

# Roundtable

## **Asian Constitutionalism at Crossroads: New Challenges and Opportunities**

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## INTRODUCTION

Constitutionalism has spread all over the world including many parts of Asia. Democratic elections have been periodically held and judicial review exercised by courts. There is no doubt that constitutionalism has taken firm ground in Asian soil. The recent economic downturns and political turmoil in some parts of Asia, however, have posed great challenges or even threats to the ensuing development of constitutionalism. On September 25-26, 2009, National Taiwan University College of Law held the third Asian Forum for Constitutional Law entitled "Asian Constitutionalism at Crossroads: New Challenges and Opportunities." The last general session was devoted to the discussions on the development of Asian constitutionalism, its definitions, directions, and even its much debated features. The speakers who led the discussions include Professor Albert Hung-Yee Chen from University of Hong Kong, Professor Jong-Sup Chong from College of Law, Seoul National University, Professor Yasuo Hasebe from Faculty of Law, University of Tokyo, Professor Cheryl Saunders from Melbourne Law School, Professor Kevin YL Tan from Faculty of Law, National University of Singapore, and Professor Jiunn-Rong Yeh from College of Law, National Taiwan University.

### I. REMARKS BY PANELISTS

#### **PROF. CHERYL SAUNDERS**

The purpose of this session is to allow us to hear final reflections on the development of Asian constitutionalism from panelists as well as the audiences. There are two primary purposes of this final extended session. The first is to offer an opportunity for further thoughts and ideas emanating from this two-day conference, which may carry us forward in an intellectual way. The second is to enable us to consider the future potential of this forum. How can we sustain this scholarly network in Asia and further develop it so that we benefit both individually and collectively?

There are a number of questions on my mind, which I would like to briefly raise with you. The first is prompted by the three phases of constitutionalism suggested by Professor Jiunn-Rong Yeh: traditional, transitional and transnational.<sup>1</sup> Do these phases, and especially the last,

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1. Jiunn-Rong Yeh, *The Emergence of Asian Constitutionalism: Features in Comparison*, 4(3) NTU L. REV. 39, 41-44 (2009); Jiunn-Rong Yeh & Wen-Chen Chang, *The Changing Landscape of Modern Constitutionalism: Transitional Perspective*, 4(1) NTU L. REV. 145, 145-76 (2009); Jiunn-Rong Yeh & Wen-Chen Chang, *The Emergence of Transnational Constitutionalism: Its Features, Challenges and Solutions*, 27 PENN STATE INT'L L. REV. 101 (2008).

accord with contemporary constitutional experience? What are the implications of such a trajectory for our discipline, if it is indeed taking place? Secondly, what is the relation between this categorization of constitutionalism and the useful notion of a constitutional tipping point elaborated by Professor Victor V. Ramraj in his presentation to the Forum?<sup>2</sup> Thirdly, to what extent is the Asian constitutional experience distinctive? To what extent is Asian constitutional development understood elsewhere and, conversely, how might it influence global constitutional law?<sup>3</sup> Fourth, to the extent that Asian constitutional experience, or the experience of particular Asian polities is distinctive, how can this best be explained and understood? In particular should it be attributed to historical, legal, structural, ideological or economic factors or a combination of any or all of them?<sup>4</sup> Fifth, is it possible to identify a dominant conception of a Constitution in Asia as a framework for limiting or, alternatively, for empowering the state? Finally, recalling a fascinating issue raised by Professor Cho on the first day of the conference,<sup>5</sup> to what extent are constitutional theories universal? Does truly global comparative constitutional law demand that attention be paid to the underlying theories as well?

I would like to stop now in order to encourage our panelists to reflect on these or other issues. I will open the floor to discussions later. Let us begin with Professor Hasebe.

*Professor Yasuo Hasebe:*

Thank you, Professor Saunders. Before I begin with my final reflection, I would like to say that these have been really incredible and amazing couple of days and I learned a great deal from the sessions, especially from Professor Borwornsak Uwanoo's remarks and Professor Keun-Gwan Lee's morning presentation,<sup>6</sup> which taught me, not only about other countries' law or laws at the transnational level but also how Japanese law is seen from outside.

In Professor Jiunn-Rong Yeh's keynote speech, he points out as a

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2. Victor V. Ramraj, *Constitutional Tipping Points: Sustainable Constitutionalism in Theory and Practice* (Sept. 25, 2009) (unpublished manuscript), <http://asianforum2009.tw/web/modules/news/article.php?id=3>.

3. Roundtable, *Asian Constitutions in Comparative Perspectives*, 4(1) NTU L. REV. 186, 186-211.

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

5. Hong Sik Cho, *Liberal Democracy in State of Emergency: Seen by Standing on the Shoulders of Carl Schmitt*, 4(3) NTU L. REV. 55 (2009).

6. Borwornsak Uwanoo, *Economic Crisis and Political Crisis in Thailand: Past and Present*, 4(3) NTU L. REV. 141 (2009); Keun-Gwan Lee, *From Monadic Sovereignty to Civitas Maxima: A Critical Perspective on the (Lack of) Interfaces Between International Human Rights Law and National Constitutions in East Asia*, 5(1) NTU L. REV. 155 (2010).

common characteristic of East Asian constitutionalism and traditional constitutionalism, I quote, “a thin understanding of a liberal constitutional foundation upon which states, societies and individuals are defined.” This further leads to his second point that in constitutional case law, East Asian constitutional courts defies what the so-called Asian value discourse has been advancing. In my view, these arguments are congruent with my strong view that the very core of constitutionalism is the same all over the world; there is no specifically Asian conception of constitutionalism.

Anywhere and anytime, constitutionalism basically tries to provide a framework for fair and impartial social cooperation between people with various, incompatibles and sometimes even incommensurable worldviews and cultures. And this fact, I daresay “fact,” would also explain why there has emerged a convergence of constitutions these days, the phenomenon Professor Saunders eloquently described;<sup>7</sup> although I am not sure if Professor Yeh and Professor Saunders agree with my maybe controversial interpretation or misinterpretation of their theses.

Finally, I would like to express my sincere gratitude towards the organizers of this Forum: Professor Jiunn-Rong Yeh and Professor Wen-Chen Chang. Thanks again for their great accomplishments and achievements with the Forum.

*Professor Cheryl Saunders:*

Thank you, Professor Hasebe. Professor Chong, please.

*Professor Jong-Sup Chong:*

First, I would like to thank National Taiwan University for hosting this forum, especially expressing my appreciation towards organizers Professor Jiunn-Rong Yeh and Professor Wen-Chen Chang. Out of these two days in this conference, I have learned something exceptional, for instance, abundant varieties of constitutional knowledge. As Professor Jiunn-Rong Yeh mentioned traditional, transitional, transnational constitutionalism and Professor Victor Ramaj from Singapore pinpointed constitutionalism in combination with political, social, and economic realms.<sup>8</sup> Out of all options we may need to ask again: what is constitutionalism? In addition, for so many kinds of democracies being established after a worldwide trend of democratized transitions, what comes next?<sup>9</sup> In this conference, three fairly

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7. Cheryl Saunders, *Towards a Global Constitutional Gene Pool*, 4(3) NTUL REV. 1 (2009).

8. Ramraj, *supra* note 2.

9. See generally BRUCE ACKERMAN, *THE FUTURE OF LIBERAL REVOLUTION* (1992); JUAN LINZ & ALFRED STEPAN, *PROBLEMS OF DEMOCRATIC TRANSITION AND CONSOLIDATION: SOUTHERN*

important issues are raised: firstly, the definition of constitutionalism; secondly, the future prospects of democracies; and last but not the least, the correlation between the two. When it comes to modern Asian developments, we cannot ignore the achievement of constitutionalism and democracy.

Twenty years ago, we launched a transition to constitutionalism in Korea, and today we proudly announce its success. In the early stages of constitutional developments, most scholars praised the Constitutional Court of Korea in divergent degrees. Recently, however, some scholars began considering if judicial powers have been excessively exercised by the Constitutional Court.<sup>10</sup> For example, the ultimate harmonization between the constitutional court and the legislative body is deliberated as the most complicated but fundamental means lying between constitutionalism and democracy.<sup>11</sup>

As you have heard, my colleague Professor Jong Cheol Kim discussed the separation of powers in the Constitutional Court of Korea and explained how justices attempted to unravel political rivalries through judicial review.<sup>12</sup> It is certainly important to encourage the development of constitutionalism in a newly democratized nation. Nevertheless, we must figure out the balance between constitutionalism and democracy. Similar disputes seem also on a rise in Taiwan,<sup>13</sup> which may be worthy of future debates and researches.

Moreover, we cannot bypass human rights while meditating upon constitutionalism in relation to democracy. Protection of human rights is considered as a core principle in the rule of law, and scholars are expected to incorporate such criteria into constitutions and further justify the righteousness as such protections are viewed as the underlying discourse of liberal individual rights. On the other hand, serious debates are conducted over liberalism and communitarianism.<sup>14</sup> Undoubtedly, the definition and characteristics of human rights would transform if societies were to associate

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EUROPE, SOUTH AMERICA, AND POST-COMMUNIST EUROPE (1996); IAN JEFFRIES, *THE COUNTRIES OF THE FORMER SOVIET UNION AT THE TURN OF THE TWENTY-FIRST CENTURY* (2004).

10. *THE FIRST TEN YEARS OF THE KOREAN CONSTITUTIONAL COURT: 1988-1998*, at 15-16 (The Constitutional Court of Korea ed., 2001); Youngsol Kwon, *Acquisition of Statehood and Constitutional Framework in Korea* (Sept. 25, 2009) (unpublished manuscript), <http://asianforum2009.tw/web/modules/news/article.php?id=3>.

11. Jong-Sup Chong, *Political Power and Constitutionalism*, in *RECENT TRANSFORMATIONS IN KOREAN LAW AND SOCIETY* 11 (Dae-Kyu Yoon ed., 2000).

12. Jongcheol Kim, *In the Name of "Customary Constitution": A Dangerous Usurpation of Legislative Power by the Korean Constitutional Court* (Sept. 25, 2009) (unpublished manuscript) <http://asianforum2009.tw/web/modules/news/article.php?id=3>; see also TOM GINSBURG, *JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES* (2003).

13. See, e.g., Wen-Chen Chang, *The Role of Judicial Review in Consolidating Democracy: The Case of Taiwan*, 2(2) *ASIA L. REV.* 73, 86-87 (2005).

14. See generally, MICHAEL WALZER, *THE SPHERE OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY* (1984); *LIBERALS AND COMMUNITARIANS* (Stephen Mulhall & Aadm Swift eds., 1996).

with communitarianism. We need to carefully contemplate on human rights with respect to our traditions. Furthermore, we need to weigh the costs of such rights as Professor Cass Sunstein once raised similar concerns in the United States.<sup>15</sup> One may ask: are we ready and can we actually afford the costs of rights protections? In this time, I would like to add this issue—the costs of human rights—to the discussion of constitutional developments in Asian countries.

In the welcoming remarks, I mentioned the need in pursuing our own constitutionalism as constitutionalism and democracy in different Asian jurisdictions have evolved in somewhat different contexts in respective societies. The Japanese scholar Tokujin Mastudaria, for example, emphasized the importance of judicial review in justifying the image of democracy under public inspection.<sup>16</sup> Professor Ming-Siang Chen from Taiwan also indicated that judicial power possessed by the Constitutional Court have somewhat intervened in political divisions.<sup>17</sup> To conclude, the developments of constitutionalism and democracy are dependent upon different contexts of different countries.

*Professor Cheryl Saunders:*

Thank you, Professor Chong. Now I would like to invite Professor Chen to give us his reflections.

*Professor Albert Hung-Yee Chen:*

Thank you, Professor Saunders. I would like to begin by offering my congratulations to the organizers of the conference, particularly Professor Jiunn-Rong Yeh and Professor Wen-Chen Chang for their excellent works in organizing such a big yet almost perfect international conference, which in my own experiences is extremely difficult to accomplish. I understand the heavy workload required by such a forum yet everyone was utilized and comforted. Thank you very much for putting together this very important service for all of us here.

Professor Cheryl Saunders began her keynote speech by commenting on the methods, logical problems and enigmas of comparative constitutional

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15. STEPHEN HOLMES & CASS R. SUNSTEIN, *THE COST OF RIGHTS: WHY LIBERTY DEPENDS ON TAXES* (2000).

16. Tokujin Matsudaira, *Judicial Enforcement of Political Constitution: A Theoretical Study* (Sept. 25, 2009) (unpublished manuscript), <http://asianforum2009.tw/web/modules/news/article.php?id=3>.

17. Ming-Siang Chen, *Storm Center: The Role of Constitutional Court in the Process of Democratic Consolidation* (Sept. 25, 2009) (unpublished manuscript), <http://asianforum2009.tw/web/modules/news/article.php?id=3>.

law,<sup>18</sup> which I consider as very important. She revealed plentiful theories and methodologies that were developed in comparative private laws but not so much in comparative public laws. For that reason, there is much room for further researches in law and legal theory in comparative constitutional laws. Asian contexts, in particular, are most capable of offering resources to comparative constitutional law researches due to their diversities in cultures, traditions and political systems.<sup>19</sup> Participants from South East Asia, East Asia and South Asia may represent very different viewpoints in this conference.

Confucian culture, for instance, is commonly shared in East Asia, including the People's Republic of China, Taiwan, Hong Kong, Vietnam, Korea, and Japan to some extent.<sup>20</sup> On the other hand, the influence of Colonialism still remains in many parts of East and South East Asia. Korea and Taiwan both adopted Japanese rules during the colonial period. Philippines contained American legacies. Other parts of East and South Asia, such as Hong Kong, Singapore Malaysia, India and Pakistan, comprised British style.<sup>21</sup> As these once colonized nations shared subsequently equal constitutional developments to a certain extent, we can compare and contrast them in cultural heritages as well as colonial legacies.

With regard to political systems, the third wave of democratization has swept across countries such as South Korea, Taiwan, Cambodia, Philippines, Thailand and Indonesia.<sup>22</sup> Some nations took chances to contribute to the development of constitutionalism by establishing constitutional courts. In the very beginning of his speech, Professor Jiunn-Rong Yeh referred to such contribution as transitional constitutionalism, which is ultimately a project reconciling democracy, the protection of human rights and various constitutional institutions such as checks and balances from former authoritarian regimes.

Transitional constitutionalism has become essential for political, constitutional and legal developments for many Asian countries and is instructive to those that have not yet undergone democratization. Consequently, Asian countries and jurisdictions may learn a great deal from one another. Those advanced ones may improve in the project of constitutionalism along with human rights protection in/after

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18. Saunders, *supra* note 7.

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

20. See, e.g., Victoria Tin-Bor Hui, *Toward a Confucian Multicultural Approach to a Liberal World Order: Insights from Historical East Asia*, 99 AM. SOC'Y INT'L L. PROC. 413 (2005); Tom Ginsburg, *Confucian Constitutionalism? The Emergence of Constitutional Review in Korea and Taiwan*, 27 L. & SOC. INQUIRY 763 (2002).

21. See generally HASSAL & SAUNDERS, *supra* note 4.

22. See generally SAMUEL P. HUNTINGTON, *THE THIRD WAVE: DEMOCRATIZATION IN THE LATE TWENTIETH CENTURY* (1991).



democratization while late comers may benefit from the past experiences and acquire knowledge from the advanced. In this way, the newly developing ones may complete the process of constitutionalism with less time and effort. For example, constitutional adjudication by the Constitutional Court of Taiwan, also known as Judicial Yuan Interpretations, may serve as useful assets and resources for the People's Republic of China to develop its constitution in the foreseeable future. South East Asian countries possess likewise opportunities to learn from each other as well.

Finally, I would like to address Professor Yasuo Hasebe's belief in the existence of a cardinal principle along worldwide constitutionalism. I also agree on the essence of universal constitutionalism. Professor Randall Peerenboom once proposed two versions in the rule of law: a "thin" version and a "thick" version. He argues that People's Republic of China has realized the "thin" version of rule of law. However, it is still far away from accomplishing the "thick" version of rule of law, where a constitution fully protects human rights particularly regarding civil rights.<sup>23</sup> He is convinced that economic developments may aid to accelerate the evolution of constitutionalism and democracy in China. Though his theories remain controversial, it is affirmed that constitutionalism cannot be fully realized until the state economic growth reaches to a certain point of progress. Nor does this deny the probability of a universal constitutional inspiration which may be derived from the development of constitutional laws. I look forward to hearing your comments and questions. Thank you.

*Professor Cheryl Saunders:*

Thank you. Professor Yeh, please.

*Professor Jiunn-Rong Yeh:*

Thank you, Professor Saunders. First of all, I would like to thank two previous organizers of the Forum. Without their initiative for this regional cooperation, this forum would never be possible. Please allow me to formally address my sincere gratitude to Professor Jong-Sup Chong and his colleagues for the first Forum and Professor Masanori Aikyo and his colleagues in the second Forum. For the third Asian Forum for Constitutional Law 2009, we are especially grateful of your participation. It is wonderful to have all of you here to be with us, not only in Taipei, Taiwan but also in these two new buildings. Our college just moved to the two newly constructed buildings, and we are particularly pleased that all of you can join

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23. RANDALL PEERENBOOM, CHINA'S LONG MARCH TOWARD RULE OF LAW (2002).

with us in this unique occasion.

With regard to today's topic, Asian constitutionalism has always been considered as a challenging issue and a very difficult task. It is never easy to generalize all sorts of diversities with such a restricted term as Asian constitutionalism. Nevertheless, there has been certainly a compelling need for all of us here at least to begin naming and researching on "Asian constitutionalism." If you look into any comparative constitutional law textbooks, such as the wonderful volume by Vicki Jackson and Mark Tushnet,<sup>24</sup> you could hardly see any cases or constitutional developments in Asia being discussed. In these textbooks, perhaps you may have a glance at a couple of decisions made by the Japanese Supreme Court as a way to reflect some comparisons with western constitutionalism. But have you seen any sincere discussions with regard to constitutional developments taking place in Korea, Taiwan, Indonesia, Thailand or other places in Asia? More likely you have not. That is precisely the reason for all of us here to launch an initiative at least to naming or framing the understanding of Asian constitutionalism, which include divergent issues, decisions, and practices in various parts of Asia.

In addition, I would like to ask a difficult yet fundamental question: to what extent is Asian constitutionalism different or exceptional? The discourse of Asian constitutional exceptionalism often comes with the discourse of Asian values as if the latter is the only subject in Asian constitutionalism.<sup>25</sup> I disagree with such a tendency, and that is precisely why in my keynote speech I place the discussion of Asian constitutionalism in the context of traditional constitutionalism and further extended to transitional and transnational constitutionalism.<sup>26</sup> I always regard exceptionalism as a kind of relativity embedded in the traditional constitutionalism. The concept of universal constitutionalism seems to be agreed by Professor Cheryl Saunders, Professor Yasuo Hasebe and Professor Albert Chen in their respective remarks. If there is only one liberal constitutionalism with limited focus, there shall be no exceptionalism or any of relativities.<sup>27</sup> However, if one looks into historical, political or economical contingencies in the course of constitutional developments within Asian states, various kinds of relativity abound. For example, the

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24. E.g., VICKI C. JACKSON & MARK TUSHNET, *COMPARATIVE CONSTITUTIONAL LAW* (1999).

25. Michael C. Davis, *Constitutionalism and Political Culture: The Debate over Human Rights and Asia Values*, 11 HARV. HUM. RTS. J. 109. (1998); Karen Engle, *Culture and Human Rights: The Asian Values Debate in Context*, 32 N.Y.U.J. INT'L L. & POL. 291 (2000).

26. Yeh, *supra* note 1.

27. Jiunn-Rong Yeh & Wen-Chen Chang, *The Changing Landscape of Modern Constitutionalism: Transitional Perspective*, 4(1) NTU L. REV. 145 (2009); Jiunn-Rong Yeh & Wen-Chen Chang, *The Emergence of Transnational Constitutionalism: Its Features, Challenges and Solutions*, 27 PENN STATE INT'L L. REV. 101 (2008).

discourse on constitutional engineering or civil education in Asia more or less relates to divergent relativities. Within and outside Asian states, we exercise relativities based on cultures, beliefs, family values, among many others. To understand how individuals process ideas and thoughts, we should look into social, political, historical, and even colonial experiences upon which they had been shaped.<sup>28</sup> These factors are worthy of addressing not only for today, but for days to come. Perhaps constitutional lawyers in this region would be able to discuss constitutionalism in much richer, diversified and sophisticated perspectives in the future.

I would also like to provide further elaboration on transitionality in constitutionalism, which is more than a mere expansion from traditional constitutionalism. Transitional constitutionalism develops from traditional constitutionalism that began with the Magna Carta. While nations gradually establish their own fortresses among constitutionalism nowadays, their pathways are also expanding to a transitional and further transnational level. When we discuss transitional constitutionalism or transnational constitutionalism, it is not to replace traditional constitutionalism. It is much more like a river data expanded and enriched by the origin as Professor Wen-Chen Chang and I have articulated.<sup>29</sup> If this is the case, how are we going to incorporate divergent Asian experiences into this picture? Many Asian countries have undergone different eras of transitions. If you compare South Korea with Taiwan, you would notice astonishing commonality in their respective dynamics of democratic transitions. I have been conducting some researches on this issue and am feeling eager in acknowledging the striking similarities that exist in Taiwan and South Korea, not only regarding constitutional adjudication but also in the respective social structures. I recall now the moment at which Professor Chong and I discussed over divided societies and presidential system when we met in Nagoya for the second Forum. At the time we both were troubled and struggled with direct presidential election and its impact on divided societies, a delicate issue facing both Taiwan and South Korea. Starting from there, we may begin comparative constitutional law scholarship within this region. We are not comparing Taiwan's constitutional system with American one, but rather conduct comparisons with our neighboring states in Asia. We hope that constitutional lawyers in Asia would begin to look at their neighboring states' experiences seriously and carefully. In the past, constitutional law scholars in this region have relied on western constitutional laws to reflect our own practices, but starting from now, it is time for us to reflect upon more on our own constitutional experiences here in Asia.

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28. Yeh, *supra* note 1.

29. See generally Yeh & Chang, *supra* note 27.

*Professor Cheryl Saunders:*

Thank you. Professor Tan, please.

*Professor Kevin YL Tan:*

I think it is quite appropriate that the theme speaks of Asian constitutionalism at crossroads. It is interesting that it says at crossroads and not at “the” crossroads, meaning that it is not the issue of what this crossroad is, but “what” our crossroads are. We all face different crossroads in our quests for greater democracy and rule of law in our respective countries. Once you are at a crossroad, you are likely to ask the following questions: Which way am I heading towards? What path do I take? Where does it take me? I would like to reflect on these questions. In a way, comparative constitutional law is going on a long and continuing journey. It will be an engagement that will take us generations. We are only at the beginning of this particular journey.

The challenges that will confront us in this long journey can be seen at the two levels. The first level is internal and resides within our individual states; and the second one is wider, within the Asian region. Let us look at the challenges within individual states first. We have benefitted a great deal over the last two days. We have seen how states in Asia have tackled different constitutional challenges. Asian states have since 1980s moved into a new political epoch, a transition that saw many states move away from Asian despotism towards greater democracy and accountability. The journey has just begun and we constantly look for inspirations. Constitutionalism, that key mechanism for the control of state powers, has its foundation in the west. The temptation in transplanting western models is tremendous, as sovereign states in this region have also imported continental legal systems in the past.

However, this kind of constitutional transplants based on the adaptation and importation of foreign models is an extremely difficult process and much more difficult than the simple grafting of a tree for a couple of reasons. The first is that the quest for better and alternative systems of governance is also paralleled by the fact that other Asian states are also trying to find new ways of organizing the state with devices drawn from autocratic and authoritarian regimes in the region. There is a political gap in terms of state continuity and progress. The fact that states have become suddenly more vulnerable to attack, to collapse and failure have led new governments to retreat and to reemphasize their grip on the state power. The need to secure state’s survival has meant from the viewpoint of constitutional theory we see

an increasing reluctance of the state to surrender any element of control and sovereignty. This is seen with constitutional attempts on control and power.<sup>30</sup> This anxiety has very much been evident in some court decisions, particularly those of constitutional tribunals in the region, in their reluctance to overturn state decisions, with perhaps exceptions in Hong Kong, Philippines, South Korea and Taiwan. The research for the adaptation of constitutional system will continue and it will be a long, difficult and challenging one, but ultimately we will find our own way; but it will take a while.

What about the challenges within Asia itself? As Asian countries find their own constitutional barriers, ongoing conversations between scholars and practitioners of constitutional law become relevant and urgent. Asian governments are more likely to bring themselves in conformity with the practices of other Asian states rather than those drawn from western examples. The conception here is that if Asian states are able to find their own solutions to the constitutional difficulties that they face, the chances of one Asian state looking to another Asian state for possible solutions might be greater. Therefore, there is a need to expand the conversation, especially the one between constitutional scholars in Asia. What other things we can substantially do other than the proposal made by Professor Wen-Chen Chang in her opening address? Perhaps some sort of organization of constitutional lawyers, practitioners and those interested in Asian constitutionalism might be contemplated. I think this is essential not simply because we would like to show some kind of Asian solidarity but because it would provide us a very important platform to share the information. For example, it will make a great deal of difference if constitutional law professors promote the study of Asian constitutional law developments to our respective students. If we have the ability to access those Asian examples, our students would understand their region better. It is regrettable that from the viewpoint of Singapore law scholars, our students might probably know more about western constitutionalism and administrative law than constitutional or administrative laws in Indonesia, our neighbor. In fact, the pivotal judgments of Korean Constitutional Court, Taiwanese Constitutional Court, and Japanese Supreme Court have now been made available online in English. That is a wonderful resource for us, affording us the opportunity to step into this wellspring of jurisprudence that will not only keep this conversation going but enrich it as well. To this end, some kind of formal organizations might be useful. The second possibility, of course, is related to some kind of pan-Asian conversation with and engagement in international human rights, upon which various models of comparative constitutional law would be

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30. See, e.g., Uwanno, *supra* note 6 (describing recent constitutional turmoil in Thailand).

established. My own idea in how we can get away from the difficulties in comparative constitutional law methodology is to look at comparative constitutional laws from the viewpoint of problems we need to solve within our own states. We all have our own different problems and different ways in dealing with them. If we adopt a problem- or issue-based methodology,—a kind of Toynbeeian “challenge” and “response”—then we study institutions, theories, practices in a very different way across state borders. I also notice that even though the topic is stated as being constitutionalism at crossroads, almost all the papers that we are presenting relate primarily to a judiciary-centric perspective on constitutionalism. Our tasks must be extended beyond this. It might be more useful in the future to look at institutional or cultural matrix with which this scholarly conversation is to be associated.

## II. FLOOR DISCUSSIONS AND PANELISTS RESPONSES

*Professor Cheryl Saunders:*

Thank you very much, Professor Tan. I would like to thank all of the panelists for their extremely thoughtful concluding remarks. Now I would like to open the floor to discussions.

### Remarks from the floor:

Justice John Paul Stevens of the U.S. Supreme Court once said that there is only one kind of equal protection, but he was criticized by not giving sufficient consideration for as delicate and difficult as the issue of racial discrimination in the American context. In a similar vein, I agree with what Professor Yasuo Hasebe said that there is only one kind of constitutionalism as a system of legal norms. But this may render the same mistake to ignore how difficult for constitutionalists to broaden and to enhance the idea of constitutionalism in their respective countries. Therefore I think there would be various strategies for developing constitutionalism in various contexts. One thing I would like to remind all of my colleagues here is that constitutional law is the most important legal venue to allow ordinary people to have formulated with and argued for their own interpretations. If we ignore this, there may be conservative revenge to come. That was what Japan experienced some six years ago. Perhaps we may see another conservative developments also in the region.

*Professor Cheryl Saunders:*

That is a very important observation. Any of the panelists may respond to it later.

Remarks from the floor:

I totally agree that we should develop Asian constitutionalism at least in the right way that we are looking at it. While we do that, we may also be able to conduct a deeper conversation with traditional constitutionalism or western constitutionalism and gain an in-depth understanding. In this aspect, I would like to raise an issue for us here to contemplate. Usually we understand traditional constitutionalism as pretty much power-limiting or state-limiting. However, it is intriguing that in the last two centuries during which the two powers, Great Britain and United States, have built themselves into two super powers in the world while having their respective constitutionalism as embodying separation of powers as power-limiting mechanism. This reminds me of the very famous conceptual distinction between infrastructure power and despotic power. It means that nations may be weak on despotic powers but strong in infrastructure powers. It enlightens us to inquire further as to how Asian countries may utilize constitutionalism to foster infrastructure powers and suppress despotic powers.

*Professor Cheryl Saunders:*

Thank you. I think we should not underestimate this interesting perspective on restricting the power of state that is the main focus of traditional constitutional systems. In the interest of time, I shall allow one more question.

Remarks from the floor:

My question is for Professor Albert Chen. I would like to inquire about Hong Kong's enforcement of ICAC and its impacts on the practice of rule of law. Maybe this would enlighten Taiwan as both are Chinese societies. Thank you.

*Professor Cheryl Saunders:*

Now let us turn to the members of the panel to express their concluding thoughts or to respond to comments or remarks raised by the floor. Professor Hasebe, please.

*Professor Yasuo Hasebe:*

My concluding thought is very brief. That is, to say that there is one core of constitutionalism does not contradict with the observation that we there are indeed diversities out there. Partly because each society embraces its own set of various worldviews, a constitutional arrangement appropriate for one society is not necessarily so for other societies. But the core idea is still one and the same.

*Professor Jong-Sup Chong:*

Constitutionalism entails the progress of liberalizing authoritarian regimes. For example, in Korea, the Constitutional Court leans comparatively very much towards democratization. What is the constitutionalism in Korea? What would be the right direction the development of constitutionalism to take? Some states focus on democracy while others focus on the development of the society and administration. I think that we need constitutionalism to make the stability of the society while at the same time allowing democracies to prosper. In the future we all need to find the balance between constitutionalism and democracy.

*Professor Albert Hung-Yee Chen:*

I think the control of corruption is a very important element of any developing or transitional constitutional states. Particularly in many Asian societies and developing countries, corruption has happened, so there is a transition to constitutionalism with some kinds of institutional arrangement to tackle the problem of corruption. In Hong Kong, ICAC was set up in 1970s precisely because of serious corruption in government at that time. Similar problems also occurred in other jurisdictions. For example, in Taiwan and South Korea, political leaders, such as presidents, have been put on trial for corruption charges. The control of corruption is a very important test for the rule of law, and the rule of law is an important test for constitutionalism. But trying and investigating these cases also put a great deal of stress on legal authorities such as prosecutors and courts. The ongoing trial of the former president in Taiwan is a good illustration for the test of the rule of law. The judiciary must be strengthened in their independence and capacity in dealing with delicate issues like this.

*Professor Jiunn-Rong Yeh:*

I would like to mention one important contribution to the development



of Asian constitutional law which is related to Professor Cheryl Saunders. I would say Professor Cheryl Saunders was one of the first to recognize the importance of Asian constitutionalism. Some years ago she put together a conference in Katmandu addressing this important issue. Many of us here today actually had our first encounter there and began our mutual collaborations as well as friendship. That kind of contribution and spirit must continue and help us build up better networks between us all in this region.

*Professor Kevin YL Tan:*

I would just like to have a quick response to the question on one or many kinds of constitutionalism. Frankly, I am not in favor with any slogans like one constitutionalism. I think it is very dangerous if we start getting ourselves debating on these points. I believe that at the end of the day constitutionalism or constitutions are created by human beings working in the highest selves. When we think of the good and the right in the highest selves, we forge constitutions to save ourselves in case to descend to our lower and rust selves. What you infuse the constitution with, such as the rule of law, democracy, non-corruption, might be the substances of constitutionalism which would certain vary in every society.

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