

## **Constitutions, Constitutional Practice and Constitutionalism in East Asia**

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The constitutions and constitutional practice of states in East and Southeast Asia (hereafter called “East Asia”) provide worthwhile case studies for scholars of comparative constitutional law, constitutional theory and politics. This chapter seeks to provide a conceptual framework for such comparative studies, and discusses some key components of the existing literature on this subject. It is hoped that the chapter can serve as a point of departure or guide for further research into the topic. Given space limitations, the treatment in this chapter is necessarily selective and incomplete, in terms of both the countries and the literature included in the discussion.

East Asia is a region characterized by great ethnic, cultural, religious and linguistic diversities, different levels of economic development, and large variations in the types of political regimes that have existed or are now prevalent. This is highly relevant to the study of Asian constitutionalism, as constitutional law is bound up with history and politics. All states in East Asia have adopted written constitutions in modern times, but the nature, purposes and functions of these constitutions vary according to the nature and character of the political regimes in which they exist. This chapter will therefore begin with a discussion of the types of regimes that have existed in modern East Asia, before proceeding to investigate the relationship between constitutions and regime types.

Political regimes in the contemporary world may be classified as democratic, non-democratic (or authoritarian), and hybrid regimes (which have both democratic and authoritarian elements). It is easy to recognize political systems in East Asia that resemble Western liberal democracies as democratic regimes. Such cases include post-War Japan, and South Korea and Taiwan after they embarked on democratization in the 1980s. Non-democratic regimes in the modern world (Brooker 2000) and in contemporary Asia are those in which political power is concentrated in one single party (as in the People’s Republic of China and Vietnam), one single strongman (as in North Korea), or the military (as in Thailand for various periods since royal absolutism was replaced with constitutional monarchy in 1932, and in Myanmar for significant periods). Hybrid regimes (Diamond 2002) constitute a more complex category. As the phenomenon of hybrid regimes has been significant in modern East Asia, we will investigate it further by examining some key ideas relating to hybrid regimes.

Political scientists have pointed out that the boundary between democratic and non-democratic political systems is often “blurred and imperfect” (Diamond et al. 1990: 7). There exist regimes which may be described as a “half-way house” between democracy and

authoritarianism (Case 1996); they inhabit the “vast gray zone that occupies the space between authoritarianism ... and consolidated democracy” (Ottaway 2003: 6). These are what may be called hybrid regimes (Diamond 2002), alternatively known as semi-democratic (Case 1996) or semi-authoritarian regimes (Ottaway 2003). Scholars have researched the “grades of distinction among less than democratic systems” (Diamond et al. 1990: 7). For example, in their authoritative work on politics in developing countries, Diamond et al. (1990: 7-8) identified several species of hybrid regimes, which may be summarized as follows.

The first type is called “semidemocracy”. Competing political parties and elections exist in such a political system. However, the elections held are not completely free and fair elections; restrictions exist on political parties’ activities; civil and political liberties are limited. As a result, the “electoral outcomes, while competitive, still deviate significantly from popular preferences”. “[S]ome political orientations and interests are unable to organize and express themselves.” Furthermore, in a semidemocracy, the “effective power of elected officials” may be “limited”.

A second type of hybrid regimes is the “hegemonic party system”. As in semidemocracy, opposition political parties are allowed to exist and elections are held. However, there is “pervasive electoral malpractices” and “frequent state coercion” against the opposition. As a result, the opposition is “denied ... any real chance to compete for power”. This means that the existing power-holders are able to perpetuate their monopoly of political power and pass it to others within the same “hegemonic party system”.

Diamond et al. also formulated a third category, which they called the “pseudodemocracy”. In their classification scheme, this is a “subset of authoritarian regimes”. Authoritarian regimes are those in which little “pluralism” is permitted, there are few or no civil and political freedoms, and “most forms of political organization and competition” are banned. It is recognized that authoritarian regimes vary in terms of the space available for “independent and critical political expression and organization”, whereas in the “totalitarian” regime, there is no such space at all. In the case of the pseudo democracy, “the existence of formally democratic political institutions, such as multiparty electoral competition, masks ... the reality of authoritarian domination”. In this theory, the difference between the pseudo democracy and hegemonic party system seems to be a matter of degree. The former is “less institutionalized”, “more personalized, coercive, and unstable” (Diamond et al. 1990: 8).

The concepts of semidemocracy and hegemonic party system discussed above may be usefully compared with that of “semi-authoritarianism” as formulated by Ottaway (2003) (who considered Egypt under Mubarak and Venezuela under Chávez as typical examples of this type of regime) and that of “semidemocracy” as formulated by Case (1996; 2002) (who applied it to the study of politics in Singapore and Malaysia). According to Ottaway, the key feature of semi-authoritarianism is that although there exist opposition political parties and elections, there is “little real competition for power” (2003: 3), because there are “mechanisms that effectively prevent the transfer of power through elections from the hands of the incumbent leaders or party

to a new political elite or organization” (15). Ottaway points out that semi-authoritarianism usually relies on “power networks independent of the formal democratic processes and institutions” (134). The latter are often weak and manipulated by the rulers (16-17). There is thus a “discrepancy between the way in which power is generated and allocated in practice and the way in which it ought to be generated and allocated according to the formal institutional framework” (16).

Ottaway stresses that the semi-authoritarian systems which she describes in her book are not “imperfect democracies struggling toward improvement and consolidation” (2003: 3). The countries concerned are “semi-authoritarian by design, not by default: They are successful semi-authoritarian regimes rather than failed democracies” (9). This converges with Case’s assessment of what he calls “semidemocracy”, where the rulers “borrow cunningly some features of democracy in order substantially to avoid it” (Case 1996: 438). According to Case, semidemocracy is characterized by “electoral contestation” without “liberal participation” (439). Restrictions on civil liberties and on the opposition’s activities are such that the opposition would not be able to win power in an election, which is no more than a “visible outlet for social grievances” (439). Case argues that as a “distinct regime form” (437), semidemocracy can be stable. Developing this theory of semidemocracy in the mid-1990s, Case considered Singapore and Malaysia to be typical examples, as contrasted with the Philippines and Thailand, which in his view (1996: 437; 2002: 26-28) were unstable, low quality or unconsolidated democracies (which are more democratic than semidemocracy), although he classified Thailand in the 1980s as a semidemocracy.

On the basis of the above discussion, it may be observed that the key distinction between a hybrid regime and a full democracy is that in the former case, although different political parties are allowed to exist and regular elections are held, the possibility of different political parties taking turns to form the government after winning a general election is largely or completely ruled out in practice. The monopoly of power by the ruling elite, or the practical impossibility of transfer of power to a different political party or group, is secured by restrictions on civil and political liberties, persecution of and coercion against opposition politicians (for example, by means of repressive laws or selective enforcement of the law), informal power networks (including those based on a culture of patrimonialism, patronage and clientalism), practices inconsistent with free and fair elections (including vote-buying, rigging the election), etc. On the other hand, the difference between a hybrid regime and a completely authoritarian one is that in the latter case, there exist minimal or no civil and political liberties (including freedom of the press), little or no space for political and social pluralism such as political parties other than the ruling party and civil society organizations outside the control of the regime, and elections (if they exist) are merely those in which there are no candidates who are not from or approved by the ruling party.

The differences between democratic, authoritarian and hybrid regimes as discussed above have important implications for their constitutions, constitutional practice and constitutionalism.

We now proceed to review some existing classifications of constitutions, and then seek to correlate them with these types of regimes. Two schemes of classification of constitutions will be considered here: that developed by Loewenstein, and that by Sartori.

Loewenstein (1957) proposes an “ontological” approach to the classification of constitutions, which focuses on the degree to which political practice conforms to or relates to the norms set out in the constitution. In his theory, there are three types of constitutions: normative, nominal and semantic. A constitution is normative if it is “faithfully observed by all concerned” and is effective in “governing the dynamics of the power process” (1957: 148-149). A constitution is said to be nominal if it is “not lived up to in practice” – because of, for example, unfavourable “socioeconomic conditions”, but it serves an “educational” purpose and function, “with the goal, in the near or distant future, of becoming fully normative” (148-9). According to Loewenstein, this type of constitutions is often found in “states where western democratic constitutionalism has been implanted into a colonial or feudal-agrarian social order” (151). The semantic constitution, which in Loewenstein’s view was exemplified by that of the former Soviet Union, does provide information about the political and legal systems, but is no more than an instrument of political control and “the formalization of the existing location of political power”. “The peaceful, non-revolutionary change in the location of political power is impossible.” (149-150)

Sartori (1962) also developed a threefold classification of constitutions, but the terms he used and their meaning are slightly different from Loewenstein’s. In Sartori’s theory, the three types of constitution are the “garantiste constitution”, the “nominal constitution”, and the “façade constitution (or fake constitution)”. The garantiste constitution secures civil liberties, restricts arbitrary power and ensures a limited government (1962: 854-855). It is therefore equivalent to Loewenstein’s normative constitution. Sartori’s nominal constitution is, as Sartori himself acknowledges, the same as Loewenstein’s semantic constitution. It is a “collection of rules which organize but do not restrain the exercise of political power” (861). The main discrepancy between Sartori’s scheme and Loewenstein’s lies in Sartori’s concept of the façade constitution, which “give[s] us no reliable information about the real governmental process” and is “basically a disguise” (861). Façade constitutions “take the appearance of ‘true constitutions’”, but “are disregarded (at least in their essential *garantiste* features)”. “As far as the techniques of liberty and the rights of the power addressees are concerned, they are a dead letter.” (861) Sartori considered his concept of the façade constitution to be different from Loewenstein’s nominal constitution, which (in Loewenstein’s view) is intended to become fully normative at some future point in time. Sartori also pointed out that there is “often a considerable overlapping between nominal and façade constitutions”, thus giving rise to “a ‘mixed type’ (partly nominal and partly fake) of pseudo-constitution” (861).

We can now map the types of constitutions on to the types of regimes as follows. Democratic regimes that are governed by liberal-democratic constitutions have normative or garantiste constitutions. Such constitutions may also operate to varying degrees in democracies

that are fragile, unstable, unconsolidated or of poor quality. On the other hand, transitional or new democratic regimes which have enacted liberal-democratic constitutions and are aspiring towards the full practice of democracy may have nominal constitutions in Loewenstein's sense. Authoritarian and hybrid regimes which have constitutions that are textually liberal-democratic are likely to have what Sartori calls a façade constitution or pseudo-constitution. Authoritarian or totalitarian regimes of the Marxist-Leninist type, in which the leadership of the communist party is prescribed by the constitution which also rejects multi-party competitive elections, may be said to have semantic constitutions (in Loewenstein's sense) or nominal constitutions (in Sartori's sense).

<i>Types of regimes</i>	<i>Types of constitutions</i>
Democratic	Normative (Loewenstein) or Garantiste (Sartori)
Transitional (towards democracy)	Nominal (Loewenstein)
Hybrid	Façade (Sartori) or Pseudo-constitution (Sartori)
Authoritarian	Façade (Sartori) or Pseudo-constitution (Sartori)
Authoritarian (communist)	Semantic (Loewenstein) or Nominal (Sartori)
Totalitarian (communist)	Semantic (Loewenstein) or Nominal (Sartori)

We now turn to examine the constitutional practice of East Asian states with different types of regimes. The survey here is by no means comprehensive or exhaustive; we will consider countries whose constitutionalism has figured more prominently in the existing literature. The following four groups of states and the species of constitutionalism that is practiced by them will be discussed: (a) the relatively well-developed democracies of Japan, South Korea and Taiwan (hereafter called "Category I Cases"), which, together with Singapore and Hong Kong, represent the East Asian political entities with the highest level of economic development; (b) the new, fragile, unstable, or low-quality democracies of the Philippines, Thailand and Indonesia ("Category II Cases"); (c) the semidemocracies of Singapore and Malaysia ("Category III Cases"); and (d) the authoritarian states of the People's Republic of China (PRC) and Vietnam ("Category IV Cases"), which may be distinguished from the totalitarian state of North Korea.

### **Category I Cases: Japan, South Korea and Taiwan**

Japan was the first East Asian state to adopt a Western-style constitution --- the Meiji Constitution of 1889. Since the end of World War II, Japan has developed into the wealthiest nation in East Asia and a stronghold of liberal democracy in the region. In the post-War era, Taiwan and South Korea, together with Hong Kong and Singapore, achieved rapid economic growth as the "Four Little Dragons" of East Asia. Whereas both South Korea and Taiwan had experienced authoritarian strongman rule under Park and the Chiangs respectively, democratization in both states has made good progress since the late 1980s, and both South Korea and Taiwan today may be regarded as reasonably consolidated democracies. Indeed, if the turnover of ruling parties is to be used as an important measure of democracy, South Korea and

Taiwan in their relatively short lives as democracy thus far have perhaps surpassed Japan, where the Liberal Democratic Party has been long dominant.

The constitutions and constitutional practice of these Category I Cases have been studied systematically by Yeh and Chang (2011) in their definitive article on “The Emergence of East Asian Constitutionalism”, which will therefore be used here as our point of departure in the present study. Yeh and Chang point out that Japan, South Korea and Taiwan are “vibrant constitutional democracies” today (2011: 805). They discuss the historical and social contexts in which liberal democracy has evolved in these states in the post-War period, including rapid economic growth, political pluralism and development of civil society, modernizing social changes, and relative ethnic homogeneity. They then identify what they believe to be four features common to the constitutional practice of these states (816-833): (a) an “instrumental approach” to constitutions as part of the project of modernization and state-building; (b) “continuity” in terms of the text and institutions of the constitution which has been maintained as “incremental” constitutional changes took place; (c) “a reactive and cautious style of judicial review”; and (d) the recognition of “a wide range of rights responsive to social and political progress”, including both civil and political rights and social and economic rights. Yeh and Chang then argue that these four features define what they call “East Asian constitutionalism” (833), which they consider to be a “distinctive form” (805) of constitutionalism or “a distinct constitutional model” (834) that can be compared and contrasted with Western constitutionalism, “transitional constitutionalism” as in Eastern Europe, and “Asian values” constitutionalism (834-838).

In this author’s opinion, “East Asian constitutionalism” is indeed a useful term that can conveniently be used to refer to the collective and similar constitutional experience of Japan, South Korea and Taiwan, which can be distinguished from that of the Category II, III and IV Cases to be discussed below. However, in my opinion what justifies the grouping of these three states within one category is that, compared to the other three categories of states, Category I Cases are more successful and mature in their practice of the normative constitution (in Loewenstein’s sense) or the garantiste constitution (in Sartori’s sense), which may be correlated with the fact that unlike the other three categories of states, Category I Cases are well-developed, consolidated or relatively mature liberal democracies – a fact noted by Yeh and Chang when they describe the sociopolitical context of the emergence of East Asian constitutionalism. In these Category I Cases, the liberal-democratic constitutions are fully effective and do regulate the behavior of political actors. Free elections are regularly held in which there is fair competition for political power among political parties with different platforms. There exist healthy legal systems which afford protection for human rights and civil liberties. The Rule of Law both empowers and constrains administrative authorities, which are capable of enforcing the law efficiently and are largely free of corruption. Separation of powers and judicial independence are well-established, and the constitutionality and legality of legislative and executive actions are often subject to judicial review. Freedom of the press and civil society flourish. The practice of

democracy is stable, and competition for power in accordance with constitutional and electoral law is “the only game in town”. These are all features of a normative constitution that is successfully at work.

As regards the four features of East Asian constitutionalism identified by Yeh and Chang, I have doubt as to whether any of them or their combination together is unique to the three East Asian states and thus contribute to constitute a distinctive form of constitutionalism. Let us examine the four features one by one. First, Yeh and Chang stress that East Asian constitutionalism is characterized by an instrumental approach to the constitution in the sense that the constitution was adopted by modernizing elites for purposes such as nation-building rather than an act of “We the People” in a revolutionary or constitutional moment for the protection of their rights and limitation of state power. However, a broader view of the emergence of constitutions in the non-Western world would suggest that the phenomenon identified by Yeh and Chang is in fact common among non-Western states in the late nineteenth and early twentieth centuries whose survival were threatened by the expansion of the West, and states that emerged towards the end of the age of colonialism and imperialism which used their newly promulgated constitutions to assert their newfound national identity and to legitimize their newly established political systems (Chen 2014). Such constitutions are often “politically enabling documents” (Brown 2007: 49, 67). Referring to the invention of the modern constitution in the West and the subsequent widespread adoption of constitutions all over the world, Grimm has pointed out that “once invented the constitution could be instrumentalized for purposes other than the original ones, adopted only in part or even as a mere form” (Grimm 2012: 104).

Secondly, it seems that the constitutional continuity discussed by Yeh and Chang is only a question of degree. The constitutional histories of different countries display varying degrees of constitutional continuity or discontinuity, and it is by no means clear or obvious that the East Asian states exhibit a high degree of continuity in this regard that distinguishes them from other countries in the world. For example, the degree of constitutional continuity in East Asia cannot be said to be high when compared to older democracies in the West, such as Britain, the USA, Canada and Australia, or some other states in Asia, such as India, Malaysia and Singapore. Even among the three East Asian states themselves, it would appear that Japan differs considerably from South Korea and Taiwan. As Yeh and Chang point out in their article, the Japanese Constitution of 1946 has not experienced even a single amendment (though there have been calls to amend it, particularly the famous Article 9 on pacifism), though constitutional reforms (such as electoral reforms) have been introduced by statute. On the other hand, South Korea’s first constitution of 1948 has been amended eight times in the course of a fairly tumultuous constitutional history (Chen 2010: 867-871), culminating in the 1987 Constitution of the “Sixth Republic” which established the subsequently famous and successful Constitutional Court. Since democratization began in the late 1980s, the Constitution of the Republic of China that has been

in force in Taiwan has undergone seven major amendments (the last one being in 2005), in addition to the repeal in 1991 of its “Temporary Provisions” of 1948.

Thirdly, we turn to what Yeh and Chang describe as the “reactive and cautious style” of constitutional adjudication in East Asia. Their article provides useful data on the records of constitutional review by the Supreme Court of Japan and the constitutional courts of South Korea and Taiwan. It is well-known that the Japanese Supreme Court is conservative, and has only made rulings of unconstitutionality in eight cases over six decades. On the other hand, as Yeh and Chang point out, the constitutional courts in both South Korea and Taiwan have ruled against legislative or governmental acts in roughly one-third of cases in the last two decades. Indeed, these constitutional courts have established themselves as respectable guardians of constitutional rights, and have made a significant contribution to reforming the repressive laws of the previous authoritarian eras in the two states and to adjudicating difficult issues of political and social conflicts that emerged in the course of democratization.

Yeh and Chang argue that the three courts of Japan, South Korea and Taiwan “share an underlying attitude: they are reactive and cautious” (2011: 823) They are “reactive – rather than proactive – to social and political demands and constrained largely by social and political circumstances”. “They are ‘cautious’ because they did not rule directly against the majoritarian preferences of the public”, and seek to provide “more space for political dialogue and deliberation” (836). In my opinion, being reactive and cautious (and politically prudent) are probably the traits of successful constitutional or supreme courts engaged in constitutional adjudication all over the world. Furthermore, the constitutional court of South Korea and the post-1987 constitutional court of Taiwan (which dated back to the 1946 Constitution) can be said to have engaged in a significant degree of judicial activism, as contrasted with the judicial restraint of the Japanese Supreme Court. It is therefore doubtful whether all three courts should fall under the same rubric of being “reactive and cautious” in their approach to constitutional adjudication.

Finally, as regards the willingness to recognise a wide range of rights, including civil and political rights as well as social and economic rights, this again can hardly be said to be a defining feature of constitutional adjudication in East Asia. Indeed, progressive constitutional and supreme courts all over the world share such willingness; hence the trends of the globalization of constitutional law (Tushnet 2009) and the increasing judicialization of constitutional rights and of governance as a global phenomenon (Ginsburg and Chen 2009). However, Yeh and Chang (2011: 838) do have a good point in drawing a distinction between East Asian constitutionalism and what they call “Asian values” constitutionalism, in the sense that the former is more liberal in prioritizing individuals’ rights whereas the latter emphasizes collective or communitarian values. We shall visit “communitarian constitutionalism” in a later section of this chapter.



## **Category II Cases: The Philippines, Thailand and Indonesia**

We now turn to “Category II Cases”, where democracy exists but is young, unconsolidated, fragile, unstable or otherwise of poor quality. These states operate a normative constitution to varying degrees, but the normative constitution may break down from time to time as a result of coups (as in Thailand frequently and most recently in 2014), states of emergency or martial law, popular uprisings (including what has been known in the Philippines as “People Power” events (in 1986 when Marcos was ousted, and again in 1998 when Estrada was ousted), which also occurred in Indonesia in 1998 leading to Suharto’s downfall), civil unrest or serious confrontations (as in Thailand since 2006). The operation of a normative constitution may also suffer from the “poor quality” of the democracy. As the “quality” of the democracy that exists today in the three Southeast Asian states discussed under this Category II leaves much to be desired, the concept of the quality of democracy needs to be elaborated here.

According to Morlino et al. (2011),<sup>1</sup> the quality of democracy in a particular country may be assessed by reference to a multi-dimensional framework, in which the three main dimensions are respectively (a) procedural, (b) content-based, and (c) outcome-based. Some of the dimensions may be further divided into sub-dimensions. The quality of democracy in each dimension or sub-dimension may be evaluated on the basis of a number of indicators. With regard to the procedural dimension of democracy, the sub-dimensions include the Rule of Law (the indicators of which include respect for physical integrity, government effectiveness and level of corruption), electoral accountability (indicators of which include press freedom and voters’ electoral self-determination), inter-institutional accountability (indicators of which include the parliament’s oversight capacity and effectiveness of constraints on executive powers), political participation (an indicator of which is the voter turnout rate), and political competition (indicators of which include the number of political parties, and the difference in the numbers of parliamentary seats held by the largest and second largest parties).

Morlino’s second dimension of democracy – the “content-based” dimension – is an assessment of the degree of freedom and of equality that exists in the country concerned. As regard the third dimension – the “outcome-based” dimension, this addresses mainly the perceived legitimacy of, or degree of popular satisfaction with, the regime.

It may therefore be seen that whereas some of the dimensions and sub-dimensions of democracy relate directly to democracy understood as political participation and electoral competition, some are more relevant to constitutionalism understood as the Rule of Law, separation of powers, checks and balances, and constitutional protection of human rights. The latter would include what Morlino calls the Rule of Law, inter-institutional accountability, freedom and equality. The inclusion of elements of constitutionalism in the assessment of the quality of democracy shows that there is a close relationship between constitutionalism – particularly the practice of the “normative constitution” in Loewenstein’s sense – and democracy,

and that a democracy of low quality is likely to be a country where the constitution is not fully normative, or is a nominal constitution in Loewenstein's sense.

Compared to "Category I Cases" above, "Category II Cases" are less wealthy economically, and less well-developed or well-established in terms of their democracy and thus have democracy of a weaker quality. It has been pointed out that whereas democratization in South Korea and Taiwan may be understood as a "negotiated trans-placement" or "state-modulated transformation" (Case 2002: 25, 247, 250) characterized by negotiation between government and opposition (in South Korea in 1987) or liberalization initiated by the regime itself (in Taiwan in 1987), the "modal form of transition" and of democratization in Southeast Asia seems to be a kind of "opposition-led replacement" that was more of a bottom-up process led by civil society protests (Case 2002: 25, 247-250) (as in the Philippines in 1986, Thailand in 1973 and 1992, and Indonesia in 1998). In all three "Category II Cases", new constitutions were drafted or existing constitutions substantially amended to mark the transition from authoritarianism or hybrid regime to democracy, with strenuous efforts in constitutional engineering for the purpose of constructing a more perfect democratic political system with strong constitutional guarantees of citizens' rights and high aspirations towards social justice, elaborate mechanisms of separation of powers and checks and balances, and a powerful judicial machinery to safeguard the integrity and supremacy of the constitution. Thus the empowerment of the Supreme Court of the Philippines by the 1987 Constitution (Ciencia 2012) and the establishment of new constitutional courts in Thailand and Indonesia by Thailand's 1997 Constitution and Indonesia's constitutional amendment of 2001 respectively (Harding and Leyland 2008; Harding and Nicholson 2010). This in turn gave rise to the phenomenon of the judicialization of politics (Dressel 2012), and, in the cases of the Philippines and Thailand, even the politicization of the judiciary, as will be discussed below.

Let us first consider Indonesia's transition from Suharto's strongman rule to democracy, the constitutional foundation for which was laid by a series of constitutional amendments adopted by Indonesia's People's Consultative Assembly in 1999-2002. Given the country's complex ethnic and cultural cleavages, the sudden collapse of Suharto's regime in 1998 amidst the Asian financial crisis and mass protests, the fragmented political configuration of the country at the time, the long-standing role of the military in Indonesia's politics, the weakness of the legal system and the political subordination and corruption of the judiciary, Indonesia was not, as of the turn of the century, a likely candidate for successful transition to constitutional democracy. Yet this most populous and Muslim nation of Southeast Asia succeeded against all the odds, and achieved a democratizing transition whose relative smoothness went beyond expectations. Horowitz (2013: 8-10) points out that the process of constitutional renovation that took place in Indonesia was unconventional in the sense that it did not follow the "standard operating procedures" or "rules ... of democratic constitution making" usually advocated by international experts. Instead, the process was managed by the political elites and involved minimal public participation; a national election was conducted before constitutional reform took place; there

was no constituent assembly specially elected for the purpose of constitution-making; and the constitutional reform was achieved in an “incremental” and “gradualist” manner in the course of four years. Yet, according to Horowitz, the success of Indonesia’s democratization was largely attributable to this particular process chosen by the political elites at the time.

Another interesting feature of Indonesia’s constitutional reform was the creation of a constitutional court, which was in some respects (particularly as regards the manner of selection of its justices) closely modeled on the reputable and successful Constitutional Court of South Korea (Hendrianto 2010).<sup>2</sup> It seems that the historically contingent and politicized event of the impeachment of President Wahid in 2001 contributed to the Assembly’s decision to establish a constitutional court in Indonesia that can render a fair and impartial decision in any future case of impeachment (Hendrianto 2010: 162; Harding and Leyland 2008: 125).<sup>3</sup> Starting to function in 2003, the Indonesian Constitutional Court has since established a good record in independent and active review of laws that were challenged before it, and in the performance of other functions such as adjudication of disputes arising from elections (Harding and Leyland 2008; Hendrianto 2010).

We now turn to the case of the Philippines. Compared to other Southeast Asian states, the Philippines has had a longer experience of the practice of constitutional democracy, as one of the expressed aims of American colonial rule in the Philippines had been to prepare the Filipinos for democracy and self-government (Nadeau 2008). Democracy was practiced in the Philippines after it acquired its independence in 1946, until Marcos declared martial law in 1972. The “People Power” revolution of 1986 that toppled Marcos was a watershed event in Southeast Asian democratization, and ushered in the 1987 Constitution which was carefully designed to guard against any recurrence of authoritarianism, dictatorship or abuse of human rights, and to stipulate social and economic policies that were considered just and progressive. The power of the judiciary led by the Supreme Court as the constitutional guardian was considerably strengthened by the new constitution (Ciencia 2012).

It has been argued that the enhancement of Court’s authority by the 1987 Constitution has actually contributed to the judicialization of politics in the Philippines, which was a gradual process that reached a climax during the presidency of Arroyo in the first decade of the 21<sup>st</sup> century (Ciencia 2012). In my opinion, such judicialization was largely a result of the operation of a normative constitution in circumstances of fierce political struggles, in which political and social actors used litigation as a means of advancing their interests and claims. The concept of judicialization of politics, and the related one of politicization of the judiciary, are indeed useful for the purpose of studying comparative constitutional law. East Asian countries with constitutional courts or tribunals (Taiwan, South Korea, Mongolia, Cambodia, Thailand, Indonesia, Myanmar) or supreme courts actively involved in constitutional adjudication of political controversies (e.g. the Philippines) provide interesting case studies in this regard (Dressel 2012).

The judicialization of politics may be understood as the increasingly active role of the constitutional or supreme court in making crucial decisions in the domain of what Hirschl (2008) calls “mega-politics” (including fundamental moral and policy issues, electoral outcomes and issues of regime change, collective identity and nation-building). As regards the politicization of the judiciary (Ciencia 2012: 118, 128-129), this would occur when public perceptions of the judiciary (particularly the constitutional or supreme court) are such that it is not considered to be fair and impartial in its decision-making, but is partisan and has been co-opted or captured by one among several competing political forces or groups. The judicialization of politics may or may not be accompanied by the politicization of the judiciary.<sup>4</sup> However, the more powerful the court is and the greater is the degree of judicialization of politics, the greater is the incentive on the part of political actors to “capture” the court by ensuring that it is staffed by their allies.

In the case of the Philippines, the politicization of the judiciary was evidenced by the facts that by 2009, the number of Supreme Court justices appointed by President Arroyo was so significant that it was perceived as an “Arroyo Court” (Ciencia 2012: 129); this court decided in favor of Arroyo and her government in “the most politically sensitive cases” (130); and Arroyo’s “midnight” appointment of Corona as chief justice just before she was due to vacate her presidency, which was upheld by the Supreme Court although it was apparently in violation of a constitutional prohibition against the president’s exercise of general powers of appointment near the time of a presidential election (Ciencia 2012: 130). The subsequent impeachment of Corona by the Senate in 2012 (Bonoan 2012) was partly a reaction against such a politicized appointment.

Finally we turn to Thailand, which at the time of writing (April 2014) is the most constitutionally unstable state in East Asia, and also a site where constitutionalism and constitutional adjudication is put to the most severe test. After experiencing many cycles of constitution-making, election, conflict, coup and constitutional reordering in the six decades since royal absolutism was replaced by constitutional monarchy in 1932 (during which a total of fourteen constitutions had come and gone), Thailand in the mid-1990s experienced democratic participation on the making of a new constitution – the “People’s Constitution” (Kuhonta 2008) - - that was intended to put an end to the vicious cycles of the past and to introduce in Thailand once and for all a genuine constitutional order that is democratic and progressive, and that would minimize bureaucratic domination, politicians’ corruption, and the instability of coalition governments. The 1997 Constitution, in its broad declaration of rights and its elaborate design of electoral systems and mechanisms of checks and balances such as the new “watchdog” (Harding and Leyland 2008: 132, 136) or “guardian” (Ginsburg 2009: 83-84) agencies of the Constitutional Court, Administrative Court and independent commissions on elections and anti-corruption, was a codification of the world’s most advanced constitutional jurisprudence and has been described as a “postpolitical” constitution (Ginsburg 2009). The tragedy is that it was one of the instances in the world’s modern constitutional history in which the ambitions, hopes and

ideals of constitution-makers were particularly high and yet the consequences and end results were particularly disappointing and disastrous.

It has been argued that the text and institutions of the 1997 Constitution actually contributed to Thaksin's autocratic rule which ended in the coup of 2006 (Kuhonta 2008). In my opinion, there is insufficient evidence in support of this thesis, and the 1997 Constitution could have worked well if the person elected to power under it had been a different person. In other words, the fateful path taken by Thailand was more a result of the individual's agency than a result of institutional design and constitutional rules. On the other hand, the establishment of a constitutional court by the 1997 constitution, which lives an "afterlife" (Ginsburg 2009) in the current 2007 Constitution, did inaugurate a new era of judicialization of politics in Thailand. Such judicialization was subsequently accompanied by politicization of the judiciary; indeed, the degree of judicialization of politics in Thailand since 2006 has become extremely high by world standards.

The constitutional court under the 1997 Constitution, the constitutional tribunal under the interim 2006 constitution promulgated after the coup, and the new constitutional court established by the 2007 constitution, have each rendered the boldest decisions at the highest level of "mega-politics", including decisions on the survival of an existing government or political party, and the validity of national electoral outcomes and of constitutional amendments. In May 2006, in the midst of popular protests against Thaksin and shortly after King Bhumibol intervened (in exercise of a residual power which, according to Ginsburg's (2009) study, exists under Thailand's unwritten constitution which operates side by side with, and is even more enduring than, the formal written constitution) by meeting the judges of the Constitutional, Supreme and Administrative Courts and encouraging them to take action to resolve the current constitutional crisis (Ginsburg 2009: 98; Harding 2010: 121), the Constitutional Court invalidated the result of the general election held on 2 April 2006 – the "snap election" (Harding 2010: 121) that was called (and won) by Thaksin and boycotted by the opposition.

After the coup of 19 September 2006, the constitutional tribunal that replaced the constitutional court decided in May 2007, on the basis of findings of electoral misconduct, to dissolve Thaksin's political party (the Thai Rak Thai) and to ban its leaders from running in elections in the next five years (Harding and Leyland 2008: 122; Ginsburg 2009: 100). In December 2007, the first general election was held under the 2007 Constitution (adopted by a referendum in August 2007 and retaining most of the institutional innovations of the 1997 Constitution), and was won by pro-Thaksin forces. In September 2008, the new Constitutional Court held that Prime Minister Samak had violated the law by hosting a cooking program on TV; he was thus forced to resign. In December 2008, in the midst of large-scale demonstrations against the pro-Thaksin government, the Court disbanded the ruling pro-Thaksin coalition on the ground of electoral fraud; Prime Minister Somchai, who as Samak's successor, was forced to step down (Harding and Leyland 2008: 133). A new government led by the anti-Thaksin

Democratic Party then came to power. In May 2010, a violent crackdown on pro-Thaksin demonstrators occurred.

In July 2011, the second general election held under the 2007 Constitution again resulted in the victory of pro-Thaksin forces, and his sister, Yingluck Shinawatra, became prime minister. Under the new government, Thai society continued to be polarized between pro- and anti-Thaksin forces, culminating in anti-government protests which engulfed Bangkok in late 2013 and early 2014. In the meantime, the Constitutional Court made several controversial decisions on issues of mega-politics (Harding et al. 2013). In July 2012, it held that in the absence of a referendum the government and National Assembly could not proceed to enact an entirely new constitution, and could only proceed to amend the existing constitution piecemeal article by article.<sup>5</sup> In November 2013, a bill introduced by the government to amend the constitutional provisions on the composition of the Senate (by providing for a wholly-elected Senate to replace the existing one which was half-elected) and passed by the National Assembly was struck down by the Court as unconstitutional.<sup>6</sup> After Yingluck called the national election of 2 February 2014 in order to resolve the political crisis caused by large-scale demonstrations – an election that was boycotted by the opposition which also obstructed the conduct of the election, the Court annulled the election result on technical grounds (Ginsburg 2014). Finally, on 7 May 2014, the Court found Yingluck and nine Cabinet ministers to be guilty of abuse of power in the making of a personnel decision and dismissed them from their offices with immediate effect. Yingluck thus became the third Prime Minister dismissed by the Constitutional Court since 2008. The caretaker government established after Yingluck's fall from power was toppled by the military coup of 22 May 2014, suspending once again Thailand's fragile constitutional democracy.

It is clear from the above that Thailand has, since 2006, become an extreme case of the judicialization of politics, and, given that the major judicial decisions documented above were all against Thaksin and his allies or supporters, the perception of the politicization of the judiciary cannot be avoided. Actually, the 2007 Constitution has aggravated these trends by giving the judiciary prominent roles in the selection of that half of Senate members who are not popularly elected, and of members of the independent "watch-dog" agencies. In modern Thai history, the Thai judiciary has generally been respected and trusted by the people (Harding and Leyland 2008: 126). The recent trend of its politicization is therefore regrettable and sad.

It may be observed that the judicialization of politics in Thailand was the inevitable and combined result of the constitutionalization of politics by the 1997 Constitution and its successors (which charged the Constitutional Court with the mission to police and enforce constitutional rules governing matters such as elections, political behavior and constitutional change), and the intensity and continuity of the political conflict between pro- and anti-Thaksin factions in Thai society. Had Thai society been less divided between two strongly opposing camps, the position of the constitutional court as the guardian of the constitution would not have been so difficult. The Thai case thus illustrates the inherent limitations of constitutional democracy in sociopolitical circumstances where the key institutions of constitutional democracy,

such as free and fair elections, civil and political liberties, and a constitutional court intended to be independent and impartial, are inadequate in coping with, regulating and containing the deep divisions in a society torn by conflicting values, interests and political convictions.

### **Category III Cases: Singapore and Malaysia**

With no turnover in the ruling party or ruling coalition despite periodic elections in more than half a century, considerable restrictions on civil liberties – sometimes justified by the discourse of “Asian values” -- for the purpose of upholding political stability and social harmony in a multi-ethnic society in pursuit of rapid economic development, strict national security and public order laws, and a very limited judicial role in constitutional adjudication, Singapore and Malaysia are often regarded as semi-democracies rather than full democracies. Despite the gains made by the opposition in Malaysia in the 2008 election and the opposition winning half of the votes (though not a parliamentary majority) in the 2013 election, which seem to suggest that Malaysia is probably reaching what Ramraj (2010) calls a “constitutional tipping point”,<sup>7</sup> we will discuss both Malaysia and Singapore here under “Category III”, with particular reference to Thio’s concept of communitarian constitutionalism.

Thio (2012) points out that insofar as constitutionalism means restraint on arbitrary power and government limited by the Rule of Law, it embraces varieties and trajectories other than liberal constitutionalism, and can be found in “illiberal polities”. Thio discusses in particular two species of non-liberal constitutionalism – “theocratic constitutionalism” (such as “Islamic constitutionalism” in Iran) and “communitarian constitutionalism” (as exemplified in Southeast Asia by Singapore and Malaysia). Unlike liberal constitutionalism which requires the state to be morally neutral and privileges the individual’s autonomy and the judicial enforcement of individuals’ rights, communitarian constitutionalism allows the state to be paternalistic, to uphold communitarian and cultural values, and to take actions to promote the common good, including the pursuit of economic growth and the maintenance of public order and religious harmony in a multiracial and multicultural society. Thus in Singapore and Malaysia, free speech may be restricted to a greater extent than in Western liberal democracies (Thio 2012: 138, 147). In the case of Malaysia where the constitution itself defines Malays as Muslims, the judicial enforcement (in the famous *Lina Joy* case) of restrictions on the freedom of religious conversion and on apostasy on the part of Malays is considered to be justified (Thio 2012: 141-142).<sup>8</sup>

Communitarian constitutionalism, at least in the context of Southeast Asia, seems to be associated with the “Asian values” discourse which asserts that liberal Western notions of human rights are not necessarily universally valid and applicable, and that Asian culture does not balance individuals’ liberties and the collective interest in exactly the same manner as in the West (Chen 2006: 492, 507-511). Such an “Asian values” thesis was probably more persuasive in the 1970s than in the 2010s, given the spectacular advance of liberal constitutionalism in the last three decades in Taiwan, South Korea, the Philippines, Thailand and Indonesia. Today, the sphere of influence of communitarian constitutionalism seems to be shrinking in Asia, except

that this species of constitutionalism has an affinity with the emerging constitutionalism in the communist-party dominated polities of China and Vietnam. To these we now turn.

#### **Category IV Cases: The PRC and Vietnam**

One of the distinctive features of East Asia from the perspective of comparative constitutional law is that despite the global decline of communism after the collapse of the former Soviet Union, significant parts of East Asia today – China, North Korea, Vietnam and Laos -- are still ruled by communist parties that monopolize political power and do not permit the multi-party elections that take place in the Category I, II and III Cases discussed above. Among these four states, China and Vietnam may be regarded as belonging to one sub-category, as both have successfully pursued market-oriented economic reforms since the 1980s, opened up their societies to Western influences and moved from totalitarianism to some form of authoritarianism. For our present purposes, it is particularly noteworthy that both China and Vietnam have in recent decades introduced rather similar constitutional revisions and legal reforms, including constitutional recognition of socialist legality or Rule of Law, human rights and private property rights, and the construction of a socialist legal system in which detailed laws would govern all domains of economic and social activities, state organs and officials are required to exercise their powers in accordance with the law, and systems of courts, procuratorates, lawyers and legal education were built up for the purpose of operating the legal system effectively (Gillespie and Chen 2010).

Despite bold calls for liberal-democratic constitutional reforms by small numbers of intellectuals, such as the “Charter 08” of 2008 in China (led by Liu Xiaobo who was convicted and jailed as a result but also awarded a Nobel Peace Prize in 2010) (Béja et al. 2012) and “Petition 72” in Vietnam in the year 2013 (Bui 2013a), the regimes in both countries have firmly resisted any political reform that might weaken or threaten the Communist Party’s monopoly of state power. Although human rights are now enshrined in the constitutions of both countries (and Vietnam’s new Constitution of 2013 has placed increased emphasis on human rights and on the role of the courts in securing justice and human rights), the courts have no role to play in constitutional adjudication in their legal systems (and although a provision on the establishment of a constitutional tribunal was included in an earlier draft of the constitution, the final version of the Vietnamese Constitution adopted on 28 November 2013 does not include this provision (Bui 2013b)). According to the classification schemes developed by Loewenstein and Sartori discussed above, the constitutions of the PRC and Vietnam are “semantic constitutions” (Loewenstein’s term) or “nominal constitutions” (Sartori’s term) in the sense that they reflect the allocation of power (including the supreme leadership of the communist party) but do not effectively constrain its exercise. However, given the two regimes’ normative commitment to the Rule of Law and reasonable records in making laws and developing legal institutions in the last three decades,<sup>9</sup> it may be doubted whether the concepts of “semantic” or “nominal” constitutions are completely adequate in describing and analyzing the nature and character of constitutional practice or constitutionalism (if any) in contemporary China and Vietnam. In this regard,



Backer's (2009) theory of "party-state constitutionalism", which was developed in the course of his study of PRC constitutional practice but is in my opinion equally applicable to Vietnam given the similar political-legal trends in the two countries, deserves to be considered here.

As in the case of Thio's theory mentioned above, Backer adopts a broad understanding of constitutionalism which is not limited to liberal constitutionalism. "Constitutionalism is grounded on the fundamental postulate of rule of law", which "avoid[s] tyranny or despotism by grounding state action in law and by limiting the reach of such lawful state action on the basis of values reflecting the values of the political collective" (Backer 2009: 103) Depending on the content of the "legitimizing value system" in the state concerned, constitutionalism may take the form of "nationalist constitutionalism", "transnational constitutionalism", "theocratic constitutionalism", "natural law constitutionalism", etc. "[T]hey all share equally in the commitment to the fundamental values of a constitutional order – a rule of law based governance structure grounded in limits on state power and popular accountability based on law." (104-5)

In studying the constitution and constitutional practice of the PRC, Backer takes as his point of departure the idea that the Chinese Communist Party (CCP) is constitutionally entrenched as the "party in power" (Backer 2009: 108). Thus unlike political parties in liberal-democratic systems, the CCP is not merely one among several political parties, but is an integral and vital part of the state's constitutional, political and legal systems. In Backer's view, the real constitution of the PRC includes not only the Constitution of the PRC state, but also the constitution of the CCP.<sup>10</sup> Insofar as the CCP promotes the Rule of Law, subordinates itself to the Rule of Law and engages in "self discipline" (Backer 2009: 152) for this purpose, and insofar as there is some form of "separation of powers" (141) (between the CCP (which Backer considers to be the source of the values and fundamental policies that guide the government (148)) and the state organs (which engage in concrete administrative tasks), constitutionalism can be said to be practiced in China. This may be called "state-party constitutionalism", a kind of "constitutionalism with Chinese characteristics" (111). Backer (110) admits that in this kind of constitutionalism, not all citizens have "political citizenship" and exercise political rights, although all of them have "economic and social citizenship" and exercise economic and social rights. Political citizenship in China, according to Backer's theory, is confined to members of the CCP, whose membership is open to everyone who subscribes to its values and visions (151). The CCP as an updated version of the Leninist "vanguard" party (143, 150) represents the interest of the Chinese people, acts as their "proxy" and in a "fiduciary capacity" (109), and discharges "pedagogical and tutelage responsibilities" (150).

Backer's analysis is useful for the purpose of studying the evolution of a communist party-dominated political system that abandons totalitarianism, withdraws itself from the control of many sectors of the economy and society, concedes a large space for private life and private pursuits, seeks to regulate itself by the Rule of Law, and recognizes that citizens' rights should be afforded legal protection. The state-party constitutionalism theorized by Backer shares some of the features of the communitarian constitutionalism discussed above, particularly the

adherence to the Rule of Law and legal restrictions on civil liberties, but differs from communitarian constitutionalism in that it does not permit any space for opposition political parties and multiparty elections. Without such space, it may be questioned whether Backer's portrayal of the role of the "party in power" under "state-party constitutionalism" is too idealized and too distant from the reality that despite the fact that the CCP has 85 million members today, its power is actually exercised by a small elite of Party leaders who are subject to little electoral accountability. The de facto lack of political citizenship on the part of the great majority of Chinese citizens as recognized by Backer also contradicts the text of the PRC Constitution itself, according to which all citizens have equal political rights. It is therefore doubtful whether this theory of party-state constitutionalism can fully legitimize the party-state itself.

## **Conclusion**

It may be seen from the above that East Asia has been and is a great laboratory for diverse constitutional projects. The study in this chapter is based on the premise that there is a close relationship between regime types and the nature and character of constitutional practice in the states concerned. It has discussed four categories of East Asian cases, which differ from one another in terms of the political systems and constitutional practices that exist today. It should be borne in mind that the present-day constitutional situations in these countries can only be fully understood and explained in the light of their constitutional history and the dynamics of their constitutional development, which are not covered in this chapter. Such a historical study would reveal that the constitutional landscape of most of the countries studied in this chapter has changed beyond recognition in the last three decades, with most of the originally authoritarian or hybrid regimes being transformed into vibrant liberal constitutional democracies. This has been the case in Taiwan, South Korea, the Philippines, Thailand and Indonesia. Even in communist China and Vietnam, legal reforms have made such progress in the last three decades that previous theorizations of constitutions and of the lack of constitutionalism in communist one-party states may have become out-of-date. Constitutions and constitutionalism, though originating from Western modernity, have thus been transplanted to Asian soils and grown up considerably. The constitutional future of this part of the world promises to be an exciting and challenging one.

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<sup>1</sup> For further details, see Morlino (2011).

<sup>2</sup> For the Korean Constitutional Court, see Ginsburg (2010). For a discussion of Asian constitutional courts generally, see Ginsburg (2008).

<sup>3</sup> See generally Ginsburg's (2003) "insurance theory" which seeks to understand and explain political elites' decisions, at the time a constitutional settlement is made by opposing camps, to establish a constitutional court, with reference to their calculations regarding what might happen if they lose power in future, and how a constitutional court might offer them some protection in such circumstances.

<sup>4</sup> See in this regard Dressel's (2012: 6-7) 4-category typology of judicial politics: "Working from the two dimensions of de facto judicial independence and engagement in mega-politics, we can build a matrix that

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illustrates a typology of ideal judicial pattern types, ranging from judicial restraint and judicial muteness to judicial activism and politicization of the judiciary.”

<sup>5</sup> Section 291 of Thailand’s 2007 Constitution, which governs constitutional amendment, does not provide for a referendum, and allows the Constitution to be amended by a simple majority of the National Assembly (i.e. the collective membership of the its two Houses, the House of Representatives and the Senate). However, the section prohibits any amendment “which has the effect of changing the democratic regime of government with the King as Head of State or changing the form of State”.

<sup>6</sup> The main legal basis for the Court’s decision was section 68 of the Constitution of 2007, which prohibits any act “to overthrow the democratic regime of government with the King as Head of State under this Constitution or to acquire the power to rule the country by any means which is not in accordance with the modes provided in this Constitution”.

<sup>7</sup> It is also noteworthy that in Singapore’s general election of 2011, the ruling party (the People’s Action Party) won only 60% of the popular votes, though this also meant that it won the overwhelming majority of parliamentary seats.

<sup>8</sup> The full name of the *Lina Joy* case is *Lina Joy v Majlis Agama Islam Wilayah Persekutuan* [2004] 2 MLJ 119, [2007] 3 CLJ 557. Lina Joy is a Malay Muslim woman who converted to Christianity. She applied to court to delete from her identity card the reference to Islam as her religion. She wanted to marry a Christian man but under Malaysian law she could not do so if she was Muslim. The Federal Court rejected her application on the ground that the change in the identity card which she sought could not be made in the absence of a certificate or declaration from the Syariah court that she had apostatized.

<sup>9</sup> See particularly Peerenboom’s (2002: 130-141) discussion on “specifying the minimum conditions for rule of law” and how to distinguish between Rule of Law and mere rule by law.

<sup>10</sup> Jiang Shigong, law professor at Peking University, shares Backer’s views on the Chinese constitution. See Jiang 2010; Jiang 2014a; Jiang 2014b.