National Taiwan University Law Review

Asian Constitutions in Comparative Perspectives

Cheryl Saunders, Jiunn-Rong Yeh, Wen-Chen Chang, Nigel Nien-Tsu Li, Chao-Chun Lin

Volume 4 **March 2009** **Number 1**

Roundtable

Asian Constitutions in Comparative Perspectives

CHERYL SAUNDERS, JIUNN-RONG YEH, WEN-CHEN CHANG,
NIGEL NIEN-TSU LI, CHAO-CHUN LIN

Moderator: PROFESSOR JIUNN-RONG YEH
(College of Law, National Taiwan University, Taiwan)

Speaker: PROFESSOR CHERYL SAUNDERS
(Melbourne Law School, Australia)

Commentators: PROFESSOR WEN-CHEN CHANG
(College of Law, National Taiwan University, Taiwan)

PROFESSOR NIGEL NIEN-TSU LI
(College of Law, Soochow University)

PROFESSOR CHAO-CHUN LIN
(Department of Law, National Taipei University)

INTRODUCTION

Constitutionalism has swept the world in the last two decades, and most countries in Asia have established constitutional governance that guarantees rights of their citizens and checks power exercise of their governments. Despite this widespread reception of constitutions, however, it remains intriguing to ask whether values underlying these constitutions are also becoming convergent or they nevertheless remain divergent and even independent of constitutional functions. The College of Law, National Taiwan University is particularly honored to invite Professor Cheryl Saunders from Melbourne Law School, Australia to discuss with us on this very important topic. It is hoped that this roundtable discussion would shed a new light on the discourse of comparative constitutional studies by extending its research scope to values underlying constitutional texts and jurisprudence as well as to the geographic region of Asia.

I. OPENING REMARKS

PROF. JIUNN-RONG YEH

Good morning, we are honored to have Professor Cheryl Saunders with us. We are also very pleased to have our teacher, Professor Yueh-Sheng Weng, to join us this morning. Before I introduce Professor Saunders to all of you, I must first mention a story about Professor Saunders, Taiwan's constitutional development and myself. In 1994, Professor Saunders was elected to the member of the Academy of Social Science in Australia, and Taiwan just completed the third constitutional revision setting up direct presidential elections. Professor Saunders organized a conference, the focus of which was on representation in the Asia-Pacific Region. She was very kind to invite me to the conference in Katmandu, Nepal where I submitted the paper illustrating the ways in which the profound change in the concept of representation in Taiwan has been undertaken through judicial interpretations.[1] I first discussed how *Interpretation No. 31*[2] manipulated the concept of representation and then how judicial attitude evolved to change in *Interpretation No. 261*[3] by demanding the retirement of aging representatives and the completion of full suffrage, setting a platform for

1. Jiunn-Rong Yeh, *The Cult of Fatung: Representational Manipulation and Reconstruction in Taiwan*, *in* THE PEOPLE'S REPRESENTATIVES: ELECTORAL SYSTEMS IN THE ASIA-PACIFIC REGION 23-27 (Graham Hassall & Cheryl Saunders eds., 1997).

2. *J. Y. Interpretation No. 31* (1954/01/29). For the text in English, *available at* http://www.judicial.gov.tw/CONSTITUTIONALCOURT/EN/p03.asp.

3. *J. Y. Interpretation No. 261* (1990/06/21). For the text in English, *available at* http://www.judicial.gov.tw/CONSTITUTIONALCOURT/EN/p03.asp.

congressional reorganization. This judicial interpretation resulted in the first ever parliamentary election in 1992, which had impacts on the decision to set up for the presidential election in 1994.[4] I argued in the paper that the original base of representation in the Constitution was not from sovereignty but from a very ideological concept, *Fa-Tung*, a Chinese ideology which links the authority of the rulers and even to the King, but it was changed during democratizations and through judicial interpretations.[5] It should be noted that *Interpretation No. 261* was rendered in the hand of Professor Weng as he served as Chief Justice of the Constitutional Court at the time. He was very conscious about what was going to happen and what would be involved with the role of the judiciary.

Now fourteen years later, with a lot of happenings in between, Professor Saunders is here witnessing the second regime change of Taiwan. Professor Weng retired from the President of Judicial Yuan as well as Chief Justice of the Constitutional Court but is still very concerned with constitutional developments. The Constitutional Court has become more trusted and credible and has rendered more than 646 interpretations. Some of these constitutional interpretations are very important including *Interpretation No. 499*.[6] In that interpretation, the Constitutional Court actually declared unconstitutionality of constitutional amendments, the process of which was solely controlled by the National Assembly. With its abolishment made by the constitutional revision in 2005, the National Assembly has become part of the history. I was privileged to personally join the history by having served as the last Secretary General of the National Assembly.

After such a brief note on the connections between Professor Saunders, Professor Weng, myself and Taiwan's constitutional developments, now I would like to sincerely welcome Professor Saunders to Taiwan and introduce her to all of you. As mentioned, Professor Saunders serves as a member of the Academy of Social Sciences in Australia. She has been involved in many constitutional engineering projects and published many articles. It is impossible to enumerate them one by one. Her publication focus has been largely on the areas of federalism, constitutional making, constitutional theory, comparative constitutional law, administrative law, and law on democracy, Professor Saunders also served as President of International Association of Constitutional law in 2003-07. It is thus really our greatest

4. The text of ROC Constitution and its Additional Articles are *available at* http://constitution.president.gov.tw/en/law.htm (last visited Jan. 11, 2009).

5. *See* Yeh, *supra* note 1; and *see also* Jiunn-Rong Yeh, *Constitutional Reform and Democratization in Taiwan: 1945-2000*, in TAIWAN'S MODERNIZATION IN GLOBAL PERSPECTIVE 55-57 (Peter Chow ed., 2002) (analyzing Taiwan's dynamics of constitutional change over the last fifty-five years along the line of the national drive for modernization and political democratization).

6. *J. Y. Interpretation No. 499* (2000/03/24). For the text in English, *available at* http://www.judicial.gov.tw/CONSTITUTIONALCOURT/EN/p03.asp.

pleasure to have her with us today. This lecture is jointly sponsored by the Weng Yuan-Chang Foundation and named as Weng Yueh-Sheng Lecture in honor of the contributions made by Professor Weng to academic researches of public laws in Taiwan. Hence, today's event is particularly valuable and deserves our special note. Now let us give a big applause for Professor Saunders in welcoming her speech on constitutional law in Asia. Thank you.

II. SPEECH
ASIAN CONSTITUTIONS IN COMPARATIVE PERSPECTIVES

PROF. CHERYL SAUNDERS

1. Observations on the Development of East Asian Constitutionalism

Professor Weng, Professor Yeh, Professor Chang, colleagues, ladies and gentlemen. I am greatly honored to be invited to deliver this lecture, and even more so because it is named after Yuan-Chang Weng, who has been such a distinguished and important figure in the constitutional development of Taiwan.

I was originally invited to give this lecture as one of a series on East Asian constitutionalism, organized in preparation for the third Asian Constitutional Forum to be held in Taiwan next year. It was suggested that I should examine the features or characteristics of Asian constitutionalism and compare it with what was described as classical constitutionalism. Otherwise, I was given a carte blanche and at the time I chose a somewhat general title: Asian constitutions in comparative perspective.

When the time came to think a little more deeply about the topic I encountered several dilemmas. The first is the result of my own limitations: inevitably, my knowledge of Asian constitutionalism lacks the depth and innate understanding of those who live here and bring an "insider's" point of view. That said, I follow constitutional developments in Asia as closely as possible for a range of reasons. My own country, Australia, is part of the same region, on at least one view of the geography. Asia is such an important part of the world that its constitutional experiences cannot be ignored by comparative constitutional lawyers if they are to have adequately understanding of their subject. On this, I fully share the conclusion of Professor Wen-Chen Chang in her recent article on constitutional making, contending that the constitutional experience of Asia offers models of constitutionalism from which global constitutional lawyers can learn.[7] And

7. Wen-Chen Chang, *East Asian Foundations for Constitutionalism: Three Models Reconstructed*, 3(2) N.T.U. L. REV. 111, 134 (2008).

in any event, constitutional developments in Asia are extraordinarily interesting in their own right. One of many examples is the constitutional transformation of Indonesia since the fall of Suharto: a case study of Asian constitutionalism in its own right. One dimension of it that initially attracted my attention is the incremental approach to constitutional change in Indonesia which has taken place in four main stages over successive years since 1999[8] and which is similar in many respects to the approach that was taken in Taiwan.[9] More recently, the establishment of the Indonesian Constitutional Court as a new specialist constitutional court in the region has been an important development that both contributes to and draws on world constitutional experience, including precedents from the Constitutional Court of Taiwan.

The fact remains, however, that for all my interest, my knowledge of developments here is that of an observer rather than of a participant.

The second dilemma with which I was confronted in considering my topic for today is that I am not persuaded that Asian constitutionalism is significantly more different from so-called classic constitutionalism than that of many other parts of the world, outside the relatively small ranges of states from which classic constitutionalism was derived. And these, of course, also differ significantly from one another. I accept the points made by Professors Yeh and Chang about the differences between the "transitional constitutionalism" that accompanied the democratic transitions of the end of the twentieth century and the constitutionalism that emerged from the eighteenth century enlightenment experience in North America and Europe.[10] As they themselves show, however, this new wave of constitutionalism was not confined to Asia and many of the distinguishing features they identify in their article are shared with other parts of the world.

There is of course a great debate presently underway in the field of comparative constitutional law about whether constitutions are converging or whether they are deeply diverse as a result of history, tradition, culture, ideology, social and economic contexts. Whatever the answer to this question, it is the same for Asia as for the rest of the world. Asia is a rich field for comparative constitutional law because of the diversity of its

---

8. Andrew Ellis, *The Indonesian Constitutional Transition: Conservatism or Fundamental Change*, 6(1) SINGAPORE J. OF INT'L & COMP. L. 116, 116-53 (2002); Tim Lindsey, *Indonesian Constitutional Reform: Muddling Towards Democracy*, 6(1) SINGAPORE J. OF INT'L & COMP. L. 244, 244-301 (2002); Jared Levinson, *Indonesia's Odyssey: A Nation's Long, Perilous Journey to the Rule of Law and Democracy*, 18(1) ARIZ. J. OF INT'L & COMP. L. 103, 103-40 (2001).

9. Jiunn-Rong Yeh & Wen-Chen Chang, *Path Dependency or Collective Institutional Choice? Modeling Constitutional Changes in the Context of Democratic Transitions*, 45 WENTI YU YANJIU, 1-31 (2006) (in Chinese with English abstract) (providing four models of constitutional change for new democracies).

10. Jiunn-Rong Yeh & Wen-Chen Chang, *The Changing Landscape of Modern Constitutionalism: Transitional Perspective*, 4 (1) N.T.U. L. REV. (2009).

peoples, history, religions, ideologies and legal systems, which is reflected in the variety of institution, principles and practices of Asian constitutional systems. The constitutional arrangements of Asian states necessarily have much in common, through shared experiences that are in part the consequences of geographical proximity. Nevertheless, it is as rash to generalize about constitutions within Asia as is to draw broader constitutional comparisons between Asia and states elsewhere.[11]

In exploring these questions also it is necessary to accept that world constitutionalism is not static, but is constantly undergoing change, if only of an evolutionary kind. One of the consequences of the frenetic burst of constitutional activity at the end of the 20th century and the beginning of the 21st century has been a more obvious than usual degree of experimentation with both the substance and processes of constitutionalism, expanding and thereby changing our understanding of making, changing, structuring and using constitutions. Even classic constitutionalism is not what it was, and it continues to evolve.

My solution to these two dilemmas is to use the opportunity presented by this lecture to outline to you a project in which I am presently engaged on the light that national Constitutions throw on underlying values in countries across the world. I should add that the project has nothing to do with the now outdated debate on Asian values, although it may indirectly have relevance to that as well. My purpose is to develop the ramifications of the project for our understanding of comparative constitutional law. The project presently involves about fifteen countries, but in the course of the lecture I will make particular reference to the constitutional experience of two of the Asian states so far participating in it, Japan and India. It goes without saying that I would be most interested in your observations on the project, both generally and from the standpoint of your understanding of East Asian constitutionalism.

2. *Rationale*

The project began as an inquiry into the question of whether there are universal values that are recognized in all or most countries of the world or whether there exists what some ethicists in United States call a diversity of values.

As the project has proceeded, it has become necessary to identify more precisely the kind of values that are of interest. We have used for this purpose the notion of ultimate values, in the sense in which British

11. *See generally* GRAHAM HASSELL & CHERYL SAUNDERS, ASIA-PACIFIC CONSTITUTIONAL SYSTEMS (2002).

philosopher Joseph Raz has used the term: values with dimensions that "explain and justify the judgment that it is good in itself and which are such that their own value need not to be explained or justified by reference to other values."[12] Raz contrasts these with "instrumental" values that derive their value from the character of the consequences they are likely to have or can be used to produce.[13] Drawing and maintaining this distinction is something of a challenge in the field of constitutional law.

There is no doubt that there are many disciplines through which the inquiry into ultimate values might be pursued. This particular project pursues it through what we have described as the "lens of national constitutional jurisprudence." As the project initially was conceived, we sought to answer three questions. Firstly, do national Constitutions recognize particular values, in their texts, the associated jurisprudence or in other relevant sources, which include scholarly writings or important legislations? Secondly, what priority do national constitutions give these values? And thirdly, to what extent is there congruence or consistency between constitutional jurisprudence and constitutional practices as far as these values are concerned?

This project has multiple purposes. On one level, it is simply another way of investigating the extent to which there are universal values, as an inquiry of some interest in its own right in a variety of disciplines. On another level, it provides a basis for testing the assumptions on which international human rights law rests, and considering its possible future directions in conditions of globalization. At a third level, however, the project has the potential to make a contribution to the discipline of comparative constitutional law. This has become an important dimension of it and it is the dimension that I will develop in more detail today.

One of the most burning questions in comparative constitutional law is the extent and significance of the convergence of world constitutional systems.[14] In one sense, constitutional systems are obviously converging. But every constitutionalist knows enough about his or her own system to be acutely aware of the complexity and nuance that lie beneath the surface, raising the possibility that convergence, such as it is, may literally be only skin-deep.

This is not simply an academic debate, although it also is that. It goes to the question of how well states understand each other, both generally and in

---

12. *See* JOSEPH J. RAZ, THE MORALITY OF FREEDOM 200, 204-05 (1986); and also *see generally* JOSEPH RAZ, THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY (1979); JOSEPH RAZ, ENGAGING REASON: ON THE THEORY OF VALUE AND ACTION (1999).

13. *Id*. at 204-05.

14. Jiunn-Rong Yeh & Wen-Chen Chang, *The Emergence of Transnational Constitutionalism: Its Features, Challenges and Solutions*, 27 PENN STATE INT'L L REV. 89 (2009) (illustrating that to a certain extent the convergence of world constitutional systems is happening and forming part of transnational constitutionalism).

a host of transnational contexts. These include, for example, the making of treaties and situations that call for the application of the principles in private international law. The techniques of comparative constitutional law assist a state to make an informed decision, when it borrows or adopts an institution or a principle from another state, in the course of making and developing its constitutional arrangements. And they are also relevant to the integrity of the reasoning of courts when they refer to constitutional experiences of others in the course of adjudication, whether for the purpose of applying foreign law, adopting foreign law in their own circumstances or rejecting foreign authority as unsuited to their needs.[15]

The project on global values has the capacity to make a contribution to this debate. On the one hand, it highlights the extent to which, at least in the context of human rights, there is convergence both in constitutional texts and in the institutional arrangements through which rights are protected. Initially, this was the result of borrowing, by newly emerging states from the most common ancestral constitutional systems: the United States, the United Kingdom, France or Germany or (usually) a combination of two or more of them. More recently, other states have also been models for this purpose including India, Canada and South Africa. But more typically now, convergence is occurring through the incorporation into domestic constitutional arrangements of international human rights norms, which by definition leads to at least textual convergence. I note in passing that an associated feature of this development is a slowly emerging tendency of constitutional instruments to instruct or authorize courts to consider international or foreign law.[16] If this continues, it may strengthen apparent convergence. It may also encourage the assumption, already strong in the United States that references by courts to international and foreign law are illegitimate in the absence of explicit authorization, with the stultifying consequences for the spread of knowledge and ideas.

At the same time, however, the project aims to try to penetrate beneath the surface of the constitutional text, by inquiring into the similarity or difference of the underlying values of the societies in question. A finding that the values are similar would suggest that the collective constitutional

15. CHERYL SAUNDERS, COMPARATIVE CONSTITUTIONAL LAW IN THE COURTS: IS THERE A PROBLEM? (forthcoming 2009); and *see also* Cheryl Saunders, *The Use and Misuse of Comparative Constitutional Law*, 13 IND. J. GLOBAL LEGAL STUD. 37 (2006); and Vicki Jackson, *Constitutional Comparisons: Convergence, Resistance, Engagement*, 119 HARV. L. REV. 109, 109-27 (2005).

16. For example, Sec. 39(1) of the South African Constitution prescribes that when interpreting the Bill of Rights, a court, tribunal or forum (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) must consider international law; and (c) may consider foreign law. Also Art. 9(1) of the Constitution of the Republic of Hungary states that the legal system of the Republic of Hungary accepts the generally recognized principles of international law, and shall harmonize the country's domestic law with the obligations assumed under international law.

systems of the world take the shape of an egg. Broadly comparable values at one end are reflected in broadly comparable rights instruments at the other; In between, however is a thick sphere of difference in the institutional and other arrangements that are a product of national context over time. At the other extreme, a finding that values are diverse would suggest that the shape of world constitutionalism is closer to that of a pyramid, with convergence at its tip offering a somewhat misleading picture of the depth of the diversity underneath, including diversity in values.

3. *Methodological Concerns of Comparative Constitutionalism Project*

The project is attended by all sorts of methodological difficulties. I will mention some of the principal difficulties here, not only to avert some of the questions that I am sure are already forming in the minds of the commentators but because exploring them sheds additional light on the field of comparative constitutional law.

The first methodological issue concerns the choice of the countries. At the moment, fifteen countries are involved in the project: Australia, Canada, Finland, France, Germany, Hungry, India, Iran, Israel, Japan, People's Republic of China, South Africa, United Kingdom, United States and Venezuela. They represent a reasonable mixture in terms of geography, culture, stage of developments and legal system. For the moment at least, despite the need for caution in choosing subjects for comparison in constitutional law, this is the methodological issue that concerns me least. Of course, a finding that some or all values are shared between these fifteen countries could not be conclusive as to the existence of global values but would be merely a step on the way to a wider inquiry. A finding that values are not shared between these fifteen countries, however, would be conclusive, all else being equal.

The second issue, also relatively easily handled, concerns the definition of a Constitution, for the purpose of the analysis of constitutional jurisprudence. This problem has two dimensions. The first is presented by the states that have no formal constitutions, of which United Kingdom and Israel are examples, or by states that have a constitution that is so thin that it is not useful for the purpose. Australia is a good example of the latter, because it has no constitutional bill of rights. In the case of countries of this kind, it is necessary to find indications of values in other legal sources including general case law and important legislation. The second dimension of this difficulty concerns the relationship between the Constitution and private law. In states where there is no written Constitution, there is only an obscure dividing line between the two, and private law is necessarily drawn

into the sphere of constitutional law, at least to some degree. States with formal constitutions are divided between those that give the Constitution only vertical effect and those in which the Constitution has at least some horizontal effect, touching the sphere of private law. These difficulties stem from different conceptions of a constitution. For the purposes of the project, they are left to each of the authors to manage, by making clear and justifying the approach that they propose to take.

The third and more difficult methodological issue concerns the selection of the values themselves. At the outset, the participants were given a range of values to consider, drawn largely from the ethics literature. They were invited to add others that occurred to them from the perspective of their own national jurisprudence.

As a result of this exercise, the following values are listed in the template for the project: Fairness/Justice; Equality; Honesty/Integrity; Community; Family; Freedom/Liberty/Independence; Responsibility/ Accountability; Compassion/Caring; Respect/Tolerance; Life; Security; Learning/Education; Dignity; Environment; Participation/Inclusion (the last as an attempt to capture the ultimate value inherent in democracy). Those that have, so far, been mentioned but excluded either on the grounds that they are not values in the relevant sense, or because they do not emerge regularly enough in the context of constitutional jurisprudence are Democracy; Secularism; Property; Diversity/Multiculturalism/Pluralism; Privacy; Religion/spirituality; and Peace. Individual contributors are welcome to continue to include them if they wish.

I will not take you through the cumbersome process of analysis that led to the decisions to retain each of the included values for general consideration. But let me mention some of it, to give you some understanding of the nature of the exercise

The group reflected for a long time over whether to include the values of learning/education, environment and security. There is no doubt about the significance of each of them, nor about their presence in constitutional jurisprudence, although the environment is a relative newcomer in this respect. In each case, however, they tend to be instrumental values, in the sense of being justified by reference to other values rather than having the status of ultimate values themselves.[17]

A second issue that attracted considerable debate concerns the value of human dignity. This was not included in the original list but it has now been added. As Man-Yee Karen Lee noted recently, writing with reference to the concept of human dignity in Asia,[18] human dignity can be traced back to

17. *See* JOSEPH J. RAZ, THE MORALITY OF FREEDOM 200, 204-04 (1986).

18. Man-Yee Karen Lee, *Universal Human Dignity: Some Reflections in Asian Context*, 3(1) ASIAN J. OF COMP. L. artilce 10 (2008), *available at* http://www.bepress.com/asjcl/vol3/iss1/art10

ancient times, and is familiar to international law but it is a relative newcomer in constitutional discourse. Nevertheless, judged by the early outcomes of this project, its use is increasing rapidly, both in constitutional texts and reasoning of courts, as another illustration of the interaction of international and constitutional law. Among the countries in our study, there is explicit reference to human dignity in the Constitutions of Germany, Hungary, India, Israel, Japan and South Africa. Human dignity features also in the reasoning of courts in France, Venezuela and United Kingdom and it is an increasingly familiar concept in the jurisprudence of countries elsewhere in the world as well. For all of these reasons, its inclusion seems obvious, as quintessentially a fundamental value. On the other hand, while many of the values under consideration in this project are susceptible to different understandings, human dignity is singularly malleable, taking much of its meaning from what Lee, quoting Barak describes as "daily, lived human experiences." The question for the project is whether human dignity is a fundamental value in its own right or whether it is a means of encompassing a range of other values in times that are throwing up new moral challenges to societies, of a variety of kinds.

The third illustration of the difficulties involved in the selection of values emerged from the division between participants over the question whether honesty/integrity and responsibility/accountability were values of their respective constitutional systems. To an Australian, where these values have high priority, this was a surprising insight. One possible explanation is that the division of view marks the line between states with clear and strong human right instruments and those that, like Australia, rely on rights protection through institutional arrangements. If this explanation is not correct, the difference may reveal a significant difference of view about these values between the states concerned.

A final set of methodological issues raises the core question of the relationship between values and constitutional jurisprudence. I will mention two: the first goes to process, and the second to the substance of the values themselves.

The project necessarily assumes that constitutional jurisprudence offers some insight into the underlying values of a national community. The justification for this assumption is obvious as far as the text of the Constitution is concerned. The justification for looking also at decisions of the courts lies in the reality that judges are parts of their own communities and that their reasons will, to some degree, speak to their community, in terms that it understands and accepts.

(arguing that a cross-cultural perspective requires putting aside ethnocentrism and exploring the convergence of views from different belief systems and examples from Confucianism and Islam may provide insights on how human dignity is understood and realized in various Asian contexts).

Such an analysis is, however, complicated by differences in adjudicative styles. One basic difference lies between countries in the civil law and common law traditions, the former with what traditionally was a sparse, deductive style of reasoning and the latter with its expansive elaboration of the reasons that led the court to its conclusions. This difference is eroding, in another example of institutional convergences, as many civil law courts with a constitutional jurisdiction adopt a more discursive style of reasoning. Other differences remain, however, between courts that are willing to play a relatively creative role in adapting Constitutions to changing circumstances, for which discussion of values can be a useful tool and those that are more formalist and likely to eschew talk of values. The evidence of this project is that courts are becoming increasingly willing to use values in constitutional analysis. Not all of them do so, however, and the reasons for those that do not require a certain amount of deconstruction, with all the hazards that involves.

The question of substance concerns the challenge of disentangling values from the manner in which they are put into effect in a constitutional system. The difficulty here is to draw a line between the differences in understanding of a value and differences in the application of a value. The line is significant, because in the former case the value may nevertheless be shared but in the latter case the values may differ in kind.

This issue rises in relation to a number of examined values, of which I will give several examples. Liberty typically is understood in the United States and other Anglo-Saxon common law countries as negative liberty or freedom from restraint. In many states in the civil law tradition, however, of which France serves as an example, liberty also includes the freedom that is achieved through the law, or as a result of a positive act that has the effect of enhancing freedom. Is the value of liberty nevertheless shared, or are these different conceptions? A second example draws attention to different understandings of equality in different states. For some, it involves formal equality, while for others it requires substantive equality. This can also be understood as the difference between civil and social equality. Is equality nevertheless a shared value?

Human dignity is a further, obvious example. If it is a value (and in my view it is), it is employed differently in different constitutional states depending upon ideology, culture and context. Do such variations which may lead to significant differences in doctrine, suggest that the value is not shared?

Still another example concerns the claimed values of accountability and responsibility. In some states, they are principally understood as institutional values. In others, however, they are understood as –or in addition to– values attached to individuals in a sense that individuals have duties that must be

performed within constitutional states. Again, the same question arises: is the value the same, with different applications or are two distinctive values at stake?

One final example of a different kind also stems from the interaction between values and constitutional jurisprudence. It raises the question of what to do about religion or the values that religions are supposed to reflect, or as the original list of values put it "spirituality." In most cases, it is difficult to identify such values through the lens of constitutional jurisprudence due to a constitutional commitment to secularism in some form. However, it does not necessarily mean that the values do not exist in the societies in question. It may mean merely that a project of this kind is not the best way to elucidate them.

The purpose of this part has been to identify some methodological issues that arise in the course of our project and, through them, to throw light on some of the challenges of comparative constitutional law. In the next part, I move to the results that are beginning to emerge, with particular reference to two of the Asian jurisdictions.

4. *Outcomes*

The project is still in a relatively early stage. Draft papers have been written for most jurisdictions, but now being revised in the light of discussions at a meeting of the participants last month.

Tentatively, however, the emerging results are these. At least on a superficial level, a number of values are shared. Fairness, justice, equality, freedom/liberty and education appear in almost all of these systems. Family and/or community and life appear in most. Dignity also appears in many.

Some of the values are understood quite differently in different systems, however. In other words, they differ not merely in their application in concrete cases, which is to be expected, but in the conceptualization of the values themselves. This is particularly true of justice/equality, freedom, human dignity and responsibility. This may suggest that the values are different, even though the same terms are used.

Thirdly, the priorities between values differ between states. The constitutional jurisprudence of most states does not accord specific priority to values or for that matter to rights, but prioritization can be deduced from what courts and sometimes legislatures say and do. The value of human dignity is foundational in many although not always to the extent that limitation is impossible. In some systems community values variously described, including equality, general interest or public order are more likely to trump absolutely liberty than others. Courts often refer to values of democracy in interpreting and applying rights provisions. On one view, this

represents the recognition of democracy as a value. On another, it is a natural institutional response from a body in the position of a court.

It appears, therefore, that there are significant differences between states that do not necessarily go to the values themselves certainly affect the meaning and use of values and the priority accorded to them. Relevantly for present purpose, the Asian states are not particularly distinctive in this regard. The jurisprudence of Japan and India reflects a wide range of values commonly held by states across the world, overlaid by a rich layer of country-specific constitutional principles and practices that are the product of context, history and experience.

In the case of Japan for example, the principal values identified from constitutional jurisprudence are equality, justice and in particular due process, including a measure of substantive due process; freedom in the sense of negative liberty; responsibility in both the institutional and individual senses; respect and tolerance as a derivation of individual autonomy; life; education; and pacifism. The value of family/community emerges indirectly; the author of the Japanese paper notes an ongoing debate as to whether 'community' should find a place in the constitutional text or whether the respect for communal values should be beyond the control of law (and, by inference, beyond the limits of this project). In terms of priorities, the noted willingness of the Japanese Supreme Court to play an active judicial review role has been explained in term of deference to democratic process, thus arguably giving weight to a value of another kind: democracy, participation or legitimacy.[19]

India offers a remarkable contrast in many, although not necessarily all respects. Values identified as being significantly include justice –social, distributive as well as substantive–, freedom in the context of due process, mutual respect and tolerance in context of minority rights, life, democracy, human dignity and the environment. The value of life in particular has been used to justify a range of rights, thus playing a role that elsewhere might now be assumed by human dignity, which it encompasses. Life includes the amenities of living; culture and heritage; and rights to freedom from exploitation in various ways.[20]

---

19. Yasuo Hasebe, *Constitutional Borrowing and Political Theory*, 1 INT'L J. CONST. L. 224, 224-43 (2003) (investigate the reasons for the failure of Japanese constitutional borrowing to achieve its intended goals and propose a possible direction for change); *see also* Yasuo Hasebe, *The Supreme Court of Japan: Its Adjudication on Electoral Systems and Economic Reforms*, 5 INT'L J. CONST. L. 296, 296-307 (examining the role of the Japanese Supreme Court in relation to electoral systems and economic rights and arguing that academics in Japan should change their conception of democracy when criticizing the task of the court).

20. The Constitution of India grants every Indian citizen Right to Equality, Right to Freedom, Right against Exploitation, Right to Freedom of Religion, Cultural and Educational Rights and the Right to Constitutional Remedies for the enforcement of the aforesaid rights. For India Constitutional text in English, *available at* http://www.servat.unibe.ch/icl/in00000_.html (last visited Jan. 11, 2009).

The Indian basic structure doctrine assists to a degree in determining priorities, identifying unity and equality as principles that cannot be changed even by the process of constitutional amendment. However, the experience of India also suggests that priorities in relation to rights, have changed over time, as the directive duties have been elevated by the Supreme Court to a degree of significance on a par with justiciable rights.[21]

5. *Tentative Conclusions*

The project began with the goal of testing claims about global values. Whatever its usefulness for that purpose, it also contributes in several ways towards understanding of comparative constitutional law. The work that has been done so far draws attention to the emergence of values discourse in the constitutional texts and jurisprudence of a widening range of states. It provides a basis for comparison of how and why values are used and of the sources from which Constitution makers and judges derive them (or appear to derive them). It identifies another species of underlying difference between the constitutional arrangements of states, in the meaning and use of values and in the priority accorded to them. Early results shows that, broadly speaking, the relevant fault line for this purpose lies between states that emphasize individualism and those that place greater weight on the individual in society. But this conclusion points to a spectrum rather than a dichotomy, and the distribution is not necessarily coexistent with particular areas of the world.

While it is still early days, the project presently seems to be leading to a conclusion that there are some common values but that sometimes they are understood in a variety of ways and that in any event they may be accorded different priorities. If this is indeed the final conclusion, it may be more nuanced than those seeking universal values expected but it is useful nonetheless, not only for the purposes of cross-cultural understanding but also for the development of international law and the interpretation and application of international legal rules.

Whatever the final outcome, it will not resolve the debate over the convergence and diversity of national constitutional systems, although a finding that underlying values are substantially similar would be regarded as favouring the former view. Over the decades and in some cases centuries of during which the states of the current world emerged, each state has developed distinctive constitutional arrangements through which values are given effect. Typically, these consist of an amalgam of institutions, principles

21. *See generally* SURYA NARAYAN MISRA ED., CONSTITUTION AND CONSTITUTIONALISM (1999).

and rules that are interwoven and independent. At one level there has been notable convergence; notably, in the adoption of judicial review. Even here, however, different styles of judicial review can be discerned, not least in the two genres of concentrated and diffuse judicial review, both of which operate throughout the world, including this region. But convergence, such as it is, has been counterbalanced in recent times by renewing constitutional inventiveness, in the face of opportunity or necessity. The new roles played by some courts in emerging democratic systems, to which Professors Yeh and Chang refer, is an example of this kind. For the comparative constitutionalist, the challenge of a contextual understanding of each other's constitutional systems remains.

The outcome of this project has some indications for certain constitutional practices including transnational dialogue between judges. A finding that certain values are similar but their meanings and applications differ could inform the ways in which judges make use of the jurisprudence of others. In practice, however, the impact of this may be slight. Judges already tend to rely instinctively on the reasons of jurisdictions with which they regard their own state as having the most in common. And the practice is already established whereby cases from other jurisdictions are distinguished, on the basis that the society has a different understanding of shared values or accords different priorities to them. Cases dealing with conflicts between freedom of speech and the interest of individuals in their reputations as an attribute of dignity are a familiar example of this kind.

There is one final question about whether an identification of shared values, if any, is the end of the story. If they have been correctly identified, values should be enduring. This project suggests, however, that the meaning of values, their priority and their application may be dynamic. There is some evidence, for example, that priorities have shifted, at least in the short term, in the face of the threat of terrorism. Values may be satisfied differently over time: the value of justice in the eighteenth century was satisfied by conditions that are not acceptable today and today's conditions may not be satisfactory tomorrow. Emergent problems cast values in a new light and require them to play a somewhat different role. Consider, for example, the impact of abortion, euthanasia, organ transplant and human cloning on the values of life and human dignity. Finally, as the reference to human dignity reminds, there are dimensions of interactions of values and national constitutional systems that are likely to be influenced by transnational interactions, with the usual mixed results in terms of convergence and innovation.

To conclude, I would like to thank you again for having me here in Taiwan. I was reminded upon my arrival that this is my first time here. I very much hope this would not be the last. I must thank you all for your

hospitality and for listening so attentively to this incomplete and somewhat complicated story. I hope it has been of some interest and I look forward to your comments.

III. COMMENTARY

Professor Jiunn-Rong Yeh:

Thank you so much. Professor Saunders started it with a claim that her talk would not be concerned with Asian values. It is however ended up with a gigantic system of values and discourses. From my perspective, it is certainly very interesting. This speech brings a new horizon of constitutional discourse. Before our discussants enter into the discussion, my impression is that this talk is in a way very post-modern. Modern constitutionalism was developed as an effort trying to divert vague ideologies or values into rights, principles and legal interests protected by constitutions which rely further upon constitutional courts to render interpretations in a scientific way. The project that Professor Saunders has been involved is to this point post-modern that it discusses values and systems of values and even tries to build up a hierarchical order or framework of values. If constitutional discourses identify the roles of values in a comparative view, it is –in my opinion– a new horizon for constitutional researches and builds up a new landscape for further constitutional debates and discourse.

We have three discussants. The first is Professor Wen-Chen Chang, the primary working force for this event and a colleague of mine at College of Law, National Taiwan University. The second commentator is Professor Nien-Tsu Nigel Li from Soochow University. Professor Li is a very famous lawyer who places quite significant focuses on constitutional lawyering. We also have Professor Chao-Chun Lin. He has taught in Soochow University but now moved to National Taipei University, and we thus have more university representations today due to his move. Thank you, Professor Lin. Now let us have our discussants. We will begin with Professor Chang.

A. PROF. WEN-CHEN CHANG

I really enjoyed the talk that Professor Saunders gave us this morning. The following remarks are some immediate reflections and primarily tailored to the Asian context. In the beginning of her lecture, Professor Saunders observed that Asian constitutional developments shared must of the similarities with the world while there was no doubt that certain some particular features also existed in the Asian context. Thus, I would like to take up the challenge to apply the comparative project of values, in which

Professor Saunders and her colleagues were engaged, to the Asian context and examine whether there are any particular difficulties or complex implications. The project of Professor Saunders looked only Japan and India among Asian states, but now I would like to add Taiwan, South Korea and other countries into the inquiry.

One of the methodological difficulties her project faced was how constitutions, constitutional developments and constitutional jurisdictions would be defined. Professor Saunders elaborated such a difficulty in terms of how to examine "constitutions" if states do not have a written constitution or only have a very thin constitution. This difficulty, in my view, would be even much more apparent in Asian constitutions, since incremental constitutional developments have been undertaken by many Asian states in their progress of constitutional changes. As Professor Saunders indicated, Indonesia had undergone four stages of constitutional developments and established a Constitutional Court that begun partaking significant roles in constitutional developments. In such rather dynamic and increment constitutional changes, it would be extremely difficult for any researchers to understand and even analyze values underlying those changing dynamics. Sometimes the dynamic of incremental constitutional changes may involve the making or amending of quasi-constitutional statutes. In Japan, for example, although the Constitution remains unchanged since 1946, a great deal of quasi-constitutional legislation has rendered more dynamics into constitutional practices. The electoral reform in the mid 1990s was a perfect illustration,[22] which certainly changed some of profound values in the Japanese constitutional system such as political equality and democracy.

Judicial decisions provide another layer of constitutional dynamics into the picture. For example, in both South Korea and Taiwan, decisions of the Constitutional Court have played very significant roles in pushing forward constitutional changes over time.[23] Take the value of human dignity that Professor Saunders discussed earlier for example. The Constitution of Taiwan does not contain a human dignity clause, but in a landmark constitutional decision, *Interpretation No. 603*, the concept of human dignity was referred in identifying the right of privacy, information privacy and decision-making autonomy.[24] Having said that, to what extent and in what ways the Court has included human dignity into part of the Constitution remains unclear. In South Korea, not long ago, the Constitutional Court

22. This legal change was also litigated in the Court, *see* Case to seek invalidity of election, 1999 (Gyo-Tsu) No. 8, Nov. 10, 1999.

23. *E.g.* Wen-Chen Chang, *The Role of Judicial Review in Consolidating Democracy: the Case of Taiwan*, 2(2) ASIA L. REV. 73 (2005).

24. *J. Y. Interpretation No. 603* (2005/09/28). For the text in English, *available at* http://www.judicial.gov.tw/CONSTITUTIONALCOURT/EN/p03.asp.

rendered a decision that recognized certain forms of unwritten constitution as a part of the Constitution that could not be changed without formal constitutional revisions.[25] In this case, the Capital of Seoul was defined as a constitutional custom whose change requires a formal constitutional amendment. Here constitutional sources are even extended to custom and practices whose underlying values are even more difficult to discern. Still, when a constitutional text cannot be a full representation of constitutional sources, it seems inevitable that we must add up more dynamics into our analysis. In the case of Japan, we even need to look into legislative dynamics loaded with constitutional functions. Yet this addition of more dynamics that seems inevitable in most Asian states would render a great deal of complexity into the research inquiry.

My second reflection is perhaps related to the earlier remark made by Professor Yeh with regard to whether this lecture is spoken with a rather postmodern tone. For at least the past decade, many Asian states have experienced profound transformations into new constitutional democracies, and a great deal of judicial efforts involved in them. In this very process, what has been reflected upon in transformative judicial decisions, statutory enactments, and even lawyering discourse was really a set of languages typically reflective of classical legal concepts of rule of law, democracy, rights, freedoms, transparency, and due process. Rights discourse, instead of values, has been the primary legal language. For, facing transitional contexts, lawyers and scholars would be reluctant to or even restrained from using the languages of values. Instead, they preferred to use instrumental concepts, formalistic legal reasoning and legal language in order to further constrain courts and judicial processes for the benefits of their legal struggles. Moreover, with a great deal of efforts involving constitutional or institutional reforms, languages about institutions rather than values would be deployed, and it has never been easy to see through institutional undertaking and discern their underlying values, some of which might be very unclear, in direct or implicit conflicts, or had already been compromised.[26] Even if some consented values did exist behind the veil of institutions, they would have to be discerned and understood from their very complex contexts. This is the second challenge that I think would lie ahead if the comparative project of Professor Saunders would be to apply into a much larger Asian context.

---

25. The Relocation of the Capital City Case, 16-2(B) KCCR 1, 2004 Hun-Ma 554 (consolidated), Oct. 21, 2004. For the text in English, *available at* http://english.ccourt.go.kr/ (last visited Jan. 11, 2009).

26. WEN-CHEN CHANG, TRANSITION TO DEMOCRACY, CONSTITUTIONALISM AND JUDICIAL ACTIVISM: TAIWAN IN COMPARATIVE CONSTITUTIONAL PERSPECTIVE (JSD Dissertation, Yale Law School, 2001).

I also would like to discuss about the value of human dignity. This year celebrates the sixtieth anniversary of the Universal Declaration of Human Rights (hereinafter UDHR) that was made in 1948 at the United Nations. The UDHR represented the very first legal institutional effort to embody the value of human dignity, though its wording appeared only in the preamble but not in the provisions. When the drafters discussed about the entire document in New York, a leading Chinese philosopher from mainland China was among them.[27] The drafting process and its discussions were reflective of such transformative efforts that universal concepts and values would be introduced on a transnational scale. A wide range of multicultural contributions from Asia, Latin America and Africa were involved very early on. In this very perspective, perhaps we must say that convergence had already been taking place much long ago, and what we are doing today is merely to rediscover those earlier consented concepts and values. It was once debated sixty years ago, and we must now consider or reconsider how much convergence or divergence we are now compared with then.

This brings to my last point about "time," a very important point in comparative studies. It is very often in comparative studies that time factor is neglected in their methodological consideration, and that comparative studies are done as if all cases were merely frozen in time. But for some rapidly changing contexts, such as most Asian countries, political institutions and their underlying values at time one may be very different from those at time two, and the two different time points are in themselves perfect cases for comparative studies in terms of changing institutions and values. Often we travel across a variety of countries for perfect comparative cases, but in reality perhaps most perfect comparative cases are to be discovered in the same country at different times. Thus in any comparative study, we should be reminded of such a time factor and make clear what time point of country A or country B that is in our comparison. To most Asian countries, this time factor may be much more relevant and intense if compared to western or advanced countries.

East Asia or Asia is a fast-changing area which provides rich and complex contexts for comparative studies within and beyond. It is of great importance for comparative studies to take this region into account to both enrich the discipline and expand the research horizon. My remarks drawn from some of Asian constitutional experiences are an invitation for Professor Saunders and her project to join in this regional academic pursuit. With that, I shall conclude my comments. Thank you.

---

27. For the detailed discussion of the drafting process and the discussions in which the Chinese philosopher was participating, *see* MARY ANN GLENDON, A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS (2001).

Professor Jiunn-Rong Yeh:

Thank you, Professor Chang. This is an interesting time comparison argument about Asian constitutionalism. *Certainly Interpretation No. 603* is a landmark decision, where the Constitutional Court declared unconstitutionality of the national finger-print system because of its violation of information privacy as Professor Chang stated. Next we will have Professor Li as the second commentator. Professor Li, please.

B. PROFESSOR NIGEL NIEN-TSU LI

I am very honored and pleased to participate in this lecture. I would like to thank Professor Saunders for sharing her project with us. It is a very intriguing and ambitious project in comparative studies of constitutional law. In comparative studies, you identify convergence and divergence of constitutionalism, which is really one of the most significant issues in comparative studies. Interestingly however, if there is no divergence, there would be no basis for any comparative studies, which is seemingly not the case since we are still trying to see some convergence and conduct comparative studies. This paradox explains why we are on the one hand trying to see if there is any identifiable world constitutionalism, while on the other hand witnessing varying degrees of constitutional developments and having doubts as to whether there is any world constitutionalism.

In the project, Professor Saunders emphasized the life of national constitutionalism. National constitutionalism is another good label for the project. You have nationalism on one hand and constitutionalism on the other. Constitutionalism may represent a common language. However, nationalism may indicate divergence. The project that Professor Saunders is currently engaged in is about the comparative study of values. Without a doubt, values are very important, and that is why the study of values is the ultimate goal of the project. Professor Saunders has identified fifteen constitutions and tried to evaluate different kinds of constitutional jurisprudence in the course of exploring values in their constitutional developments. She also made a selection of values, ultimate or fundamental values on the one hand and instrumental values on the other.

As a discussant, I am more interested in raising questions like a student. For me, the presentation led to the following questions. First is about nationalism versus constitutionalism. When we talk about values as well as the study of national constitutionalism, it is interesting to ask whether the value of nationalism is higher than that of constitutionalism. This has been a constant question in my mind for many years or at least for the years that I am a constitutional practitioner, a dilemma or even a struggle. It is equally

important to ask whether human rights are of greater value than sovereignty in the discourse on constitutionalism. When we talk about global constitutionalism, we see this divergence in the name of national labels. Professor Saunders identified fifteen constitutions and obviously fifteen samples of national jurisprudence. While constitutionalism may be the common language, the fifteen national labels indicate divergence. Thus I am very much intrigued in terms of how these two sets of different emphases would be resolved in the project.

My second question is whether constitutionalism itself is a value, and whether it should also be included in the list of values in the project of Professor Saunders. This of course triggers the question of what the final end or final value is for having a constitution. Is it not a very important value to be on the list or is it already a self-evident or steady value in the name of the project? Is it an ultimate value or just an instrumental value? Obviously, everyone in the beginning may think that constitutionalism must be an instrumental value because it is for achieving higher goals. However, procedural law is certainly not only for procedure but for some substantial end-goals, and there is even some substantive component of due process of law. Thus, the question about whether constitutionalism is just an instrumental value or in fact a part of ultimate values is still worth contemplating. The question that must follow is what constitutionalism is. If we do not have any common language in understandings of constitutionalism, we would not gather here. It is a type of understanding that transcends borders. We all know what constitutionalism is although when we come to talk about it, we may have a debate about its definitions and cannot stop arguing. We all know what constitutionalism is because the common understanding of constitutionalism helps this type of conversation and dialogue but it cannot (and need not) eliminate differences. There are many intriguing questions like why every nation has a constitution, whether constitutionalism itself is an ultimate value, and why some countries that do not have written constitutions are still seen as having constitutionalism. Some countries identified as having a thin constitution still can be considered having an enormous amount of constitutional practices.

Professor Saunders identified Australia as within the category of having a thin constitution. Another question of mine is whether France would be considered are of those that have a thin constitution. There is no list of human rights in the French constitution, which is nothing but a map for organization of the government. There might be other factors besides the constitutional text, which include practices, constitutional culture and what lie behind it due to the duration or history of French constitutionalism.

The last question is what metrics for measuring values are utilized in your project. This question concerns the selection of jurisdictions. I believe

there must be some standards of measurement for you to come up with those fifteen jurisdictions. Maybe they are based on population? From what I can tell, most jurisdictions you selected are big countries with large populations. Surely population itself is a very important factor. There may be some other factors such as the size of the land, the life or the history of constitutions or time factor. But population seems not the factor due to which the People's Republic of China (hereinafter PRC) was selected since the life of the Constitution there is not very long. The current PRC Constitution was adopted in 1982 and has been amended several times in recent years.[28] Its lifespan is comparatively short. On the list provided by Professor Saunders, other examples of long and enduring constitutions and enduring shared values are mentioned. It seems to be that the life of constitutions should be an important factor in the selection process if we are trying to explore ultimate values that underlie enduring constitutions.

Here I come back to my first dilemma, that is, whether nationalism or constitutionalism is more important. The reason why I ask this question is partly because Taiwan is not on the list. At this very moment in my mind, nationalism comes first, then constitutionalism. However, on the other hand, if we really think constitutionalism is an ultimate value, I think in your study you may need to pay some attention to jurisdictions which are not on your list but are still of great importance. As Professor Chang mentioned, this year is the sixtieth anniversary of the UDHR, and Chief Justice Weng also reminded us that this year we are celebrating the sixtieth anniversary of constitutional interpretations under our Constitution. Sixty year represents some enduring shared values. Our constitution –albeit with a rather tragic course– still is one of the oldest constitutions in the world. It has a life longer than the French Constitution and the German Constitution. It was born in the same year as the Japanese constitution and produced many good examples as accumulated wisdom of shared constitutional values.

Professor Jiunn-Rong Yeh:

Indeed, a great deal of wisdom lies behind decades of constitutional developments. Our last discussant is Professor Lin, please.

C. PROFESSOR CHAO-CHUN LIN

Thank you very much. Professor Yeh. Based upon the very illuminating lecture of Professor Saunders this morning, my remarks are divided into

28. The constitution of the People's Republic of China was adopted in 1982. It was revised several times in 1988, 1993, 1999, and 2004. For the text of the constitution and constitutional amendments, *available at* http://servat.unibe.ch/icl/ch00000_.html (last visited Jan. 11, 2009).

three points. The first point is concerned with what seems to be a trend of textual convergence among different constitutional systems that Professor Saunders indicated at the beginning of her talk. At the end of the lecture, Professor Saunders also mentioned that it seems for this project the most important task is to study the contextual understanding of different countries' systems. However, these two things are both relevant and interconnected. Professor Saunders must use this basis of context to understand any particular country or particular constitutional text. For example, the United States constitution, to protect freedom of speech, emphasizes that the Congress shall not make no laws to restrict freedom of speech. But we should qualify what "no law" refers to. I think this is very relevant particularly in understanding the relationship between the text and the context in Asian constitutions. Take Taiwan's Constitution for example. In most articles concerning the bill of rights, it uses very simple words or terms to specify the context of any particular rights. Therefore, it is very difficult to grasp the whole picture if you ignore contexts or forget to compare various texts.

My second point is relevant to the first. In some countries, you cannot find even most important values in the Constitution and sometimes values may be specified in different ways or even be translated into different kinds of obligations. For example, in Taiwan, we inherited traditions influenced by Confucianism, and thus we emphasize that people should be loyal to their parents. But in our Constitution, we do not prescribe that parents have the rights to ask their children to be loyal to them. Instead, we prescribe that children have obligation to be loyal to their parents.[29] I have never seen any case relevant to obligations of children sent for adjudication by the Constitutional Court. Thus, this particular way of value articulation would not be easily "discovered" by researching constitutional texts, judicial decisions or even constitutional jurisprudence. As Professor Saunders discussed methodological difficulties, I very much share these concerns and believe much greater cautions is warranted especially when researching values of non-western countries.

Thirdly, the whole project does not emphasize the importance of institutional designs in different countries. I think that not only the text of a constitution but also decisions of different constitutional courts should be referred to. It is relevant to particular designs of judicial review, i.e. the concrete or the abstract one, and the result would be different. And at times legislative materials may be involved in such inquires. For example,

29. Chin-Chin Yi & Bernhard Nauck, *Gender, Marriage and Family Support in East Asian Families*, 54(2) CURRENT SOCIOLOGY 155-63(2006); Arland Thornton & Thomas E. Fricke, *Social Change and Family: Comparative Perspectives from the West, China and South Asia*, 2(4) SOCIOLOGY FORUM 746-80 (1987).

Interpretation No. 392 was critical to our reform of criminal procedures, which reinterpreted the Article 8 of Taiwan's Constitution.[30] In the past, we allowed prosecutors to detain suspects, but the Constitutional Court rendered the practice as unconstitutional and changed the system. Thus, I have the sense that in researching values underlying any constitutional jurisdiction, one must look beyond constitutional texts and look deeper at specific and perhaps even constantly changing contexts. These are my remarks. Thank you.

IV. CONCLUDING REMARKS

PROF. JIUNN-RONG YEH

Before we conclude this lecture, I would like to exercise my privilege as a Chair to have some concluding remarks. Certain concerns that may link to the study of values need to be addressed. As constitutional lawyers in Taiwan, we are trying to fight against rule by values. In traditional Confucianism, there exist many values. The past Chinese dynasties represented as the regime in that a king ruled the country by values. Ancient Confucianism adopted eight values which included Chung, Hsiao, Jen, Ai, Hsin, Yi, He, Ping, and four more other values, Li, Yi, Lien, Hcih, all kinds of values before the birth of modern constitutionalism. Rule by values is very risky because values are defined by power. Consequently, in the context of Asia, constitutional scholars like me for example, would be very reluctant to be engaged in value discourse. On the one hand, we do believe there exist similar features of constitutional developments in this area. On the other hand, however, we are rather restrained in linking such commonality to any value discourse as we have been fed up with the discourse of Asian values or Asian relativity made by authoritarian political leaders such as Kuan-Yew Lee, ex- Prime Minister of Singapore. In order to argue against the discourse of Asian values, ideas and institutions built upon liberal constitutionalism are mostly favored and being greatly utilized in the process of democratic transitions. In discussing Asian values, it is really important to take notice of who is talking, authoritarian leaders such as Kuan-Yew Lee or the people. When those authoritarian leaders argue that values such as family or community should stay above liberty or private interests, they often manipulate values of family, community or even national interests as great excuses for suppressive measures.

Through the years, many constitutional courts have been fighting hard

30. *J. Y. Interpretation No. 392* (1995/12/22). For the text in English, *available at* http://www.judicial.gov.tw/CONSTITUTIONALCOURT/EN/p03.asp.

to protect liberty and rights guaranteed in their constitutions. It is true that some of constitutional jurisdictions began to talk about values but that invited a great deal of risk and should not be underestimated. When you open up value discourse constitutionally, certain historical reflections and cautions must be exercised. If we push Asian constitutionalism a little bit further, the real issue is that Asia is such a diverse area. It is more diverse than any part of the world and certainly more diverse than Europe and America. From Russia to Jakarta, you see language barriers, not to mention vastly different cultures and ethnic groups. It is a very troubled area. It is certainly very risky in terms of finding their common values or even seeking one form or anther of Asian constitutionalism. At the same time, however, due to democratic transitions in this region, many began to emphasize the importance of Asian constitutionalism as exemplified in South Korea, Taiwan, Japan, Indonesia and perhaps Thailand. Yet we must exercise cautions so as not to build up walls in the globe. The project and topic of Professor Saunders reconfirm the current situation, convergence as well as divergence, which represent the reality. This topic is so important, and we have so much more to learn from the world and must work hard to provide valuable examples and theories for global digest.

REFERENCES

Beer, L. W. (Ed.). (1992). *Constitutional Systems in Late Twentieth Century Asia*. Seattle: University of Washington Press.

Carozza, P. G. (2008). Human Dignity and Judicial Interpretation of Human Rights: A Reply. *European Journal International Law*, 19(5). 931-944.

Chang, W. C. (2001). *Transition to Democracy, Constitutionalism, and Judicial Activism: Taiwan in Comparative Constitutional Perspective*. Unpublished JSD Dissertation, Yale Law School.

____ (2005). The Role of Judicial Review in Consolidating Democracy: the Case of Taiwan. *Asia Law Review*, 2(2), 73-88.

____ (2008). East Asian Foundations for Constitutionalism: Three Models Reconstructed. *National Taiwan University Law Review*, 3(2), 111-142.

Chaskalson, A. (2002). Human Dignity as a Constitutional Value. In D. Kretzmer & E. Klien (Eds.), *The Concept of Human Dignity in Human Rights Discourse* (pp. 133-144). Springer.

Eckert, J. (2002). *Roots of Human Dignity in German Law*. In D.Kretzmer & E.Klien (Eds.), *The Concept of Human Dignity in Human Rights Discourse* (pp. 41-54). Springer.

Ellis, A. (2002). The Indonesian Constitutional Transition: Conservatism or Fundamental Change. *Singapore Journal of International and Comparative Law* , 6(1), 116-153.

Glendon, M. A. (2001). *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights*. Random House Trade Paperbacks.

Green, S. G. (2007). Human Dignity and Law. In J. Malpas & N. Lickiss (Eds.), *Perspectives on Human Dignity* (pp. 151-156). Springer.

Hasebe, Y. (2003). Constitutional Borrowing and Political Theory. *International Journal of Constitutional Law*, 1, 224-243 (2003).

____ (2007). The Supreme Court of Japan: Its Adjudication on Electoral Systems and Economic Reforms. *International Journal of Constitutional Law*, 5, 296-307.

Hassell, G. & Saunders, C. (Eds.). (2002). *Asia-Pacific Constitutional Systems*. Cambridge University Press.

Jackson, V. (2005). Constitutional Comparisons: Convergence, Resistance, Engagement. *Harvard Law Review*, 119, 109-127.

Jemielniak, J. (2002). Just Interpretation: The Status of Legal Reasoning in the Continental Legal Tradition. *International Journal Semiotics of Law*, 15(4), 325-335.

Jordan, D. K. (1986). Folk Filial Piety in Taiwan: The "Twenty-four Filial Exemplars. In W. Stole. (Ed.), *The Psycho-cultural Dynamics of the Confucian Family: Past and Present* (pp. 47-112). Seoul: International *Cultural* Society of Korea.

Klein, E. (2002). Human Dignity in German Law. In D. Kretzmer & E. Klien (Eds.), *The Concept of Human Dignity in Human Rights Discourse* (pp. 145-160). Springer.

Kretzmer, D. (2002). Human Dignity in Israel Jurisprudence. In D. Kretzmer & E. Klien (Eds.), *The Concept of Human Dignity in Human Rights Discourse* (pp. 161-178). Springer.

Lee, M. Y. K. (2008). Universal Human Dignity: Some Reflections in Asian Context. *Asian Journal of Comparative Law*, 3(1), Article 10, *available at* http://www.bepress.com/asjcl/vol3/iss1/art10.

Levinson, J. (2001). Indonesia's Odyssey: A Nation's Long, Perilous Journey to the Rule of Law and Democracy. *Arizona. Journal of International and Comparative Law*, 18(1), 103-140.

Lindsey, T. (2002). Indonesian Constitutional Reform: Muddling Towards Democracy. *Singapore Journal of International and Comparative Law*, 6(1), 244-301.

McCrudden, C. (2008). Human Dignity and Judicial Interpretation of Human Rights. *European Journal International Law*, 19(4), 655-724.

Misra, S. N. (Ed.). (1999). *Constitution and Constitutionalism in India*. A.P.H. Pub. Corp.

Peerenboom, R. (2006). *Human Rights in Asia: A Comparative Legal Study of Twelve Asian Jurisdictions, France and the USA*. Routledge.

Raz, J. J. (1979). *The authority of Law: Essays on Law and Morality*. Oxford University Press, USA.

____ (1986). *The Morality of Freedom*. Oxford University Press, USA.

____ (1999). *Engaging Reason: on the theory of value and action*. Oxford University Press, USA.

Saunders, C. (2006). The Use and Misuse of Comparative Constitutional Law. *Indiana Journal of Global Legal Studies*, 13, 37-76.

____ (2007). Comparative Constitutional Law in the Courts: Is There a Problem? In J. Holder & C. O'Cinneide (Eds.), *Current legal problems 2006* (pp. 91-127). Oxford University Press.

Thornton, A. & Fricke, T. E. (1987). Social Change and Family: Comparative Perspectives from the West, China and South Asia. *Sociology Forum*, 2(4), 746-780.

Yeh, J. R. & Chang, W. C. (2006). Path Dependency or Collective Institutional Choice? Modeling Constitutional Changes in the Context of Democratic Transitions. *Wenti Yu Yanjiu*, 45, 1-31 (in Chinese).

____ (2009). The Emergence of Transnational Constitutionalism: Its Features, Challenges and Solutions. Pennsylvania *State International Law Review*, 27, 89-124.

____ (Forthcomming 2009). The Changing Landscape of Modern Constitutionalism: Transitional Perspective. *National Taiwan University Law Review*, 4(1).

Yeh, J. R. (1997). The Cult of Fatung: Representational Manipulation and Reconstruction in Taiwan. In G. Hassall & C. Saunders (Eds.), *The People's Representatives: Electoral Systems in the Asia-Pacific Region* (pp. 23-37). Allen & Unwin Academic.

____ (2002). Constitutional Reform and Democratization in Taiwan: 1945-2000. In P. Chow (Eds.), *Taiwan's Modernization in Global Perspective* (pp. 47-77). Praeger Publishers.

Yi, C. C. & Nauck, B. (2006). Gender, Marriage and Family Support in East Asian Families. *Current Sociology*, 54(2), 155-163.