計畫編號：AH04-00
計畫名稱：「東亞法治之形成及發展」---對東亞法治理論、體制與實踐之整合法學研究
計畫主持人：蔡明誠
計畫摘要(中)：

前期「東亞法治之形成」整合型計畫，以東亞的法治為研究對象，運用整合的法學研究方法，並以「法治」理念為核心，來進行相關之理論、體制，與實踐經驗的研究。本計畫延續前「東亞法治之形成」計畫之研究議題及方法，除展望東亞法治之理論、體制及實踐之變遷，更加入東亞法治之發展作為研究對象，以時間之動態觀察，比較分析東亞法治之形成、發展過程及實踐成果，期待於現有文獻研究成果中，進一步深入探索東亞法治之文化形塑及發展，對於東亞之人與社會之規範內容及影響。

本計畫以 6C 面向進行整合法學研究，在空間上有全球的、地區性及地方性的脈絡(Context)，及在時間上有傳統的、現代的及後現代的脈絡(Context)下，比較（Comparative）、批判的（Critical）及創新的（Creative）研究分析東亞法治形成之規範內容（Content）。本年度研究計畫之目標，為注重「法治文化之形塑、法治原則之發展及人權保護理念之實踐」之觀察及探討，並就「人、社會、文化與法治」之關係，以東亞及區域性國際脈絡之「人權」、「憲政」、「多元文化」與「社會發展」為核心，探討下列本年度東亞法治整合研究之議題：

(一)東亞及區域性國際脈絡下「人權」與法治發展
(二)東亞憲政體制與法治原則發展
(三)亞洲多元文化下法治原則之反思及實踐
(四)面對社會變遷及發展衍生個別法治問題之挑戰及法體系回應

計畫摘要(英)：

The previous integrated project, “ The Formation of the Rule of Law in East Asia” focused on the legal systems in East Asia. Surrounding the concept of “law and order”, integrated law research methods were used in related research on the theories, systems and implementation.

This project, while retaining the research subject and method from the previous one, looks at not only the changes in East-Asian law theories,

systems and implementation, but also at future development. By observing different time periods, analyses of the formation, development and implementation of East-Asian legal systems are conducted in this project in the hope of further exploring the contents and influence on people and societies of the cultural background and development of East-Asian law and order, based on literatures and findings at hand. Using the 6C integrated law research method, this project is conducted in local, regional and global context, as well as in traditional, modern and post-modern context. Comparative, critical and creative analyses are done on the contents of the formation of law and order in East Asia.

The goal of this annual research project is to carry out observation and discussion on “ the formation of law and order, the development of legal principles and the implementation of human right.” Centered on human right, constitutional governance, multiculturalism, and social development in the East-Asian and regional context, and through the relations between people, society, culture and law and order, the project is to discuss the topics of research this year:

1. Human right and the development of law and order in the context of East Asia and Different regions;
2. Constitutional systems and the development of legal principles in East Asia;
3. The reflections and implementation of the legal principles under Asian multiculturalism, and
4. Individual legal issues and challenges generated from social transformation and development, and the response from legal systems.

計畫編號：AH04-01
計畫名稱：總統選制、分裂社會與憲法法院：臺灣與南韓的比較研究
計畫主持人：葉俊榮
計畫摘要(中)：

在亞洲的新興民主憲政中，台灣與韓國具有高度的相關，其中一項便是憲法上的總統角色以及總統選制。相對於日本的內閣制，台灣與韓國總統選制是建立在全輸或全贏的規則上，提供分裂社會的憲政基礎。而面對分裂社會，法院往往扮演著相當特殊的角色，而台灣與

南韓同時都有憲法法院的設置，兩國的憲法法院如何面對總統選制所造成的社會分裂？本研究將透過台灣與南韓的比較，探究亞洲的總統體制對分裂社會形成的作用，並透過憲法裁判的比較分析，探討亞洲的憲法法院，又是如何因應基於憲政體制設計所造成的社會分裂。在研究步驟上，本研究將先行分析台灣與南韓憲法上總統的職權與選制的內涵與演變，進而分析此等憲政制度設計是否以及如何對社會產生裂痕。本研究進一步挑選出與總統職權與選制有關的憲法解釋或裁判，並分析其與分裂社會的關連，以及法院對此一社會裂痕的認知程度，進而比較分析憲法法院的對此的司法哲學取向。本研究的意義，除了彰顯憲法上政府體制與選制設計與社會結構的關連外，更要以此一共同的問題，型塑法院對分裂社會的著力。將台灣與南韓做比較研究，更有檢討亞洲憲政主義，並與當代主流憲政主義對話的作用。而整體研究結果，對未來憲政改革方向或憲政主義發展方向，均具有高度參考價值。

計畫摘要(英)：

Among new democracies in East Asia, Taiwan and South Korea share many common

transitional features. Constitutionally both share a level of semi-presidentialism and functioning constitutional courts in adjudicating constitutional controversies. The contested presidential elections, a winner takes all game, may has contributed to the cleavage of the divided societies and consequential political gridlocks. These political issues are then commonly referred to constitutional courts for resolution. To what extent and in what ways the courts in Taiwan and South Korea have dealt with the social cleavage contributed by the contested presidential elections and constitutional presidentialism? How are these constitutional adjudications contributing to the constitutional scholarship?

This study aims to analyze the function of constitutional court in resolving social conflicts arising from the all-or-nothing presidential elections and constitutional presidential powers. A comparative study into Taiwan and South Korean experiences would further contribute to comparative study of constitutional adjudication in Asian transitional context. This study not only highlights the close link between constitutional government framework and social structure but also

demonstrates function of modern constitutional courts. By comparing Taiwan and Korea, this study presents the transitional constitutionalism in Asian context that may be significant for other emerging democracies facing constitutional choices between presidential and cabinet system and whether to establish a constitutional court.

計畫編號：AH04-02
計畫名稱：法規範性與合法性
計畫主持人：顏厥安
計畫摘要(中)：

本計畫是本人一系列相關研究的持續延伸，其核心的研究對象或主題脈絡有二，第一，由法概念論的「法律是什麼？」的問題意識，發展為什麼是法的規範性。第二，法規範性問題在臺灣/東亞的具體歷史經驗脈絡下的意義是什麼，我們可以由此等理論研究，反省看出這些經驗的何種新意涵。其中尤其關涉到法治、民主，與法學的客觀性等議題。但是由於這兩個問題層面都過於複雜龐大，因此實際著手研究的時候，也只能從比較瑣細的問題謹慎地展開探討。1

本計畫預定第一年更精密地發展本人多年來持續探索的規範縫隙概念。此一概念與法規範性的關連需要更多的研究，其中尤其涉及法學研究與司法裁判所處理的對象問題。第二年將接續處理法規範性與合法性的關係，其中關鍵在於正當性統治如何透過合法性，來創造法規範性。第三年則希望運用前述理論，重新反省臺灣/東亞的「法治」經驗。本人的初步想法是，這是一個透過目的合智謀性(purpose-rationality)，來塑造正當性，並將其轉化為技術規範性(technical normativity)的過程。因此不但法治的價值理性或合理性會被公開地質疑，並且在實踐中浮現了一種以行政權為核心的宏觀特別權力關係傾向。而東亞的法治轉

型，也不是一般所謂從「傳統法」朝向「西方法」的發展，而是帶有往「法策略」發展的趨力。

計畫摘要(英)：

I will continue my research and theoretical concerns in the past few years in this project. Broadly speaking, there are two major concerns in my recent researches, first, reformulating the question ‘what is law?’ to ‘what establishes the legal normativity?’; second, based on such

theorization of legal normativity, what sorts of new insights can be developed from the legal experiences of Taiwan and East Asia, particularly related to the problems of rule of law, democracy and the objectivity of legal knowledge? Due to the high complexity of these two dimensions, anyhow, I can only start with some trivial problems.

In the first year of this project I will continue my investigation into the concept of normative gap. The problem of 'objects' of legal knowledge and judicial decisions plays the major role. The relation between legal normativity and legality will be studied in the second year. Particularly the way how the legitimate domination can create legal normativity through legality should be analyzed.

In the third year I will try to use the theoretical results to reflect the rule of law experience of Taiwan and East Asia. My preliminary thoughts would be: this is a process of using purpose-rationality to create legitimacy and then transform it into technical normativity. Therefore, not only the value-rationality or reasonableness inherent in the idea of rule of law would be dismissed publicly, there also emerged in the practice a kind of macro special power relationship. I will argue that the transformation of East Asian rule of law is better understood as from traditional law to 'strategic law' than to alleged Western rule of law.

計畫編號：AH04-03
計畫名稱：欠缺作為傳統 – 東亞法治論述的後殖民女性主義反思
計畫主持人：陳昭如
計畫摘要(中)：

在主流的西方法學論述中，東亞傳統經常以（西方之）欠缺的面貌出現，特別是，法治之欠缺，儼然成為東方傳統之特色。比較法/中國法學者 Teemu Ruskoda 便以 Edward Said 的東方主義（Orientalism），分析西方比較法研究傳統的東方主義色彩，特別是此研究傳統如何將中國建構為欠缺法律主體性的他者，而這樣的他者化，又如何有助於近代西方主體的形成。他將此種歐美中心的法律論述稱之為「法律東方主義」（legal Orientalism）。法律人類學家 Laura Nader 則更進一步提出「缺無理論」（the theory of lack），藉以說明在歐美帝國/殖民霸權的形構中，「欠缺法治」如何被用以標示被殖民的他者，「法治」如何表彰了歐美的位置優越性（positional superiority）、

並且正當化其擴張。

本子計畫即試圖透過後殖民女性主義批評，探討「法治之欠缺」如何被論述性地建構為東亞傳統，以及在此形構當中，東亞女性如何被雙重地他者化：先是作為東亞的他者、其次是作為女人的他者。在西方法學的凝視之下，透過將西方形塑為法治之母國、將東亞形塑為欠缺法治傳統之西方法繼受國，此他者化的過程創造了東亞（以及其他非西方國家）在世界法律發展進程上的落後位置，從而也形塑了東亞的落後時間性，以及繼受西方法的必要性：西方法之可欲，以及東亞傳統之應棄。因此，「欠缺法治之傳統」的建構之同時，也建構了「具備法治」之西方傳統，法治之有無乃是一體的兩面。而女性、特別是女性人權保障之欠缺，更被當成東亞傳統的落後象徵，並且成為西方文明化任務的拯救對象，從而更加正當化了繼受西方法之必要性。透過對於東亞傳統論述建構的梳理，本子計畫將反省「法治」論述如何展現了西方法律霸權，以及抵抗之可能性。

計畫摘要(英)：

This project is an investigation into and a critique of the discourses on “the East Asian tradition” as “the lack” -- in particular, the lack of rule of law. Western legal hegemony has discoursively constructed a dichotomy of the progressive West (as the mother of the concept of rule of law) and the backward East (categorized by its lack of rule of law). Under such construction, women are treated as the authentic victim of the East Asian tradition. This project will reveal how discourses on rule of law have been used for an assertion of knowledge and power, which produces as well as facilitates the superiority of the West. It will also provide a localized practice of the theory on legal Orientalism in the context of Taiwan and in consideration of Japanese colonialism.

計畫編號：AH04-04
計畫名稱：區域性國際刑事人權基準之形成：歐洲經驗與東亞發展
計畫主持人：林鈺雄
計畫摘要(中)：

刑事法的國際化與刑事人權基準的普世化，是第二次世界大戰以後刑事法發展的趨勢。其推動的力量，又可略分為二：一是全球性及區域性國際人權公約及其保障機制的影響（按：刑事被告的權利保

障，本來即是國際人權公約的典型課題），全球性如聯合國之《公民及政治權利國際公約》（ICCPR），區域性如《歐洲人權公約》（ECHR）。二是刑事法本身全球性及區域性的國際化發展，全球性如國際刑事法院（ICC）規約之簽訂及設置，區域性如作為歐盟模範刑事法典之 CJ（Corpus Juris），以及歐盟陸續發佈之被告權利綠皮書。

在上開全球化與國際化浪潮衝擊之下，本來各有法律文化傳統的歐洲各國刑事法，遂展開前所未有的整合，幾十年來逐步形成了泛歐的共同刑事人權基準。相較之下，儘管我國大法官也曾再三援引國際人權基準作為檢視內國刑事案件判斷之準繩（如釋字第 582 號解釋即據此而將刑事被告的對質詰問權作為普世人權），惟我國身處的東亞，儘管在民主政治與經濟發展的成果令全球矚目，但迄今仍然沒有任何區域性的國際刑事人權清單基準及保障機制。在當今刑事人權議題與刑事法學研究國際化、全球化的趨勢底下，台灣及東亞諸國刑事程序要嚴肅以對的兩大課題包括，如何把內國法的刑事人權基準提升至已經被逐步普世化的國際刑事人權水準，以及如何形成東亞區域性國際刑事人權的基準及其保障機制。

本研究計畫將以區域性國際刑事人權基準的發展為研究範圍，從歐洲經驗出發，再來檢討東亞發展的條件。上開歐洲刑事人權基準的發展經驗（含歐洲人權法院的刑事權利相關判例法、歐盟刑事法典、歐盟刑事被告權利綠皮書等），同時也是近年來最為熱門的國際人權法及比較刑事法課題，這原因主要有三：

一是鑒於近年來刑事人權議題與刑事法學研究的國際化、全球化的趨勢，使得各國刑事法的發展已經難以閉門造車。二是歐洲刑事人權基準之建立，乃迄今為止國際間最具成效的國際刑法發展，其影響早已不限於歐洲區域。三是在冷戰結束之後，國際化、全球化的潮流驅使之下，傳統上影響世界深遠的兩大主要法系，也難抵擋整合的浪潮。由於歐洲區域本來就是這兩大法系的發源地，因此，歐洲人權法院正是觀察英美法與歐陸法兩大法系整合的重要平台，尤其是刑事程序。到底歐洲人權法院及歐盟，如何將背景不同的各個歐洲內國法整合為一套共通適用的刑事人權基準？這牽涉到他國或國際法律如何轉換成為內國法的高難度問題，但也正是包含我國在內的東亞諸國（歷史上繼受西方法制的國家）經常面對的典型問題。因此，瞭解歐洲刑事人權基準有助於我們釐清這個問題，並且據此發展出超越法系與訴訟構造差異的「普世價值之刑事基本人權」及「刑事被告權利清

單」，換言之，未來東亞亦可以歐洲經驗為借鏡，發展出東亞的區域性國際刑事人權基準及保障機制。本計畫即在此一思考的背景之下，進行對歐洲區域性國際刑事人權基準與保障機制的研究，進而思索及其對東亞區域性國際刑事人權發展可能的啟示與影響。計畫申請人之研究方向，長期關注此一議題，目前已經寫作相關論文十餘篇（含五篇 TSSCI 論文），曾指導關於國際人權基準如何適用到我國法之四本相關碩士論文，並曾以相關研究，於 2005 年獲德國宏博學術基金會（Humboldt-Stiftung）研究獎勵金資助，赴德深造半年。今期待在此學術基礎上，進而研究東亞與國際刑事人權基準之接軌問題，為此目的，本計畫亦邀請北京大學法學院陳興良教授為計畫顧問。

計畫摘要(英)：

The criminal law internationalization may be the tendency of the criminal law development after World War II. It may be divided into two topics to classify: One is the global international development and the regional international development; the other one is the internationalization of criminal law and the development of the international criminal law itself. According to the above, it may also be divided into four kinds of basic types:

	A The development of the international criminal law which is led by the international human rights	B the development of the international criminal law itself
1. The development of the global internation-alization	ICCPR	ICC ICTY ICTR
2. The development of the regional internation-alization	ECHR ACHR ACHPR East Asia？	CJ 2000 Green Paper 2003 East Asia？

At the Type A(A1,A2), it implicates the list of accused’s rights. Europe Convention on Human Rights (ECHR) is an ideal of all regional international human right pacts and the protection of accused’s rights. Because of the accumulation of case-law for several dozen years, ECHR becomes a model in the research of comparative law.

At type B (B1, B2), since the Nuernberg Trials and the Tokyo War Trials, the formation of international criminal law datum and the question of court judgment namely has floated the floor, but there still has been no "global international

criminal court" established. Until "the Roman Statute" was signed, it not only initially achieved the goal that a global standing international criminal court was set up, but also was sure the common standing that listed of accused’s rights. In 2000 Criminal Code of EU (CJ 2000) claimed the time of the common criminal basis in Europe was coming.

However, in Asia, especially in East Asia, it still has lacked of any regional international criminal human rights list and the safeguard mechanism up to now. This project will research European experiences and finally discuss the possibility of Asian development.

This project analyzes three main points:

1. the formation and development of the basis on European criminal human rights and safeguard mechanism;
2. the case-law of European Court of Human Rights, CJ 2000 and Procedural Safeguards for Suspects and Defendants in Criminal Proceedings of EU;
3. the European experiences and their inspiration on East Asian human rights standards in the future.

計畫編號：AH04-05
計畫名稱：憲法與國際人權法的對話：東亞脈絡的考察
計畫主持人：張文貞
計畫摘要(中)：

憲法是國家主權秩序下的最高規範，所規範的是政府與人民的關係；國際人權法則是在各個主權國家之間所發展出的國際規範秩序，兩者屬於不同的規範脈絡。不過，近年來，我們卻看到各國最高法院或憲法法院在解釋各國憲法時，有援引或參考國際人權條約或國際人權法院判例之趨勢。憲法與國際人權法的對話或匯流，成為新一波發展的趨勢。

很可惜的是，國際上對於此波憲法與國際人權法對話的討論，主要集中在西方國家，尤其是美國及歐洲，對於東亞國家在此一現象上的發展則有所忽略。實際上，東亞新興民主國家的法院，例如南韓的

憲法法院或台灣的司法院大法官，近年亦有在其內國憲法解釋中積極援引或參考國際人權條約的現象。此外，深受普通法體系影響之香港、新加坡及馬來西亞的法院，亦有於判決中主動援引國際人權法之現象。憲法與國際人權法的對話、甚或匯流，在東亞此一區域似隱然成形。

值得深入探討的是，東亞國家的法院是如何進行其內國憲法與國際人權法的對話？是否仍表現出「東亞」特色？此一對話是單向或雙向？在其內國憲法脈絡下對於人權保障標準的選擇與詮釋，是否可能積極導引國際人權法的發展？甚至是否可能逐步發展出東亞區域之人權規範基準？凡此問題，均為本計畫擬深入分析探討之方向，其成果一方面在回饋目前國際憲法學界相關研究欠缺東亞脈絡的問題，另方面也希望藉此研究作為探詢東亞區域人權標準或機制的起點。

計畫摘要(英)：

Constitutions are supreme laws of nations that govern governments and their citizens, whereas international human rights treaties are consented norms that bind all nations. Both are different normative regimes with distinctive functions. The sharp line between the two, however, has been blurred by the fact that increasing number of national courts are looking into, referring or even directly applying international human rights laws or judicial decisions in their interpreting of domestic national constitutions. The dialogue or even convergence of constitutional laws and international human rights has been of acute attention recently.

Regrettably, recent discussions on the dialogue or convergence of constitutional law and international human rights have been centered upon experiences of the West, but ignored East Asian practices. Perhaps to the surprise of western eyes, new courts of emerging democracies in South Korea and Taiwan have been referring to international laws in deciding domestic controversial issues. In a number of countries influenced by common law tradition, their courts have also been inclined to refer to international human rights laws. Indeed, the dialogue of constitutional laws and international human rights also exists in East Asia.

The key question is how the dialogue of constitutional laws and international human rights has been conducted in East Asia. Has there

also been an “East Asian” character? Is the dialogue one-sided or mutually beneficial? Is there any possibility that the ways that East Asian domestic courts interpret international human rights norms would in turn influence upon or even construct and significantly contribute to the existing body of international human rights norms that have been largely formed from the West? Most importantly, would the dialogues that exist in various East Asian courts in their interpretation or even reconstruction of international human rights norms help to facilitate the emergence or even consolidation of regional human rights standard for East Asia? By exploring these issues, this project seeks to contribute to international discourse by providing East Asian context and at the same time inquire the starting point of an autonomous regional human rights regime constructed in East Asia.

計畫編號：AH04-06
計畫名稱：法治原則與臺灣原住民族之保障
計畫主持人：王泰升
計畫摘要(中)：

臺灣於 2005 年 2 月 5 日公布施行「原住民族基本法」，聯合國亦甫於 2007 年 9 月 13 日通過「聯合國原住民族權利宣言」，此說明了以法治原則保障原住民族的利益，已是當今國內與國際上的主流。回顧歷史，今在臺灣所稱之原住民族，首次遭受外來者統治，正是臺灣史上第一次出現近代型國家統治型態的日本統治時期。然而日本帝國在台的殖民地政府並不將原住民視為法律上的權利主體，對原住民族連最起碼的形式法治國原則都不予理會。緊接著統治原住民族之來自中國的國民黨政府，雖然將其主要的國家法律，包括民事法、刑事法等，一體適用於原住民族，但這些法律在制定當時並未考量及原住民族的需求。而給予原住民族特殊對待的法律制度，包括原住民身份、原住民族保留地等，仍長期地以行政命令規範之，明顯違反法律保留原則。一直到國民黨統治晚期的 1994 年，才在憲法增修條文宣示應特別保障其政治地位和社會文化。在民進黨政府執政期間，又進一步建構保障原住民族之法制。但是這些法制仍有待更具體的法規來落實，故如何在臺灣現實條件下，規劃出最具可行性的法律規範，再以包括釋憲和法院機制在內的法治原則，要求政府與人民一體遵守，已成為刻不容緩的議題。在研究過程中，將與美國西雅圖華盛頓大學原

住民法中心的教授密切合作，以參考美國法制經驗與做理論層面的對話。

計畫摘要(英)：

In Taiwan, the Fundamental Law for Indigenous Peoples was promulgated and enforced on February 5, 2005. In the United Nations, the Declaration on the Rights of Indigenous Peoples was passed on September 3, 2007. Accordingly, the idea that the interests of indigenous peoples should be protected by the principle of rule of law has been widely accepted all over the world. However, when Taiwanese indigenous peoples met the modern state for the first time in the Japanese era, they were actually not exposed to the principle of rule of law. After 1945, the Chinese Nationalist regime began to govern indigenous peoples by law which was also applied to the ethnic Chinese in Taiwan. Those laws applied to the indigenous people did not take into account the legal civilization of the indigenous peoples when they were enacted, and therefore the principle of rule by law finally resulted in the loss of original life style of indigenous peoples. Until the 1990s, the late period of the Nationalist rule, the uniqueness of indigenous peoples was recognized by the constitutional law of Taiwan, which further provided that the interests of indigenous peoples should be protected by the law. Later on, the DDP became the governing party of Taiwan. The DDP administration enacted many laws for protecting the interests of indigenous peoples. Nevertheless, it is still doubtable whether those laws can carry out the purpose of the Fundamental Law for Indigenous Peoples. This project wants to examine the history of the indigenous peoples' encounter with rule of law and further argue what kinds of legislation are necessary for the indigenous peoples under the current situation of Taiwan. For referring to the Native American experiences and dialoguing with the theory of the indigenous law, I would like to visit the Native American Law Center in University of Washington School of Law during the period of executing this project.