

Roundtable

History and Culture: Complexities in Studying Southeast Asian Constitutionalism

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INTRODUCTION

Traditionally, Southeast Asia lacks a sense of national identity and the notion of borders. The variety of landscapes and cultural divisions in this region also makes the study of Southeast Asian constitutionalism much more difficult and complex. The College of Law, National Taiwan University, is honored to invite Professor Kevin YL Tan from Faculty of Law, National University of Singapore, to discuss cultural and historical complexities underlying the development of constitutionalism in Southeast Asian countries. Professor Tan considers the great abundance of historical and cultural legacies of this region, and uses three templates—colonialism, communism and evolution and revolution—to explain and describe the development of constitutions in this area. Three distinguished commentators were invited to join the discussion by reflecting on Professor Tan’s speech from different perspectives as diverse such as history, feminism, culture and constitutionalism, with a particular focus on Taiwan’s experience. This roundtable sheds a new light on our understanding of constitutionalism and its relationship with culture and history in Southeast Asia and even beyond.

I. OPENING REMARKS

PROFESSOR JIUNN-RONG YEH

Good morning. We are very much honored today to have Professor Kevin Tan from Singapore with us, who has been both a very successful professional historian and a distinguished professor of law in this region.

Before I introduce Professor Tan, I would like to recount a little anecdote. I first met Kevin at Yale Law School when we were both graduate students. In one of our outings with our two German classmates to Niagara Falls, we decided to cross the border into Canada, to see the Falls from the other side. However, our car was stopped at the border because of me. As a Taiwanese citizen I was required to obtain a visa to enter into Canada while my travelling companions were exempt. I did not have one. When I failed to get an “on-the-spot” visa, the four of us decided to “punish” the Canadian government by not entering into their country. As a result, they lost four visitors who could have contributed to their tourism and economy. This little story tells us a little bit about the complexity of ideas such as nationality, identity, and boundaries in our modern world and how they may impact our individual lives as well as our laws and institutions. Today, an ever-increasing flow of humans across borders aptly demonstrates the complexity of constitutionalism and the need to understand constitutionalism within various geo-political contexts. In my scholarly pursuit of

constitutional law and particularly some relativity theories, a question that often comes to mind is: Does a constitution, functioning as a working document, vary from culture to culture?

Later when I gave a seminar on the comparative study of constitutionalism in Asia, I drew on four ethnically Chinese societies for comparison. They include a very big super power, China; a very strong and vibrant small city state, Singapore; Hong Kong, which functions within “one country two system” structure;¹ and Taiwan, a country with a rather ambiguous international identity and controversial internal engagement with the issue. A comparative study of these four societies makes us think beyond the ordinary concepts of nation-state and constitutional operations. Once we cross borders, we begin to see constitutions operating in a brand-new way. This particular perspective, i.e. studying constitutional laws by taking historical contingencies and social contexts seriously, is what Kevin and I have in common in our scholarly pursuits. Instead of adopting a narrow concept of constitutions through formalistic conceptualization, we can study them through historical contexts, to see how a nation or the very concept of constitutionalism, democracy and rule of law may evolve in a society. As Kevin will show us in his lecture, it is very important for scholars operating in this era of regional integration and globalization, to cross borders and look beyond the traditional and the formal into constitutional developments. Kevin will argue that it is not easy to draw boundaries—let alone offer definitions—in an area as diverse as Southeast Asia. As scholars, we function in a world of definitions, but we should not be hindered by any of them.

Before Kevin’s speech, let me introduce the three discussants with us today. First, we have Professor Chao-Ju Chen, who is an expert in the field of feminist theory and law, legal history, and jurisprudence. Next, we have Professor Li-Ju Lee one of the leading scholars in the field of law and society; and last but not least, Professor Wen-Chen Chang, who actually coordinated this roundtable behind the scenes, and like Kevin, a student of Bruce Ackerman at Yale. Let us now welcome Professor Kevin Tan.

1. For the discussion of “one country two system” constitutional operation in Hong Kong, see HONG KONG IN TRANSITION: ONE COUNTRY, TWO SYSTEMS (Robert Ash, Peter Ferdinand, Brian Hook & Robin Porter eds., 2002) (analyzing the exceptional constitutional and administrative legal system that has been taking place in Hong Kong, based on a substantial period under Chinese rule); see also Denis Chang, *The Imperatives of One Country, Two Systems: One Country Before Two Systems?*, 37 H.K.L.J. 351 (2007).

II. SPEECH

HISTORY AND CULTURE: COMPLEXITIES IN STUDYING SOUTHEAST ASIAN CONSTITUTIONALISM

PROFESSOR KEVIN YL TAN

1. *Introduction*

Good morning Professor Yeh, esteemed colleagues, ladies and gentlemen. It is my great pleasure and honor to be here at the kind invitation of National Taiwan University College of Law. In this speech, I hope to give you a brief insight into the fascinating and complex world of Southeast Asia, and try to explain the complexities involved in the study of this region's constitutions.

First, a caveat. By using the phrase *Southeast Asian Constitutionalism*, I do not mean to imply that there is a unique beast or a distinct brand of constitutionalism in Southeast Asia as distinct from constitutionalism in some other region. There is no such beast, for one cannot speak of "Southeast Asia constitutionalism" as one would, for example, speak of "European law" or "European Community Law."

I am not an expert on the history of Southeast Asia, even though I have done some broad and sweeping work covering various countries in the region.² My specialty is the constitutional law of Singapore and Malaysia because the law of these two jurisdictions is relatively close.³ Southeast Asia comprises many countries but I shall focus on those states that make up the alliance known as Association of Southeast Asian Nations or ASEAN.⁴

The landscape varies greatly from continent to scattered islands, this huge area has seldom been seen as an entity. As a geographical entity, Southeast Asia is a very recent construct, which was unfamiliar to the world

2. E.g. Kevin YL Tan, *The Making and Remaking of Constitutionals in Southeast Asia: An Overview*, 6 SING. J. INT. & COMP. L. 1 (2002); Kevin YL Tan, *The Role of Public Law in a Developing Asia*, 2004 SING. J. LEGAL STUD. 265 (2004); and Kevin YL Tan, *From Myanmar to Manila: A Brief Study of Emergency Powers in Southeast Asia*, in EMERGENCY POWERS IN ASIA: EXPLORING THE LIMITS OF LEGALITY (Victor Ramraj & Arun Thiruvengadam eds., 2010).

3. E.g. TAN, YEO & LEE'S CONSTITUTIONAL LAW IN MALAYSIA AND SINGAPORE (Kevin YL Tan & Thio Li-Ann eds., 3d ed. 2010); KEVIN YL TAN, AN INTRODUCTION TO SINGAPORE'S CONSTITUTION (2d ed. 2010); EVOLUTION OF A REVOLUTION: FORTY YEARS OF THE SINGAPORE CONSTITUTION (Kevin YL Tan & Thio Li-Ann eds., 2009); ESSAYS IN SINGAPORE LEGAL HISTORY (Kevin YL Tan ed., 2005).

4. The Association of Southeast Asian Nations (abbreviated as ASEAN) formed on Aug. 8, 1967, is composed of ten countries including Indonesia, Malaysia, the Philippines, Singapore, Thailand, Brunei, Burma (Myanmar), Cambodia, Laos, and Vietnam. Its official website: <http://www.aseansec.org/> (last visited Sept. 18, 2010).

up to just sixty years ago.⁵ Of course in big world politics, people did not think of Southeast Asia very much. The first time the idea of Southeast Asia came about was at the military conference in the aftermath of Second World War where the British thought that they were setting up something called Southeast Asia Command.⁶ It was a very western way, or rather, English way of referring to this vast region as Southeast Asia, just as they refer to Hong Kong as being in Northeast Asia. For the term to make sense, it had to make reference to a centre, and for those who coined the phrase, continental Asia with its two most ancient civilizations, China and India were the centre. But for the people who lived in the region, I'm not even sure that they ever thought of themselves of living southeast of anywhere. Writers often referred to the region was variously as "Further India" (for the British and Europeans), "Asia of the Monsoons" or "Nanyang" (or the South Seas by the Chinese). Its inhabitants and visitors were unaccustomed to thinking of it as one general entity until World War II when "Southeast Asia" gained currency as a military and strategic concept.

Many countries of what is now considered Southeast Asia became independent only after 1945. Indonesia, the region's largest and most populous country was known as the Dutch East Indies until 1948. Cambodia, Vietnam and Laos formed part of French Indochina. The Philippines was part of America while Burma, Malaysia, Singapore and Brunei were all British possessions. Thailand, which was never colonized, was called Siam. Today, Southeast Asia is a large and diversified region, with a population larger than that of Europe, with two countries of the size and population as France, with the world's largest Muslim country, the world's busiest port, and with at least three distinct legal traditions. As Clark Neher once remarked: "[n]o comparable area of the world has such a range of geographic, ethnic, linguistic, and religious diversity as does Southeast Asia."⁷

What I propose to do first in this lecture is to offer a brief overview of pre-colonial Southeast Asia, and then to discuss three templates, which have had a significant impact on the development of constitutions in the region. I will then suggest possible ways, in which a comparative constitutional lawyer may approach the complexities of studying and gaining a better understanding of constitutionalism in the region. However, I would not

5. See generally MILTON E. OSBORNE, *SOUTHEAST ASIA: AN INTRODUCTORY HISTORY* (10th ed. 2010); THE EMERGENCE OF MODERN SOUTHEAST ASIA: A NEW HISTORY (Norman G. Owen, David Chandler & William R. Roff eds., 2004).

6. See Russell H. Fifield, *The Southeast Asia Command*, in *THE ASEAN READER* 20-24 (K. S. Sandhu et al. eds., 2003).

7. Kevin YL Tan, *The Making and Remaking of Constitutionals in Southeast Asia: An Overview*, 6 *SING. J. INT. & COMP. L.* 1 (2002); CLARK D. NEHER, *SOUTHEAST ASIA: CROSSROADS OF THE WORLD* 7 (2000).

restrict myself to law or legal institutions here, because once we started looking purely at the legal institutions, we begin running into trouble. What I was a law student in Singapore, we had few local law teachers. Many of our teachers came from England or the United States and they taught us constitutional law as if it was an adjunct to constitutional law in these various countries. So the English teachers started with Dicey⁸ and the Americans with *Marbury v. Madison*.⁹ It was very difficult for us to imagine how the constitution really worked in Singapore. After I returned from Yale Law School, I started to rethink how we should teach constitutional law from a local perspective, from the eyes of someone who lives in and with the legal system. I began with the assumption that the Constitution is to be taken seriously and should not to be trivialized. Now, it might be difficult for a lawyer to imagine why some people would regard laws as being trivial, but that is the case in some societies. Rather than dismiss this phenomenon as symptomatic of a dysfunctional legal system, we should try to understand the reasons for this state of affairs. In this respect, I looked to history to consider how our constitution system developed and what social, economic and political forces contributed to its stability, legitimacy and status.

What templates am I talking about? Some years ago, when I wrote an article explicating how constitutional orders in Southeast Asia tended to be made and remade,¹⁰ I suggested that three templates or overlays might help us understand constitutional development in the region. The first template is *colonialism*. Every country in Southeast Asia had once been under colonial domination, except for Thailand, the only one that remained neutral by cleverly playing the British against the French. The second is *communism*, quite possibly the most potent anti-colonial force between the 1930s and the 1960s. All three Indochinese states—Vietnam, Laos and Cambodia—came under communist regimes while communist insurgencies were fought in Malaysia, Singapore and Indonesia. Burma, while not communist, became a socialist military state in the end. The third template, a term I use rather loosely here, *evolution* and *revolution*, will help us understand the development of constitutions in the region.

2. *Pre-Colonial Southeast Asia: A Brief Overview*

Please allow me to begin by talking a bit about Southeast Asia's pre-colonial history.¹¹ The reason why pre-colonial Southeast Asia is

8. ALBERT VENN DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION (1959).

9. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

10. Tan, *supra* note 7.

11. See generally NICHOLAS TARLING, 4 THE CAMBRIDGE HISTORY OF SOUTHEAST ASIA (1992).

important in our examination of the place of state and law in the imagination of Southeast Asian peoples is because the idea of state itself was only very recently constructed and emerged primarily after World War II. Prior to that, there were empires with very little notion of boundary lines. Though boundaries shifted, the power of rulers in Southeast Asia did not depend on whether or not they could secure their borders. Contrary to China who built walls to draw its boundaries, the concept of borders in Southeast Asia was very fluid. This was more so in the case of archipelagic Southeast Asia. We can hardly imagine how to draw exact borders between so many islands.

Interestingly, Southeast Asia's pre-colonial past has a close link to Taiwan, where the earliest settlers in Southeast Asia primarily came. Around 45,000 years ago, the first settlers reached this region, and the Austronesian people, who formed the majority of the current populations of the Philippines and Indonesia, migrated to Southeast Asia from Taiwan about 12,000 years ago. From Indonesia, they spread to the rest of the Southeast Asian archipelago, including to the Malay Peninsula. We know little about these early peoples, except that they were exceptional seafarers, and travelled from the region to as far as Madagascar, carrying on a lucrative trade with India and beyond.

Trade also brought religions to Southeast Asia, where most original inhabitants were animists. From the 2nd to the 13th century, Hinduism and then Buddhism were the dominant religions of the region.¹² For example, we know that the *Jawa Dwipa* Hindu kingdom flourished in Java and Sumatra around 200 BCE. The Indian traders were anxious to trade with their counterparts in Southeast Asia because of their access to rich forests and maritime products, as well as with Chinese merchants. In Sumatra, a powerful Malay kingdom called Srivijaya emerged around the 7th century but was eventually absorbed into the expanding Majapahit empire, an Indianised kingdom that emerged in east Java. But the Srivijaya empire was not without challenge. Between 1010 and 1200, the Cholas of Southern India conducted regular raids into Southeast Asia, putting parts of Burma, Thailand, Malaya, Sumatra and Borneo under his influence and control. By the 13th century, Srivijaya was no more. The Majapahit empire lasted for some 200 years from about 1293 to 1500. At its peak, under Hayam Wuruk, the Majapahit empire encompassed the southern part of the Malay Peninsula, Borneo, Sumatra, Bali, parts of the Celebes, the Moluccas Islands, and parts of Western Papua, making it the biggest empire to have existed in Southeast

12. THE RELIGIOUS TRADITIONS OF ASIA: RELIGION, HISTORY AND CULTURE (Joseph M. Kitagawa ed., 2002); SOUTHEAST ASIA: A HISTORICAL ENCYCLOPEDIA, FROM ANGKOR WAT TO EAST TIMOR 282-86, 587-88 (Keat Ooi ed., 2004); ENCYCLOPEDIA OF ANCIENT ASIAN CIVILIZATIONS (Charles F. W. Higham ed., 2004).

Asian history.¹³

On mainland Southeast Asia there was the great Hindu Khmer empire, which grew out of the old kingdom of Chenla and ruled over parts of what is today Laos, Thailand, Vietnam, Myanmar and Malaysia.¹⁴ Of course, the world knows of this great civilization through the magnificent Angkor Wat (dedicated to Brahma)—the world’s largest religious building. In its heyday, Angkor, the seat of the Khmer kings ruled over the largest pre-industrial urban centre in the world. Hinduism and Mahayana Buddhism were adopted as the empire’s official religions. Further east, on the mainland there was another Indianized civilization, Champa, emerging in about the 7th century and which co-existed with the Khmer empire.

In the 11th century Islam arrived at Southeast Asia. The first ruler in Southeast Asia to convert to Islam was the legendary Phra Ong Mahawangsa, Maharaja of Kedah who took on the name of Sultan Mudzafar Shah (1136-1179) after abandoning the Hindu faith. Over the next 300 years, Islam made significant inroads into Hinduism, especially in island Southeast Asia, and its spread was catalyzed by the arrival of the famous Muslim Chinese admiral, Zhenghe. The conversion of Parameswara led to a further spread of Islam throughout the region, largely through trades and the interactions with the Hadhrami Arabs of Yemen, who claimed direct ancestry from the Prophet Muhammad.¹⁵

Peeling away the layers of history up to this point, we see overlays of empire building by Indian, Chinese and other Southeast Asian powers, the establishment of major cities and sites of worship, and each heavily influenced by Hinduism, Buddhism and then Islam in that order. While territory was important to the early empire builders, religious influence over populations was even more important. This was especially so in the riverine sultanates on the Malay Peninsula and in archipelagic Southeast Asia and had a huge influence on the ways how people thought about power and authority. Most people there defined themselves primarily as being subject and loyal to a particular ruler or religion, rather than to any particular space. For example, the power of each Malay ruler did not depend on how much land he controlled; it depended on how many people he could summon when there was a war. Therefore, Southeast Asians did not think of themselves as being settled in a particular place. They moved around, right across what we may call “borders” fluidly and easily. No passports needed.

13. *See generally* LYNDA NORENE SHAFFER, *MARITIME SOUTHEAST ASIA TO 1500* (1996); and SLAMET MULJANA, *A STORY OF MAJAPAHIT* (1976).

14. *See generally* MICHAEL D. COE, *ANGKOR AND THE KHMER CIVILIZATION* (2005).

15. *See generally* BEN SIMPFENDORFER, *SINGAPORE’S HADRAMI COMMUNITY IN TODAY’S ECONOMY* (2010); HUSSIN MUTALIB, *ISLAM IN SOUTHEAST ASIA* (2008); *see also* *THE HADRAMI DIASPORA IN SOUTHEAST ASIA: IDENTITY MAINTENANCE OR ASSIMILATION?* (Ahmed Ibrahim Abushouk & Hassan Ahmed Ibrahim eds., 2009).

Let me illustrate this point. One of the mysteries about Singapore is why it suddenly faded from view for almost 600 years after it was sacked by the Majapahit Empire in the 13th century. The Europeans, who came in the 19th century could not understand why people there had not reconstructed and rebuilt the city and carried on trading. Well, the reason was because the survivors simply moved on to another island with food and fresh water and built a new city there instead. When you have so many islands to choose from, it was really no big deal to move from one island to the next in search of a better life. The same goes for traders in pre-colonial era; if they were not satisfied with how rulers taxed or ruled them, they just packed up and left, again, no passports needed. This mentality actually continues to these days.

The idea of a state with clearly defined borders was in its infancy and it was not till the advent of colonialism in the early 1500s that the idea of clearly demarcated territorial boundaries became an increasingly accepted concept.

3. *Colonialism: The First Template*

The first template that dramatically transformed Southeast Asia was *colonialism*. Colonialism introduced into Southeast Asia the idea of modern state. Political scientists and international lawyers trace the establishment of modern states to the Peace of Westphalia in 1648, but long before that, societies in Europe had already organized themselves along loyalties based on allegiance to particular one ruler, language and culture. Even before 1648, it was clear that the Portuguese felt themselves quite different from the Spaniards, the French or the English.¹⁶ What happened with colonialism was the ossification of these divisions. Lines that were loosely drawn in Europe were carefully inked into the maps of the colonized regions of Southeast Asia.

They came to Southeast Asia for two reasons: spices and trade with China. Valuable spices made people rich very quickly, and Southeast Asia was the key gateway to China. All vessels had to sail down the narrow Straits of Malacca, out through the Straits of Singapore, or one of the narrow straits in the Indonesian archipelago, and then head northeast towards China. Of course, having traveled so long a journey, by the time the traders reached to the tip of Malayan Peninsula, they needed to rest, refill fresh water and repair ships; that is how Singapore came on the stage. In other words, the importance of Southeast Asia was magnified by the arrival of European merchants.¹⁷

16. See NICHOLAS TARLING, *IMPERIALISM IN SOUTHEAST ASIA* 45-156 (2001).

17. See *ADVENTURES AND ENCOUNTERS: EUROPEANS IN SOUTH-EAST ASIA* (J. M. Gullick ed., 1996).

At the end of the 15th century, two of the biggest naval powers in Europe, Spain and Portugal, made a deal to divide the world into two areas under the Treaty of Tordesillas (1494).¹⁸ As to exactly where the line would be drawn in Asia was never determined with certainty and it became a constant source of disputes between the two powers.

In any case, the Portuguese were the first Europeans to establish colonies in Asia. In 1509, Alfonso d'Albuquerque scored an important victory in the Indian Ocean by defeating a combined force of Mamluks, Ottomans, the Zamorin of Calicut and the Sultan of Gujarat. The Battle of Diu—this encounter was called—was significant in that the Ottomans and Mamluks, who had long dominated the trade route from Africa to Southeast Asia, left the waters of the Indian Ocean, allowing the Portuguese to dominate the trade routes for the next 100 years. This set the stage for colonial intervention in Southeast Asia.¹⁹

The Portuguese enjoyed the fruits of the labour for over a century until the Dutch captured Malacca in 1641. As Portuguese power waned in Europe, so did its empire shrink in Southeast Asia. Eventually all that was left was a small territory known as East Timor. Meanwhile, the Spanish were also active in the Philippines. Meanwhile, the Spanish were active in the Philippines, conquering it after a series of expeditions between 1525 and 1536. It captured Cebu in 1565, and by 1600, succeeded in controlling most of the Filipino archipelago with Manila as its capital.²⁰

The Dutch first arrived in Southeast Asia in 1596, and the Dutch East India Company (hereinafter *VOC*) started operating from Batavia (present day Jakarta) and determined to profit from monopolistic trade of spices, which came from the Spice Islands, or Moluccas. Because the *VOC* was far more interested in trade than in colonization, its control over Indonesia was tenuous and constantly subject to challenges. It was only until the *VOC* collapsed in 1799, leading to the Dutch Government's taking over the company's assets in 1825, that Dutch dominance in the region was exerted and extended in a statist form.²¹ Even so, some parts of the Indonesian archipelago, such as Aceh and Lombok as well as Borneo (Kalimantan), remained independent.

By the end of the 18th century, the British joined the fray with its first

18. The Treaty of Tordesillas, signed at Tordesillas on June 7, 1494, divided the newly discovered lands outside Europe between Spain and Portugal along a meridian 370 leagues west of the Cape Verde islands.

19. See A. J. R. RUSSELL-WOOD, *A WORLD ON THE MOVE: THE PORTUGUESE IN AFRICA, ASIA, AND AMERICA, 1415-1808*, at 1-57 (1993); and RONY A. KOHAR, *THE PORTUGUESE IN SOUTHEAST ASIA: MALACCA, MOLUCCAS, EAST TIMOR* (1997).

20. See LINDA A. NEWSON, *CONQUEST AND PESTILENCE IN THE EARLY SPANISH PHILIPPINES* 5-9 (2009).

21. See ROBERT PARTHELIUS, *DUTCH SHIPS IN TROPICAL WATERS: THE DEVELOPMENT OF THE DUTCH EAST INDIA COMPANY (VOC) SHIPPING NETWORK IN ASIA 1595-1660* (2010).

outpost in Penang (Prince of Wales' Island) in 1786. The outbreak of the Napoleonic wars in Europe led to a major conflict between the British and the French, and this had an immediate knock-on effect on the scramble for territory and the control of trade routes in Southeast Asia. The Dutch territories in Southeast Asia, like Batavia and Malacca, were placed under the charge of the British from 1811 to 1815 to prevent the French from annexing them. When the war ended, the territories reverted to Dutch rule, but Malacca was handed back to the British in 1824 under the Anglo-Dutch Treaty which settled their respective spheres of influence in Southeast Asia.²²

The French first arrived in Indochina in the 17th century but it was not till the end of the 18th century that they began intervening militarily in the region. By the 1860s, the French controlled substantial parts of present-day Vietnam, including Saigon and Danang. In 1862, France obtained concessions over three treaty ports in Annam, Tonkin and Cochinchina. The following year, King Norodom of Cambodia requested the establishment of a French protectorate over his country to protect it from a Siamese invasion. And by the end of 1907, the French controlled all of what comprises present-day Vietnam, Laos and Cambodia.²³

The Americans appeared in Southeast Asia after their victory over Spain in 1898. They colonized the Philippines.²⁴ On the eve of World War II, Southeast Asia was carved into several parts, the British occupied Singapore, Burma, Malaya and the Borneo territories, the French controlled Indochina, the Dutch ruled all the southern Malacca, while Portugal managed to hold on to Portuguese Timor.

Colonialism had profound effects on the legal landscape of Southeast Asia. First, the drawing of boundaries to demarcate the various spheres of influence between the Dutch, the French and the English introduced the idea of modern state to the region for the first time. People in Southeast Asia began to see themselves as owing allegiance to a particular territory. Second, each colonial power brought with it its own structure of government as well as their own legal system; both were transplanted alongside local existing indigenous legal systems, and over time supplanted them. What the common law system that Malaysia, Singapore and Brunei operate today is the heritage from the British, while the civil law system that Indonesia has is very much based on the Dutch law. Third, the introduction of transnational commerce meant that Southeast Asia was now connected to the rest of the world and a

22. See H. V. BOWEN, *THE BUSINESS OF EMPIRE: THE EAST INDIA COMPANY AND IMPERIAL BRITAIN, 1756-1833*, at 1-83 (2008).

23. Tan, *supra* note 7, at 18-19. See also STANLEY KARNOW, *VIETNAM: A HISTORY* 139-75 (1997).

24. See HAZEL MCFERSON, *MIXED BLESSING: THE IMPACT OF THE AMERICAN COLONIAL EXPERIENCE ON POLITICS AND SOCIETY IN THE PHILIPPINES* 43-74 (2001).

globalised economy making it imperative for mercantile laws to be homogenized and systematized.²⁵

Western laws replaced indigenous laws to a large extent, and when it came to trade, almost all of the foreign law was practically transplanted onto Southeast Asian soil. The seeking of fortune made property law important; the demand from the traders made contract law fundamental; and the need of maintaining order brought criminal law of the Western states to Southeast Asian lands.

Besides, all the colonial powers ruled by picking and co-opting elites; individuals they could trust, and by playing minority against majority very often. The British, for example, found out very early on that if you armed the majority, it could prove dangerous since they could resurrect and revolt against the colonizers. But if you armed a minority and deployed them as police and soldiers, you could always play the majority off against them. On the other hand, the colonizers did reserve and allocate some space for personal law that remained applicable to indigenous people. Take Singapore for example. Even though the British adopted monogamy (i.e. having only one spouse at any one time), they legalized polygamy as practiced by the local Chinese and Muslim population. In short, I would say colonialism is probably the most influential factor on our understanding of the development of constitutional ideas and institutions.

4. *Communism*

The next template I would like to discuss is *communism*. While colonialism provided the biggest impetus for state formation and its consequent constitution-making, communism fuelled the *remaking* of many of the constitutional orders in Southeast Asia. Indeed, many countries, particularly the independent Indochinese states, gained their independence riding on Communism's back. Today two of these states—Vietnam and Laos—remain communist. As an ideology, communism, with its trenchant opposition to imperialism and capitalism, provided the strongest argument against colonialism.

One of the most well-organized and effective communist parties in the region was the Indochinese Communist Party (ICP), formed by Ho Chi Minh in 1930.²⁶ Dissolved in 1945 and merged with the Viet Minh, it eventually morphed into the Communist Party of Vietnam. They defeated the French in 1954, paving the way for Vietnamese independence and the eventual withdrawal of the French from Indochina altogether. However the following

25. Tan, *supra* note 7, at 10-16.

26. *Id.* at 18-19; *see also* GEORGE S. PRUGH, *LAW AT WAR: VIETNAM 1964-1973*, at 21-27 (1975).

division of the country did not come to an end until the Vietnam War, when the communists won the war and reunited the country. A socialist style constitution was first drafted in 1959.

There was a parallel development in Laos. Immediately after Laos became part of the French Union, anti-colonial forces under Prince Souhanouvong and his communist party, aided by Ho Chi Minh's forces, attacked central Laos. Under the 1954 Geneva Agreements and the 1955 armistice, the country was divided by the pro-Vietnamese communist forces and the royalist anti-communist forces. The communists seized power completely in 1975, and Laos has to this day remained under communist rule.²⁷

France granted Cambodia its independence in 1953. King Norodom Sihanouk ruled till 1955 when he abdicated in favour of his father to form his own political party, the Sangkhum Reastr Niyum (People's Socialist Community), becoming Cambodia's first Prime Minister. Sihanouk continued to dominate politics in Cambodia until he was overthrown by his armed forces chief, General Lon Nol in a 1970 military coup. Sihanouk left for exile in China. In the meantime, Lon Nol, who was backed by the Americans, presided over an economically ruined and war-torn Cambodia from 1970 to 1975. The American bombing and the Vietnam war had spilled over into Cambodia's territory. In April 1975, the communist anti-government insurgent group, the Khmer Rouge (Red Cambodians), overthrew Lon Nol and even Sihanouk supported the rebels from his base in China. The Khmer Rouge ruled Cambodia for a terrifying three-and-a-half years till they were overthrown by Vietnamese troops on Christmas Day 1978. A new government headed by Hun Sen was established and governed with the backing of Vietnamese troops who occupied Cambodia from 1979-1989. The Hun Sen regime had to do battle with three resistance groups: the royalist FUNCINPEC, founded by Prince Sihanouk; the Khmer People's National Liberation Front (KPNLF) led by former Prime Minister Son Sann, and the surviving Khmer Rouge army and leadership. In 1991, the warring factions signed a major peace accord and invited the UN to intervene in Cambodia. The United Nations Transitional Authority in Cambodia (UNTAC) was mandated to create a neutral political environment for free and fair elections. After two years, UNTAC held general elections in May 1993, and FUNCINPEC won 58 of the 120 seats. The Cambodian People's Party (CPP) won 51 seats, the KPNLF 10 seats and the independent Moulinaka one seat. The 120-member Constituent Assembly adopted a new constitution promulgated by the reinstated King Sihanouk as Head of State. Unlike its two neighbours, Cambodia moved away from communism with

27. Tan, *supra* note 7, at 28.

the democratization process and today has a liberal democratic constitution.²⁸

Even among some Southeast Asian states, which did not eventually end up with communist governments, communism played a major role in defining statehood and ideology for them. The Malayan Communist Party (MCP) was formed in 1930 and proved to be the most potent anti-colonial political force in Malaya and Singapore until it was outlawed by the British government in 1948. Going underground, the MCP fought a 12-year war with the British in Malaysia and Singapore, and the war was euphemistically called “the Emergency” by the government.²⁹ When the Emergency was declared over in 1960, a draconian piece of legislation, the Internal Security Act, was enacted to deal with a possible subsequent insurrection of the communists. The Act gave the government the power to detain persons without trial for up to two years at a time, and the constitutions of both Malaysia and Singapore expressly provided for the constitutionality of this preventive detention law.

Communism has been instrumental in transforming the idea of law in the Indochinese states. In Vietnam and Laos, the idea of constitutionalism introduced by the French was completely overturned by the communists.³⁰ Looking at the demography of Vietnam today, more than eighty percent of the population professes no religion at all. Considering that this had been a country where the teachings of Confucius and Buddhism dominated for thousands of years, one can imagine how successful the ideology of communism has been achieved.

In Indonesia, although the Indonesian Communist Party (PKI) never captured enough seats to form the government, it had grown so influential and powerful that it was seen as a serious threat by the military, as well as by the Americans in the Cold War. When General Suharto seized power in 1965, he initiated a massacre of some 500,000 alleged PKI members, thereby effectively obliterating the communist party.³¹

5. *Evolution and Revolution*

Some observations I made in my 2004 study of the constitutions of Southeast Asia were that: (a) the communist states tend to be slow in transforming their constitutions; (b) countries in Southeast Asia that

28. See PETER LOWE, *CONTENDING WITH NATIONALISM AND COMMUNISM: BRITISH POLICY TOWARDS SOUTHEAST ASIA, 1945-65*, at 97-127 (2009).

29. *Id.* at 215-45.

30. See D. R. SARDESAI, *SOUTHEAST ASIA: PAST AND PRESENT* 125-34, 310-54 (1997).

31. See ARNOLD BRACKMAN, *COMMUNIST COLLAPSE IN INDONESIA* 22-32, 129-43 (1969).

inherited British constitutional system (Malaysia, Singapore and Brunei) tend to evolve their own unique brands of constitutions; and (c) all the other countries experienced convulsive changes that brought about revolutionary transformation of their respective constitutional orders.

To start with, constitutional change in Vietnam and Laos moved at a snail's pace. In Vietnam, the Constitution of 1959 was amended only in 1980 to emphasize popular sovereignty, the need for a new political system, a new economy, a new culture, and a new socialism. Soviet influence on the 1980 Constitution was evident. Power was concentrated in a newly-established Council of State much like the Presidium of the Supreme Soviet. The executive branch of government was substantially strengthened, with a corresponding decrease in the importance of the National Assembly. The Council of Ministers, while nominally subordinate to the Council of State, remained all-powerful in practice. In 1986, the Vietnamese government adopted a policy of *doi moi* (renewal) at the Sixth National Party Congress and proceeded to amend its 1980 Constitution to reflect this. What started out as a constitution-amending exercise led to the adoption of a new Constitution in 1992 that downplayed the Vietnamese Communist Party as *the* leading force and recognized the right to property.³²

Having seized power in 1975, the Pathet Lao government gave little priority to redrafting the constitution. Only in 1982 did the Party agree to "urgently undertake the major task" of revising the constitution. Aided by East German advisors, this process was painfully slow, and it took the Party seven years to appoint the drafting committee. The final draft was passed in August 1991.³³

In the former British colonies of Malaysia,³⁴ Singapore³⁵ and Brunei,³⁶ things moved a little quicker but there were no revolutionary changes in their governments or constitutional order. This could be attributed to the fact that in all these states, power was effectively centralized in a powerful executive and in elites-leading parties. During colonial time, those elites were literally hand-picked by the British to take on the reins of power once they left.

Burma and Thailand, on the other hand, experienced revolutionary change in constitutional government as a result of military coups. Burma attained its independence in 1947, but its elected government suffered

32. See Pham Van Bach & Vu Dinh Hoe, *The Three Successive Constitutions of Vietnam*, 1 INT'L REV. CONTEMP. L. 105 (1984).

33. See M. Stuart Fox, *The Constitution of the Lao People's Democratic Republic*, 17 REV. SOCIALIST L. 299 (1991).

34. See JOSEPH M. FERNANDO, *THE MAKING OF THE MALAYAN CONSTITUTION* (2002); *CONSTITUTIONAL LANDMARKS IN MALAYSIA: THE FIRST FIFTY YEARS, 1957-2007* (Andrew Harding & H. P. Lee eds., 2007).

35. See Kevin YL Tan, *The Evolution of Singapore's Modern Constitution: Developments from 1945 to the Present Day*, 1 SING. ACAD. L.J. I. 1 (1989).

36. See B. A. HUSSAINMIYA, *THE BRUNEI CONSTITUTION OF 1959: AN INSIDE HISTORY* (2000).

constant attacks on its legitimacy and power. Challenges came from the minority Karens and Shans as well as the communists. By 1958, the situation in Burma had become so chaotic that President U Nu voluntarily turned over state administration to a caretaker military government headed by General Ne Win. The military government restored law and order, and reorganized the bureaucracy. Two years later, elections were held and U Nu was returned to power. The highly-popular U Nu was committed to democracy and announced his plan to make Buddhism the state religion. This caused more uprisings among the non-Buddhist ethnic minorities. U Nu also announced a plan to turn Burma into a federation, giving hill tribes greater autonomy. This proposal upset the military who felt this would bring greater civil strife. On March 2, 1962, General Ne Win overthrew U Nu's government in a military coup. Ne Win disbanded parliament, banned political parties, arrested U Nu for his political failures, and restricted civil liberties. He then established the Burmese Revolutionary Council (BRC) comprising 17 military leaders and announced a programme of radical economic and political reforms called the "Burmese Way to Socialism." These reforms were based on a mixture of Buddhist principles coupled with Marxist economic thinking. In 1974, the BRC handed over power to an elected government in accordance with a new Constitution establishing Burma as a one-party socialist unitary state. The state was led by the Burmese Socialist Programme Party (BSPP) which was formed by Ne Win and his BRC cadres.³⁷

Thailand has seen more constitutional changes than any other country in Southeast Asia. Since 1932, when its absolute monarchy was abolished, the Thais have framed and discarded eighteen constitutions. Thai constitutional development is characterized by periods of military dictatorship and repression of civil liberties, interspersed by periods of liberal democracy.³⁸

Indonesia has a 1945 constitution drafted by Sukarno at the time when he was fighting with Dutch. It prevailed for two decades but had been overturned by people revolution in 1966-67. Suharto then led to a new constitutional order which envisaged and the institutionalized the role of the military power under the concept of *dwifungsi* (or dual function).³⁹

Revolutionary change came to the Philippines in 1986 when *People*

37. David C. Williams, *Constitutionalism Before Constitutions: Burma's Struggle to Build a New Order*, 87 TEX. L. REV. 1657 (2009).

38. See Borwornsak Uwanno & Attorney Wayne D. Burns, *The Thai Constitution of 1997: Sources and Process*, 32(2) U. BRIT. COLUM. L. REV. 227 (1998).

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

Power overthrew the corrupt and repressive regime of President Ferdinand Marcos, who ruled the country from 1965 till he was toppled from power. Marcos, who had initially been elected, declared martial law in 1972 and ruled the country without calling for elections for the next fourteen years.⁴⁰ The democratic revolution of 1986 led to a complete redrafting of the Filipino constitution. Although the American constitutional model had influenced both the Philippines' earlier constitutions (of 1935 and 1973), there is an emphasis on social and economic rights in the 1987 Constitution that is unique among Southeast Asian democratic constitutions. The focus on social justice and protection for labor was taken to new heights, and special provisions were also drafted to promote agrarian and natural resources reforms. The 1987 Filipino Constitution is the first revolutionary constitution in Southeast Asia with a strong democratic ethos. It is remarkable for an inclusion of indigenous elements and third generation social and economic rights.⁴¹

6. *Studying Constitutions in Southeast Asia*

Even though I have suggested three templates or overlays to help us understand the development of constitutions in Southeast Asia, I have not yet succeeded in developing a methodology to actually understand the nature of these constitutions. It is one thing to use the three themes to track back and locate the developments of constitutions in Southeast Asia, but it is quite another to expect that these templates will offer us further wisdom in the study of them.

At the start of my talk, I cautioned against the idea that we should even think of using a term like "Southeast Asian Constitutionalism." Our brief exploration into the genesis and development of constitutions in just 10 countries has already demonstrated the futility of such an enterprise. States did not emerge organically in Southeast Asia but were constructs of colonial powers anxious to draw dividing lines between their spheres of influence. We have to live with that even if the lines made little cultural or sociological sense. Many states in Southeast Asia cannot even be called nations, for

40. David Wurfel, *Martial Law in the Philippines: The Methods of Regime Survival*, 50 PAC. AFF. 5 (1977); see also Richard P. Claude, *The Decline of Human Rights in the Republic of the Philippines*, 24 N.Y.L. SCH. L. REV. 201, 207 (1978).

41. Art. XIII of 1987 Philippines Constitution states: 1) The Congress shall give highest priority to the enactment of measures that protect and enhance the right of all the people to human dignity, reduce social, economic, and political inequalities, and remove cultural inequities by equitably diffusing wealth and political power for the common good. To this end, the State shall regulate the acquisition, ownership, use, and disposition of property and its increments. 2) The promotion of social justice shall include the commitment to create economic opportunities based on freedom of initiative and self-reliance.

national identities are also newly minted in the post-colonial era.⁴² We cannot say that Southeast Asian countries look at constitutions and constitutionalism in the same way, either, since the multiple layers that have been heaped upon this region have made it impossible for such grand theorizing. What is needed is a methodology that is more discrete and contextual. As Mark Tushnet noted, it is important to

“ . . . emphasize the fact that constitutional law is deeply embedded in the institutional, doctrinal, social and cultural contexts of each nation, and that we are likely to go wrong if we try to think about any specific doctrine or institution without appreciating the way it is tightly linked to all the contexts within which it exists.”⁴³

There are a number of political scientists suggesting that constitutions can be studied at a more abstract, generalized level based on scientific ideas. They propose hypothesis, test the hypothesis with empirical evidence, and arrive at theories about constitutionalism in a particular space. I would suggest that this approach would probably lead you up the wrong path if you try to apply such theories to a regional context. Theories are not realities. The reality is that we will often run up against hard cases and exceptions, and it would be better to get into the history, understand the social structure of a particular society, as well as how they see themselves vis-à-vis law, government, economy and the rest of the world. Only then will you actually begin to understand the constitution that has emerged.

How then might we contextualize the study of constitutionalism in Southeast Asia without becoming too specific and descriptive? Might not these developments be seen in a more universal light? In this respect, I have been particularly drawn to historian Arnold J. Toynbee’s thesis of “challenge and response.” In his monumental *A Study of History*, Toynbee looked at civilizations in terms of challenge-and-response and argued that civilizations arose in response to some set of challenges of great difficulty if “creative minorities” devised solutions and reoriented their societies. When civilizations respond to challenges, they grow, and when they stop responding creatively to these challenges, the societies decline.⁴⁴

In the same way, I see the development of constitutionalism in each

42. Chan Heng Chee & Hans Dieter Evers, *Nation-Building and National Identity in Southeast Asia*, in 2 BUILDING STATES AND NATIONS: ANALYSES BY REGION 310-19 (S. N. Eisenstadt & S. Rokkan eds., 1973); DAVID BROWN, THE STATE AND ETHNIC POLITICS IN SOUTHEAST ASIA 1-32 (1993); ANTHONY REID, IMPERIAL ALCHEMY: NATIONALISM AND POLITICAL IDENTITY IN SOUTHEAST ASIA 25-48 (2009).

43. MARK TUSHNET, WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW 10 (2007).

44. ARNOLD J. TOYNBEE, A STUDY OF HISTORY 61-67 (1989).

Southeast Asian country as an attempt by its people to respond to the challenges of a modern, post-colonial environment. The fact that the Thais constantly jettison their constitutions in favor of a new one does not mean that they do not value their constitutions or the rule of law. It could simply mean that Thais view the drafting of constitutions as constitutive acts whenever a regime change occurs. What is really fascinating in such an approach to the study of constitutionalism is to understand how each society deals with the challenges it is confronted with, as well as to study the nature of these challenges. Oftentimes, the challenges are not mere political challenges from within, but also legal challenges from abroad. In an age of transnational legal conversations, and with so much information available at a click of a mouse, internal discourse on what is good and right is necessarily informed by what is being said about the same subject somewhere else in the world.

When a societal shift takes place, a paradigm change emerges and quite possibly a “moment” of some sort may catalyze development in a different direction. It may not be what Bruce Ackerman calls a “constitutional moment,”⁴⁵ for not every momentous event pivots on the constitution. But the shift in thinking and in the way a society copes with its challenges will necessarily impact the state of its laws and constitution.

The fact that increasingly the constitutions begin to look more and more alike may be due to several reasons. The first is the condition of modernity. As American legal historian Lawrence Friedman has suggested “[a]ll modern societies seem to be traveling in the same direction” because modern states and modern social and legal relationships compel us to start deploying laws and institutions in the same way. The primacy of the capitalist system and globalization now has also led to a convergence in the kinds of laws and correspondingly, the kinds of constitutions we make.⁴⁶

These are just some tentative thoughts on developing a framework to understanding the complexities of constitutions in this very large region. It is already difficult to compare constitutions from the same tradition with each other, for example that of Taiwan and Germany, harder still to compare them across traditions. However, if we can study constitutions comparatively by looking at how a society is dealing with and responding to similar issues and challenges, that might be a good starting point.

Thank you very much.

45. BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATION* (1998).

46. See LAWRENCE M. FRIEDMAN, *THE HORIZONTAL SOCIETY* 54-55 (1999).

III. COMMENTARY

A. PROFESSOR CHAO-JU CHEN

It is my pleasure to attend this roundtable discussion. I enjoy so much in Professor Tan's speech. As a scholar of feminism and legal history, I would like to offer some thoughts on history and gender. Since I am not an expert either on Southeast Asian history or comparative constitutionalism, you will find me talking less about constitutional laws but more about philosophy.

First I would like to discuss about history. In the three templates that Professor Tan offered in your study on Southeast Asian constitutions, I am rather interested in the history of colonialism. When I read your draft, I first thought you took a modernist approach, especially in your very brief introductory part on colonial history. However, when I listened to your lecture, I realized that you are not a modernist. As a critical scholar more familiar with the scholarship focusing on the ugly side of colonialism and post-colonialism, I am more interested in the following question: how did colonization produce the inferiority of the colonized and superiority of colonizers? How did colonization shift the very meaning of modernity, which survived at the end of colonial rule? And is modernity equivalent to westernization?

I would like to make some comparisons between the development in Taiwan and the one in Southeast Asia, from which an abundance of similarities can be found. As Professor Tan just described, the colonial governments adopted double strategies, that is, assimilation and differentiation.⁴⁷ Assimilation applies the criminal laws to the colony, and differentiation leaves local practice intact, especially in terms of personal laws. The Japanese colonizers in Taiwan adopted almost the same strategies here. A well-known example is their permission of "adopted daughter in-law." While some people might think of differentiation as a way of showing respect for the locals, it is problematic still, because the colonizers, by differentiating, treated colonized people as uncivilized subjects; therefore they chose to tolerate their uncivilized practices. The colonizers would not treat the colonized equally until they had lived up to the standard. The two strategies, from my point of view, are important for these colonial empires to create a sense of inferiority of the colonized.

I also would like to talk about westernization, which is a common theme in studying constitutional histories of many non-western countries. This subject is open to various interpretations: some consider it a progressive

47. Donald L. Horowitz, *Ethnic Identity*, in *ETHNICITY: THEORY AND EXPERIENCE* 111-40 (Nathan Glazer & Daniel P. Moynihan eds., 1975).

development, while others concern more with the impacts. I think our current practice, which is mostly formed and shaped by our past, needs more precise narratives of our past. That is, it is not what happened in the past that matters, but how we understand the past as well as our relationship to the present that matter. Until now, the bright side of modernity, such as the concepts of modern states and law still prevails in our understanding of the development of constitutionalism in Asia. In my opinion, it is time to take the dark side of colonialism and its byproduct, modernity, seriously.

The next topic I would like to discuss is the issue of gender, which Professor Tan did not have a chance to deal with in his lecture. I now begin with the idea Professor Tan mentioned both in the beginning and the end, the possibility of Southeast Asian Constitutionalism. In the subject of categorization, I would like to focus on the concept of Asia, especially on the following two examples, Asian women and Asian feminism. Some scholars interrogated the concept of Asia and argued against it as a natural concept. A famous Japanese feminism philosopher, Yoko Arisaka, argued that Asia is either forced into a racist category or being too diverse a region to be treated as a category of geography, nation, or identity. She suggested that we focus more on the stereotype, which bears cultural elements associated with Asia.⁴⁸ Another Chinese philosopher Sun Ge suggested that we examine the meaning of Asia with consideration of the meaning of Orientalism's Asia, because Asia as a concept emerged in the context of European Orientalism.⁴⁹ He believes that the question of Asia resists any attempt to provide a clear explanation, since Asia is not only a political concept, but a cultural one; it is not only a geographical location, but a measure of value judgment. For me, considering Asia as a cultural concept and major value judgment is very helpful to understand the question, for example, what Asian women stand for. Asian women refer not so much to a descriptive collection of every woman living in Asia or of Asian origin, but to a discursive construct. And we find that under western eyes, Asian women are different from western women in the sense that they represent the backwardness of Asian culture. They are presented as authentic victims and non-feminist *other*. This portrait of Asian women resulted in the impossibility of feminism in Asia; that is, Asian feminism as oxymoron. I think we must resist this orientalist representation of Asian women and engage in the critical construction of Asian feminism subjectivity.

Furthermore, we should also pay attention to intra-Asia differences, because in Asia some societies had been through Asian colonialism, while some others were the colonizers. The former Asian colonizers, China and

48. Yoko Arisaka, *Asian Women: Invisibility, Locations, and Claims to Philosophy*, in *WOMEN OF COLOR IN PHILOSOPHY: A CRITICAL READER* 209-34 (Naomi Zack ed., 2000).

49. Sun Ge, *How Does Asia Mean?*, 1(1) *INTER-ASIA CULTURAL STUD.* 13 (2000).

Japan,⁵⁰ are still dominant in relations to other Asian societies. Communicational barriers do arise from this complex colonial memory from the past and present. One feminist suggested that instead of turning our gaze away, we should pay attention to those painful moments, because we should learn more from acknowledging and confronting the stubborn solidarity of communicational barriers, instead of rushing to break them down in the name of an idealized unity; that is, the concept of Asia. Here I take it as a starting point for further investigation into Southeast Asian women, their relationship with themselves, as well as the constitutions of Southeast Asian countries.

B. PROFESSOR LI-JU LEE

I would like to thank Professor Tan for giving us such a fascinating story and a grand picture covering a long period of time in so many countries. What attracted me most is the historical and cultural context representing the constitutional texts or the colonial institutions. As Professor Tan indicated, constitutions do not come from vacuum; instead, they have cultural roots and a close interaction with political regime change. Thus, in my following reflection, rather than comment, I would like to organize the relationship between regime change and constitutional change, and draw the concept of constitutional culture, or legal culture, into a picture.

After reading your fascinating stories of Southeast Asia, Professor Tan, I could not help but wonder whether there is any constitutional culture or rules developed in this period of time, and how such culture might look like. Constitutional culture is generally defined as collective values and behavioral patterns of a society towards constitutions. Another way to look at the concept of constitutional culture is to explore how changes in the constitutional meanings or understandings emerged from the interactions between the society, the court and the government that construct and enforce the constitution.⁵¹

Popular constitutionalism is another concept related to constitutional culture, which focuses on the *people*, who plays a substantial role in the creation, interpretation, evolution and enforcement of constitutional norms. From some literature on legal pluralism, in which we find a number of authors prefer to take Southeast Asia as a reference, there seems to be an existence of different layers of constitutional culture, e.g. of women, elites and majority or minority groups.⁵²

50. W. G. BEASLEY, *JAPANESE IMPERIALISM 1894-1945* (1991).

51. See, e.g., *CONSTITUTIONAL CULTURE AND DEMOCRATIC RULE* (John Ferejohn et al. eds., 2001); *CONSTITUTIONAL CULTURES* (Miroslav Wyrzykowski ed., 2000); ROBERT F. NAGEL, *CONSTITUTIONAL CULTURES: THE MENTALITY AND CONSEQUENCES OF JUDICIAL REVIEW* (1989).

52. See, e.g., ACKERMAN, *supra* note 45; BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS*

However, this constitutional culture and the people are never completely separated from political and constitutional systems. If we look at the development of constitutional changes in Taiwan, constitutional culture changes overtime and is heavily influenced by the political regime and the institution of judicial review. For example, in the authoritarian era, when people's political lives were especially heavily controlled, the constitution at that time only served as ceremonial function. But it can give the government, which is also the ruling party, to claim itself as a legitimate government of China.⁵³ Judicial review system was in place, but the Grand Justices (also known as the Constitutional Court) that conducted the judicial review at that time worked more like the legal counsel for the government. There were few interpretations issued, and when they did issue an interpretation, they mostly followed official policies. When the dissidents and scholars were calling for constitutional and democratic reforms, the ordinary people actually had very little to do with the constitutions. The fact that constitution was normally a charade enforced the general feeling of distrust in government and formal legal institutions, which constituted the basic tone of the constitutional culture in the authoritarian era. As the Professor Tan pointed out today, constitutional changes often occurred to respond to challenges.

As Professor Yeh argued in his work, legitimacy crisis of the former authoritarian regime contributed to political and constitutional changes in Taiwan in the 1980s, in addition to the international pressure, the social and political movement within the island for political and constitutional changes.⁵⁴ And the re-invention of the judicial review system mattered a great deal in the mutual interaction between the people and the constitution as well.⁵⁵ As I argued in my presentation at 2009 Asian Forum of Constitutional Law,⁵⁶ in this period the Grand Justices had not only assumed an active role in facilitating the process of democratization and regime

(1991); AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* (2005); LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004); Robert C. Post, *Democratic Constitutionalism and Cultural Heterogeneity*, 25 AUSTRALIAN J. LEGAL PHIL. 185, 185 (2000).

53. See e.g., 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 (Graham Hassall & Cheryl Saunders eds., 1997).

54. JIUNN-RONG YEH, *Chaoyue Chuanhsing: Taiwan te Hsienfa Pienchien [Beyond Transition: Constitutional Change in Taiwan]*, in MINCHU CHUANHSING YU HSIENFA PIENCHIEH [DEMOCRATIC TRANSITION AND CONSTITUTIONAL CHANGE] 23, 30-33 (2003).

55. Jiunn-rong Yeh, *Tsung Kuochia Fachan yu Hsienfa Pienchien lun Tafakuan te Shihhsien Chineng: 1949-1998 [A Study into the Function of Interpretations of the Grand Justices from the Perspective of National Development and Constitutional Change: 1949-1998]*, in MINCHU CHUANHSING YU HSIENFA PIENCHIEH [DEMOCRATIC TRANSITION AND CONSTITUTIONAL CHANGE] 253 (2003).

56. Li-Ju Lee, *Rights Talk and Institutional Legitimacy of Judicial Review in Taiwan—A Preliminary Study*, paper presented at 3th Asian Forum for Constitutional Law, College of Law of National University, Taipei, Sept. 25-26, 2009.

change, but also redirected a mission to become the guardian of individual freedoms. After Grand Justices made it certain that citizen petitioners could apply for retrial of their cases upon receiving favorable interpretations, 90% of the constitutional interpretations that came to them feature issues concerning protection of fundamental rights.

In addition, a great number of public interest groups and watchdog groups have brought their claims, as a form of constitutional challenges, enriching constitutional discourse. For the people in Taiwan, constitution and judicial review system have thus become part of people's common knowledge and political lives. According to a survey I partook in March, by asking people about the constitution and the role of Grand Justices, we found that 58% of ordinary people were able to clearly point out the mission of Grand Justices, as well as their role as conducting judicial review and interpreting the constitution. There is a slight increase compared to the 1992 survey, but for the group of people who live in rural areas and who are less educated, the increase is quite significant. Besides, 95% of the respondents support the legitimacy and authority of Grand Justices. Interestingly, by asking people who should have the final say to serious national disputes, while referendum is—not surprisingly—ranked as top priority, the Grand Justices win the second place by beating president, congress, or ministers. Those are the examples of some differences we have found in contemporary Taiwanese constitutional culture, especially after the significant regime change.

C. PROFESSOR WEN-CHEN CHANG

We all agree that history and culture matter for constitutionalism. If we do not look at what happened in the past, before constitutionalism was ever established, then we cannot really understand how constitutionalism has developed as it is now, nor can we be certain as to what direction it would progress in the future. With this in mind, I am really fascinated by the way Professor Tan describes of the pre-colonial and colonial history as one of the templates for the understanding of constitutionalism developed in Southeast Asia.

To begin with, I would like to reflect the position of Taiwan in this comparative constitutional study of East or Southeast Asia, particularly in terms of what Professor Tan just described, historical legacy. In the past, when we heard those statements such as that Taiwan enjoys a unique position in larger Asia, they often sound more like one of those propagandas made by the Nationalist Party (also known as Kuomintang, KMT) that retreated to Taiwan after World War II and took the island as a base for reclaiming China. However, from what Professor Tan suggested today, I

realize that Taiwan does enjoy a strategic position in intra-comparative constitutional history and culture particularly within Asia. For, colonizers in Southeast Asia, such as the Dutch and Spaniards, also came to Taiwan in the 15th and 16th centuries. Since Taiwan was subsequently colonized by Chinese and Japanese empires, there was not much memory left about how those Spanish and Dutch came to rule this island and what kind of influence they had brought. In addition, the two biggest colonizers in Asia, China and Japan, also colonized Taiwan, which makes some similarities in Taiwan's history with the one in Korea and other countries. In an interesting way, Taiwan stands in a historical strategic position in reflecting upon two kinds of colonial history, one by the West and the other by the East (China and Japan), in the process of constitutional development. Professor Tan suggested three templates for the study of constitutions in Southeast Asia. Colonialism is the one, which is shared by Southeast Asia as well as East Asia. Sometimes the colonizers are different, but Taiwan has all of them; the differences only lie in a longer or shorter period of time.

As for the second template, communism, it might be the biggest difference between East Asia and Southeast Asia in the way that communism diminished very quickly because of American and European's interests during the Cold War from the 1930s to 1960s. Therefore, in Taiwan and South Korea, you do not see that kind of legacy as in Southeast Asia, that communism was combined with nationalism and it was undertaken as a key strategy against western colonization. In Taiwan, though quickly suppressed, the communist party, in which the very famous Marxist feminist Shue-Hong Hsieh was a member, used communism as a strategy against Japanese colonization.⁵⁷ In Korea, some similar sparks of communism were aroused, but again were quickly suppressed.⁵⁸ Of course, the biggest and most successful communist country till today is China, despite the fact that many have doubts about the genuineness in its embrace of communism. This communism template can be served as a common analytical point of view across East Asia and Southeast Asia.

As for the third template, evolution and revolution, in one recent paper Professor Yeh and I coauthored, we also found that one of the distinctive features shared by three constitutional jurisdictions in East Asia—Japan, South Korea and Taiwan—was an interesting continuity in either constitutional texts or institutions.⁵⁹ In that paper, not only that we are not

57. Frank S. T. Hsiao & Lawrence R. Sullivan, *A Political History of the Taiwanese Communist Party, 1928-1931*, 42(2) J. ASIAN STUD. 269 (1983).

58. JAMES K. WHEATON, *THE FORGOTTEN WAR: A BRIEF HISTORY OF THE KOREAN WAR* (2010).

59. Jiunn-rong Yeh & Wen-Chen Chang, *The Emergence of East Asian Constitutionalism: Features in Comparison*, 59(3) AM. J. COMP. L. (forthcoming 2011).

afraid of categorization but we also go such far to claim that there is a distinctive form of East Asian Constitutionalism. While we share the kind of caution Professor Tan takes in categorizing or analyzing any kinds of constitutionalism, we contend that certain categorical analyses may still be necessary in our pursuit of understanding the development of constitutionalism(s) in any particular local contexts and periods in history. As I said earlier, since Taiwanese have experienced all forms of colonization throughout the history, I think we are in a strategic position to categorize what we have here, in order to contrast with what other constitutionalism(s) may have.

Another point Professor Tan described charmingly is that people in Southeast Asia moved around because of their island and sea cultures. In contrast, East Asian people do not move around. If we think culture matters, the way people move may have further subsequences and impacts on how they understand themselves as a people, how they understand the state and fixed territories, or how to organize a fixed legal construct as fundamental as constitutionalism. If people always live in such a fluid movement, it would be quite unnecessary for them to build a fixed time- or space-oriented legal system as constitutionalism. One unique feature of East Asian constitutionalism that Professor Yeh and I identified in our paper is the lack of a clear constitutional founding moment.⁶⁰ A great number of constitutional happenings came through with continuity in time and in space. By continuity, I do not mean that people do not move or regimes never change, but that there is no such revolutionary moment recognized as some western constitutional or religious moments understood as having a brand-new beginnings entirely departing from the past. Rather, in Asia, people do move around and things move ahead, but the ways of those particular movements and legal constructs and institutions influenced by them are quite different from what happened elsewhere. This perspective matters, if we attempt to fully understand the formation of constitutionalism here.

While the colonial and communist history of Southeast Asia may draw some similarities with the development of Latin American and African constitutionalism, after hearing Professor Tan's description on pirates and sea cultures, there is something I find very distinctive in Southeast Asia. Latin America and Africa have developed in an integrated territory with harsh mountains and terrible weathers, Southeast Asia live with the sea with relatively stable climate. This difference in natural conditions and historical contingencies it might result would enlighten come careful thoughts in

60. *Id.* See also Wen-Chen Chang, *East Asian Foundations for Constitutionalism: Three Models Reconstructed*, 3(2) NTU. L. REV. 111 (2008).

comparative legal study between the two large continents. In the interest of time I would stop right here to allow more time for discussions and Professor Tan's response.

IV. GENERAL DISCUSSIONS AND RESPONSE

Shao-Man Lee (College of Law, National Taiwan University):

What is the impact of regional organizations on Southeast Asian constitutionalism, ASEAN in particular?

Professor Kevin YL Tan:

ASEAN was established in 1967 primarily as an economic regional organization.⁶¹ It has not been particularly successful as a true political or legal entity except when they displayed great solidarity in their objection to Vietnam's invasion of Cambodia in 1978. It has been attempting to systemize and regulate trade laws within ASEAN, but not with too much success either. However, it is still in the process of development, given some recent impetus. From the original five founding countries, it has grown to encompass ten states and its possibilities are now bigger than ever. For example, the organization has recently come out with the ASEAN Charter with a program of action, where for the first time you began to see a shift from traditional ASEAN methodology that stood for non-intervention in national politics. In the past, Singapore would not comment on what was going on in Malaysia for the sake of harmony with its neighbours. But recently for the first time, the Ministry of Foreign Affairs of Singapore issued a press statement denouncing the treatments of Aung San Suu Kyi and some other countries are also taking on a particular stance.

Like any living organism, the organization changes. But as to the question whether it will have the same impact on the constitutional order in Southeast Asia in the way the European Union does in Europe, my guess is: Not in the next two decades. Hopefully I will be proven wrong. Recently a Human Rights Mechanism has been established—the ASEAN Inter-Governmental Commission on Human Rights (AICHR). To human rights advocates, AICHR might seem like a joke—a forum for talking shop but with no real teeth. But isn't it better to have something like this than none at all? My position is this: If states are prepared to create such an institute—in whatever form—I would grab it first and then figure out what

61. THE ASEAN READER (K. S. Sandhu, Sharon Siddique, Chandran Jeshurun, Ananda Rejah, Joseph L. H. Tan & Pushpa Thambipillai eds., 1992).

to do with it next. AICHR is meant to only give advice to ASEAN governments, without actually monitoring or investigating human rights abuses. But there is hope yet. I have been part of an initiative to establish a human rights resource center in Jakarta to support the work of AICHR, because they have no intellectual or substantive resources. That's an important start, and strategically, we have decided to focus on those human rights issues, which invoke no dispute among ASEAN governments to deal with, for example, the rights of transmigrant workers and kidnapping and trafficking of women and children. How these changes may affect ASEAN is yet too early to tell.

Chien-Chih Lin (College of Law, National Taiwan University):

What has westernization left behind in Singapore in the context of constitutional culture?

Professor Kevin YL Tan:

The relationship between westernization and constitutional culture is rather dynamic, because westernization does bring, but only brings, a particular way of thinking about law and institutions to this place. The colonizers cannot rule by simply making demands or commanding in a forceful way; instead, they have to engage the locals. Thus they started to create an elite group. However, elites are also autonomous, and their educational background cannot guarantee that they will automatically buy into the colonizers' logic and paradigm. The truth is that all of the nationalist leaders who went against the colonial powers after World War II were elites educated at the top universities in their imperial educational systems. Education makes a difference, even more than the rulers hoped for. It transforms people, and then they go back and make changes; transform things.

In the case of Singapore, Lee-Kuan Yew was educated in a very western way. But the fact that he was the student of Sir Ivor Jennings does not mean he had accepted the values espoused by a British constitutional lawyer. That is the reason why we should appreciate the power of human agency. The moment you start to run a place and your priority is not democracy or institutions guaranteeing maximum of public participation, but management of a controlled economy and survival, your mind is tuned in that fashion, and it does not matter whether it is western or eastern, Asian or Southeast Asian. It is a particular response to challenges and problems posed at a particular point in history. Sometimes it is really not a question of importation of western concepts.

Yi-Chen Lo (College of Law, National Taiwan University):

From Professor Tan's lecture, we see a brand-new edifice of a possible way of understanding constitutionalism. Take historical knowledge, with which we are so familiar in our experience, into our consideration. When we are accepting a certain theory or principle originating from the West, our acceptance can be founded on a more concrete and realistic basis. Drawing Taiwan's colonial experience as a comparison, we can find that the constitutional culture the Japanese introduced into Taiwan was a more modernized version than the one brought into South East Asian countries during early-modern time. Could you talk more about this missing link, between early-modern and post-war eras; also, does the way it evolve or revolve have anything to do with some countries' common-law legal system?

Professor Kevin YL Tan:

In the colonial era, the ideas of state and boundary were introduced, and some values of fundamental freedoms also came to in via colonial laws. However, there was always one law for the metropolis and one law for the colonies, so we can expect that the more intelligent among the local elites would argue for an equal treatment, as the Queen's subject. In fact there was very complex interaction between the interests of the colonies and the interests of British politicians themselves. Back in Britain, the British politicians were up against each other. You would have the Conservatives arguing one line about the colonies, while Labour on the other side was saying the opposite; thus they would have to campaign certain causes for some colonial population. This is where we can see these dynamics at work, even in colonial contexts. Certain changes in Singapore law would not have been possible, had it not been for conversations taking place in London. In other words, there is an appropriation of the colonial interest by the London elites; meanwhile the local elites are also using similar conversations for their own interests. As a result, they began to use the same languages for political or legal discourses.

Chun-Yuan Lin (College of Law, National Taiwan University):

What are the interactions between the three templates?

Professor Kevin YL Tan:

That's a tough one. First of all, I do not claim that these templates occur in hermetically sealed chambers; they do not. There are obviously

cross-currents of each template interacting with each other. If we are not afraid, as Professor Yeh and Professor Chang suggested, to categorize, we can understand the development through these three templates. However, the templates are not perfect paradigms but mere tools to for analysis and you always have exceptions. It might take a book to fully explain their interactions, but here let me briefly say that colonialism and communism, for example, actually to head-to-head with each other. It was communism that carried the rhetoric of revolution against the exploiters. However, in some cases, the colonial powers won; in others, they lost. This is only one example, but the whole picture presents too large and grand a scale to be drawn here.

Professor Jiunn-rong Yeh:

Thank you, Professor Tan and all participants. Although this discussion is mainly concerned with Southeast Asia and legal institutions, it is based on a close and thorough understanding about the historical and social evolutions in this place. We are not proposing East versus West polarization; instead, we have to take it seriously about the way we look at ourselves, and the attitude we hold towards Southeast or East Asia, because they so profoundly change the way we understand ourselves as well as our learned or received legal ideas and institutions. We need to understand why at some historical junctures or places political leaders or even supermen are so worshiped by people and why at other historical junctures or places democratic constitutionalism would be brought into being and the role of law and constitutions taken seriously. We hope that several years down the road, constitutionalism(s) in Asia, not just Asian constitutionalism, will become one of the mainstream efforts in the global pursuit of constitutional studies.

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