecturer at Harvard Law School, co-teaching with Professor William P. Alford.

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**Harro von Senger**, citizen of Geneva (Switzerland), was born in 1944. During 8 years, he visited the gymnasium of the Benedictine Coventry in Einsiedeln where he graduated in 1963. From 1963 till 1969, he studied at the Law Faculty of the University of Zürich where he obtained his title of doctor in law in 1969 with a doctor thesis on “Contracts of Sale in Traditional China.” From 1969 to 1971, he worked at two law courts in Zürich, Switzerland. In 1971, he passed the lawyer’s examination of the Canton of Zürich. From 1971 to 1973, he studied at the Law Faculty of National Taiwan University (Taiwan) under the guidance of Prof. Ma Han-Pao, from 1973 to 1975 at the Law Faculty of the University of Tokyo (Japan), and from 1975 to 1977 at Beijing University, Faculty of History and Faculty of Philosophy. In 1981, he obtained his second doctor title in Philosophy (major: Sinology) at Albert Ludwigs University of Freiburg, Freiburg i. Br. (Germany), where he is since 1989 a lifetime professor of sinology at the Faculty of Philosophy. From 1981 to 1989, he was a scientific collaborator of the Swiss Institute of Comparative Law (Lausanne); since 1989, he is expert in Chinese law of the same institute. He was a member of a human rights expert team sent to Tibet by the Swiss Foreign Ministry (August 1997) and of several Swiss legal delegations visiting different parts of the PRC. In April 2008, he was a member of a delegation of the German minister for education, Missis Annette Schavan visiting Beijing and Shanghai. He was one of less than a half dozen European participants of two human rights symposia in Beijing (April 2008, November 2009). He has published many articles on human rights questions and several books on law, for instance, “Introduction to the Chinese Law” (in German language), München 1994, and the “Succession Law of the PRC” (2004). Books of him are published in 15 languages.

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Dr. Wilske's practice areas include international arbitration (counsel and arbitrator) and litigation, M&A, corporate law, and public and private international law. He has extensive publications on dispute resolution in many renowned journals. He is listed in *Who's Who of Commercial Arbitration 2016*, *Who's Who of Commercial Litigation 2016*, *Who's Who Legal Germany 2016*, *GAR 100 2016*, *Chambers Global 2016*, *Legal 500 EMEA 2016*, *Chambers Europe 2016*, and *Best Lawyers 2016*.

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**Chien-Huei Wu** is currently an associate research professor in Academia Sinica, Taipei, Taiwan. He received his PhD degree in European University Institute, Florence, in 2009. Since then, he worked as an assistant professor in National Chung Cheng University, Chiayi, Taiwan, for a short period. Before pursuing his doctoral degree in Florence, he worked for the Ministry of Justice in Taiwan as a district attorney. In 2011–2012, he advised the ministry in drafting prisoner transfer legislation in Taiwan with a view to facilitating the prisoner transfer between Taiwan and China and Taiwan and Germany. He also regularly advises the Ministry of Economic Affairs and Ministry of Health and Welfare (MOHW) on health-related trade issues. His research interests cover EU external relations law and international economic law. He follows closely EU-China and EU-ASEAN relations and pays particular attention to Asian regionalism and WTO-IMF linkage. He has just published a new book by Martinus Nijhoff entitled "WTO and the Greater China: Economic Integration and Dispute Resolution." In 2014, he was awarded Ta-You Wu Memorial Award, an award set up by the Ministry of Science and Technology in memorial of the renowned physicist Ta-You Wu for his academic achievement and contribution.

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**Jiunn-rong Yeh** is the National Taiwan University Chair Professor of the College of Law. He is known for his policy science approach to various law and policy issues, including constitutional change, regulatory theories, and environmental sustainability and climate change. Professor Yeh's extensive publication of books and articles in both English and Chinese covers topics such as constitutional law, environmental law, and administrative law. His recent publication includes *Constitutionalism in Asia: Cases and Materials* (Hart, with Wen-Chen Chang, Li-ann Thio, and Kevin YL Tan) and *Asian Courts in Context* (Cambridge, with Wen-Chen Chang eds.). Professor Yeh has held teaching positions in many major foreign institutions, including Columbia University (SIPA, 1999), Harvard University (Law, 2003), and the University of Melbourne (Law, 2012). He was named Distinguished Visiting Faculty 2000–2001 by the Faculty of Law, University of Toronto, where he taught transformative constitutionalism in East Asia in Fall,

2000. He was appointed as the Professorial Fellow in 2014 by the University of Melbourne. Professor Yeh has been substantially involved in many constitutional, legislative, and regulatory issues in Taiwan and in the region. He headed or participated in the drafting of several major legislative bills, including the Freedom of Information Act, the Administrative Procedural Act, the Superfund Law, and the Greenhouse Gas Control Act. Professor Yeh joined the Cabinet of Taiwan as a minister without portfolio in 2002, in charge of government reform, sustainable development, and interministerial coordination. In 2005, Professor Yeh was elected Secretary-General of the National Assembly that approved the constitutional revision proposals by Legislative Yuan. He is now the director of the Policy and Law Center for Environmental Sustainability at the College of Law. He is now the Minister of Interior of the ROC.

**Dr. Hong-Lin Yu** graduated with a PhD in law from the University of Edinburgh in 1998. She lectured at the University of Essex Law School before joining Stirling in 2005 as a lecturer in law and becoming a Reader in Law in 2007. She was the director of LLM in International Commercial Law for 5 years. Currently, she is the director of Research Postgraduates Programme. Dr. Yu has been an external panel member in subject institutional reviews at the University of Strathclyde, Edinburgh Napier University, and Glasgow Caledonian University. She has also carried out PhD examination internally and externally. She is a member of the editorial board of the *International Arbitration Law Review*. Dr. Yu's main areas of interest are the theories and practice of international commercial arbitration, international investment law and arbitration, legal research methods, as well as transnational commercial law. Her approach is broadly doctrinal and comparative based, and she has a particular interest in exploring law in the context of current development in practice. A key theme in her work is justification of current developments in both commercial and investment arbitration, and she has published in these areas in journals such as the *International and Comparative Law Quarterly*, *Journal of International Arbitration*, and *Civil Justice Quarterly*. She has also acted as a referee for journals in her specialist areas.

# **Part I**

## **Introduction**

# Chapter 1

## Introduction to the Book: Interaction and Mutual Enrichment Between the East and the West

Chang-fa Lo, Nigel N.T. Li, and Tsai-yu Lin

### 1.1 The Diversities and Mutual Enrichment Between the East and the West and the Role of Professor Herbert H. P. Ma in the Context of Taiwan

In this globalized world, the interaction and the mutual influences between the East and the West in their legal systems and practices have been immense. There are even convergences of different legal regimes in many fields of law. However, it is also a fact that diverse legal practices and approaches exist. The diversities in legal systems and practices have their social, political, and philosophical backgrounds. They are not necessarily negative elements in the contemporary legal order. Identifying these diversities and addressing the interactions and mutual influences between different regimes should be valuable not only in their mutual enrichment but also in the enhancement of possible and desirable coordination between legal systems. The discussions in this volume cover different levels of legal order, including domestic, regional, and multilateral levels, so that the East/Asia-West interaction can be more clearly and comprehensively analyzed.

This volume begins with an introduction to the key figure who bridged the East (especially China and Taiwan) and the West, Professor Herbert H. P. Ma, by his

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longtime friend, Jerome A. Cohen. In his chapter “Herbert Ma and the Arc of Taiwan’s Progress,” Cohen writes that many Americans studying China’s legal systems, past and present, had suggested that he call on Professor Ma before he came to Taiwan. He admired Professor Ma’s attitude, informality, and low-key manner as well as his knowledge and zest for the study of comparative law and jurisprudence. Cohen explains the circumstances when Taiwan was still in its rough years in the 1960s and 1970s and Professor Ma’s role during that period. He indicates that through his teaching, scholarship, and government service, Professor Ma has had the opportunity to play an important role in the developments of democracy, the rule of law, and human rights in post-World War II Taiwan.

## 1.2 In the Broader Areas of Legal Regimes and Practices

Part II of this volume focuses on the mutual influence and interaction in legal regimes and practices from a broader perspective. John Owen Haley in his chapter “The Triumph (?) of Western Law: A Contemporary Perspective” discusses the Western private law having become universal, an indication of Western ascendancy. However, in the fields of regulatory and criminal law, core features of law in China had replaced private law in the volume of rules and cases. He questions whether Western law has triumphed after all. He suggests that the West has something to learn from the East, particularly the success of the contemporary Japanese criminal justice system in its avoidance of incarceration and other retributive sanctions by distinguishing condemnation of the crime with correction and reintegration of the criminal.

John Ohnesorge in his chapter “How Can We Know What We ‘Know’ About Law and Development?: The Importance of Taiwan in Comparative Perspective” argues for the importance of Taiwan as a case study for research on relationships between law and economic and political development. He suggests that the pioneering work of Professor Ma and others about law in Taiwan should be developed and expanded so that scholars around the world can incorporate Taiwan’s experience into more general theorizing about legal systems and economic and political change. He observes that the role of law and legal institutions in the economic development and the transition to democracy of Taiwan has been understudied in the global law and development literature. This is a serious shortcoming for the scholarly field. Ohnesorge addresses the shortcoming by surveying various claims or assumptions in the field of law and development and examining them in light of Taiwan’s experience.

Jiunn-rong Yeh in his chapter “Judicial Strategies and the Political Question Doctrine: An Investigation into the Judicial Adjudications of the East Asian Courts” explores transformative issues. He explains that many transformative Asian states confront politically charged issues in the constitutional actuality, many of which demand judicial resolution. Yeh uses a four-model analysis, namely, the “hot potato,” the “rubber stamp,” the “active legalism,” and the “social dialogue” models

to discuss cases of Taiwan, Japan, and the Philippines, and finds that the courts in East Asia mainly adopt the “hot potato” and the “rubber stamp” models. He observes that many Asian courts evaluate the legitimacy of mechanism and the political context in applying the political question principle.

Chi Chung in his chapter “The Ideas of ‘Rights’ in the ‘East’ and ‘West’ and Their Continued Evolution: A Case Study on Taxpayer’s Rights in Taiwan” uses taxpayer’s right as a case study to discuss the evolution of the concept of “rights” pertaining to the relationship between state and society. He observes that in some areas, the realization of rights requires the state to abstain from interfering with society, whereas in some others, the realization of rights requires the state to build a fair and sophisticated legal system to enable the successful assertion of rights. He demonstrates how the idea of “rights” in a jurisdiction in the “East” has been influenced by ideas prominent in the “West.”

### **1.3 In the Areas of Constitutional Law and Fundamental Rights**

Part III of this volume focuses on the mutual influence and interaction in constitutional law and fundamental rights. Wen-Chen Chang in her chapter “Comparative Discourse in Constitution Making: An Analysis on Constitutional Framers as Dialectic Agent” discusses foreign constitutional sources having exerted influences upon the domestic discourse of constitutional writing through closely examining the discourse of constitution drafting and making of the ROC Constitution. She finds that comparative constitutional discourse was vital in the drafting and making of the ROC Constitution, and more importantly, the foreign educations of constitutional drafters may have been pivotal to their engagement in the comparative constitutional discourse.

Albert H. Y. Chen in his chapter “Constitutional Change in Hong Kong and Taiwan in the Late Twentieth Century: A Comparative Perspective” discusses a challenge to Hong Kong and Taiwan. These two jurisdictions have undergone dramatic constitutional changes in 1980s. He observes that Hong Kong and Taiwan are now open and pluralistic societies that respect human rights and the rule of law and practice constitutional government. There is a vibrant civil society and a free press in Hong Kong and Taiwan. Yet many people there perceive Mainland China as “the Other.” A challenge for the people of Hong Kong and Taiwan in further developing their respective constitutional orders is how to position themselves toward “the Other” and how “the Other” views Hong Kong and Taiwan.

David KC Huang in his chapter “Different Patterns of Applying Transitional Constitutionalism Between the Nationalists and the Communists” discusses modernization of having become China’s manifest prospect for the past 170 years. He observes that transitional constitutionalism was promoted by both the Nationalists and the Communists. The Nationalist Party aimed at China’s constitutional