

Roundtable

Constitutionalism and the Search for Legal and Political Legitimacy in the Asian States

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INTRODUCTION

Professor Kevin Tan is an expert in constitutional law. With a background in legal history he has written widely on both legal history and constitutional law. He approaches the study of constitutionalism in Asia by focusing on historical and other different contexts. In this round table he was invited to share his knowledge on constitutionalism and the search for legal and political legitimacy in Asia. He dissects political and legal phenomena that caught many Asian states in frenzy and puts them in their respective context.

I. OPENING REMARKS

PROFESSOR WEN-CHEN CHANG

Professor Tan is a leading authority on Singapore constitutional law and legal history. He has published, with Professor Li-ann Thio, the leading cases and materials book on constitutional law in Malaysia and Singapore. We have also been consulting for some time in understanding the happenings in the development of Singaporean constitutional law. Professor Tan is also an accomplished legal historian and has edited and published several books on Singapore's legal history. I must say his recent book on Singapore's 2011 general elections records a milestone political development in Singapore. We are very excited to have Professor Kevin Tan to talk and share his view on constitutionalism in this part of world. We are also excited and pleased to have our guest discussion panelists Professor Ming-Sung Kuo and Ms. Hui-Wen Chen. Both of them are graduates of this college of law. Currently Professor Kuo teaches in the faculty of law in Warwick University in England. Ms. Hui-Wen Chen is a SJD candidate at Harvard Law School. We are really pleased to have them back with us in this roundtable. Without further ado we will invite Professor Tan to give his speech.

II. SPEECH

CONSTITUTIONALISM AND THE SEARCH FOR LEGAL AND POLITICAL LEGITIMACY IN THE ASIAN STATES

PROFESSOR KEVIN YL TAN

1. *Understanding Constitutions in Asia*

Thank you very much for your generous and wonderful introduction and

for once again being so kind in having me here at the National Taiwan University. It is always a pleasure to be back. What I hope to do here – as Professor Chang has said – is to share with you an intellectual journey rather than posit any particular ideas about how one should look at constitutionalism in Asia.

First of all, as you probably know by now, Asia is an indefinable mass. It is difficult to determine where Asia begins and where it ends. Secondly, it is even possible to talk about Asia constitutionalism or should we not talk more meaningfully as constitutionalism in Asia. These are two separate things. When we talk about Asian constitutionalism we are assuming that there is such a definable thing as Asia, and an Asianised constitutional law that comes out of it. I am not convinced that this is a useful enquiry.

So, let me begin from a different perspective by sharing with you my biographical journey, of how I came to the study of constitutional law and how I arrived at where I am today. It has been over twenty-five years since I started this journey. I was one of those lucky people who got recruited into academia pretty much straight out of school. Constitutional law wasn't initially my choice of study and it was not a subject I was keen to teach. I was much more interested in public international law and intellectual property law. In fact in Singapore, very few students are interested in or keen to undertake constitutional law or international law as a career because these are not considered 'lucrative' subjects. Singapore is essentially a commercial city and many students prefer pursuing careers in banking, finance or working as a corporate lawyer dealing with mergers and acquisitions.

Studying constitutional law as a student is very different from actually having to teach the subject. When you are a student, just meeting the minimum requirements of passing the exams will, in most cases, suffice. However, it is quite challenging when you actually start to teach the subject because you need to approach it with a clear framework and vision. One way of teaching the course is to simply teach it in the same way you were taught. As a very young academic, I seriously considered using this approach, but quickly came to the conclusion that although it was an easy way out, it was going to be a rather dull and uninspired approach. It made no sense to just imitate the way my professors taught me, as well as going through the same syllabi and prescribing the same textbooks.

In preparing my lectures and tutorials, I realised that even if I was a very good imitator, somehow it was not going to work. As a student I did not really enjoy studying constitutional law because what we were taught had so little semblance with the reality of constitutional law in Singapore. We had quite a few professors from United Kingdom and the United States of America. Those who were trained in the British legal system invariably started with Dicey and taught constitutional law like English administrative

law. As you probably know, they do not have a written constitution in England. Judicial review as such encompasses a judicial review of administrative actions. Therefore it is a striking down of administrative acts rather than law.

My American professors on the other hand were equally puzzling; they threw us Alexander Bickel's *The Least Dangerous Branch*, a book some of you are pretty familiar with. They always begin with *Marbury v Madison* and Chief Justice John Marshall. *Marbury v Madison* is quite an interesting case but in my mind I kept thinking: What has this to do with Singapore law? We did not have any equivalent of *Marbury v Madison* and we certainly did not have a Chief Justice like John Marshall. Our constitution looks so different. How do you even begin to talk about these things?

That got me thinking about how we could, in the Singapore context, take constitutions and constitutionalism seriously. Now, I am not talking about this whole discussion of whether there exists a different kind of constitutionalism in an Asian context yet. So, we start by trying to make sense of constitutionalism in the context of Singapore. Let us all take the constitutional enterprise seriously, and see where we go. We have no *Marbury v Madison*, nothing like the English House of Lords or the US Supreme Court. And it dawned on me that this court-centric approach of studying constitutional law was not terribly helpful. Was there no constitutional law beyond the courts? The kind of court- and judiciary-centric approaches adopted by some of my teachers offered what I felt to be a rather skewed view of what constitutional law is all about.

I then looked around at the current writings on the subject and came away convinced that in the 1980s, many authors considered Asia as a sort of aberration. Asians did not understand constitutionalism. Instead, they claimed an alternative exception to the norms of western liberal democracy. In other words constitutionalism in Asia was seen primarily as a western concept grafted onto an Asian context and Asians were regarded as inept and had little to say about constitutional law.

It is true that the idea of constitutionalism is pretty much a western concept. If we look at the history of constitutional law and its development, its institutions and its concerns about limiting and restricting the power of the state generally, it all pretty much comes from the west. So writers on constitutional law and constitutionalism in Asia tended to look at its regimes as exceptions. Their general outlook was that Asians are less concerned about power than westerners and do not really believe in law. They only believe in ethics. This view was shared by great historical writers like John King Fairbank, a distinguished American scholar majoring in Chinese history. In his researches on China, he talked about how people do not worry too much about law in a Confucian-influenced state. Instead, they focus on

ethics and that is how morality is brought into the equation.¹

Another way of looking at it is by saying that there is no such thing as ‘the rule of law’.² To say that in Asia, there is no rule of law. There is no concept of constitutional adjudication; the courts are facile, impotent bodies that are afraid to interfere with the executives in Asia. As a result of the impotence of the courts, the executives tend to be above the law. The subtext of this argument is that at the end of the day, there is no rule of law. There is only power politics and the courts have a marginal role in checking the abuse of power. Academic literature on Asia at this time echoed similar sentiments and were quite prevalent.

Well, if those arguments were in fact true or irrefutable, I might as well stop teaching and start practicing law. What is the point of teaching constitutional law if it’s all about power? The indoctrination of four years of law school made me believe that law was intrinsically good and embodied certain virtues. So one had to look beyond the façade, beyond the institutions we are familiar with, and even transcending the exceptional examples to see if there is in fact something worth looking at as far as Asia is concerned.

This is a major challenge, as you can imagine. Look at the size of Asia. It is such a diverse area. I have not done an in-depth study of every single state in Asia; that would entail a superhuman effort requiring several life times. But I have managed to look fairly closely at about twenty important constitutions in the region. My personal mind map of Asia extends as far as Pakistan in the west but does not include Afghanistan, and it reaches up as far as Mongolia and down into the Southeast Asian region. My comments would thus be primarily focused within these states.

2. *Why Conventional Approaches Do Not Work*

Moving away from what western constitutional scholars are saying about constitutionalism in Asia, let’s take a look at what the political scientists are doing. The political scientists tend to adopt both categorisations and typologies in their bid to explain political and social phenomena. Typologies are useful tools for us to understand certain paradigms, but paradigms only work if humans were machines. Since humans are not machines, paradigms do not sufficiently capture numerous exceptions and nuances. As we go along, you could say: ‘Well actually, this doesn’t quite work either, as there are things that couldn’t possibly fit.’ I love this particular analogy painted by Robert Nozick where he says that it is like trying to cram everything into a box, shut the lid and take a photograph

1. See generally JOHN KING FAIRBANK, CHINA: A NEW HISTORY (1992).

2. See Kevin YL Tan, *The Role of Public Law in a Developing Asia*, 2004 SING J. LEGAL STUD. 265, 272-75.

before it all tumbles out again.

Paradigm building is difficult because human beings are unique; we are too multifarious and diverse. Typologies are also problematic since they tend to be static. When we classify the communist regime as communist regime or a socialist type constitution, that fixes it at a particular point in time, and therefore suggests it does not change. The reality is that it *does* change.

I believe there will be changes in the world that we live in today because of the inherent nature of states and societies in an increasingly globalised world. I prefer not to take a typological approach to understanding constitutional law. It is very restrictive and hampers our way of thinking about how constitutionalism and constitutional law develops in areas such as Asia.

I prefer what I called a discursive approach and here I am deeply influenced by the work of the British economic historian Arnold Toynbee. In his magisterial work on the rise and fall of civilizations,³ he speaks in terms of ‘challenge’ and ‘response’. Every time a society reaches a particular point in its history it will face a crises (that’s the challenge) and its fate depends on how it responds. If you are unable to respond then your civilization collapses, if you are able to respond you actually have a new paradigm. You move on and have a new society.

I look at societies in that manner. There is nothing dialectal about it, in the sense that there is no inevitability. A society is not destined to end up in a particular manner. There is no rule that says that you are going to end up looking like a western-style liberal democracy or a dictatorial hegemony. You could get there because that is your aspiration but there is no rule that says it is inevitable.

Therefore, how each society responds to the challenges that it faces and how it crafts constitutional documents and institutions to deal with these responses become much more important. One might think that a certain option is better to deal with a particular challenge than another, but it does not mean that the path taken will work. However, we must at least take it seriously on its face value. Now I will go back to my key point about understanding the nature of constitutionalism in Asia.

3. *Why We Should Take Constitutionalism Seriously*

The short answer is that constitutions matter. Constitutions act as a major constraint on power. No state in the world, no matter how ghastly the regime might be, would claim to be above the law. This proposition holds true in international law as well. In fact the debate becomes even more

3. See generally, ARNOLD J. TOYNBEE, A STUDY OF HISTORY, VOLUMES I-XII (1934-1961).

protracted in international law. Professors of international law always begin their first lectures by trying to convince their students that there is such a thing called international *law* rather than politics. There are two reasons. On one hand, no state, not even a dictator, would ever claim to be above the law. The constitution as the ultimate law, is the highest law of the land and acts as a major constraint on power. Second, the moment you begin to delve into the language of constitutions and its frameworks, you discover a certain internal logic in the subject.

We cannot talk about constitutionalism without considering some kind of division and separation of powers. In the same manner one cannot talk about constitutions and law without talking about courts and interpretation. Why? Because it is law and everyone knows that it is not possible to craft legal language in so precise a manner that there is no ambiguity. Hence the need for interpretation. We also know that because constitutions are generally harder to amend than ordinary law, interpretation becomes necessary to ensure that constitutions continue to be relevant over time.

Constitutions are also very important for those regimes in power to be legitimized. Every regime always attempts to first justify its existence legally. We no longer live in the days of emperors and kings when your claim to legitimacy is that you are the first born of the emperor or that you have been the designated heir or that you possess certain supernatural powers or that you possess a vibrant charisma that makes you a leader.

Nowadays, legitimacy is sought through legal means, even in North Korea. It is really interesting to watch it. I must say your news here is incredible in the exposition of North Korea, and we never get any of that in Singapore. Maybe you have quite some investment in North Korea (laughter). Put that aside, the point is that it is quite interesting how the legitimacy of the son (Kim Jong-eun) is being established. If that is the case, there is no real constitutional law to talk about. He is touted to have many other well-regarded traits. Even his father, who just passed away, was known as the Great Architect. He has other distinctive attributes besides being the son of the emperor.

4. *Political and Legal Legitimacy*

So constitutions function in that way. People always claim legitimacy by referring to the legal basis of power first. There is, of course, legal legitimacy and political legitimacy, but what we are mostly concerned with here is legal legitimacy. The kind of legal legitimacy we are talking about in Asian states in a 'challenge and response' kind of way is based on the received law and the continuation of that law in adaptation to a new situation. In other words, legitimacy flowing from legal continuity.

Something is legal because it is done according to the current law. You have power because the law says so. You don't become a ruler because you just feel like doing it. There is a certain order.

Let's take the case of King Norodom Sihanouk of Cambodia, one of the most remarkable Southeast Asian leaders of his time. He was enthroned in 1941 but later abdicated in favour of his father so he could contest elections and become the prime minister. This allowed him to become involved in politics. Later on, after all the crises in Cambodia, he was made king again in 1993 and in 2004, he abdicated again, this time in favor of his son Norodom Sihamoni who is now the king of Cambodia.

He is a very remarkable character. He claimed that he was dying thirty years ago. He is now ninety years old and I think he will outlive all of us. This picture suggests that there is a political and legal order: You don't just choose to give up your crown. You abdicate according to law and then your father becomes king. In fact they had a major crisis in Cambodia some years ago. Sihanouk intended to abdicate on account of his old age and the Government suddenly realized that the Constitution did not provide the selection of a new king. There was only a provision for a new king to succeed to the throne when the old one dies, but in this case, Sihanouk is still alive. So what do you do? Well, they amended the Constitution and then chose Sihamoni. There is legality behind all these maneuvers.

Notwithstanding the fact that Sihanouk is legally a purely constitutional monarch, he remains very influential because of his personality and because of he has been around for such a long time. Even so, he insisted that the law be changed and that succession take place accordingly. So, it was not a simple case of "I, Sihanouk designate my son to be king." In fact, he named three of his sons whom he said were eligible to be king; and it was the third son who was chosen. So legal legitimacy has a life of its own.

Political legitimacy is what many political actors try to claim, and tends to be based on other factors: charisma, economic success, ideological imperatives or popular endorsement and support. Even Communist regimes ostensibly speak in the voice of the people, with the support of the masses and that is manifested through elections which are organized under the rule of law.

5. *Legal Legitimacy*

Another facet of legal legitimacy worth thinking about is its dependency on legal continuity. In order for law to be made legitimate it must continue from a past order. Even if you have a break with legal continuity, you then have a fresh order that legitimizes it. Basically if one wants to go back to positivist legal theory, one can refer to Hans Kelsen's *Grundnorm* and when

the Grundnorm changes all the derivative norms follow. Every norm must conform to a higher norm until you reach the ultimate norm, which is the Grundnorm.⁴

In 1986 when President Ferdinand Marcos was forced to flee following a popular revolt. When Corazon Aquino came to power, the first thing she did was to appoint a Constitutional Commission to put together a new constitution. A break in legal continuity through revolution may be cured by seeking a new mandate from the people, as Aquino did in this case. But not every break in legal continuity results in a revolutionary situation nor the drafting of a new constitution. In the case of Indonesia, Suharto's removal, after twenty years as president did not actually result in (the Indonesians) crafting a new constitution. They continued to rely on the 1945 Constitution but with a couple of important amendments.⁵

In Southeast Asia, Thailand has the distinction of being the country which has crafted and dispensed with more constitutions in this part of the world. Since 1932 when King Prajadhipok gave up absolute monarchical powers, Thailand has framed and discarded seventeen constitutions. Their present constitution is the eighteenth one. In 2006, a few of us scholars were invited to Bangkok. In fact it was in 2006 to celebrate the tenth anniversary of the 1997 constitution. We considered it to be the most enlightening, liberal and democratic constitution Thailand has ever had.⁶ We were all getting ready to go to Bangkok and then the coup d'état occurred. We thought they were going to cancel the conference. We were not disappointed or anything. We thought we do not have to go, and probably we do not want to go to Bangkok when the events were still unstable.

Later on we got a note saying, "The conference is on. Please come". We began to panic because we were supposed to celebrate the 1997 Constitution but they had just thrown that constitution out. What would we talk about? So all of us made a pact that we were going to talk about what we would like to see in the new constitution. So basically, most of us said "we like the old constitution can you keep most of it please?"

The point I want to make here is that legal legitimacy stems from the continuation of the legal order. One must flow from the other. If there is a break in continuity, it must be legitimized. How is it legitimized? Going back to the plebiscite usually legitimizes it. In the case of people power, both in the Philippines as well as Indonesia, you see that kind of strategy. You either craft a new constitution by setting up a new constituent assembly or a constitutional commission (and the same thing with Thailand) or you simply

4. See generally HANS KELSEN, *GENERAL THEORY OF LAW AND STATE* (1949).

5. Kevin YL Tan, *The Making and Remaking of Constitutions in Southeast Asia: An Overview*, 2002 SING. J. INT'L & COMP. L. 1, 35.

6. *Id.* at 38.

try to justify the break with the past by recognising the status quo as legitimate under a doctrine of necessity.

6. *Courts and Legal Legitimacy*

The Courts can be called upon to play this role. If the legislature does not go back to the people in trying to formulate a new constitution, they may leave it to the courts. This has happened in the past, but what do courts do in a revolutionary situation? One option, when judges don't think that the leaders of the coup have any legitimate business throwing out the government, they can resign and possibly precipitate a constitutional crisis. However, many of them do not want to. Some feel they can remain and actually do something about it thus refuse to resign. I'm sure you all know about the political question doctrine, so some of us might say that this is a political doctrine, it does not deal with law, and we are interested in politics so stay out.

The other way is for the courts to take an active role as some courts have done. In Pakistan for example after the Ayub Khan revolution the Supreme Court actually validated the usurpation of power. In fact in the case of *Dosso v. State*,⁷ Pakistan, 1958) (a very interesting case) the Pakistani Supreme Court used Kelsen's grundnorm theory to justify a change of the grundnorm. They said that there is a clear break from the past and there is no legal continuity and the doctrine of necessity requires them to recognise the prevailing situation and legitimise the new regime. The same sort of principle was applied in *Lakanni v. AG*, in the Western Region of Nigeria in 1970.⁸

7. *Creation of New States*

Let us take a look now in Asia and how some of the Asian states have actually been created. The quest for legitimacy through law, and the constitution comes through various processes depending on how these states were formed. Prior to the Second World War (WWII) there were all but maybe forty-seven or forty-eight states in the world. Most of the states we now have were then still colonies. Looking at Asia – the Asia I am talking about – the independent states would have been China, Japan and Thailand (the only South East Asian country that has never been colonised). That's it, more or less.

Then subsequently after WWII, because of the decolonisation process,

7. *Dosso v. State* (PLD 1958 SC 533).

8. *Lakanni v. Attorney-General* (West 1970) 6 N.S.C.C. 143.

you began to see new states emerge. With the creation of new states, the point at which new states come into being is, I think, quite an important starting point for us to understand how these constitutions develop and the kind of legitimacy they derived. I just use two words to deal with them, devolution on one hand and revolution on the other hand.

8. *Devolution Maintaining Legal Continuity*

Devolution suggests some kind of evolutionary process; over time, you slowly develop. This process is usually peaceful; it is usually done through discussions and negotiations that result in the creation of a new state. This method was used by most of the colonial powers particularly Britain, even the United States of America. Philippines was a United States colony and it became independent through the process of devolution.⁹ The process of devolution is usually well-structured, and in the case of the British, it was in fact very well-orchestrated and I mean that in more than one way.¹⁰ It was done, symphony-like, in four movements. The process begins by bringing in nominated trusted locals. The legislative branch can then be expanded to allow publicly nominated sectoral local representation with colonial domination, with the aim of increasing the number of locally elected representatives to outnumber the colonial representatives. Finally, the former colonies gradually move towards self-government and then independence.¹¹ India provides a good model for studying this devolution.

In negotiations, the British would basically cherry pick. They would identify those who are likely winners and who are not anti-British and would support them wholeheartedly. If you look at the colonial records, it is full of these accounts. At the back of their minds, the colonial masters combined some sense of altruism with an overpowering sense of self-interest. Who do they think they can trust? Who can they work with so British interest would not be defeated? Obviously, the communists could not be trusted because they might nationalise all the British industries. They might kick you out from all the military bases and so on. Hence they begin to pick people whom they felt they could get along with and this was the pattern throughout the fifty or so states that became independent from Britain.

That's how Jawaharlal Nehru became the first prime minister of India. The most important political party in India at that time was the Indian National Congress which he led. At that time they were the ones with whom the British thought they could work with. These were local folks but they were either anglophilic or were highly anglicised. Nehru and his children

9. Tan, *supra* note 5, at 5-7 .

10. *Id.* at 7-16.

11. *Id.* at 9 .

were all educated in Oxford and he spoke perfect English.

The same thing happened in the case of Singapore. The founder of Singapore, Lee Kuan Yew, got a double first at Cambridge; he drank warm beer like the British. It's these people whom the British felt comfortable with. Mr. Lee and his supporters were the ones whom they identified as the erstwhile successors of the British.

It did not always go according to plan. Some of those they chose ended up losing the elections. Sometimes there were surprises but the British were at least honourable enough to respect the choices that were made eventually, because they were the architects of the constitutional artifices of these new states. The Colonial Office in London drafted more constitutions than anybody else, some fifty odd constitutions. What an irony, since Britain does not have a written constitution. The British, in their arrogance, thought that the British system was much too complicated for Asians and the natives. Just like a game of cricket you have to learn the quirky rules over time, so just in case you got it wrong, we better write it all down. This is the evolutionary model that the British adopted.

9. *Revolution: Establishing a New Order*

A revolution is a break from the past. This tended to be wars of liberation waged against the British. The only power in Asia that had the military muscle to beat the colonials at their own game were the communists.¹² We have very seldom seen a non-communist military power winning a war of independence. Even Suharto of Indonesia had the backing of the PKI. When you have a revolutionary situation, you are not likely to have too many connections to the past.

Those states that developed as a consequence of the devolution process tended to have constitutions that look like the mother or metropolitan model. So when you look at Singapore's constitution or Malaysia's constitution, you will see some differences but a lot of similarities. At the same time, English tends to be the operating language of the law and the common law tends to be kept as part and parcel of the emergent legal and constitutional system.

It is a commonality shared amongst countries colonised by Britain. Hence a Singaporean lawyer can easily communicate with an Indian lawyer, Bangladeshi lawyer or a Nigerian lawyer. However, it will be harder for us to communicate with a Taiwanese lawyer because the legal systems are very different.

An analysis of the communist regimes is necessary, because they have

12. See Kevin YL Tan et al., *History and Culture: Complexities in Studying Southeast Asian Constitutionalism*, 5(2) NTU L. REV. 187, 199-201 (2010).

established new legal orders of their own that are quite different from those of the devolutionary model. In the case of devolution, legal continuity was maintained through several things. First, a legislature with local representation was created (this is the four-step process I was talking about) and then the number of representatives was increased to outnumber the official nominees. After that, you have independence talks with the colonial elites, selected elites and the metropolitan masters. Transfer of power was negotiated between the elites.

Legal continuity is often maintained by passing legislation by the metropolis to renege sovereignty over former colony, together with new constitution. The former colony adopted the constitution, and an act of parliament is passed to say the metropolis will no longer exercise sovereign right over this particular territory. The new state will typically pass legislation accepting and establishing sovereign powers. There will be some kind of proclamation of independence. Therefore, legal continuity is maintained. I give you the law, you accept the law and it carries on.

The establishment of a revolutionary new order is not always founded on law; in many instances it is founded on ideology or personality or the primacy of the communist party. Here you have a few remnants of the socialist style of constitutions that does not really recognise the rule of law. In Marxism, law is nothing but a superstructure, meaning that it is no more than a political instrument that enforces the existing power relations between those within the state. In this perspective, personality becomes important.

10. *Post-independence Developments*

What happens in the post-independence period? What happened after the constitutions were created? This is where the adoption of typologies will stop. Typologies can be used up to this point but beyond that, it will not work well. Depending on the domestic situation and challenges, there may be interesting and innovative responses. For example, it may turn out that the constitution has malfunctioned and this resulted in a revolution. It may well even be a communist revolution, like what happened in Cambodia and Nepal.

Cambodia by the way was marginally colonised by the French but was also given independence by the French largely because of the personality of King Sihanouk. However, Sihanouk himself could not hold on to power because he was eventually kicked out by his own military chief, General Lon Nol. Lon Nol led a very corrupt regime and was thrown out by the Khmer Rouge who brought the communist regime back. The Khmer Rouge, after three terrifying years of governance, were kicked out of power by an invading Vietnam.

Similarly, there were democratic revolutions that had nothing to do with military power; but rather with people power. We saw that in countries like Taiwan, South Korea, Indonesia and the Philippines. A country can also end up descending into a continuous revolution. This is a big problem; there are some states that are continuously searching for legitimacy through law and the constitution. Thailand is one such case where the constitution is being dispensed with one after the other every three or four years. This could consequently lead to constitutional anarchy or constitutional irrelevance to the extent that the constitution may become marginalised as far as the politics is concerned.

That is not to say that the constitution should just be discarded or forgotten. As I suggested earlier, constitutions have an internal logic and they do come back. For instance Burma was granted independence by the British government in 1948, and they had a democratic government for ten years until 1958. Unfortunately there was a problem. U Nu, the prime minister at that time, saw that the country lacked the capacity to take charge and manage itself. As a result, he handed power voluntarily over to the military. They seemed competent enough and appeared to be the only people who could run the country. The military declared that after sorting out the affairs of the country they would hand the power back to the people. Two years later elections were held in 1960 and U Nu was once again elected into power by the democratic process. Yet, again he lacked the capacity to run the country because most of the elites actually left the country. The military took over in 1962, transformed it into a single-party state and ruled Burma for quite a period of time up until recently.¹³

Interestingly the Generals never claimed that they deserved to rule. They simply pledged that they intend on making sure that the country does not fall into disarray and will eventually return it back to democratic rule, which is what happened this year in a terribly problematic election. It is nothing close to democratic but there was an election. Whether it is just a façade or something more than that, we will need to see. They seem to be moving forward, but it needs further observations.

I think that they are actually moving somewhere because they are going to take over the chairmanship of ASEAN next year. So the ASEAN states have internally been pushing Burma towards some kind of resolution of their internal problems.

CONCLUDING OBSERVATIONS

Some of my concluding observations are as follows: When we look at

13. Tan, *supra* note 5, at 31-32; *id.* at 187, 202-3.

Asia, boxing the constitutions up into categories may be problematic but we can bear in mind a couple of things. Firstly, constitutions have both legal and political legitimacy. If a constitution meets both requirements, it is more likely to endure. A corollary is that if it only has purely political legitimacy, the chances of a collapse are greater. The claim to having legitimate grounds to consolidate your claim to power is a very powerful one.

Secondly, in post-revolutionary constitutions my proposition is that if they are drafted (and this is a truism, more like stating the obvious) through greater popular engagement, it is likely to carry greater legitimacy. Here I use the term popular engagement rather than any kind of specialised terms like constituent assembly because you can have a constituent assembly and totally fix the membership of that assembly. It is important that you have popular political engagement and get people on the ground to actually engage with the process.

Constitutions based purely on political or sociological legitimacy are inherently problematic and there is this constant seeking of legitimacy through the remaking of constitutions. The difficulty that hinders our constitutional thinking is we were taught that there are only three powers that need to be separated, respectively the legislative, executive and judiciary. This is the standard theory constructed by John Stuart Mill and Montesquieu. However we tend to forget that there may be real substantial powers outside these three institutions that continue to influence how the state is run, such as the military and the monarchy. In other words, the constitution must be practical; it must take into account these various facets of state power if it is to be taken seriously. Otherwise the constitution could easily be subverted by one of them. I have observed this phenomenon in countries like Thailand and Burma. Thailand is a classic case, because every now and then the military comes out of the barracks and takes power. After the elections are held, they go back to the barracks.

Besides the military, there are also rather odd institutions such as the Privy Council with ex-military men like Prem Tinsulanonda who are up there and very influential. Another cause of concern is the revered King who has amassed a huge political influence. These alternative and legitimate sources of power must be counted and constitutionally limited, otherwise the constitution is going to be subverted once again.

My final observation is that there is a lack of constitutional culture in Asia. Constitutional culture in this context refers to the combination of ideas about the limitation of state power, the understanding that law matters, and that no one is above the law. The rule of law is fundamental, buttressed by

the idea that one should do things according to rules and norms that have been established and accepted by all, rather than on the basis of power. If a society lacks the constitutional culture or what Andras Sajó calls ‘constitutional sentiments’, its constitution becomes very vulnerable. Mind you, none of this has anything to do with the huge Asian values debate of the 1990s. It is just a belief that law matters and it is important and we should try to abide by it.

Thank you.

III. COMMENTARY

A. PROFESSOR MING-SUNG KUO

Thank you for the fascinating presentation. I have two brief questions. The first is about the relationship between legal and political legitimacy. I would like to start with your third concluding observation. As just presented, I agree with you that as regards a new legal order, its legitimacy must be based on some kind of political support. So a new political order without extralegal political support would not survive. However, when we passed the revolutionary point of creating a new legal order, how do we position ourselves towards the relationship between the legal and political legitimacy? Do we translate political legitimacy wholly into a question of legality? Or, can we still maintain a distinction between legal and political legitimacy? That is the first question I would like to ask Kevin.

Second, I just want to hear more from Kevin about the devolutionary vis-a-vis revolutionary distinction. My impression was that actually both models are quite close to the context of decolonisation. So we can see the cases of Malaysia, Singapore, India and even Pakistan fit into the model of devolution. On the contrary, the independence of Vietnam and Laos would be categorised as within the model of revolution. Yet, I am not quite sure about the case of China; I think you would refer China to the 1949 situation in which the Chinese Communists defeated Generalissimo Chiang Kai-Shek and proclaimed the creation of the People’s Republic of China. But I am not sure whether it has anything to do with the creation of a new state or is it actually more about the creation of a new legal order. Can the case China be accounted for under your devolutionary vis-a-vis revolutionary distinction, which mainly concerns the decolonisation context? So I just want to push you a little bit to clarify the relationship between devolution and the revolutionary model of the political context of constitutionalism and the scope of its coverage.

B. MS. HUI-WEN CHEN

I have three general questions. The first is about what you have suggested at the very beginning of your talk. You noted that in a Hong Kong Conference, you discussed about the difference between Asian constitutionalism and constitutionalism in Asia. This question has puzzled me for quite a long time and until now I do not have an answer to it. I am a little bit skeptical of the concept of Asian constitutionalism because it seems to me that Asian states are too diverse to have a common concept (or ground) of constitutionalism as opposed to Western constitutionalism. Instead, if we take a very thin concept of Asian constitutionalism, it seems that there is no difference between the concept of Asian constitutionalism and the general comparative study of constitutional law in Asia. That is my first question and I would like to hear more of your opinion.

The second question is about your suggestion that a unique model or an approach be adopted in researching constitutionalism in Asia and, accordingly, you make some concluding observations. I was wondering whether these concluding observations and the research approach can be applied to the cases of all non-Western constitutional states in general, and whether we would reach the same conclusions on this issue from a comparative study of non-Western constitutional orders. If so, what is the uniqueness of studying Asian constitutionalism or constitutional law in Asian countries? If not, as a constitutional scholar from Asia, how can we have a dialogue with constitutional scholars from, say, Islamic countries.

Finally, I would like to turn our gaze back to Western constitutionalism. I found that Asian constitutional scholars tried very hard to contextualise Asian constitutionalism or Asian constitutional law but while doing this, some scholars tend to de-contextualise Western constitutionalism. Actually it is a very vague idea and we can even question the very concept of Western constitutionalism or whether there is a universal agreement on the substance of Western constitutionalism. For example, judicial review and constitutionalism have quite different understandings between the United States and the UK, let alone Germany. It is suggested that when doing comparative constitutional law in Asia, we contextualise Asian experiences. However, what should we do when we do a comparative study that includes Western countries? Do we have to contextualise western constitutionalism too and if so, to what degree?

C. PROFESSOR KEVIN YL TAN

Thank you very much for your various questions. First, after the new order is created is it necessary or should we translate all the political

legitimacy into a legal one, is that your question?

No, we should not do it, or it would be absurd just as they tried doing this before in 1962 or 63 for the Constitution of Cyprus. When the British Colonial Office began the process of decolonisation at that time (and in fact, up till now), Cyprus is divided into two parts, the Greeks and the Cypriots. The material that they tried to specify the status of the two different races in the constitution went to ridiculous lengths where even the number of hours you are allowed to broadcast Greek programs compared with Cypriot programs were fixed in the constitutions.

The constitution should never become an all-encompassing manual for the existence of a nation. It should be sufficiently flexible to allow for the vicissitudes of human behaviour and how human beings interact within a context. The more elastic it is, the more likely it is to survive, while the more rigid it is the more likely it is going to break down and lose legitimacy very quickly. It is because when one intentionally wants to pick up a fight in the above constitutional context, it will be very easy. For instance, one might say “Actually we need one more hour of TV”, and this will provoke a legal fight over something that is really quite inconsequential. I do not think that one can or should turn everything that is political into something legal.

I have only one point about this. If it is only a political fact and is not supported by the legal system, then one is in trouble already. Take for example, the position of the King of Thailand. It is obvious that the next King will never enjoy the same kind of legitimacy that King Bhumibol now has. His status was achieved over some 60 years where he had time and opportunity to build up a good reputation and a heartwarming connection to the people, etc. However, the reputation will evaporate with the death of the leader. So, if his successor comes into the office hoping to exercise the same influence, that is just not going to happen.

IV. GENERAL DISCUSSIONS AND RESPONSE

Question:

Many countries have struggled to maintain and build their political and economic aspects through the democratic processes. Interestingly a by-product of democracy is a polarise society as in the case of Taiwan and Korea. As a result courts have been more active in taking a leading role to legitimise political phenomena. How do you explain this situation in your actual framework?

Question:

In Thailand's constitution we have three separate sets of powers, the legislative, judiciary and the executive. Practically speaking the King of Thailand has considerable powers and it has become a very serious problem. Legal scholars are divided on this issue of whether to grant the King powers or to divest his powers and make him a symbolic figure instead. What is your opinion regarding this issue?

Question:

In several parts of Asia Hinduism and the Muslim Sharia law plays a very important role in those countries however religion does not seem to play a big role in such countries like Taiwan or China. Can this difference be generally discussed as a matter pertaining to Asian constitutionalism? What is the role of religion in the formation of constitutionalism in Asia?

Question:

You indicated that in Asia there is a fourth institution besides the judiciary, the executive and the legislature. There are many instances where the fourth institution controls more power than the other three powers. Is Asian constitutionalism different from what is normally explained in the western textbooks and cases? Is there a fourth institutional power in a leading country like Singapore?

Professor Kevin YL Tan:

Firstly, I will address the question concerning Thailand and deal with the rest as I go along.

The role of the monarch has always been safeguarded in Thailand's constitutions even during the reign of King Bhumibol. The unique situation in Thailand originated from the personality of the king himself. He is a person of exemplary behaviour. He makes sure that the poor are taken care of and also does a lot of charity work and strongly supports big public projects. There are many books written about his life. He tries to keep a very noble personality of very high morality. At least that is how the public views him.

In Thailand the institution of the monarchy has actually gained more political legitimacy than what is legally ascribed under the constitution. One of the biggest debates in Thailand now is concerning the fate of the monarch.

What will happen if the king is so ill? This is a serious problem in Thailand. Some scholars are proposing to draft a new constitution. Others are talking about changing the provisions relating to succession. There are also talks of the possibility of having a queen instead of a king. The differing opinions have caused a split in Thailand's academic circles. You cannot talk too openly about this because of Thailand's archaic lese-majeste laws. These issues make Thailand unique. What can you do to the legal power of the monarchy? Can you tame it with the Constitution? Can you reduce the impact of the Privy Council, a very powerful institution in Thailand? Its highly influential role stems from the power-brokering positions that these people have. For example, General Prem is a very highly respected former prime minister. Besides being a former military top brass, he is also very close to the royal family. Though he is a very highly respected individual he is very old already.

In my opinion one of the biggest challenges for Thai constitution making is not about writing a new constitution, it is about how to ensure that the role of the military is contained such that it cannot act whenever it feels that the civilian government has not acted in the best interest of the country. A mechanism should be in place to allow the people to go back to the polls and say: 'We reject the government.'

What is happening in Thailand in the last couple of years is symptomatic of another phenomenon in that country, namely, the split between the Bangkok elites and the rest of the populace. There are more or less three sections to be worried about. There are the conservatives, pro-monarchy and anti-Thaksin Bangkok elites, the pro-Thaksin supporters in the north who are not that well off, and the separatist Islamic militants controlling the southern part. How do you deal with all these three groups is a political question rather than a constitutional question. However, the constitution must have sufficient mechanisms for the government in power to deal with crises, rather than simply sending in the military whenever there is a problem, or simply forcing people to take sides as the supporters of "Red Shirts" or "Yellow Shirts" and so on.

There is no real effort to contain it and there is a contradiction because there are obviously self-interests involved. Thaksin on one end of the spectrum is being seen as an anti-monarchist. Sondhi Limthongkul, a former Thaksin business partner, is seen as very anti-Thaksin. He capitalises on his media enterprise to drum up support and deride Thaksin. So there is a serious problem where the legal process itself actually tends to become marginal in the main discussion of politics. I do not pretend to know how to solve this problem. A new constitution can be brought in time and again but new constitutions do not work unless they sufficiently capture the reality of the power relationships between the various groups within Thailand itself.

As I said there is too much self-interest. A good start would be to regulate the media law a bit more tightly. But since Thaksin and Sondhi are both media moguls why would they want to regulate themselves more tightly? When self-interests clash with policy interests, problems arise. Much of the world has disposed of their monarchies. This may well be a viable path Thailand should seriously contemplate. I am afraid this is the best answer I can give.

The role of religion in the formation of constitutions is a significant issue. Let me start by saying that first of all one has to look at the ethnic composition of the colonial state. Some states are little bit more homogenous than others. But most colonial states are extremely pluralistic in nature. In other words, when the colonials went in and took power, they did not take into account the varying differences. On the contrary, they drew a map and forced locals to accept it.

Look at the map of Africa that is a classic example. It is impossible for the natural borders to be so straight. Most natural borders follow natural features, but that is not how the Europeans carved up Africa. What then happens is that, in international law we have a doctrine called *uti possidetis*, which means basically you let the borders lie where the western colonies fell. So instead of realigning the border and including the various tribal regions to make the states more homogenous, they leave them where they are. There is a heated debate going on in Africa concerning this issue at the time of decolonisation, but the African states preferred to leave the borders where they lay.

Religion is another major factor. It acts as yet another cleavage, and oftentimes, a reinforcing one at that. The political scientist Arend Lijphart talks about cleavages in plural societies and describes the different kinds of cleavages in dividing societies.¹⁴ You either have cross-cutting cleavages or reinforced cleavages. Cross-cutting cleavages are less dangerous since the danger of a major rift is reduced. Reinforced cleavages, especially those of race and religion can create very serious rifts within a society making it particularly fragile and fractious.¹⁵

Most colonial powers, and the British in particular would do this, they would play favourites. The British were not exceptional. The Germans, the French, and actually everybody would play favourites. They cannot possibly run an empire with troops alone, so they needed to co-opt the local elite. Therefore they looked around for those whom they might favour, and they tended to pick the minority since they generally felt marginalised anyway. By raising the status of the minority to a superior position, they turned the

14. See generally AREND LIJPHART, PATTERNS OF DEMOCRACY: GOVERNMENT FORMS AND PERFORMANCE IN THIRTY-SIX COUNTRIES (1999).

15. Tan, *supra* note 5, at 40-41.

society into a quite divided one. The favoured people are probably English-educated. I will just use the case of Singapore and Malaysia as example. This is how the British did it. Top of the list among the elites were the Eurasians, those who are mixed (partly European and partly Asian parentage). So the Eurasians were the favourable ones. The pecking order went something like this: Europeans on the top tier, and in second place were the all English-educated Eurasians, who tend to be either Roman Catholics or Christian protestant. Then there are the Straits-born Chinese who were ethnic Chinese but local-born and educated in English. They were known as the King's Chinese or Queen's Chinese, depending on who was on the throne. My mother is one of the Straits-born Chinese. She grew up not speaking any Chinese at all since they all spoke Malay and English at home.

These would be the next rung among the elites, but those who were not educated in English would be relegated down a rung. The problem is that when the colonial authorities divided up the communities in their governance approach, you see reinforced cleavages emerging for ethnic minorities were often also religious minorities, in this way a serious problem would eventually emerge.

Singapore is rather unique in that, it is primarily Chinese and among the Chinese there are ethnic Chinese professing numerous different religions. About sixteen percent of them are Christians/ Catholic, and the remainder may be at largely Taoist/Buddhist, while a significant, say, fifteen percent of them do not profess any particular religion. But the fractures are quite different and reinforced when we consider the Malay population. The Malay population is almost, by definition, Muslim. So there are two cleavages being reinforced: ethnic cleavage on one hand and religious cleavage on the other hand.

Now what has all these to do with constitution-making? It has a lot to do with it, when you work into the constitution provisions that would address previous inequalities. Now we need to solve problems about inequality of treatment. One way is what the Americans called "affirmative action", whereby you try to actually raise the position of these minorities that have been disadvantaged during the colonial era. How can such clauses be written into constitutions? That is the first major challenge. The second major challenge is the inclusion of religious practices. How can equal rights for all religions be ensured? Not all religions will have rules and laws consonant with your civil laws. Under Islamic law, a man can marry up to four wives, but in the Women's Charter of Singapore Constitution, the practice of polygamy is forbidden. How can the government confront this clear contradiction? The compromise made in Singapore is that we exempt the Muslims from this particular provision so they can carry on practising their faith accordingly. This goes across the board. The approach taken by states

like Singapore and some other states is what we called a “quasi-secular approach”.

I would say it is not purely secular because when it is purely secular, there is no public space for religion at all. People do not even talk about religion in the public space. In an extreme case of secularism, you cannot even walk around a public school with a crucifix chain because that will bring religion into the public sphere. We are not talking about this form of secularism or semi-secularism. The state will recognise a person’s right to practice his or her own religion but it will not privilege any particular religion in the constitution itself.

Malaysia faces a catastrophic nightmare with this clash between Islamic law and civil law, as does Pakistan right now. Pakistan was born out of the problems of separation during the decolonisation of India. Pakistan, Bangladesh and what is now India were really one entity under the British colonial government. Yet, because the Muslims in the north were so worried that they would be bullied by the majority of the Hindus in the south, they wanted a separate state. Muhammad Ali Jinnah, the founder of Pakistan, wanted a separate state and it was a bloody affair. So many people were massacred. There was so much bloodshed because at the stroke of midnight, if you were at the wrong side of the border, you will be trapped. Things have simmered somewhat but the tensions are always there, so in the end they created an Islamic state in Pakistan.

In the case of Malaysia and Singapore, the Pakistani influence comes in because when they set up the Reid Commission to decide on the framing of the Malaysian constitution as part of the decolonisation process, one member of the Commission was Justice Abdul Hamid of the Islamabad High Court from Pakistan. He was one of five members who suggested to Abdul Rahman, the first prime minister of Malaysia, that there should be an official religion clause in the constitution of Malaysia. This resulted in the inclusion of Article 3 of the Malaysian constitution, which by now reads: “Islam is the religion of the Federation”. What does that mean? Does it mean that Malaysia is an Islamic state? Obviously if you examine the historical documents, the authorities concerned would all say that there never was any intention to create an Islamic state. Islam is the religion of the state for the purposes of ceremonies and rituals. Therefore if you have the Opening of the Parliament, Muslim prayers can be said. It is this kind of ceremonialist Islam that was thought of by the founders. But in the last forty years, this intention has been re-interpreted and appropriated by proponents of religious politics.

The ruling Barisan Nasional, sort of a coalition led by the United Malays National Organisation (UMNO), is always trying to push the Islamic envelope to appeal to the fundamentalist and more right-wing Muslims. Hence, everybody is claiming to be more Islamic than each other and

problems of extremist interpretations surface. In this context, Malaysian politicians began to make use of Article 3 and claiming that Malaysia is an Islamic state. Now, the population of Malaysia is composed of sixty-five percent Malays who are Muslims. The remaining thirty-five percent non-Muslims are Chinese, Indians and the indigenous peoples like the Orang Asli and the Dayaks. Interestingly, the largest Indian population outside India is to be found in Malaysia.

What does that mean? Nowadays the more quasi-secular Malaysian constitutional scholars argue that “It is a nightmare to have this clause in the constitution”. Professor Wen Chen Chang and I were in Bangladesh earlier this year and we had great privilege to interview the principal drafter of the 1972 Bangladesh Constitution, Dr Kamal Hossain. He said, “We learnt a lesson from Pakistan, namely, never put your religion inside the Constitution, which is the reason why we do not have the kind of problems that Pakistan has.” He told us that in those days, every time he went to Pakistan, the Pakistani constitutional lawyers would say to him “Oh you are so lucky, you did not put Islam into your constitution.”

In Sri Lanka, religion has also become a problem, it started out as a quasi-secular constitution just like Singapore in which there is no religion clause inserted into the constitution. However when the political party with a religious founding and ethnic mandate came to power, it began to push Sinhala as the official language, and Buddhism as the official religion. It had a sufficient majority and change the constitution. They inserted official language Sinhala, official religion Buddhism and a similar problem emerged. That is how the Tamil Tigers of Tamil Eelam began their secessionist war, because they are Hindus and they speak Tamil. Then we begin to see privileges distributed accordingly. This is a real nightmare, and does it have any effect? Yes, it does. Is there an ideal solution? Probably not, but at least if you can keep it out of the Constitution, perhaps it might be a safeguard for minorities to ensure that their rights are not being trampled upon, you might have a better chance at it.

The next question was more concerned about the role of courts in pluralisation and it is a different question altogether. Not all courts appear to be equal, by that I do not mean some courts are better than others. If we look at different constitutional systems, there is always a role ascribed to courts. The American model is extremely deceptive and you will come away very disappointed when you look at your own system. When you look at the Federalist papers, and the way in which they founded the American Republic, the American Supreme Court was clearly intended to be a political institution. It was not meant to be a sort of aloof and independent institution that steered clear of political issues; rather, it was clearly intended to be political because that is how the three different branches were expected to

work. That is why Hamilton argued that the courts are the least dangerous of the three branches, partly because they cannot initiate anything. However, they certainly have the power to change the law and that was very important in the enlightenment of the American founding fathers.¹⁶

Other constitutions are not crafted in the same way. If constitutions are based on a German constitution law, and the civil legal system or model, the ordinary courts are not that important in a political sense. That is the reason constitutional courts are created. It is quite a new development and only in the latter part of the twentieth century can we see the development of constitutional courts. There is no real constitutional court in a traditional civil law legal system.

However, the reason why there is no constitutional court in the constitution may simply be because under the civil legal system, there is no doctrine of binding precedent. Previous precedents are not that important. Judges decide on a case-by-case basis and do not find themselves bound by previous decision of its own or of a higher court, etc. Whereas under the common-law system, judges adhere far more to previous precedents and as a result they follow the precedents much more clearly and that is the reason we tend to remember the names of famous common law judges. One talks about American Judges like John Marshall, Rehnquist and so forth. Few people can remember the last great constitutional court judge of Germany because it is a civil legal system. That is why I said not every court is created equal, because their ascribed constitutional roles are designed in different ways.

So where do the courts stand in terms of the pluralisation of society and what happens? In the common law courts – which play a more important interpretive role – judges tend to have more leeway compared to the constitutional courts. It is hard for constitutional courts to do much, as the judges have to try to reach a majority decision, which tends not to be too long. In common law tradition decisions can be as long – 100 odd pages. In the celebrated Indian Supreme Court case *Kesavananda Bharati v. State of Kerala* (1973),¹⁷ which discussed the validity of the basic features doctrine, the full bench of 13 sat and was written more than a thousand pages that it required the publishing of one extra volume of the yearly report simply for that case. So that's what common law judges do. So within that context judges sometimes see for themselves, a particular role. The Indian Supreme Court, because of its own frustrations with the political process and with the other branches of government, actually has taken on a far more expansive role than it would under normal circumstances. They created new rules of *locus standi* to allow that never been heard of anyway. This is a court that

16. See generally ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1962).

17. His Holiness *Kesavananda Bharati v. The State of Kerala and Others*, AIR 1973 SC 1461.

has probably the biggest backlog in the world, yet it was prepared to hear actions against the executive almost at the drop of a hat.

However, not every court behaves like the Indian Supreme Court, so let me return to my main points concerning the political and legal challenge and response. How does an institution respond to a particular challenge? At that point one might say let's pause for a moment and look at the constitution. Is this really allowed, and how are we permitted to do these sorts of things? On this issue I cannot give you a more generalised answer. The courts have a structured role, and institutionally there is a legal document circumscribing its role. Beyond the literal norms they may take on roles of their own beyond the words of the constitution and interpret that in a more liberal way.

Question:

Would you use bylaws to make your constitution more flexible so that you do not have to always get rid of your constitution, when a little bit of a problem occurs, you can alter your bylaws or whatever you have on the sight to solve it?

Question:

I think you are such a knowledgeable person on history, economics and the legal systems in Southeast Asia. I just want to ask you, as a student who do not have abundant knowledge on such various subjects, how should we begin to broaden our visions on the studies of Asian constitutionalism or other similar interdisciplinary subjects? Can you recommend some introductory resources for us?

Professor Kevin YL Tan:

Sometimes you might want to do that and sometimes you want to remain silent. Sometimes it is better to leave things unsaid. If everything is put down in black and white, picking a fight will be easier. The moment it is written down as law or a by-law there is room to launch a challenge, and the problem with courts and judges is that when you go up there, the decisions will be binding and one of the two sides will lose the case. That is why we try not to bring difficult and highly-contentious or emotive cases to courts but try to solve them by alternative methods, and hopefully reach a compromise. If one goes all the way to the courts, then the judge can only say you win and you lose. They cannot have both sides win or lose. When you realise that the result of any legal challenge is necessary binary, you will be very careful about it. Sometimes you do not want to lose face when going

to courts. So sometimes you leave it for negotiations but not in all cases, or it will make your negotiations and your political maneuverings exceed what the law allows.

The second question is about devolution and evolution in the case of China. My view is, of course not backed up by any particular empirical classification but I would say, in 1949 a new state was created. Whether or not it is a new state, it is not a continuation of 1911 or 1912 constitution. Rather, it's a new constitution and a new legal order. Actually there were several waves up to 1949. Let me just illustrate from a very personal perspective. My grandfather came to Singapore from Shandong in China sometime around 1920. He spent his whole life making money in Singapore so he could buy more farmland in Shandong. Singapore was not his home; China was.

But after 1949 as far as he is concerned there wasn't a China anymore, Singapore became our home. In terms of one's committed idea of reality that is another country already. It is not the China he had been supporting and sending money back to; the old China was gone. Like I said it is totally unscientific.

My view has always been that is no such thing as Asian constitutionalism. I know Professor Wen Chen said there is and although she is my dearest friend, I disagree with her point of view. You could find certain characteristics here and there but I am a universalist who is more concerned with history and trends. I come from the background of history, so every time when one turns around and say, "If you do not know history, it will repeat itself". It is nonsense because no two things are ever exactly the same. A new generation acts differently to the same circumstances. What would you have done if I put you back to two hundred years ago? You never know. What would Jefferson do today when he looks at Taiwan? I have no idea, because people would react differently to different situations.

Every country attempts to practice constitutional government. Is there any difference between the brand of constitutionalism practiced by states in Asia as compared to those elsewhere? I do not think so. I think many Asian scholars carry too much baggage from the colonial era. It did not help that in the 1990s, as Asia was fast rising, we became ever more conscious of our Asianess, thus setting the scene for a revival of the great East versus West debate in the form of the Asian Values debate. To up the ante, the World Bank issued a controversial report in 1993 in which it argued that the economic success of all the Asian tigers or dragons was largely because of Confucian Asian values. I think that there are no real differences among the countries. There is no need to keep saying we are Asians and therefore are different because we end up in this kind of defensive position. We can just drop that, we can just forget about it. That is why I started off by saying let

us not worry about where the idea came from, if it is a good idea and a good way of analysing a problem, then just use it. Never be haunted by the question whether it came from the West or the East because it really does not matter. So that is my response in this contextualisation and de-contextualisation. Since we are Asians, we have the feeling that we have to defend the Asian position, but no, we do not have to. We do not need to be patriotic about Asian all the time.

I do not know about tips on how to begin the studies but I do know how I stumbled into these subjects. I read a lot of history. Actually you do not have to read very advanced historical studies. I like big historical analyses because people try to present general ideas and some of them are more worth reading than others. I never worry too much about who the author is and where she/he came from. My Chinese is terrible so I cannot read serious Chinese text, though I can probably read a newspaper article; just about. Hence I tend to have to rely mainly on English texts more than anything else.

I read a lot of yearly updated country reports and articles in *Asian Survey*, a wonderful journal published by the University of California, Berkeley, which I find it extremely useful. Sometimes one just read things in bits and pieces over time. I would not worry too much about trying to remember it all. My memory is not good but when I need to connect up various dots it kind of comes back to me. There is another useful resource called *Keesing's Contemporary Archives*, which is just for general use and adopted to keep in touch with what is going on and what maybe important. The problem is that, in those days, when I am doing a lot of research on these topics, the materials in late eighties and early nineties cannot be found easily, I was lack of resources because there is no Internet in the previous decades.

Back then, you literally had to live in the library because that was the only place you can find everything. Now with the online resources, the problem has changed from lack of information to an explosion of information. I also try to read a good weekly magazine like *The Economist*. Besides, that, newspapers like *International Herald Tribune* are pretty good. I like the *Financial Times*, because I think the news is better presented and analysed and the writing style is excellent. However, these are just my personal and biased choices. Beyond that, you learn by doing. In other words, you have to try writing little pieces which require you to start running around and gathering the data. You have no choice. There is no book that you could go to in the very beginning. Honestly speaking, there is no really great book in the field of comparative constitutional law. There are a number of good ones but not one outstanding one.

To write such a volume, one needs a whole team rather than one or two person. There is just too much material to be covered. Nowadays nobody

really writes one big international law treatise. The subjects become so specialised so what you might like to do is just keep in touch of what is going on. General history books are also a good starting point. For example, if I wanted to read up on China, I tend to gravitate to the work of John King Fairbank. I love his books because he writes so well and gets to the heart of the matter, even though Chinese scholars tell me his work is too superficial. You read to get the big picture, rather than the details, and authors who provide the best big picture, are for me, the most useful. Some of these books are quite small, for example when reading up on Southeast Asia, I start with Milton Osborne's wonderful little *Southeast Asia: An Introductory History*¹⁸ which is now in its tenth edition. My problem is that South Asian scholars tend to be very loquacious so their books are very thick. But there are exceptions. For India, I have always found the two-volume Penguin History of India most useful. The first volume is by the great Indian historian Romila Thapar and the second volume by Percival Spear.¹⁹ That is a pretty good introduction; small and concise. I would always try to start from small, introductory works, even encyclopaedia entries, just to get the broad sweep and the basic storyline and picture. From there you can always move on to more advanced and specialised works. It is a never-ending journey.

18. *See generally* MILTON OSBORNE, *SOUTHEAST ASIA: AN INTRODUCTORY HISTORY* (2010).

19. *See generally*, ROMILA THAPAR *A HISTORY OF INDIA: VOLUME 1* (1990); PERCIVAL SPEAR, *A HISTORY OF INDIA: VOLUME 2* (2010).

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憲政主義於亞洲國家中之法律與政治正當性

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摘 要

Kevin Tan教授作為一位深具法律史研究背景的憲法學者，其撰述廣泛地遍及於法律史與憲法學。他以藉由對於歷史文本與其他文獻資料之關注，作為其對於亞洲憲政主義的研究進路。他受邀作為此次圓桌會議主講人，並分享了他長年專注於憲政主義在亞洲國家中之法律與政治正當性的研究成果。他剖析了在許多亞洲國家中所引發之失序的政治與法律現象，並將這些現象置於各個國家的研究脈絡中探討。