Judicial Comparativism and Judicial Diplomacy
Professor David Law, Washington University-St. Louis

ABSTRACT: Much has been said on the normative question of whether and in what ways courts ought to make use of foreign law. Rarely, however, do scholars broach the underlying empirical question of why some courts make greater use of foreign law than others. To identify the causes of comparativism, a behind-the-scenes investigation was conducted of four leading courts in East Asia: the Japanese Supreme Court, the Korean Constitutional Court, the Taiwanese Constitutional Court, and the Hong Kong Court of Final Appeal.

Evidence from interviews conducted with numerous justices, clerks, and senior administrators suggests that a combination of mutually reinforcing factors creates the conditions necessary for comparativism to thrive. The first factor is institutional capacity. A court that lacks institutional mechanisms for learning about foreign law, such as the recruitment of law clerks with foreign legal expertise or the use of researchers who specialize in foreign law, is unlikely to make more than sporadic use of foreign law. The second factor is legal education. Even the most elaborate of institutional mechanisms for facilitating comparativism is unlikely to be effective unless it is backed by a system of legal education that produces an adequate supply of lawyers with both an aptitude and appetite for comparativism.

Investigation of the reasons for which courts engage in comparativism also reveals a hidden underlying phenomenon of judicial diplomacy. Unlike other judicial practices such as textualism or originalism, comparativism is not merely a means by which judges perform legal and adjudicative functions; it can also be a form of diplomatic activity. When constitutional courts demonstrate mastery of foreign law or host foreign judges, their goals may not consist exclusively, or even primarily, of writing stronger opinions or winning over domestic audiences. They may also be competing with one another for international influence or pursuing foreign policy objectives, such as promotion of the rule of law and judicial independence in other countries. The concept of judicial diplomacy helps to explain why constitutional courts engage in a number of practices that are only tenuously related to the act of adjudication.