

1. Introduction

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I. CONSTITUTIONALISM IN ASIA

The newly revitalized field of comparative constitutional law has tended to let North America and Europe dictate the agenda. From one point of view, this is understandable, of course: modern written constitutions were first developed in the Atlantic world and spread to the new nation states of Latin America, well before Japan adopted the first national constitution in Asia in 1889. But Asia has also been home to vibrant constitutional discourses for 150 years, as indigenous elites sought to fuse Western institutional forms with the grand East Asian legal and political traditions. This discourse is now returning to the fore with speculation about China's ongoing experiment in developmental authoritarianism. In South Asia and Southeast Asia, too, old traditions of government informed constitutional discussions, although the experience of colonialism was a more immediate factor.

In the early 21st century, Asian countries have developed increasingly vibrant practices of constitutional law. Written constitutions are now the norm, and routinely influence the politics even of authoritarian states including Myanmar or China. Constitutional courts have spread throughout the region, and are deciding many of the major social and political questions of the day. And social and political movements invoke the constitution at key junctures in many countries.

The timing is good for an examination of constitutional law in Asia. One of the great themes of constitutions in Asia is their basic stability (Yeh and Chang 2011). Vibrant constitutional democracies are now well established in Japan, South Korea, Mongolia and Taiwan. Indonesia's transition to a constitutional democracy in the early years of this century was remarkable on many dimensions (Horowitz 2013), and as of this writing, Southeast Asia is as democratic as it has ever been, with stable democracies in the Philippines and Indonesia, a more fragile stability in Thailand, relatively liberal periods in Singapore and Malaysia, and a remarkable evolution under an authoritarian-drafted constitution in

Myanmar. In fact, taking the estimate that the average constitution can be expected to live 19 years (Elkins et al. 2009) as a baseline, we see that most countries in the region have surpassed that. Only Thailand has written a new constitution in the past decade, and so Asia stands in sharp contrast with other regions of the world. This statistic does not mean that constitutions have been stagnant, however. Instead, countries have adopted a kind of gradualist evolution, emphasizing constitutional amendment, and relatively cautious judicial adjustment (Yeh and Chang 2011).

Some scholars also emphasize the political character of Asian constitutionalism, in contrast with the heavy emphasis on the judiciary in the Western tradition. For example, Yeh and Chang (2011) argue that judicial review in Northeast Asia has been underdeveloped. Michael Dowdle has criticized as ahistorical the notion that constitutionalism necessarily involves judicial control (Dowdle 2009). Both as an understanding of Western development and what we are calling the East Asian analogues, judicial enforcement of constitutional norms is the exception rather than a *sine qua non*. We agree with Dowdle that the contemporary emphasis on judicialized constitutionalism is incomplete as an account of how effective constitutions have developed and actually operate. On the other hand, as detailed in Chapter 3, Asian constitutional courts have become quite active, and are deciding central questions in many countries.

Another angle to examine Asian countries' experience is to look at the formal text of constitutions. As noted by Yeh and Chang in the context of Northeast Asia, all the countries in the region share, more or less, the idea that constitutional state building was a part of the modernization project. Constitutions in the region have very rarely been a bottom-up project or the result of hard-fought struggles for rights on the part of a people. Instead, constitutions in the region are generally speaking elite projects that only later, if ever, became part of the lived experience of the public. Constitutional politics as a terrain of social struggle is a relatively recent development.

This volume surveys Asian experience on several important constitutional topics. Two linked questions inform the exercise: to what extent is Asian experience distinctive, and to what extent can it inform debates in the rest of the world? In some areas, the jurisprudence and practices of constitutional law may be quite derivative from those of other countries, either within or outside the region. In other cases, the Asian experience may be innovative, in ways that are either obvious or subtle.

With this framework in mind, our introduction examines some of the distinctive patterns revealed in the various chapters, and connects those

patterns to broader debates about “Asian values,” traditions of political thought, and political and economic conditions.

II. THREE DISTINCTIVE PATTERNS: A BIRDS-EYE VIEW FROM ASIA

A. Convergence/Similarity

One important pattern identified by many of the authors in this volume is a pattern of *convergence*, or similarity or overlap between global constitutional norms and constitutional structures, concepts and principles in Asia.

Tom Ginsburg, for example, in writing about constitutional courts in East Asia, notes the same shift in many Asian countries as has occurred globally “away from traditional notions of parliamentary sovereignty toward the idea of constitutional constraint by expert courts”. Cheryl Saunders, in writing about judicial engagement with comparative law in Asia, notes that the 13 Asian countries she surveys with regard to engagement with comparative sources follow the same pattern she found in a prior, more general global survey of constitutional court decision making (Saunders 2013). This pattern also applies across both common and civil law systems in Asia. It includes countries, such as Korea, in which members of the constitutional court have explicitly endorsed the idea of learning or borrowing from other countries, and those such as Singapore where a “four walls” interpretive principle means that comparative engagement tends to be more deliberative or aversive in nature (Saunders, compare Choudhry 1999). This pattern, she suggests, also fits with the three broad explanations for comparative engagement by courts developed by comparative constitutional scholars on a more global scale: it reflects the capacity of foreign jurisprudence to legitimize domestic decisions, which are otherwise lacking in constitutional legitimacy; it reflects the degree to which citing leading courts can bolster the prestige of domestic courts; and it reflects “genealogical” influences within families of legal systems (Saunders, compare Choudhry 1999).

In the context of the constitutional division of power, José Antonio Cheibub and Fernando Limongi note the presence in Asia of all the major archetypal models of executive–legislative relations: presidential systems (e.g. Indonesia, the Philippines and South Korea), semi-presidential systems (e.g. Taiwan and Mongolia), and parliamentary systems (e.g.

India and Japan). Likewise, Sujit Choudhry notes the same broad diffusion in Asia of “post-conflict” federalism as a constitutional design tool that he and Nathan Hume identified in a prior chapter on the global pattern (Ginsburg and Dixon 2011). India, Malaysia and Pakistan, Choudhry notes, have all had federal systems for large parts of the 20th century, against a backdrop of serious religious and ethnic tensions. Federalism has also been proposed, in recent decades, as a design solution to ethnic conflicts in Nepal (which has been trying to adopt such a system over several years of failed negotiation), Sri Lanka, Indonesia and the Philippines. With regard to emergency regimes, Victor Ramraj notes the same broad provision for emergencies in Asian constitutions as is found in most modern constitutions elsewhere. He also notes the presence of the same variety of emergency regimes in Asia as elsewhere – including those that vest the power to declare an emergency in the executive (Singapore and Malaysia), parliament (the Philippines) or in some combination thereof (India); those that generally retain, versus oust, judicial review (e.g., East Timor, versus Singapore and Malaysia); or that potentially allow indefinite emergency rule (Taiwan), as opposed to imposing some express time limit (East Timor).

In the context of constitutional rights provisions, Adrienne Stone, Rishad Chowdhury and Martin Clark note the same broad recognition of rights to free speech, and the same structure of constitutional speech guarantees as Stone previously noted on a global scale: constitutional democracies in Asia generally recognize some form of right to freedom of “speech” “communication” or “expression”. Further the interpretation and enforcement of such rights generally follows a three-part structure, examining first, the question of scope of coverage; second, the question of permissible limitations; and third, the question of positive and negative protection. In the context of constitutional rights to property, Tom Allen notes the same presence in Asia, as elsewhere, of competing “liberal” and “social democratic” ideas about property, or property rights. He notes that social democratic ideas, for instance, were influential in the drafting of the Indian constitution, and have underpinned land reform programs in Japan, South Korea and Taiwan, as well as India. Liberal ideas have played a dominant role in court decisions interpreting and enforcing constitutional rights to property in countries such as India and the Philippines. He also suggests that constitutional property rights in Asian constitutions generally take a similar form, and involve a similar logic, to equivalent rights elsewhere: they provide that the government may only acquire property by a process laid down by law, for a public use or purpose, and on terms that provide the owner with compensation.

As for equality clauses and rights to non-discrimination, Kate O'Regan and Madhav Khosla note the degree to which all three of the Asian jurisdictions they study (i.e. India, Japan and Malaysia) have adopted a form of "rational basis" or reasonableness view, in the interpretation and enforcement of constitutional equality clauses. With regard to constitutional regulation of religion, including norms of (anti-)establishment and religious freedom, Ran Hirschl notes the presence, in Asia, of the same three archetypical "religion and state" models he identified on a more global scale in our 2011 handbook (Ginsburg and Dixon 2011): a form of "secularist" model in India and Turkey; a "preferential treatment" model in the Philippines; similar forms of "weak establishment" model in Japan, Nepal (prior to 2006), Thailand, Sri Lanka, Myanmar, Cambodia, Tajikistan, Uzbekistan, Indonesia and Malaysia; and forms of "constitutional theocracy" in other countries in Asia, including, Iran, Pakistan, Iraq, Afghanistan and Saudi Arabia.

One reason for this pattern in Asia undoubtedly has to do with constitutional "borrowing" in Asia, or the *direct* influence of North American, and European (i.e. primarily British and German) constitutional ideas on the design and interpretation of Asian constitutions. In Japan, for example, successive periods of German and American influence have led to competing "schools" of constitutional and legal thought, sometimes leading to conflicts over the shape of reforms. Indeed, there have been dueling associations of constitutional law scholars in Northeast Asia. Scholars in Korea and Taiwan also have similar ties with both German and American networks. French influence in Vietnam has led more to a kind of anti-model for the socialist constitutional model, but still informs some legal thinking. Constitutional design is thus informed by developments in other regions. At the level of constitutional interpretation, as Cheryl Saunders notes in her chapter on comparative engagement by courts in Asia, "[t]he Constitutional Court of Germany and the apex courts of the United States and the United Kingdom are influential in Asia as elsewhere, reflecting historical practice, legal systemic links, continuing reputation and the accessibility of judgements".

B. Complexity and Nuance in Existing Constitutional Categories

A second pattern our authors highlight is the degree of distinctiveness, or *variation*, in Asian constitutional systems, compared to North American, European or Commonwealth archetypes.

For example, Cheryl Saunders notes the distinctive pattern of inter-regional comparison among constitutional courts, especially among courts within East Asia, and by references by Asian courts to the

constitutional jurisprudence of the Korean constitutional court and Indian Supreme Court. Likewise in the context of judicial review, and its “strength” or finality, Rosalind Dixon and Mark Tushnet note that in Asia, weak-form review has generally existed (if at all) only via sub-constitutional review and constitutional amendment, rather than the kind of formally weakened judicial review that has become increasingly common in many Commonwealth countries.

In the context of constitutional rights to freedom of expression, Adrienne Stone, Rishad Chowdhury and Martin Clark note the degree to which, as a general proposition, Asian legal systems are often more willing than Western constitutional democracies to restrict speech, via laws criminalizing blasphemy (Malaysia, Indonesia and Pakistan) or defamation (Thailand), laws allowing defamation suits against public figures (Japan and Singapore), or laws restricting speech on the grounds of public morality (India and Singapore), public welfare (Japan), and peace, order and security (Japan, Malaysia, India). Similarly, in the context of constitutional equality rights, Kate O’Regan and Madhav Khosla note the degree to which, at least in the three jurisdictions they study (Japan, India and Malaysia), there has been a noticeable absence of the kind of “disparate impact” equality, or anti-discrimination, jurisprudence found in many other leading constitutional systems, such as Canada, South Africa and Germany. And in the context of religion, Ran Hirschl notes the degree to which “there is far lesser adherence” in Asia than in any other continent to the “classic separation of church and state model”.

One potential explanation for this pattern of Asian constitutional distinctiveness, or difference, is the role of culture, or so-called “Asian values”. In the early 1990s, scholars and political leaders in the region began to articulate the notion that Asians should not simply adopt Western political forms uncritically, but instead should be governed by regimes consistent with traditional values. These claims were subjected to criticism, but retain rhetorical power in some quarters. In the free speech context, for example, Adrienne Stone, Rishad Chowdhury and Martin Clark note – albeit with some real skepticism – the potential explanatory value of “pragmatic and neo-Confucianist or ‘communitarian’ norms” in East Asian countries, such as Singapore and Malaysia, in explaining the relatively broad set of limitations on speech upheld by courts, under constitutional free speech guarantees. They also note the potential role of cultural norms of “consensus” in explaining the formally deferential approach of the Supreme Court of Japan to restrictions on speech.

This cultural story, however, seems to overlook the importance of *politics*, or political and economic factors in explaining various patterns of Asian constitutional difference. A striking feature of constitutional dialogue in Japan and India, Rosalind Dixon and Mark Tushnet suggest, is the degree to which it has played out “against ... near complete dominance by a single political party” (Chapter 5). Single party dominance of this kind, they suggest, seems to make some form of weak-form (or at least weakly exercised) review far more likely than in systems with stable forms of two-party competition. Similarly, in the context of constitutional free speech guarantees, Adrienne Stone, Rishad Chowdhury and Martin Clark note the degree to which “democratic norms are undoubtedly weak in many Asian nations” than in leading constitutional systems in North America or Europe, and there are also often weaker legal and political commitments to norms of judicial independence. This also explains why a broader range of limitations on such rights is permitted in Asian countries as diverse as Thailand, Pakistan and Japan – and not just in East or Southeast Asian countries that share a strong Confucian heritage.

One could also argue that in countries such as India, Japan and Malaysia, the dominance of a single political party helps explain the relatively weak, or deferential, enforcement by constitutional courts of universal equality guarantees (see O’Regan and Khosla): as Tom Ginsburg notes in his chapter on constitutional courts in East Asia, in such settings, there is often less space for robust (and successful) judicial review in highly contentious areas than there might be in countries that have a longer history of two-party competition. In a like vein, while noting the degree to which Asia is a distinctly “religion-steeped continent”, Ran Hirschl explains the prevalence of some form of religious establishment model in Asia in part by reference to the distinctive political legacies and traditions of relevant Asian countries.

A purely cultural theory also seems poorly equipped to explain the pattern of *intra*-Asian diversity identified by many authors. In the context of courts and constitutional interpretation, for example, Tom Ginsburg notes the emergence of *more* powerful constitutional courts in countries such as South Korea, Taiwan and Indonesia, than in countries such as Thailand, Mongolia or Myanmar, and Leninist states such as China and Vietnam. Culture does not seem to do the work in understanding the differences.

In the context of constitutional divisions of power, Chieub and Limongi note the degree to which, unlike in Europe, Latin America and Eastern Europe, in Asia “there is no one form of government that predominates”. Rather there is enormous variety in which of the three

broad global models (i.e. presidential, semi-presidential or parliamentary) various countries adopt, and in the relationship between the executive and the monarchy, and military, in different Asian countries. Sujit Choudhury likewise notes the degree to which models of federalism and decentralization have taken a distinctly more symmetric form in South Asian countries such as India and Sri Lanka, than in Southeast Asian countries such as Indonesia and the Philippines.

A similar diversity is apparent in the context of constitutional rights. In discussing the right to freedom of expression, for example, Adrienne Stone, Martin Clark and Rishad Chowdhury note both the common thread of deference to government limitations running through the jurisprudence in Japan, Singapore, Malaysia and India. But they also identify great diversity in doctrinal approaches (from hypothetical strict scrutiny to the most demanding form of rational basis review) and case selection – from those involving incivility and unrest (Japan, India), to cases of political dissent (Japan and Singapore), to the treatment of religion or religious minorities (India and Malaysia). Similarly, in the context of the right to property, Tom Allen notes the presence of social democratic ideas about property rights in some countries, but their near total absence in other countries, such as China, which are grappling with issues of land reform and economic transition more generally. He also notes patterns of successful land reform in certain Asian countries, such as Japan, South Korea and Taiwan, and largely unsuccessful or abandoned reform in others, such as India and the Philippines. In discussing models of the relationship between religion and the state, Ran Hirschl notes similar variation in how global archetypes have been applied, or played out, in Asia: “secular” constitutional ideals he suggests, have tended to look far more absolutist in Turkey than in India, and weak forms of establishment have been far more compatible with religious freedom in Thailand, Sri Lanka or Myanmar than in Tajikistan, Uzbekistan or Vietnam (Hirschl). Similarly, social democratic ideas about the right to property have appeared to support successful land reform programs in several Asian countries, including Japan, South Korea and Taiwan, but have largely been trumped by liberal ideas, or have been unsuccessful in supporting similar efforts, in countries such as India and the Philippines.

Again, these patterns of intra-Asian difference also seem more to do with differences in history, politics and social and economic conditions, than any form of pan-Asian cultural values or approach. Tom Ginsburg, for example, in explaining the apparent success of constitutional courts in South Korea, Taiwan and Indonesia, compared to those in Thailand, Mongolia and Myanmar, notes the degree to which these countries have systems of divided government (i.e. presidential or semi-presidential

system), or some real degree of diffusion in political power, in a way that opens up space for successful judicial review. Tom Allen, in explaining the relative success of land reform programs in countries such as Japan, South Korea and Taiwan, compared to India and the Philippines, notes the importance of external and internal political influences in these countries: in each of these countries, he notes, American influences were important, and the American view at the relevant time was that redistribution was an important means of checking the advance of communism; internal political circumstances in these countries also favored redistribution, in that in Japan and Taiwan, agricultural landlords had lost large amounts of their political influence, and in South Korea, understood “that the threat of a peasant revolution meant that they were better off accepting reforms than challenging them”.

In work that complements this volume, Ginsburg (2013) examines the formal features of Asian constitutions, and following Chen (forthcoming), identifies three distinct “Asian” patterns: an evolutionary Leninist variant, a stable liberal constitutionalist variant, and a hybrid, semi-authoritarian variant. He also considers the extent to which these can be seen as distinctly Asian patterns by comparing them with constitutional orders in Latin America, Eastern Europe, South Asia and Africa. The conclusion, in this context, is that what makes Asia as a region distinctive in constitutional terms is a distinctly political set of ideas, or institutions – i.e. the presence of a vital tradition of socialist constitutions, which have distinctive institutional features. China and Vietnam, from this perspective, ought not to be at the periphery of the analysis, but at the center, and their current battles over constitutionalism (Zhang 2010) may well determine whether Asia as a whole can be said to have converged with other regions of the world or remained distinctive.

Culture, however, may still have an important role to play in explaining the distinctive constitutional patterns observed by various authors in Asia – if it is understood as connected to specific historical traditions, or traditions in political thought, that exhibit great internal diversity. The Asian legal tradition goes back for thousands of years, and there are certainly elements that could be characterized as quasi constitutional. This was obscured by early orientalism in the study of Asian political institutions, but recent scholarship has begun to explore this rich history for data (Ruskola 2013; Ginsburg 2012). A brief elaboration of pre-modern antecedents of constitutionalism helps to demonstrate the breadth of thinking and nuance.

Because China is the wellspring of East Asian thinking about law, it is important to think about Chinese contributions to proto-constitutionalism. Accounts of the imperial Chinese legal system have long emphasized the

combination of a theoretically unconstrained “son of heaven” at the center of the system with an elaborate system of institutionalized structures that provided actual constraint. Not long ago, scholars drew on this tradition to argue that contemporary Asian political systems retained a degree of comfort with one-party or “one-and-a-half” party rule (Pye 1988).

At an ideal level, the Confucian tradition had natural law elements, instantiated in the concept of ritual propriety, or *li* in Chinese, and scholars have analogized these constraints to constitutionalism. The rules of decorum known as *li* provided normative constraints on the behavior of ruler and ruled alike (Ginsburg 2002). Others have focused on other “constitutionalist” elements of the Confucian tradition, including the rectification of names (*zheng ming*) and the notion of rule by the sage (Bui 2012).

The “constitutional” texts of the Chinese dynasty focused decidedly on agency control. The Ch’in procedural manual, discovered in 1975, shows that from the very outset, the Chinese empire was concerned with the problem of arbitrary decision-making by local officials, and provided detailed, written guidelines aimed to keep Ch’in functionaries accountable in their administrative functions (Turner 1992: 9–10). The T’ang codes elaborated a complex structure of government and lawmaking, providing detailed limitations on what could be done (Liang 1989; Johnson 1979). The Q’ing codes likewise had elaborate rules for punishing administrative officials.

Yet the formal ideas of legalized constitutionalism constraining the sovereign himself were not developed in China. One sees constraint through legality – the prior specification of rules and punishments – and an elaborate system of legal orders directed at state agents, but virtually no positive announcements of legal constraint on the will of the Son of Heaven himself. The emperor surely has duties, and is exhorted to behave in accordance with an elaborate set of rules, many of which are written down and have the people’s welfare in mind.

For this reason, few scholars have argued that anything approaching constitutionalism can be found in the Chinese tradition. Indeed, this was part of the critique of 19th-century reformers such as Liang Qichao and Sun Yat-sen, and is implicitly carried on by latter-day proponents of building constitutionalism in China (Balme and Dowdle 2009). Perhaps the critics overstate the case; but the overall sense is of an authoritarian legality, with limited areas of pre-commitment used mainly to motivate agents by ensuring their trustworthiness and fidelity.

Elsewhere in Asia, the constitutional legacy is rich with documents that serve to exhort public officials without providing institutional constraints

on the ruler himself. In South Asia and Southeast Asia, Hindu and Buddhist ideas also drew on natural law thinking. The Hindu Dharmaśāstra, for example, was treated as a source of “law” by the British, but in fact integrated religion and law into a single normative order. Buddhist thought distinguished the wheel of dharma from the wheel of power, implying that the former constrained the latter. An ideal society would be led by a righteous ruler, whose state was to embody good policy that upheld the dharma. These traditions provide rich resources that inform the modern relationship between religion and state, as well as ideas about legitimate rule (Harding 2007).

Japan’s earliest “constitutional” document is the Seventeen-Article Constitution (*Jūshichijū kenpō*) of Shōtoku Taishi, the state-building patron of Buddhism of the Asuka era. Written in 604 CE and adopted as part of a broad set of Sinicizing reforms, the document reads as a Buddhist and Confucian exhortation to maintain harmony, chastise evil, and to obey authority (Steenstrup 1991). It certainly plays the important function, often ascribed to modern constitutions, of helping to bind the nation and define its ideals. But its aspirational character has led to scholarly dispute as to whether or not the document can properly be considered a constitution. Carl Steenstrup (1991: 17), in particular, contends that Shotoku Taishi’s “constitution” was not a constitution at all because it did not restrict any extant legislature.

Several centuries later, the laws of the Kamakura period (1185–1333, the period of the first shogunate) have been argued to have a constitutional character (Ginsburg 2012; Mass 1976, 1999). This was a period marked by a split of authority between the emperor and shogunate (*bakufu*), located in Kyoto and Kamakura respectively. There was competition and conflict over power during the period. A central concern of the *bakufu* government was the resolution of disputes over land, particularly among its vassals. By specializing in dispute resolution among its vassals, the *bakufu* enhanced its legitimacy (Mass 1990, 1999). The shogunate promulgated a set of documents to guide the vassals and to govern land ownership (Adolphson 2000: 188–9; Grossverg 1981; Mass 1990, 1999). Some have analogized these documents to constitutions (Mass 1976, 1999).

Perhaps the greatest body of work on the constitutional character of pre-modern law has been done in Korea, of which the recent work of Chaihark Hahm (2009) stands out. Korea’s Chosŏn Dynasty (1392–1910) was the most enduring regime in any East Asian country. Korean scholars have not been hesitant to find constitutionalist analogies in the neo-Confucian institutions of the Chosŏn dynasty (Kihl 2005, Hahm 2003a; 2003b). These institutions were embodied in written codes, closely

modeled on the Ming codes, which Korean scholars argue limited the authority of rulers. Scholars have focused special attention on the *Kyongguk Taejon* of 1471, seen as embodying a proto-constitutionalism by stating that it “provided a legal framework within which society could function, as far as that function was directly relevant to the state” (Duechler 2002: 122).

The thrust of Hahm’s (2009) argument is that paying attention to the category of ritual is important in understanding the Confucian analogue to constitutional law, meaning the norm that regulates and restrains the activities of the ruler. The fact that there was no formal institutionalized constraint on the emperor in the form of a judge or other actor who could challenge his failure to act according to ritual does not mean that there is no constraint at all. The crucial mechanism of remonstrance facilitated correction of the sovereign by loyal officials.

It is worth noting further that these constraints of remonstrance, deliberation and institutionalized *ex ante* review are arguably as extensive as any institutional constraint found in modern constitutional democracies. Many conventional analysts see judicial review as the *sine qua non* of constitutionalism. But empirical studies of constitutional courts, in Asia and elsewhere, emphasize the relative weakness of courts as constraining actors (Ginsburg 2003). A powerful political force usually gets its way when it wants to; courts are rightly seen as the least dangerous branch. Mostly, what courts do in the exercise of constitutional review is facilitate a second look at policies, and require deliberation. And this is perhaps best understood as a form of remonstrance in which the courts are encouraging deliberation in policymaking (Ginsburg 2002).

C. Missing Categories

A third pattern in Asian constitutionalism revealed by our authors is one of “blind spots” (compare Dixon 2008, 2009) or missing categories in existing constitutional scholarship. In Chapter 2, for example, Justin Blount and Tom Ginsburg explore the distinctive pattern of popular *non-participation* in the drafting of some of Asia’s most successful, or enduring constitutions – i.e. the constitutions of Japan, Korea, Taiwan and Indonesia. This success, they suggest, also helps cast doubt on the conventional wisdom in comparative constitutional scholarship that “maximum public participation is necessary for constitutional legitimacy,” and thus also, constitutional endurance. This fits with the broader pattern we noted at the outset of this introduction that, with few exceptions, constitutions in the region have generally speaking been elite projects that only later, if ever, became part of the lived experience of the

public. In this sense, a focus on Asian constitutional experience also helps highlight a broader missing category in existing comparative constitutional scholarship, driven by Europe, North America or the Commonwealth, namely: the prevalence of “elite constitutionalism” as the driving force behind initial constitutionalization projects.

In her analysis of Asian courts, Cheryl Saunders notes the hybrid or overlapping nature of references to foreign and international legal sources. Focusing on this pattern, she suggests, helps us to see more clearly the degree to which it is becoming increasingly difficult – as a matter of general constitutional practice – to distinguish between foreign and international law sources, as distinct sources of law, in ways that challenge our understanding of the monist–dualist distinction, and the basis or nature of transnational engagement itself. Likewise, in their analysis of different modes of judicial review, Rosalind Dixon and Mark Tushnet suggest that Asia helps us see more clearly the degree to which debates over the strength of judicial review are inextricably linked to questions of political structure and competition. In Europe, North America and the Commonwealth, for example, there is widespread agreement over the desirability of weakening the finality of judicial review in some way, but significant debate over the feasibility of doing so. In Asia, in contrast, at least for dominant party democracies, weak judicial review seems a more or less inevitable feature of constitutional self-government – because of a single party’s control of the judicial appointments, transfer and removal process, and control over constitutional amendment – but far greater questions remain as to the desirability of weak review, because of less robust political contestation and competition. The focus on Asia, therefore, helps highlight the need for ongoing scholarship by comparative constitutional scholars on a previously overlooked category – i.e. what might be called “authoritarian” forms of weak-form review (see Tushnet 2013), or weak-form review by courts in dominant party democracies more generally.

Similarly, in the context of various constitutional structural provisions, José Antonio Cheibub and Fernando Limongi note the degree to which Asian experience provides important, but to date under-explored, support for “later” generation approaches to questions of legislative–executive relations. These later generation approaches place reduced emphasis on formal separation-of-powers models, and focus instead on the complexity of the relationship between institutional structures, incentives and political party formation and behavior; they also challenge the consensus of “earlier” scholarship on the dangers of presidential government, emphasizing that executive rule may sometimes represent “delegation” rather than unilateral action; that *de facto* cooperation or coalition formation

does in fact occur quite frequently in presidential and parliamentary systems; and that minority governments also occur with some frequency under all three models of legislative–executive relations. A close study of Asian systems, Cheibub and Limongi suggest, also has the potential to shed new light on the explanation for these patterns: In India, for example, there is a long history of minority government, and coalition formation, on a national level, and a tendency for political parties to have a strong regional identification – this may also explain one of the conditions under which coalition formation, or minority government, is most likely to succeed. In Taiwan, the control of the executive over many years by the DPP, against the backdrop of KMT legislative majority support, also helps shed light on the *social* conditions that promote stable minority government – or the kind of cross-cutting social and political conditions that can help sustain stable minority government of various forms.

Likewise, in the federalism context, Sujit Choudhry finds that a close study of Asian constitutional systems helps to highlight important questions about the relationship between federalism and linguistic diversity, and federalism and amendment: in India, Choudhry notes, linguistic diversity has created pressure, at a minimum, for “linguistic federalism” in the internal workings of government, but at the same time, had feedback effects on opportunities for government employment, and access to political resources, in ways that have complicated ethno-linguistic tensions. Similarly, a focus on federalism debates in Sri Lanka and the Philippines helps highlight the tension between (existing) unitary procedures for constitutional amendment and the idea of federalism as a conflict-management device: in Sri Lanka, the Sinhalese majority have contended that a federal model could be introduced by ordinary constitutional amendment, whereas the Tamil minority has argued that such changes could only be passed by the Sinhalese and Tamils as two distinct peoples, or polities; and in the Philippines, the Supreme Court has invalidated attempts to amend the constitution to create a form of asymmetric federalism to resolve the long-standing conflict with the Moro majority in Mindanao, as inconsistent with existing constitutional provisions establishing a unitary state. While such tensions have been evident elsewhere, the Asian experience also undoubtedly brings this tension into much sharper relief. In addition, Choudhry suggests, a detailed study of federalism in Asia helps reveal the degree to which post-conflict justifications for federalism often overlaps with more conventional or “classical” justifications for federalism – such as those based on the value of checks and balances, or government closer to the people. Indeed, Choudhry suggests, “the lessons from the Asian cases may be

that the classical and post-conflict justifications for federalism not only overlap in particular cases but often interrelate at a conceptual level.” Connecting a range of quite different Asian cases – including India, Sri Lanka, the Philippines, and even China – makes it easier for Choudhry to elucidate these insights.

Similarly, in his chapter on emergencies, Victor Ramraj finds that a close study of Asian constitutional cases helps reveal the importance of social norms – or the “socio-legal” – gap in the regulation of emergency power. One of the most striking features of constitutional practice in this area in Asia, Ramraj notes, is the sheer frequency with which emergency powers have been invoked in different Asian countries. This is just as true in countries “with a diverse array of institutional checks” as in those that have “none at all”; and thus, one of the lessons from Asia, Ramraj concludes, is that as comparative constitutional scholars, we must go beyond formal legal analysis, and our focus on courts and judicial practices, and engage far more closely with social norms and practices on the ground, if we are truly to understand constitutional practices and regimes from either an empirical or normative perspective.

Tom Allen finds that the Chinese experience (especially between 2004 and 2008) helps to reveal a potentially important tension in liberal ideas about the right to property, namely: the possibility that, by incorporating still nascent private-law ideas about property, liberal understandings of constitutional property rights may for some period be a mere “empty vessel, awaiting content from the development of private law” (Allen). Lessons such as this seem crucial for constitutional designers working in the context of major political, economic and legal transitions.

With regard to equality rights, Kate O’Regan and Madhav Khosla find that a focus on Asian countries such as India and Malaysia helps highlight the relationship between the litigation of equality issues and the development of an equality jurisprudence based on notions of disparate impact. In India, for example, they note that after dozens of cases addressing the constitutionality of affirmative action measures or “reservations” for scheduled castes, tribes and “other backward classes,” the Supreme Court of India has taken steps toward developing a disparate impact jurisprudence; whereas in Malaysia, there is almost no trace of such an approach. In part, they further note, this is because there is a criminal prohibition in Malaysia on all acts questioning “any matter, right, status, position, privilege, sovereignty, or prerogative established” by those parts of the constitution that protect affirmative action measures for ethnic Malays (or the Bumiputra). A detailed study of Asian countries thus helps highlight the same lesson identified by Victor Ramraj in the context of constitutional emergency regimes: constitutional practices are

ultimately deeply shaped by the actions of civil society, and thus, without empowering civil society to enforce and contest the meaning of particular provisions, constitutions will rarely create meaningful social change.

Ran Hirschl's examination of models of religion and the state identifies three different forms of secularism in the Indian case: the "universalist," or neutralist form, often associated with Western-like modernization and progress; the "populist" version often associated with Hindu right-wing parties, such as the Bharatiya Janata Party (BJP); and the "multicultural" or pluralist version associated with the legal status quo, under which various religious minorities have some degree of jurisdictional autonomy. This second, more populist version of secularism also helps draw attention to a largely entirely missing dimension to Western constitutional understandings of secularism – i.e. the extent to which it may be a Trojan horse for distinctly religious, non-neutral political ideas and interests. Seeing secularism in this way may also help us see appeals to secularism elsewhere in a new and distinctly more critical light.

III. WHY ASIA? ASIA AND BEYOND

Regionally focused forms of comparison of this kind also pose distinctive challenges for comparative constitutional scholars. For most comparative scholars, there are a range of jurisdictions they know best, or are most familiar with, and thus, which provide the most natural starting point for developing general comparative insights on particular topics. Asking scholars to focus on a particular region therefore disrupts this general comparative constitutional methodology – by asking scholars to start with constitutional systems they may know little about, and which may also have little in common, other than geography.

One response to this problem by prior authors and editors in the field has been to invite regional, or country, experts to take the lead in developing this kind of regionally focused comparative study. This approach has also generated a number of fine volumes on comparative constitutional topics, including volumes on Asia. The danger we see in this approach, however, is that in adding richness to our understanding of national constitutional systems, it may lose sight of the complexity of global constitutional archetypes – and the importance, and difficulty, of locating regional constitutional patterns within their full global context.

The approach we take in this volume, therefore, is somewhat different to that in existing work on constitutional law in Asia – i.e. to invite

leading voices on *global* constitutional law, many of whom contributed to our prior volume on *Comparative Constitutional Law*, to engage more closely with Asian constitutional systems and experiences. Those who wrote on new topics, not directly covered in our 2011 volume, also sought directly to engage with those chapters and the archetypes they set out: thus in his chapter on constitutional courts in Asia, Tom Ginsburg, for example, benefited greatly from prior chapters in our 2011 handbook by Victor Ferreres Comella, Frank Michelman and David Fontana on the jurisdiction and agenda/docket control of constitutional courts; and in his chapter on constitutions and emergency regimes in Asia, Victor Ramraj was greatly assisted by the prior work of Oren Gross in our 2011 volume.

For the most part, of course, “global” authors in this project cannot hope to bring the same depth of knowledge to Asia, and Asian constitutional developments, as scholars whose work focuses largely or exclusively on Asia, or who are true experts on particular countries within the region. As the various chapters in this volume attest, however, they have capacity to enrich and deepen scholarship on Asian constitutional law in a different way – by connecting it more closely to global theoretical and empirical debates about constitutional design, change, interpretation and enforcement.

The editors and authors were also extremely fortunate, in this context, to have the benefit of the expertise and generous assistance of many leading experts on constitutional law in Asia. In adapting their prior work to engage more closely with Asian constitutional experiences, most of the contributors to this volume met at a conference co-hosted by the University of Chicago and the University of Hong Kong, in Hong Kong in December 2011. We also invited some of Asia’s most distinguished constitutional law experts to attend that conference, and act as commentators there on prior chapters from our volume on *Comparative Constitutional Law* (2011). Scholars who accepted this invitation, and were unfailingly generous in giving of their time and expertise in this context included: Wen-Cheng Chan (Taiwan) (National Taiwan University); Albert Chen (China, Hong Kong) (University of Hong Kong); Rishad Chowdhury (India) (University of Chicago/Delhi Bar); Diane Desierto (the Philippines) (University of Hawaii); Björn Dressel (Thailand) (Australian National University); John Gillespie (Vietnam) (Monash University); Chaihark Hahm (South Korea) (Yonsei University); Madhav Khosla (India) (Harvard University); H.P. Lee (Malaysia) (Monash University); Tokujin Matsudaira (Japan) (University of Tokyo); Fritz Siregar (Indonesia) (UNSW); and Po-Jen Yap (Singapore) (Cambridge University). We would like to take this opportunity to thank them for

their contribution to the volume: all of the chapters, and the volume as a whole, are so much richer for their involvement.

The dialogue they helped create also stands as a model, we believe, of how we may all be able to produce the best kind of globally *and* regionally focused constitutional scholarship: dialogue of this kind allows us both to add breadth and nuance to existing global constitutional scholarship, and to bring greater theoretical richness and broader context to existing country-focused constitutional scholarship.

Such an approach could, of course, be applied to almost any region – and indeed, it is our hope that the project we have begun in this volume may be extended, and repeated with appropriate modification and refinement, to other regions in the future. Asia, however, was where it made sense for us to begin – because of both our own expertise and geography. Asia itself is also a region of immense internal diversity: as Ran Hirschl notes in his contribution to this volume, “the term ‘Asia’ (as in say, ‘Asian food’ or ‘Asian values’) is often invoked to refer to what is actually a sub-region that includes East and Southeast Asia,” but the region is actually far larger – stretching from the Middle East to the edge of the Pacific Rim, or including 48 countries, or roughly 60 percent of the world’s population. As a region, it is thus also in many ways the perfect place in which to start our own attempts to meld truly global and regional comparative constitutional scholarship: in its enormous diversity, Asia is in some sense simply a microcosm of the world, but one that is distinct in noticeable – and often previously unnoticed – ways.

We are therefore delighted to offer you this new volume on Comparative Constitutional Law ... *In Asia*, which can be read either independently from, or in conjunction with, our prior volume on *Comparative Constitutional Law*.

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